

**Civil liability resulting from transfrontier environmental damage:
a case for the Hague Conference?**

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Introduction

Among the topics included in the agenda of the work program of the Hague Conference on Private International Law, appears "the question of the conflict of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage."¹ During the Special Commission meeting of May 2000 on general affairs and the policy of the Conference, the experts of the Member States will have to decide on the future activity of the Organisation and in particular on the topic (or topics) to be retained for the Conference's Twentieth Session. The experts will then have to take a position on the question of whether the Conference should draw up a Convention on civil liability resulting from transfrontier environmental damage. The principal purpose of this Note is to help the experts in assessing the current interest in and importance of this topic, as well as the nature of the principal problems that it raises.

I. History of the project and prior work

It was the Permanent Bureau which, in 1992, proposed to include in the Conference's agenda the topic of civil liability for environmental damage. It then drew up a first important document, *Note on the law applicable to civil liability for environmental damage*.² This Note set out an inventory of the different legal problems raised by this topic and took into account the developments which were emerging from within the international organisations or which were being raised by legal writers. The Note concluded that the principles of the conflict of laws were relatively undeveloped and that this was an area that the Conference should study.

At the Conference's Seventeenth Session (1993), the delegations were divided on the question of the priority which ought to be given to this topic. To be sure, the entirety of the delegations were of the opinion that this matter was very important and that the Conference should retain it as a subject for study; several delegations even wanted high priority to be given to it. But the majority finally thought that priority should not be given to this topic, considering on one hand that the matter was extremely complex and raised delicate political questions, and that, on the other hand, numerous international texts already existed in this area.³

A second Note on the question of civil liability for environmental damage was drawn up by the Permanent Bureau in 1995.⁴ The purpose of this second Note was to report on two activities carried out by the Permanent Bureau in the field of civil liability for environmental damage since the 1992 Note. The first of these activities concerned the colloquium held at Osnabrück in 1994 the subject of which had been: "Towards a Convention on the Private International Law of Environmental Damage".⁵ The principal

¹ Final Act of the Eighteenth Session, Part B, para. 3, in *Proceedings of the Eighteenth Session* (1996), Tome I, *Miscellaneous Matters*, The Hague 1999, p. 47.

² Prel. Doc. No. 9 of May 1992, for the attention of the Special Commission of June 1992 on general affairs and policy of the Conference (cited hereafter as "1992 Note"), in *Proceedings of the Seventeenth Session* (1993), Tome I, *Miscellaneous Matters*, The Hague 1995, pp. 187-211. This first Note itself took as its point of departure the "Dutoit Memorandum", in which Bernard Dutoit, then Secretary at the Permanent Bureau, recommended against preparing a Convention on the law applicable to torts in general, but rather favoured drawing up several instruments each bearing on a different type of tort (*Proceedings of the Eleventh Session* (1968), Tome III, *Traffic Accidents*, The Hague 1970, pp. 9-27, in French only). This differentiated approach led, in an earlier period, to the preparation of the *Convention of 4 May 1971 on the law applicable to traffic accidents*, then to the *Convention of 2 October 1973 on the law applicable to products liability*.

³ The discussion on the priority to give to the topic had brought to light a cleavage between the delegations, and the Chair had decided to submit the question to a vote: 10 delegations wanted to give priority to this topic, 12 were against and 9 abstained. See Minutes No. 2 of Commission I of the Seventeenth Session, in *Proceedings of the Seventeenth Session* (op. cit. note 2), pp. 324-325.

⁴ Prel. Doc. No. 3 of April 1995, for the attention of the Special Commission of June 1995 on general affairs and policy of the Conference (hereafter "1995 Note"), in *Proceedings of the Eighteenth Session* (op. cit. note 1), pp. 73-89.

⁵ This colloquium had been organised by Professor Christian von Bar and his *Institute of Private International Law and Comparative Law* at the University of Osnabrück, in co-operation with the Hague Conference. It was the

purpose of this colloquium had been to bring together specialists in private international law and specialists in the environment so that they could jointly assess the desirability of drawing up a private international law Convention on civil liability for environmental damage. The 1995 Note summarised the conclusions in the following way:

«Generally speaking, and although certain participants did not fail to stress the difficulties which the project will inevitably encounter, the vast majority of those who expressed their views at the Colloquium considered it sensible for a convention to be drafted dealing with problems of private international law in respect of environmental damage and welcomed the initiative taken by the Hague Conference. There are a great many grounds for this positive attitude: on the one hand, it was universally pointed out that for the time being there was no specific solution, either at domestic state level or at international level by means of a treaty, capable of satisfactorily settling the conflict of laws in regard to transboundary pollution. Moreover, recourse to general conflict rules in connection with tortious civil liability, primarily recourse to the *lex loci delicti*, did not seem sufficient, or at any rate it would not be adequate to provide both overall and detailed solutions to the specific problems arising out of liability for environmental damage. »⁶

Another conclusion which emerged from this colloquium was that the negotiators of a possible Hague Convention should have a broad view and encompass in the attempt at unification not only the conflict of laws and of jurisdictions, but also certain aspects of procedural law, as well as relations with other conventions providing for indemnification from compensation funds and the important problem of insurance.

The second activity on which the 1995 Note focused had to do with the assistance lent by the Permanent Bureau, at the request of the Secretariat of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, in the negotiation of a protocol on liability and indemnification in case of damage resulting from transboundary movements and from the disposal of hazardous waste.⁷

The Special Commission of June 1995 on general affairs invited "the Permanent Bureau to continue research into the feasibility and practicality of a convention on this topic as well as to take such measures as it considered necessary to carry the work forward."⁸ At the Conference's Eighteenth Session (1996), the same cleavage appeared as in 1993: Though several delegations stressed the breadth of the problems, particularly those of a political nature, linked to this topic, others responded by emphasising once again the importance they attached to it.⁹ In view of the Permanent Bureau's workload and the budgetary restrictions of the Conference, the topics included in the agenda with priority were in the end limited to two (Convention on jurisdiction and the effects of foreign judgments, Convention on the protection of adults). It was none the less emphasised that the Permanent Bureau was to continue to "monitor/study/encourage" work in the area of environmental law.¹⁰

subject of a publication containing all the reports and a summary of the discussions: CHRISTIAN VON BAR (ed.), *Internationales Umwelthaftungsrecht I – Auf dem Wege zu einer Konvention über Fragen des Internationalen Umwelthaftungsrechts*, *Osnabrücker Rechtswissenschaftliche Abhandlungen*, vol. 48, Cologne 1995.

⁶ 1995 Note, *op. cit.* (footnote 4), p. 75.

⁷ This Protocol was finally adopted in December 1999; for a brief overview of the system that it provides, see *infra* p. 10.

⁸ *Proceedings of the Eighteenth Session* (1996), Tome I, *Miscellaneous Matters*, The Hague 1999, p. 109.

⁹ *Ibid.*, pp. 241-243.

¹⁰ *Ibid.*, p. 243.

II. Nature and structure of the present note

Given that the topic of civil liability resulting from transfrontier environmental damage has appeared now for a number of years in the agenda for the Conference, it seemed to us that it was necessary to draw up a somewhat more complete Note than is customarily prepared at this stage of the discussions. The purpose of the present Note, once again, is to give the experts some of the elements of information that are essential for deciding whether or not the Conference should prepare a Convention in this area. This involves in particular presenting the principal international instruments which have already been drawn up in this field and sketching, so far as can be done, the different subjects that might be dealt with in a possible Hague Convention.¹¹ Conjoined around this principal purpose, this Note is divided into *three parts*.

In the **first part**, we shall try to examine the extent to which it is conceivable to draw up unified rules dealing with conflicts of law in the area of environmental liability. The response to this question will depend in particular on the three following factors: the number and scope of the *international instruments providing unified rules of substantive law* in this field, the degree of the *divergences that can be identified among the different national systems* for dealing with civil liability resulting from environmental damage, and, finally, the possibility of finding *connecting factors that are broadly acceptable*.

The **second part** will take up the questions of a *procedural* nature which are linked to an action claiming civil liability resulting from transfrontier environmental damage. It will examine in turn *international judicial jurisdiction*, some specific features of *collective actions* (*class actions*, *citizen suits* and actions brought by professional associations), the necessity for the plaintiff to have *access to information* in order to sustain his action, as well as the *recognition and enforcement of foreign decisions*.

In the **third part**, we shall present the principal conventions establishing a framework of *international co-operation* in environmental matters. We shall also try to determine the specific areas in which a possible Hague Convention might provide rules on co-operation.

¹¹ During the Conference's Eighteenth Session, a delegation had suggested that with a view to the next meeting of the Special Commission on general affairs and policy of the Conference, "a document be prepared in order to recapitulate what exists and what might yet be done in this area, in such a way that a decision might possibly be taken to make it a first priority for the following Session" (*ibid.*, p. 242 – in French only). It is somewhat with this perspective that the present Note is submitted.

Part I:
Civil liability resulting from environmental damage:
an international and comparative law overview

The principal purpose of this first part is to examine three essential factors which set the conditions for the drawing up of any Hague Convention. The preparation of a new private international law Convention only makes sense, to begin with, if international society has not succeeded in reaching agreement on *a set of rules of unified substantive law*, governing in a (more or less) exhaustive way the main legal issues raised by the topic which is to be dealt with. Indeed, if such a set of rules is in place, has been adopted on a broad scale and there is general satisfaction as to its functioning, the preparation of a private international law Convention no longer has any point. Consequently it is essential to commence our study by examining the number, the reach and the success of whatever international Conventions there are which establish unified rules of substantive liability, applicable in the event of transfrontier environmental damage (Chapter 1). Our attention will turn thereafter towards *national comparative law*. Attention will at first be drawn towards *substantive law*. Indeed, it would only be justified to draw up an international Convention if the national substantive laws differ as among each other. We shall enquire more particularly as to what are the main judicial means allowing for recovery, in the common law systems and in civil law systems, of reparations for loss resulting from environmental pollution. (Chapter 2). Finally, there will be the question of *conflicts of laws*. With a view to examining the different possibilities that might open up in this field to the Hague Conference, we shall present the principal solutions adopted by the legislators or national courts in order to determine the law applicable to a case of transfrontier pollution – this being an unfortunately too frequent example of torts committed from a distance (Chapter 3).

Chapter 1 — Unified substantive law: the rules for civil liability set out in several international instruments

I. Introduction: the approach followed

The purpose of this first chapter is to present briefly the principal international instruments that establish a unified set of rules for civil liability in the event of environmental damage. Certain of these instruments set up rules of liability *for negligence*, others for *objective liability* (strict, absolute). Several instruments provide in addition sets of rules based on the civil liability of the *operator*, *the State* being able, in certain cases, to be subjected to a *subsidiary* form of liability.¹²

Our presentation will not be geared however towards the various sets of rules established for liability, but rather towards the different *types of activities or accidents* covered by the Conventions. This choice is to be explained by the concern to identify the areas for which a unified set of rules for substantive liability has been put in place at the international level. What are, in other terms, the types of environmental catastrophies, for which unified rules for liability already exist? – this is the principal question of this first chapter (II). Starting from the assessment that will have been made, it will then be possible to better evaluate the real need for a Convention with a

¹² It should however be pointed out that the provisions which deal explicitly with the international responsibility of the State are scarce (see none the less Art. 235, para. 1 of the *United Nations Convention on the Law of the Sea*). The lack of explicit provisions does not however preclude recourse to the general rules of international law, even though the cases bringing into question the responsibility of the State for damage caused to the environment by persons not acting on behalf of the State are exceptional. The case of the Trail Smelters has remained a unique case (in this case, Canada had been considered to be responsible in regard to the United States for damage caused by toxic fumes emanating from industrial plants situated on Canadian territory: arbitral award of 11 March 1941, in *Recueil des sentences arbitrales*, Vol. III, p. 1905). On the international responsibility of States in general, see BRIGITTE STERN, *Responsabilite internationale*, Dalloz, *Répertoire de Droit international*, Tome III, Paris 1998.

more general scope of application, such as the Lugano Convention of 21 June 1993 which establishes rules of civil liability for damage resulting "from activities dangerous to the environment". The analysis of this latter instrument (III) should then allow for more accurate weighing of the need for a worldwide *private international law* Convention that the Hague Conference might possibly draw up.

Our first comments will bear therefore on the international instruments which have a very specific scope of application. These instruments deal with nuclear energy, petroleum and the carriage of dangerous goods.

II. The instruments dealing with a specific area

A. Nuclear energy

At the beginning of the 1960's, two international instruments dealing with the question of civil liability in the field of nuclear energy were negotiated. The first of these instruments is the *Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention)*¹³ adopted 29 July 1960 under the auspices of the European Nuclear Energy Agency, a semi-autonomous body within the Organisation for Economic Co-operation and Development (OECD).¹⁴ This Convention applies when a nuclear incident has occurred on the territory of a *Contracting State*, in so far as the damage caused has been suffered on the territory of another *Contracting State*.¹⁵ It has been supplemented by a *Brussels Convention*, signed on 31 January 1963, which institutes a complementary system of indemnifications drawn from public funds in the event of particularly costly damages.¹⁶ The second international instrument is the *Convention on Civil Liability for Nuclear Damage (Vienna Convention)*, which was adopted on 21 May 1963 under the auspices of the International Atomic Energy Agency (IAEA).¹⁷ Unlike the Paris Convention, the principal characteristics of which it takes on, the Vienna Convention's mission is to be *worldwide*.¹⁸

The Paris and Vienna Conventions existed for a long time independently from one another. It was only on 21 September 1988 that a linkage was established between them through a *Joint Protocol*.¹⁹ This Protocol entered into force on 27 April 1992. Its principal effect is to treat the parties that join it as if they were parties to *both*

¹³ The text of the Convention is reproduced, in English and in French, in W.E. BURHENNE (ed.), *Droit international de l'environnement, Traités internationaux*, Tome II, Kluwer Law International, under No. 960:57/011.

¹⁴ In the 1970's, with the accession of Australia and Japan, then the United States and Canada, the organisation changed its name and was transformed into the *Nuclear Energy Agency*.

¹⁵ The Convention is now in force in most of the countries of Western Europe: Germany, Belgium, Denmark, Spain, Finland, France, Greece, Italy, Norway, Netherlands, Portugal, Sweden, Turkey and the United Kingdom.

¹⁶ The text of the Convention is reproduced, in English and in French, in BURHENNE, *op. cit.* (note 13), under No. 963:10/01.

¹⁷ The text of the Convention is reproduced, in English and in French, in BURHENNE, *op. cit.* (note 13), under No. 963:40/11. We should note that the IAEA adopted, in September 1997, a *Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage* as well as a *Convention on Supplementary Compensation for Nuclear Damage* which puts in place a system of supplementary intergovernmental financing for the Vienna Convention. For the texts of these instruments (in English and in French), see BURHENNE, *op. cit.* (note 13), under Nos 963:40/A/001 and 997:92/001. These two latter instruments have not yet entered into force. The amending Protocol to the 1997 Vienna Convention significantly extends the geographical scope of application of the latter, since the Convention becomes applicable to nuclear damage, *wherever suffered* (Art. 3 of the Protocol modifying Art. IA of the Convention); however, it should be stressed that the legislation of the place of the nuclear installation may exclude from the scope of application all damage suffered in the territory of a non-contracting State.

¹⁸ As of 13 April 1999, the Convention had 32 Parties; see the information given on the Website of the IAEA (<http://www.iaea.org/worldatom/Documents/Legal/liability.html>). It is however to be noted that the United States, Russia and Japan are not yet Parties to this Convention.

¹⁹ *Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention*. The text of this Protocol is reproduced, in English and in French, in BURHENNE, *op. cit.* (note 13), under No. 988:78/001.

Conventions.²⁰ Thus, the operator of a nuclear installation situated on the territory of a State Party to the *Vienna* Convention may be held liable for damage occurring on the territory of a State which is a Party to the Paris Convention and to the Joint Protocol; conversely, the operator of a nuclear installation situated on the territory of a State Party to the *Paris* Convention may be held liable for damage occurring on the territory of a State which is a Party to the Vienna Convention and to the Joint Protocol (Art. II of the Protocol). The Protocol contains in addition a rule of conflict of Conventions; it specifies that if a nuclear incident occurs in a nuclear installation, the applicable Convention is that to which the State on whose territory this installation is located is a Party (Art. III).

The Paris and Vienna Conventions both apply to any death, any damage to persons, any loss of goods or any damage to goods caused by a civil nuclear incident occurring in a nuclear installation or in the course of carriage of nuclear substances to or from a nuclear installation.²¹

Under both Conventions, civil liability is *channelled to the operator* of the nuclear installation.²² This is the person designated or recognised in advance by the national authorities as being the operator of the nuclear installation in question. The rules for liability established being *objective* in nature, the injured party does not have to prove that the operator was negligent. The injured person must on the other hand prove that the damage was due to a *nuclear incident*.²³ The right to reparation for damage caused by the nuclear incident can also be exercised against the insurer or against any other person who has granted a financial guarantee to the operator, in accordance with Article 10 of the Paris Convention, if a right to direct action against the insurer or any person who has granted a financial guarantee is provided by the national law of the forum. An action for reparation must be commenced, under penalty of lapse of the right, within ten years from the time of the nuclear incident.

During the negotiations for the Paris and Vienna Conventions, it quickly became apparent that the establishment of a set of rules for *objective* liability had necessarily to be accompanied by a *limit* on the amount of the compensation payable by the operator. In the official commentary on the Paris Convention, this principle of limited liability is justified by the fact that in the absence of such a limitation, it would have been impossible for the operators of nuclear installations to obtain the necessary insurance policies.²⁴

Although these rules can not really be referred to as *worldwide*, it must be pointed out that the international instruments establishing unified rules of civil liability for nuclear damages have been *widely ratified*.²⁵ It is therefore permissible to doubt that a possible

²⁰ Twenty States are now Parties to the Protocol; see information given on the IAEA Website (<http://www.iaea.org/worldatom/Documents/Legal/liability.html>).

²¹ Arts. 3 and 4 of the Paris Convention; Arts. I and II of the Vienna Convention. The Protocol to Amend the Vienna Convention (see note 17) introduces in addition the concept of *impairment of the environment* in the definition of nuclear damage (Art. 2, para. 2 of the Protocol); thus, nuclear damage includes the costs of measures of reinstatement of an impaired environment, unless the impairment is insignificant.

²² It should be noted that the channelling of responsibility provided for in Art. 6 of the Paris Convention is of a *legal* nature, and not *economic*. Therefore, liability can only apply against the operator of the installation, to the exclusion in particular of the suppliers and the manufacturers of bars of nuclear fuel.

²³ For a definition of the term *nuclear incident*, see Art. 1, para. a), sub-para. I, of the Paris Convention; it should be noted that under this definition the Convention applies not only in case of a sudden and unforeseen occurrence, but also where the damage is due to nuclear emissions resulting from the normal operation of the installation. Moreover, it is not necessary for the damage and the occurrence to be of a nuclear character; the system of liability provided for in the Paris Convention applies equally where, for example, an airplane crashes into a nuclear installation, causing nuclear contamination.

²⁴ Under Art. 7 of the Paris Convention, the maximum amount of the operator's liability for the damage caused by a nuclear incident is set at 15 Million Special Drawing Rights (SDR). A higher or lower amount may be set by the legislation of a Contracting State; the amount may not however be less than 5 Million SDR. Under Art. V of the Vienna Convention, the State where the nuclear installation is located may limit the operator's liability to 5 Million Dollars per nuclear incident.

²⁵ Two more international instruments dealing with nuclear incidents should be mentioned. One of these is the *Convention of 17 December 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material*. This Convention had, at 30 June 1999, 14 States Parties (see the Internet site of the IMO at the following address:

Hague Convention on civil liability resulting from transfrontier environmental damage would be considered to be very useful in the context of nuclear incidents, especially since the instruments mentioned also contain rules on direct jurisdiction and the effects of judgments handed down abroad.²⁶

B. Petroleum

1. The pollution risks created by international maritime transport of petroleum

These past thirty years have been marked by an incredible number of devastating wrecks of big oil tankers – we mention here only the names "*Amoco Cadiz*", "*Braer*", "*Maersk Navigator*", "*Exxon Valdez*" or, most recently, "*Erika*". The first great catastrophe of this type had involved the "*Torrey Canyon*" which, on 18 March 1967, sank along the British coast of Cornwall. The disastrous consequences of this shipwreck had prompted the international community to establish a new set of rules for liability. The effort led to the adoption of the *International Convention on Civil Liability for Oil Pollution Damage* concluded at Brussels in 1969 under the auspices of the International Maritime Organisation (IMO).²⁷ Since its entry into force on 19 June 1975, the Convention has been modified by *additional protocols* adopted in 1976, 1984 and 1992.²⁸

The Brussels Convention sets up a system of *objective liability* channelled to the *owners* of ships (Art. III). It applies exclusively to "*pollution damage*" suffered in the territory, in the territorial sea, or in the exclusive economic zone of a Contracting State, as well as to *preventive measures* intended to avoid or to reduce such damages (Art. II). In return for the elimination of the requirement of negligence, the amounts of the indemnities payable are *limited*.²⁹ The actual implementation of the 1969 Convention is ensured by means of the requirement of *obligatory insurance* (Art. VII, paragraph 1) as well as by the possibility of a *direct action* against the insurer (Art. VIII, para. 8). With a view to allowing for a supplementary indemnification of pollution victims who might not be able to obtain the payment of compensation by the persons who are liable – whether they be insolvent or impossible to identify – and to assuming in part the financial burden falling on the shipowners, it was decided in addition to set up an *international fund*, subscribed to by the oil companies (*International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels 1971*), with additional protocols of 1976, 1984, 1992).³⁰ The private agreements entered into

<http://www.imo.org/convent/summary.htm>). The other is the *Brussels Convention of 25 May 1962 on the Liability of the Operators of Nuclear Ships*. So far as we are aware, this Convention, which provides for strict liability of the operator (Art. II), has not entered into force; see BURHENNE, *op. cit.* (note 13), under No. 962:40/1.

²⁶ See *infra*, p. 47 *et seq.*, and p. 67 *et seq.*

²⁷ The text of the Convention is reproduced, in English and in French, in BURHENNE, *op. cit.* (note 13), under No. 969:88/01.

²⁸ In its 1969 version, the Convention is in force in 75 States. The 1984 Protocol has not entered into force (see below note 34). The 1992 Protocol, laying down less strict conditions than did that of 1984, entered into force on 30 May 1996. As of 30 June 1999, it was applicable to 46 States (information drawn from the IMO website at the following address: <http://www.imo.org>).

²⁹ The liability limits were increased in the 1992 Protocol. In its new text, Art. V of the Convention allows an owner to limit his liability to 3 Million SDR (about 4.1 Million US Dollars) for a ship whose gross tonnage does not exceed 5000 units; for a ship whose gross tonnage exceeds this number of units, the limit is 420 SDR (about 567 US Dollars) for each additional unit of gross tonnage. In no case can the total amount exceed 59.7 Million SDR (about 80 million US Dollars). The shipowner however has no right to invoke these limits "if it is proved that the damage results from his own personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result" (Art. V, para. 2).

³⁰ As of 30 June 1999, the 1992 Protocol was in force in 44 States.

among shipowners (TOVALP³¹) and among oil companies (CRISTAL³²) institute a "voluntary" system intended to indemnify the victims of pollution, in particular the governments which carry out actions for *prevention* or for *rescue*. These agreements constitute an inseparable element of the system of indemnification.³³

The shipwreck of the *Amoco Cadiz*, which occurred in 1978, brought to light the weakness of the system instituted by the 1969 and 1971 Conventions, in particular the vagueness surrounding the concept of "pollution damage" and the unduly low limits of liability. These problems were resolved, at least partially, by the adoption of the 1984 protocol, modifying both Conventions. But the refusal of the United States to join this protocol prevented its entry into force. In 1992, a new revision was undertaken, involving this time less strict conditions for entry into force and an increase in the limits of liability.³⁴

Under Article I, paragraph 6, of the Convention, in the version of the 1992 protocol, *pollution damage* means:

- "a) the loss or damage caused outside of the ship by contamination following a leak or a discharge of petroleum from the ship, wherever this leak or discharge may occur, it being understood that the compensation paid on grounds of alteration of the environment other than profit lost as a result of this alteration will be limited to the cost of reasonable measures of restoration which have been or will be taken.
- b) the costs of the protective measures and the other losses or damage caused by these measures."

Originally, the Convention did not provide *explicitly* for indemnification of the *lost profits* due to the alteration of the environment. That had brought on divergent solutions in the application of the Convention by the different national jurisdictions.^{35, 36}

As with nuclear energy, it would seem, at least at first view, that the broad ratification of these *specific* instruments, which not only establish unified rules for liability, but also contain rules on jurisdiction and the effects of foreign judgments,³⁷ reduce the usefulness that a possible Hague Convention might have for ecological disasters arising from the transport of petroleum by sea.

2. The pollution risks arising from the exploitation of mineral resources from the seabed

Following the explosion of a wildcat well off the coast of California in 1972 and the increasing exploitation of oil reserves in the North Sea, the international community

³¹ Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution

³² Contract Regarding an Interim Supplement To Tanker Liability for Oil Pollution

³³ BOISSON DE CHAZOURNES/DESAGNÉ/ROMANO, *Protection Internationale de l'Environnement, Recueil d'instruments juridiques*, Paris 1998, p. 947-948.

³⁴ The entry into force of the 1984 Protocol required ratification by six States each having oil tankers of gross tonnage of at least one million; in the 1992 Protocol, this number went to four. See also the explanations in footnote 92.

³⁵ BOISSON DE CHAZOURNES/DESAGNÉ/ROMANO, *op. cit.* (footnote 33), p. 948.

³⁶ It should also be pointed out that on 30 November 1990, the *International Convention on Oil Pollution Preparedness, Response and Co-operation* was adopted at London under the auspices of the IMO. This Convention establishes preventive measures to avoid oil pollution and organises an effective preparation to combat oil spills. As of 31 December 1999, it was in force in 51 States (see the IMO website at the following address: <http://www.imo.org/imo/convent/summary.htm>).

³⁷ See *infra*, p. 47 *et seq.*, and p. 67 *et seq.*

began to pay increasing attention to the danger resulting from offshore operations.³⁸ At the initiative of the Government of the United Kingdom, the coastal States of the North Sea met at London in order to negotiate a Convention on liability for damage resulting from the search for and exploitation of mineral resources from the seabed. The text provides for *objective* liability of the operator of the installation involved (Art. 3, para. 1). The operator however has the right to limit its liability to 30 million Special Drawing Rights (Art. 6, para.1).³⁹

To date, this Convention has registered *not a single ratification*. There is a specific reason for this lack of enthusiasm. In fact, while the negotiations were going forward, the oil companies, in parallel, negotiated among themselves a liability agreement, the *Offshore Pollution Liability Agreement (OPOL)*, which is comparable to the TOVALOP and CRISTAL arrangements mentioned above. In the event of an incident, the operator is liable for the entirety of the damage caused. If it is insolvent, OPOL assumes the liability up to the amount of 100 million Dollars, sharing the amount to be paid among the different partners.

C. Carriage of dangerous goods

The increase in transportation of dangerous goods, whether it be carried out by trucks or lorries, by boats, or by aircraft, creates an ever-mounting risk of physical and environmental damage. Growing awareness of this risk on the part of the international community finally led to the adoption, in 1989, of the *Geneva Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail, and Inland Navigation Vessels (CRTD)*.⁴⁰ Though it was adopted under the auspices of the Economic Commission for Europe of the United Nations, the principal work of preparation of the Convention had previously been carried out within the International Institute for the Unification of Private Law (UNIDROIT).

The basic rules for liability set out in Article 5 of the Convention may be described as *objective liability*, even though there are attenuations to this principle, particularly in the exculpatory clause in Article 5, paragraph 4, sub-paragraph c.⁴¹ The liability is channelled towards the *transporter* as being the one who controls the movement of the goods, the one that the victims can most easily identify and who can obtain insurance. The transporter has the right to commence a *third-party action* against any other person who might be held liable for the damage under the applicable national law. In addition, the principle of *joint and several liability* was adopted for damage caused in the course of operations for the loading and unloading of the goods. Under Article 9 of the Convention, the liability of the transporter is *limited*, but a Contracting State may avail itself of a reservation for the purpose of applying higher limits of liability or no limit on liability for damage arising from accidents taking place on its territory (Art. 24). Finally, the system of objective liability is accompanied by the obligation to cover this liability by *insurance* or by another financial guarantee (Art. 13).

The *geographical scope* of the Convention is at once broad and restricted (Art. 2). It is broad in that the Convention applies both to internal and international carriage. On the other hand, it is somewhat restrictive since the damage must not only be caused by an

³⁸ GABY BORNHEIM, Haftung für grenzüberschreitende Umweltbeeinträchtigungen im Völkerrecht und im Internationalen Privatrecht, *Publications Universitaires Européennes*, Série II, Vol. 1803, Frankfurt 1995, p. 98.

³⁹ Every action asserting liability must be brought before the courts of the State Party or Parties in which damage by pollution resulting from the occurrence has been suffered or before the courts of the State of control, *i.e.* the State Party to the Convention which exercises sovereign rights for the research and exploitation of the resources of the seabed and below in the region where the installation is located.

⁴⁰ See the *Uniform Law Review* 1989-1, p. 280/281 *et seq.*; the explanatory report by Malcolm Evans was published in the *Uniform Law Review* 1991-1, p. 76/77 *et seq.*

⁴¹ This sub-paragraph provides that the transporter is exonerated from liability if he proves that "the consignor or any other person failed to meet his obligation to inform him of the dangerous nature of the goods, and that neither he nor his servants or agents knew or ought to have known of their nature".

event occurring in a State Party to the Convention, but it must have been suffered on the territory of such a State. The result of this is that, in case of an accident causing damage in two different States, only the victims in State A will have a right to reparation under the Convention.

Contrary to the instruments dealing with damage caused by nuclear energy or petroleum, mentioned above, the CRTD has not met with success since, more than ten years after its adoption, only two States have signed it (Germany and Morocco). No instrument of ratification has yet been deposited. The future of this instrument is consequently uncertain. In this field, a possible private international law Convention might therefore very usefully remedy a legal void.

III. The Basel Protocol of 1999 on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal

A. Introduction

The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* was adopted in 1989. It provides very strict regulation of the transboundary movements of hazardous wastes by establishing stringent procedures between Contracting States, and by organising co-operation in carrying out meticulous controls, so as to limit transboundary movements to the greatest possible extent and ultimately to contrive to eliminate hazardous wastes. A non-exhaustive list of these wastes is appended to the Convention. In March 2000, 133 States were Parties to this Convention.⁴²

It is a well known fact that the elaboration of rules on the questions of liability and compensation resulting from damage caused by transboundary movement of hazardous wastes had been envisaged by a number of countries during the negotiation of the Convention. As no agreement could be reached at that time, the compromise consisted of approving an article stating that the parties shall co-operate with a view to adopting, as soon as possible, a protocol setting out such rules (Art. 12 of the Convention). Ten years later, in December 1999, this Protocol was adopted by the Fifth Conference of the Parties to the Basel Convention.⁴³

B. Brief presentation of the regime set up

A detailed presentation of the Protocol would go beyond the limits of this Note. Hence, we will restrain ourselves to a sketch of its most characteristic principles.

Firstly, one has to underline that the Protocol establishes a regime of *strict liability*. Depending on when the damageable incident actually occurs, this strict liability is channelled to a different person: during an initial phase, the person who is notifying the transport in accordance with the Convention (the exporter) is liable for damage. This responsibility lasts until the *disposer* has taken possession of the hazardous wastes. Thereafter, the disposer is liable for any damage which may occur (Art. 4, para. 1).⁴⁴ According to Annex B of the Protocol, the financial limits for the liability shall be determined by the domestic law of the States Parties to the Protocol. However, these limits may not be inferior to the minimum requirements set by the same Annex.

⁴² 28 States in Africa, 32 in Asia and the Pacific region, 27 in Western Europe and other parts, 19 in Central and Eastern Europe, 27 in Latin America and the Caribbean; lastly, the European Community is Party in its own right. Furthermore, the Convention has been signed by Afghanistan, the United States of America and Haiti.

⁴³ The full text of the Protocol is available on UNEP's web-site (at the following address: <http://www.unep.ch/basel/COP5/docs/prot-e.pdf>).

⁴⁴ Art. 4 also provides for specific rules in particular situations, such as cases of re-import of wastes.

The designation of the person liable was one of the most debated questions during the negotiations. The solution embodied in the Protocol does indeed have the advantage of clarity, because it adopts a formalistic criterion which is probably easier to prove compared to the other solution advocated during the negotiations, *i.e.* the channelling of the liability to the person who is in operational control of the wastes. One has to admit though that the latter would probably have been a better reflection of the polluter-pays principle.

The Protocol contains a rather broad definition of damage for which compensation may be sought. According to Article 2, paragraph 2, lit. c) of the Protocol, damage means "(i) loss of life or personal injury; (ii) loss of or damage to property other than property held by the person liable in accordance with the present Protocol; (iii) loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs; (iv) the costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken; and (v) the costs of preventive measures, including any loss or damage caused by such measures, to the extent that the damage arises out of or results from hazardous properties of the wastes involved in the transboundary movement and disposal of hazardous wastes and other wastes subject to the Convention".

The two first types of damage do not give rise to particular comments, save that they are also embraced by other conventions dealing with the protection of the environment. In the same way, it is more and more accepted that loss of income resulting from an impairment of the environment should be taken into consideration.⁴⁵ The fact that costs for the reinstatement of the impaired environment are only to be compensated if measures are actually taken, or to be undertaken, is also common. As far as preventive measures (in the sense of Art. 6 of the Protocol) are concerned, they will in principle have been taken in the course of the incident and hence it will not be possible to dispute their existence. Compensation for both measures of reinstatement and preventive measures is subject in principle to the same limitation: only *reasonable* measures will be compensated (see Art. 2, para. 2, litt. d) and e)). This principle is designed to prevent any abuse that may take place. One may regret the absence of a provision defining what constitutes an impairment of the environment.⁴⁶

The *scope of application* of the Protocol is defined in Article 3. The structure of this provision is very complex, having no less than nine paragraphs and additionally various sub-paragraphs. The general rule is that the Protocol applies "to damage due to an incident occurring during a transboundary movement of hazardous wastes and other wastes and their disposal, including illegal traffic, from the point where the wastes are loaded on the means of transport in an area under the national jurisdiction of a State of export" (para. 1, first sent.). Only damage suffered in a State Party to the Protocol falls within its scope (para. 3, lit. a). However, according to the second sentence of the first paragraph, any State Party to the Protocol may, by way of notification to the Depositary, "exclude the application of the Protocol, in respect of all transboundary movements for which it is the State of export, for such incidents which occur in an area under its national jurisdiction, as regards damage in its area of national jurisdiction." The effect of such a notification seems to be that if an incident occurs in the State of export, causing damage not only within the borders of that State but also in another Contracting State, the Protocol shall apply only to the victims of the latter State. The regime set up by the Protocol would, however, not apply to the victims of the exporting State.

⁴⁵ See Art. I, para. 6 of the Brussels Convention on Civil Liability for Oil Pollution Damage, *supra*, p. 7.

⁴⁶ See the comments of THIERRY VAISSIERE, Le projet de protocole à la Convention de Bâle sur la responsabilité et l'indemnisation des dommages résultant des mouvements transfrontières de déchets dangereux et de leur élimination, *Actualité et Droit international – Revue d'analyse juridique de l'actualité internationale*, June 1999, (<http://www.ridi.org/adi>).

One may note that the transboundary movement of wastes is covered by the Protocol "until the time at which the notification of completion of disposal pursuant [to the Basel Convention] has occurred, or, where such notification has not been made, completion of disposal has occurred" (Art. 3, para. 2).

IV. The Council of Europe's Convention of 21 June 1993 on Civil Liability for Damage resulting from Activities Dangerous to the Environment (*Lugano Convention*)

The *Council of Europe's Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment*, signed at Lugano on 21 June 1993, "aims at ensuring adequate compensation for damage resulting from activities dangerous to the environment" (Art. 1).⁴⁷ The three key terms of this description are *damage*, *dangerous activities* and *environment*. Now, it must be admitted that these three terms are given very broad definitions, thus endowing the Convention with a considerable *substantive scope of application*.

A. The substantive scope of application

1. The definitions

Under Article 2, paragraph 1, the term "dangerous activity" means:

- «a) the production, handling, storage, use or discharge of one or more dangerous substances or any operation of a similar nature dealing with such substances;
- b) the production, culturing, handling, storage, use, destruction, disposal, release or any other operation dealing with one or more:
 - genetically modified organisms which as a result of the properties of the organism, the genetic modification and the conditions under which the operation is exercised, pose a significant risk for man, the environment or property;
 - micro-organisms which as a result of their properties and the conditions under which the operation is exercised pose a significant risk for man, the environment or property, such as those micro-organisms which are pathogenic or which produce toxins;
- c) the operation of an installation or site for the incineration, treatment, handling or recycling of waste, such as those installations or sites specified in Annex II, provided that the quantities involved pose a significant risk for man, the environment or property;
- d) the operation of a site for the permanent deposit of waste.»

The Convention applies on the other hand neither to damage arising from *carriage* nor to damage caused by a *nuclear substance* (Art. 4); also excluded from the scope of application are certain genetically modified organisms (Art. 2, para. 3). We note,

⁴⁷ The Convention also provides for preventive measures and measures of reinstatement. – The text of the Convention appears on the Council of Europe's website (<http://www.coe.fr/eng/legaltxt/150e.htm>). For a description of the Convention, see in particular ALAIN PIPERS, *The Lugano Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment and the Intents of the European Union with Regard to Reinstatement of the Environment*, in VON BAR (ed.), *op. cit.* (note 5), pp. 199-201.

moreover, that Article 2, paragraph 2, contains a detailed definition of *dangerous substances*.⁴⁸

Several elements of the list set out above seem to us not to be free of all ambiguity. What is, for example, this *significant* risk for man, the environment or property to which reference is made several times? How can a *uniform interpretation* of these rather vague terms be ensured, etc.?

The term "environment" likewise receives a definition which is very broad, since it includes not only "natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors", but also "property which forms part of the cultural heritage" and "the characteristic aspects of the landscape" (Art. 2, para. 10). Here again, what is the property that forms part of *the cultural heritage*? How can we take into account the variety of these heritages? What is a *characteristic* aspect of a landscape in an international context?

Finally, under Article 2, paragraph 7, damage means:

- « a) Loss of life or personal injury;
- b) loss of or damage to property other than to the installation itself or property held under the control of the operator, at the site of the dangerous activity;
- c) loss or damage by impairment of the environment in so far as this is not considered to be damage within the meaning of sub-paragraphs a or b above provided that compensation for impairment of the environment, other than for loss of profit from such impairment, shall be limited to the costs of measures of reinstatement actually undertaken or to be undertaken;
- d) the costs of preventive measures and any loss or damage caused by preventive measures, to the extent that the loss or damage referred to in sub-paragraphs a to c of this paragraph arises out of or results from the hazardous properties of the dangerous substances, genetically modified organisms or micro-organisms or arises or results from waste."

2. The system of liability

The Convention establishes a system of *objective* liability chargeable to the operator (Art. 6). In order to guarantee concrete implementation of this principle, the Convention imposes on every State Party the obligation to ensure that "where appropriate, taking due account of the risks of the activity, operators conducting a dangerous activity on its territory be required to participate in a financial security scheme or to have and maintain a financial guarantee up to a certain limit, of such type and term as specified by internal law, to cover the liability under this Convention" (Art. 12). The victim does not have to bring any proof of *fault*, nor to establish the *cause* or the origin of the occurrence. On the other hand he or she must prove that there is a *causative link* between the occurrence and the damage suffered. The Convention does not provide any presumption of causation in this respect. It simply sets it out that when considering evidence of the causal link between the incident and the damage, the court shall take due account of the increased danger of causing such damage inherent in the dangerous activity (Art. 10). It goes without saying that this provision is less favorable to the victim than a presumption of causation. The reasoning behind this provision (*ratio legis*) is moreover difficult to understand. In fact, the question of taking into account an

⁴⁸ This provision refers in its turn to Annex I of the Convention, which makes explicit reference to the *Council Directive of the European Communities 67/548/EEC of 27 June 1967 (OJEC No. L196/1) on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances*, as well as the *Council Directive of the European Communities 88/379/EEC of 7 June 1988 (OJEC No. L187/14) on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations as adapted to technical progress by the Directive of the Commission of the European Communities 90/492/EEC of 5 October 1990 (OJEC No. L275/35)*.

increased risk inherent in a specific activity arises mainly in the context of a system based upon fault or negligence, since, by definition, these systems necessitate an enquiry into the conduct of the person whose liability may be engaged; the need for such an enquiry seems on the other hand to be less obvious in the context of a system of objective liability.⁴⁹

By virtue of the *grounds for exemption* set out in Article 8, the operator is not liable if it proves, for example, that the damage resulted from a "natural phenomenon of an exceptional, inevitable and irresistible character" (sub-para. a), from pollution "at tolerable levels under local relevant circumstances" (sub-para. d), or yet from "a dangerous activity taken lawfully in the interests of the person who suffered the damage, whereby it was reasonable towards this person to expose him to the risks of the dangerous activity" (sub-para. e).

B. The geographical scope

The *geographical scope* of the Convention is defined in Article 3. Under sub-paragraph a of this provision, the Convention applies to incidents⁵⁰ occurring in the territory of a State Party, "regardless of where the damage is suffered". In other terms, the Convention applies whether or not there is reciprocity: an injured person residing in a *non-Contracting State* may bring, before the courts of a Contracting State, an action for damages against the operator of a dangerous activity, while in the reverse situation, an injured person who resides in the Contracting State can not invoke the Convention before the courts of the non-Contracting State.⁵¹ Overall, the Convention seeks to establish a scope of application which is as broad as possible. This solution undoubtedly reflects greater and greater awareness of the issues of environmental damage.

Praiseworthy though it may be, such an approach gives rise, however, to an obvious difficulty. One may doubt that all the States have the political will to adopt a text that imposes such a broad range of liabilities on its citizens and its industry.⁵² The possibility for a *reservation* contained in Article 35, which allows a State to apply the Convention only on the basis of reciprocity, apparently did not allay these fears, since at the time of the adoption of the treaty in 1993, several States, among them Germany, the United Kingdom, the Czech Republic and Ireland, already made known their refusal to sign the Convention. As of the first of August 1999, this treaty which is certainly a precursor, but possibly too ambitious, had received only nine signatures without any ratification.⁵³ Finally, let us note that the Convention may also be applicable under the mechanism of the *conflict of laws extension* set out in Article 3, sub-paragraph b: if the incident in question occurs in the territory of a non-Contracting State and the conflict of laws rules lead to the application of the law of a Contracting State, the Convention applies. No possibility for a reservation is provided in this situation.

We shall come back later to two important provisions contained in the Lugano Convention, one bearing on the *possibility of bringing a collective action (requests by*

⁴⁹ BOISSON DE CHAZOURNES/DESGAGNÉ/ROMANO, *op. cit.* (footnote 33), p. 949.

⁵⁰ For the purpose of the Convention, "incident" means "any sudden occurrence or continuous occurrence or any series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage" (Art. 2, para. 11).

⁵¹ It should be noted that the Lugano Convention also contains provisions dealing with judicial jurisdiction and the effects of foreign judgments; see *infra*, p. 49, and p. 67.

⁵² For the same idea see CHRISTIAN VON BAR, *Environmental Damage in Private International Law, Collected Courses of the Hague Academy of International Law*, Vol. 268, p. 324.

⁵³ The countries which had signed the Lugano Convention are: Cyprus, Finland, Greece, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands and Portugal. Under its Art. 32, the Convention will enter into force three months after three States, including at least two Member States of the Council of Europe, have expressed their consent to be bound by the Convention. The status of signatures and ratifications of the Convention appears on the Council of Europe's website (<http://www.coe.fr/tablconv/150t.htm>).

organisations)⁵⁴ the other setting the conditions for access to information held by the public authorities and the operators.⁵⁵

V. The *White Paper on Environmental Liability* adopted by the Commission of the European Communities

It should be pointed out here that on 9 February 2000, the European Commission adopted a *White Paper on Environmental Liability*.⁵⁶ This document explores how a Community regime on environmental liability can best be shaped; it examines in particular how the *polluter pays principle* can best be applied to serve the aims of Community environmental policy.

Having considered various solutions for a Community action (among them a Community Accession to the Council's of Europe Lugano Convention or the elaboration of a regime for transboundary damage only), the Commission concludes that the most appropriate option is a *Community framework directive on Environmental Liability*. This directive should first provide for *strict liability* for damage caused by EC-regulated dangerous activities; this regime would cover both *traditional damage* (harm to health and property) and *environmental damage* (site contamination and damage to biodiversity). Secondly, the directive should provide for *fault-based liability* for damage to biodiversity caused by non-dangerous activities. More precise details regarding such a directive shall be defined after consultations.

VI. A first assessment

This initial survey allows one to draw the following two conclusions. First of all, a set of rules for civil liability which is *unified*, widely ratified and functioning satisfactorily, is in place only for two types of ecological catastrophes (nuclear energy and petroleum). It should be pointed out here that the *Geneva Convention of 13 November 1979 on Long-Range Transboundary Air Pollution* – which is perhaps one of the most important instruments addressing the protection of the environment – does *not* deal with the question of liability for damages resulting from such pollution.⁵⁷

The second conclusion bears on the influence of a Convention of a *general* character, setting in place unified rules of civil liability for the *other* types of natural catastrophes. Such an instrument exists, to be sure, under the form of the Lugano Convention, drawn up by the Council of Europe, but it is doubtful whether this instrument will ever be widely ratified. From this point of view, a worldwide private international law Convention would come to fill a yawning gap. But before concluding that work aimed at the

⁵⁴ See *infra* p. 62 *et seq.*

⁵⁵ See *infra* p. 66 *et seq.*

⁵⁶ The full text of this document is available on the Commission's web-site (at the following address: http://europa.eu.int/comm/environment/liability/el_full.pdf).

⁵⁷ The text of this Convention, drawn up under the auspices of the United Nations' Economic Commission for Europe (ECE), is reproduced, in English and in French, in BURHENNE, *op. cit.* (note 13), under No. 979:84. As of 25 October 1999, this Convention had 45 States Parties, among them being Canada, the European Community, the Russian Federation and the United States. The basis for this Convention had been laid in the 1960's, when scientists had found a link between sulphur emissions in Continental Europe and the acidification of lakes in Scandinavia. The Convention was the first international agreement to recognise both the environmental and health problems caused by the transborder movement of atmospheric pollutants and the pressing need for a solution on a broader scale. More recently, the appearance of problems of thinning-out of the ozone layer and of global warming have given to the question of long-range transborder atmospheric pollution priority ranking in the field of environmental protection. See also *infra* p. 71.

preparation of a *Hague Convention on civil liability resulting from transfrontier environmental damage* is justified, it seems necessary to study the different rights and remedies available, in the *national* laws, to persons who have suffered damages resulting from environmental pollution. Indeed, it is only if these means *differ* that a private international law approach is justified. Obviously, it is not possible to present here a complete comparative law study. We therefore simply focus on the possible differences which may exist between the common law and the civil law systems. This will be the thrust of the next chapter.

Chapter 2 — National substantive law: overview of the principal judicial means for obtaining reparation for damage resulting from environmental pollution in common law and in civil law

I. Overview of the judicial means provided in common law for obtaining reparation for environmental damage

The classic means grounded in common law for obtaining reparation of damage are multiple. We shall limit ourselves to a brief presentation of the most important means and those which are most frequently invoked in the context of transfrontier environmental damage. In a first part, we shall examine liability under private law; this involves the theories of nuisance, trespass and negligence, as well as the celebrated rule of *Rylands v. Fletcher* which inaugurated a system of objective liability, the doctrine of the public trust and that of riparian rights (A). We shall then describe the liability provided for in a law, giving an overview of the situation in the United States (B).

A. Private Liability

1. Actions for private and public nuisance

The actions for private and public nuisance are very often invoked in pollution cases. The tort of private nuisance designates an excessive and unreasonable hindrance to the private utilisation and enjoyment of real property.⁵⁸ The action is based upon the interest that the plaintiff has in the property itself. The interests protected are multiple. These include the effective use of the property for residential, agricultural, commercial or industrial purposes, as well as the pleasure, comfort and enjoyment linked to the occupation of the immovable property.⁵⁹ The most current causes of this environmental tort are air and water pollution, but noise pollution and visual pollution may likewise form the basis for a claim.⁶⁰

Standing to sue belongs to the person who has a property right or a legally-protected interest in the use and enjoyment of the property (in particular the occupant, the possessor, the lessee or the beneficiary of a servitude).⁶¹

⁵⁸ Restatement, Second Torts, § 821D: «A private Nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land.»

⁵⁹ ISABELLE ROMY, *Mise en œuvre de la protection de l'environnement – Des citizen suits aux solutions suisses*, Fribourg 1997, p. 31.

⁶⁰ Background paper drawn up by the Secretariat of the Commission for Environmental Cooperation, *Access to Courts and Administrative Agencies in Transboundary Pollution Matters*, Montreal, May 1999, p. 12.

⁶¹ ROMY, *op. cit.* (footnote 59), p. 32; see also MARKESINIS/DEAKIN, *Tort Law*, 5th ed., Oxford 1999, pp. 435-438.

The question of knowing whether the tort of private nuisance is tied to the requirement or not of *fault* is among the most difficult and controverted. In a recent case (*Cambridge Water*), Lord Goff summarised the situation as follows:

"[I]t is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user. But it by no means follows that the defendant should be held liable for damage of a type which he could not reasonably foresee. The development of the law of negligence in the past 60 years points strongly towards a requirement that such foreseeability should be a prerequisite of liability in damages for nuisance, as it is of liability in negligence."⁶²

The system of strict or objective liability seems therefore to be losing ground in the field of *nuisance*. In general, the outcome of a case will depend on the reasonableness of the pollution and on the fact that damage has or has not been caused, as well as on its extent.⁶³

In order to constitute *nuisance* the encroachment must be excessive and unreasonable. The excessiveness is not found in the activities of the defendant, but in their *consequences* for the plaintiff. The assessment of these consequences is made from the point of view of an impartial and reasonable observer who weighs the different interests that are involved.⁶⁴

A *public nuisance* arises when there is excessive interference with a right or an interest which is common to the public in general. It does not necessarily presuppose that there is a hindrance to the use or enjoyment of a piece of real property.⁶⁵ In order to be public, the *nuisance* must affect the interest shared by the public in general or by a community. Given the nature of these actions, only a governmental authority has, in general, standing to sue. A private person has standing to sue only if (s)he establishes a particular prejudice, distinct in nature and degree from that suffered by the members of the public in general (such as bodily injury or damage to that person's property).⁶⁶

2. Trespass

The tort of *trespass* may be defined as an encroachment on the interest in exclusive possession of an immovable property. Contrary to a *private nuisance* which requires only an interference in the utilisation or enjoyment and which may apply to the indirect effects of pollution (in particular through the atmosphere), the tort of *trespass* may be invoked only in response to a *direct and immediate physical intrusion* into possession. Consequently, the tort of *trespass* does not look to the damage caused by pollutants deposited on another parcel of land by the action of the air or water, or infringements caused by noise or vibrations.⁶⁷ We note though that the courts often combine the torts of *nuisance* and *trespass*.

⁶² *Cambridge Water Co. v. Eastern County's Leather* [1994] 1 All E.R. 53 (C.A. et H.L.).

⁶³ However, it should be pointed out here that the tort of nuisance is not dependent on the occurrence of *actual* damage: it suffices that the plaintiff has undergone significant discomfort or inconvenience; see Secretariat of the Commission on Environmental Co-operation, *op. cit.* (footnote 60), p. 12.

⁶⁴ ROMY, *op. cit.* (footnote 59), p. 33.

⁶⁵ *Ibid.*, p. 35, with other references.

⁶⁶ If *nuisance*, in addition to encroaching on the public's rights, impedes the use and enjoyment of the plaintiff's real property, it is both public and private. The plaintiff may then bring her suit on both theories.

⁶⁷ Secretariat of the Commission on Environmental Co-operation, *op. cit.* (footnote 60), p. 13.

3. Negligence

Among all the aspects of liability law in the *common-law* systems, the doctrine of *negligence* is undoubtedly one of those which is evolving the most rapidly.⁶⁸ This doctrine allows for recourse against a defendant who has not acted with the degree of diligence that a reasonable person would have exercised in similar circumstances.⁶⁹ The *negligence* looks to unpremeditated acts which none the less breach the obligation of prudence. It is for the plaintiff to prove that the defendant had a *duty of diligence* towards the plaintiff and that the conduct of the defendant was the immediate *cause* of the *damage* suffered. Thus, if the plaintiff proves, for example, that the defendant caused damage to the plaintiff while handling or disposing of toxic substances in a negligent or inadequate manner, reparation may be sought on the basis of *negligence*.⁷⁰

4. The rule of *Rylands v. Fletcher* (objective or strict liability)

Under the famous decision in *Rylands v. Fletcher*, handed down by the House of Lords in 1868,⁷¹ any person who, in the context of a non-natural utilisation of his real property, accumulates anything that may cause harm to his neighbour in case it flows out, is liable for all of the damage that is the direct consequence of this outflow.⁷²

The rule of *Rylands v. Fletcher* has, in general, been applied only to activities which are very dangerous, or of broad scope, or carry a risk of catastrophe (damming up large quantities of water, burning fields or disposing of toxic waste).⁷³ It should also be emphasised that the courts have not developed a clear and precise definition of what constitutes a "non-natural" utilisation of a piece of real property.⁷⁴ Over the years, the tendency of the courts has rather been to consider a utilisation as being "natural", particularly where it represents a general interest for the public.⁷⁵ This tendency of the courts has not failed to restrict the scope of the rule in *Rylands v. Fletcher*, at least in the environmental field. Recently, another restriction on the rule seems to have been introduced by the case law. In the *Cambridge Water* case, the House of Lords recognised that the defendant can only be held liable for the damage caused if it was *foreseeable*.⁷⁶ Finally, the number of defenses that are available to the defendant has likewise contributed to limiting the scope of the rule in *Rylands v. Fletcher* (statutory authority, consent of the plaintiff, act of third party, act of God).⁷⁷

⁶⁸ MARKESINIS/DEAKIN, *op. cit.* (footnote 61), p. 67.

⁶⁹ See the decision of the House of Lords in the case of *Donoghue v. Stevenson*, 1932 A.C. 562.

⁷⁰ Secretariat of the Commission on Environmental Co-operation, *op. cit.* (footnote 60), p. 13.

⁷¹ [1868] L.R. 3 H.L. 330.

⁷² For a detailed analysis of this famous decision, see in particular MARKESINIS/DEAKIN, *op. cit.* (footnote 61), pp. 493-508.

⁷³ Secretariat of the Commission on Environmental Co-operation, *op. cit.* (footnote 60), pp. 13-14.

⁷⁴ A specific utilisation can be "non-natural" in one case and "natural" in another, in function of the characteristics of the case in question. That explains why the operation of an explosives factory was considered to be a "non-natural" utilisation of a piece of property in 1921 (*Rainbam Chemical Works v. Belvedere Fish Guano Co.* [1921] 2 A.C. 465), but "natural" in 1946 (*Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156). According to Lord Porter's opinion, what constitutes a "non-natural" or a "natural" utilisation is a question of fact "subject to a ruling of the judge as to whether the particular object can be dangerous or the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances": *Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156, 176.

⁷⁵ As for example with the storage of gas as a source of energy; see *Dunne v. North Western Gas Board* [1964] 2 Q.B. 806.

⁷⁶ See MARKESINIS/DEAKIN, *op. cit.* (footnote 61), p. 500.

⁷⁷ *Ibid.*, pp. 500-503.

In conclusion, it seems justified to affirm that strict or objective liability is, in general, less widespread in the *common law* than it is in many legal systems based on civil law.⁷⁸ The exception which confirms the rule comes to us from the United States, where the rule of *Rylands v. Fletcher* has not only been taken up and developed by the courts, but the federal Congress has also inserted a system of strict liability into several laws, of which CERCLA will be mentioned further on.⁷⁹

5. The public trust

According to the doctrine of the public trust, the State is the trustee of certain natural resources, which it is to preserve and manage in the service of the public in general.

The origin of this doctrine goes back to English common law. Taken up by American law in the 19th century, it fell into disuse after the Second World War, only to be resuscitated by an article published at the beginning of the 1970's.⁸⁰ Since then it has developed in all of the sister states of the United States of America, although unevenly.⁸¹ The theory is not accepted in Canada⁸² and seems no longer to be applied in the United Kingdom.

According to the sister states, the theory of the public trust is based upon the common law, or upon legislation, or even upon the constitution (in particular in California). Even though several federal laws have taken up this concept,⁸³ the theory of the public trust is above all a tool of the sister states.

According to the classic conception of the theory of the public trust, the lands submerged by navigable waters are held in trust by the State in the interest of its citizens. In its capacity as trustee, the State has a duty to preserve and protect the public's right to utilise these waters and lands for trade, navigation and fishing. Over the years, this classic triad has been enlarged to other forms of utilisation, in particular swimming and recreation.⁸⁴ In addition, the theory of the public trust applies likewise nowadays to lakes, to the navigable watercourses themselves, and to other natural terrain such as swamps and prairies.⁸⁵

The fundamental point of the doctrine resides in the authority of the State to exercise, in its capacity as sovereign, surveillance and continuous control over the natural features which are subject to the trust.⁸⁶ It should be noted that this principle does not prohibit transfer of the trust property to individuals. Indeed, such a transfer remains authorised to the extent that it is compatible with the goals and purposes of the public trust. In such a hypothesis, the property remains burdened by the obligations flowing from the trust.

⁷⁸ *Ibid.*, p. 500, note 50; see also pp. 504-508.

⁷⁹ See *infra*, p. 22 *et seq.* See also Section 19 of the *Restatement 2nd on Torts*: "(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm. (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." This principle is however modulated by several exceptions provided at Section 520-4A.

⁸⁰ JOSEPH SAX, *The Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention*, 68 *Mich.L.Rev.* 471.

⁸¹ ROMY, *op. cit.* (footnote 59), p. 44.

⁸² Secretariat of the Commission on Environmental Co-operation, *op. cit.* (footnote 60), p. 14. This document however indicates that a similar concept has been created by the Law on the Environment of the Yukon and the Law on Environmental Rights of the Northwest Territories.

⁸³ See in particular Section 101 (16) of the CERCLA, 42 U.S.C. Sec. 9601 (160)

⁸⁴ ROMY, *op. cit.* (footnote 59), p. 46, with other references.

⁸⁵ *Ibid.*, pp. 46-47.

⁸⁶ *Ibid.*, p. 48. The scope of the State's duties has in particular been defined by the Supreme Court in the case of *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453, 13 S.Ct. 110 (1892). In this case the Court decided that the Illinois Legislature did not have the power to transfer title to the shore and lakebed of Lake Michigan and that the State had the obligation to preserve the resources subject to the trust for use by the public.

The State may go to court in order to have the public trust respected; it may ask for an injunction or for monetary reparation for the damage caused to the environment if the law so permits.⁸⁷ In practice, numerous actions are brought by the government itself, the defendant then being an individual person or enterprise, a local government or a public agency. On the other hand, the question of whether the members of the public are also authorised to go to court in order to defend the public trust is not clearly resolved in all the States. Let us simply note that several courts in the sister states have in fact accepted that a citizen may act as a private attorney general against the State, administrative agencies of the State or individual persons and enterprises in order to protect the public trust.⁸⁸

The doctrine of the public trust incontestably has the merit of emphasising the importance to humankind of certain natural resources, and ensuring special protection for them. It recognises in addition that the protection of the environment interests and concerns directly the members of the community on whom it confers the capacity to go to court. On the other hand, the doctrine has the disadvantage of protecting only specified property and not the entirety of the natural heritage. The principal attraction of the doctrine, that is: its flexibility and its capability to be adapted rapidly to new conditions or to different social values and priorities, is qualified by the fact that the duties which it imposes on the State are very vague. The range of discretion left to the courts also brings on uncertainties as to the reach of the protection that the doctrine grants.⁸⁹

6. Riparian rights

The owner of a piece of real property bordering a watercourse has a series of riparian rights, which confer upon him or her the right for the watercourse to be maintained in its natural state, as well as the right of access and the right to utilise the water for domestic purposes. The owner may go to court and request an injunction or ask for money damages as against anyone who modifies in an unreasonable manner the watercourse, its flow or its quality.⁹⁰

B. Statutory Liability – overview of the situation in the United States

In the United States, the birth of environmental law in its modern form dates back to the promulgation, in 1969, of the National Environmental Policy Act (NEPA) by the federal Congress. This law requires in particular that environmental impact studies be carried out before any federal action is taken which may have a significant impact on the quality of the environment. More generally, this law seeks to encourage harmony between humankind and its environment, and to prevent or eliminate damage to the environment and to the biosphere as well as to stimulate the health and well-being of human beings.⁹¹ The promulgation of the NEPA has been followed by intense legislative activity, both at the federal level and in the sister states.

The first activity consisted of revising, in 1970, the Clean Air Act and reinforcing the powers of the federal authorities. The principal purpose of this law, which was revised again in 1990, is to protect and improve the quality of the air. While charging the sister states with the principal responsibility to apply the law and to reduce air pollution, this legislation imposes uniform minimal federal requirements. Under the law, it is the duty of the Environmental Protection Agency (EPA), an independent federal agency, to

⁸⁷ ROMY, *op. cit.* (footnote 59), p. 52.

⁸⁸ For more details, see ROMY, *op. cit.* (footnote 59), pp. 52-53.

⁸⁹ For a more precise evaluation of the *public trust* doctrine, see ROMY, *op. cit.* (footnote 59), pp. 54-55.

⁹⁰ Secretariat of the Commission on Environmental Co-operation, *op. cit.* (footnote 60), pp. 14-15. This document also indicates that, in Canada, the provinces of Alberta, British Columbia, Manitoba, Newfoundland and Saskatchewan have eliminated these rights or have limited them to domestic use of the waters.

⁹¹ For more information on the NEPA, see GROSSMAN/FINDLEY/REYNOLDS/WEINBERG, USA, in *International Encyclopaedia of Laws*, R. Blanpain (ed.), Vol. IV *Environmental Law*, Deventer 1999, pp. 41-46.

inventory the atmospheric pollutants which may put the public health and well-being in danger. For each of them, the EPA must set down criteria for air quality that reflect the most recent scientific knowledge. The sister states have the duty to apply the standards imposed by the Clean Air Act by limiting the emissions coming from individual sources located on their territory. Each state of the federation must adopt a State Implementation Plan (SIP) which details the measures to be taken in order to reach as quickly as possible the air quality objectives set by the law.

The Clean Air Act provides several mechanisms in order to ensure respect for the legal decisions it contains. Where a source violates the law or an SIP, the EPA administrator may in particular impose administrative penalties of a maximum amount of 25,000 US Dollars per day of violation, or yet bring a civil action seeking an injunction as well as the payment of civil penalties which likewise go up to 25,000 US Dollars per day.

A system similar to that which we have just described was instituted by the Clean Water Act of 1977, through which the federal Congress affirmed its intent to clean up the waters, whatever might be the economic impact. This legislation provides for various sanctions against the person contravening the law itself or an authorisation to discharge water. The EPA administrator may, here again, institute a civil action in order to obtain an injunction, impose administrative fines in an amount ranging from a minimum of 10,000 US Dollars to a maximum of 125,000 US Dollars, or yet bring a civil action in order to obtain the payment of civil penalties which may not however exceed 25,000 US Dollars per day of violation.

Another important area in the framework of protection of the environment is the treatment of dangerous waste. In 1976, the Congress determined that the treatment of waste had become a problem of national importance and that federal action was indispensable in order to resolve it. It then promulgated the Resource Conservation and Recovery Act (RCRA).

The RCRA regulates in detailed fashion the whole process, from generation to elimination, of the waste that the law defines as being dangerous. Under this law any official of the EPA or of one of the sister states who has an authorised program for dangerous waste has the power to inspect at any time the operation of an installation for the treatment, storage or elimination of dangerous waste. In case of violation of this law's provisions or of authorisations for the handling of waste, the EPA administrator may in particular impose civil penalties in a maximum amount of 25,000 US Dollars per day of violation, bring a civil action for an injunction or yet bring a civil action against any person who contributes or has contributed to the creation of an imminent and substantial danger to health or to the environment resulting from the handling, treatment, storage, carriage or disposal of any solid or dangerous waste. We should note that the concept of creating an imminent and substantial danger is not defined in the RCRA, but that proof of actual damage is not required.

The laws just mentioned do not include any provision on the civil liability of a polluter for the damage that may have been caused to the person or property of an individual. On the other hand, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 and the Oil Pollution Act (OPA)⁹² of 1990 broadly

⁹² Following the *Exxon Valdez* accident, which occurred in 1989 along the coast of Alaska, the United States finally decided to go its way alone and to leave off the efforts undertaken at the international level seeking to establish a unified system of civil liability for oil pollution (see *supra* p. 7 *et seq*). The *Oil Pollution Act* of 1990 (OPA) imposes *strict liability* on whoever has the control of the ship. It introduced no less than forty-one new regulations governing oil transport. To comply with them, the oil industry in the United States had to spend 17 Billion (U.S.) Dollars. In addition, the liability limits provided for in the OPA are considerably higher than those provided in the international instruments. Finally, the list of losses which may have to be indemnified under the *Oil Pollution Act* is very long. In spite – or perhaps *because* – of these Draconian measures imposed on the oil industry, transport costs *went down*, for the considerable expenses incurred in order to clean up oil spills were broadly attenuated, according to information which appeared in the French daily newspaper *La Tribune* of 18 January 2000, p. 28.

extended the civil liability of persons who are responsible for the disposal of toxic or dangerous substances, or for an accidental oil spill.

Unlike the laws mentioned above, the CERCLA, also called the "Superfund Act", does not seek to *limit* the pollution deriving from industrial installations. This law has for its principal purpose the remedying of damage caused to public health and the environment by the inadequate storage of toxic waste, as well as the clean-up of sites contaminated by dangerous substances.⁹³ It should be noted that the CERCLA also contains a provision on *citizen suits*.⁹⁴ The CERCLA imposes on the EPA administrator the duty to identify the sites contaminated by dangerous substances and to classify them in terms of the risks that they pose for health and the environment (in 1991, 35,000 sites had been identified by the EPA; on 600 of them, clean-up measures had been commenced). The CERCLA also confers on the President of the United States the authority to take the necessary safety measures in case of a threat to public health or the environment, as well as to clean up sites already contaminated, whether abandoned or still in use. The government may either carry out itself the necessary actions and recover the costs for this from the person who is potentially liable, or yet it may order the latter to undertake the clean-up. The governmental activities are financed by the Superfund, which is fed in particular by the taxes levied on petroleum products and on dangerous waste, as well as by the actions brought with a view to recovering the costs of clean-up. The CERCLA provides for four categories of persons who may be liable:

- 1) current owners and operators of the sites in issue;
- 2) owners or operators of the sites at the time of disposition of the dangerous substances;
- 3) any person who by contract or in any other way has organised the treatment and elimination of dangerous substances by any installation operated by a third party;
- 4) any person who has transported these substances.

Apart from the obligation either of reimbursing the costs of the actions undertaken by the government or by an individual, or of carrying out himself the clean-up measures ordered, the person liable is also bound to pay damages for the harm caused to the natural resources, their destruction or their loss.⁹⁵ The CERCLA institutes a system of *objective and joint liability*. This liability is engaged under the following conditions:

- 1) the site in question is an installation within the meaning of this law;
- 2) in which there is produced an emission or threat of emission of a dangerous substance;
- 3) the plaintiff has incurred clean-up costs in accordance with the National Contingency Plan; and
- 4) the defendant falls within one of the four categories of liable persons provided for in this law.

It should be noted that the plaintiff does not have to prove that the liable person actually *caused* the contamination. The defendant condemned to the payment of the costs incurred in remedying the pollution has the possibility of bringing suit against the other persons who may be liable in order to obtain recovery of the costs as between them.

The CERCLA has been subject of serious *criticism* because of the costs engendered by the cascade of liabilities for which it provides.⁹⁶ The clean-up of sites is not progressing at the desired rhythm, the costs of the measures undertaken by the EPA are enormous and exceed by far the funds that may be recovered from the liable persons and the

⁹³ ROMY, *op. cit.* (footnote 59), p. 80.

⁹⁴ On citizen suits, see *infra* p. 61 *et seq.*

⁹⁵ ROMY, *op. cit.* (footnote 59), p. 82.

⁹⁶ *Ibid.*, p.83 with other references.

funds which constitute the Superfund. A figure of 100 billion US Dollars has been mentioned.⁹⁷

II. Overview of the judicial means provided in a civil law system in order to obtain reparation for environmental damage

In a civil law system, the obligation to repair environmental damage may arise from *neighbourhood law*, from a *special rule* on environmental liability or yet from the general principles governing *civil liability*.

A. Neighbourhood law

The principal attraction of a system based on the law of neighbours is that the person injured does not have to produce proof of *fault*. It suffices for him or her to demonstrate the causal link between the neighbour's conduct and the damage suffered. An example of such a system for liability is to be found in Articles 679 to 684 of the Swiss Civil Code.⁹⁸

Under Article 684, first paragraph, "the owner is bound, in the exercise of his rights, especially in carrying out his industrial activities, to abstain from any excesses which may be detrimental to the neighbour's property." The second paragraph specifies that "there are prohibited in particular emissions of smoke or soot, unpleasant emanations, noise, vibrations which have a harmful effect and which exceed the limits of the tolerance that neighbours owe each other in view of the local usages, the location and the nature of the real property."⁹⁹ In order to decide on the existence of excess, the court should adopt an *objective* point of view and take into account the impressions of a *reasonable person of average sensitivity*, ignoring the griefs of the hypersensitive and the lack of reactions of those deprived of all sensitivity, and taking into consideration the totality of the circumstances of the concrete case in order to appreciate the different interests involved. The concept of *neighbour* is broad and is not limited to parcels of land which are contiguous or located within a precisely delimited perimeter. It includes the owner, holder of another interest in the land, farmer and tenant, as a general rule each possessor of a piece of real property who suffers harm from the fact that the owner, farmer, tenant or holder of another interest in a different immovable property goes beyond his or her property rights.

We should recall that the liability provided for in Article 684 is based only upon *objectively exceeding* the property rights, but does not require at the same time that there be *fault* on the part of the owner of the real property which originates the damage. Moreover, in the framework of Article 684, it makes little difference whether the utilisation of the real property originating the damage is *legal* or not.¹⁰⁰

It should also be noted that in the majority of systems, actions based on neighbours' rights concur with those founded upon the general rules governing civil liability for torts.

⁹⁷ *Ibid.*

⁹⁸ In France, actions in tort for damage caused to the environment may also be based on the doctrine of *troubles de voisinage*. Liability for *troubles de voisinage* is based upon Art. 544 of the Civil Code, which defines ownership as "the right to enjoy and dispose of things in the most absolute way, provided that a use of them prohibited by the laws or by the regulations is not made." Liability may be brought into play from the time when the vexations or emissions exceed an acceptable threshold, in view of the circumstances of time and place. For an overview of the different cases of application of Art. 544, see Megacode, Code civil, Dalloz 1995.1996, p. 423 *et seq.*; see also M. PRIEUR, *Droit de l'environnement*, 3rd ed., Paris 1996, no. 952.

⁹⁹ Art. 684 is a case of application of Art. 679, under which "[s]he who is harmed or threatened with harm because an owner exceeds his rights, may bring suit against this owner seeking that he restore things to their previous state or take measures with a view to eliminating the danger, without prejudice to any money damages." For a recent application of these provisions, see in particular the decision of the Swiss Federal Tribunal 121 II 317.

¹⁰⁰ ATF 119 II 411. This question of the lawfulness of the utilisation of the real property at the origin of the damage is linked with that of the effects given to an administrative authorisation (operating permit) previously given to the landowner. Now the effects of such an authorisation on liability are not the same in the different systems; see, for example, FURRER/BÖLSCHER, *Die Einbindung der Wirtschaft in umweltrechtliche Massnahmen*, Bern 1999, pp. 119 and 125-126. See *infra*, p. 40 *et seq.*

B. The special rules on environmental liability

In recent decades, numerous States have adopted laws dealing with the protection of the environment. In the majority of the cases, these laws contain provisions dealing with liability for damage caused to the environment. Now the principles governing this liability vary from one country to the other. A detailed comparative analysis of these principles would exceed the scope of this Note. However several notable differences can be pointed out.

The first concerns the nature of the liability which may be *objective* in nature (causal, strict) in certain States, or grounded in *fault in others*.¹⁰¹ Thus, *environmental liability* is tied to the existence of *fault* in the law of the Russian Federation of 19 December 1991 on the protection of the environment (Art. 86 together with Art. 81), while such liability is of an *objective* nature in most of the other systems, such as the German and Swiss laws which provide for strict liability of the holder of an enterprise or an installation presenting a particular danger for the environment.¹⁰² But even within the framework of two legal orders as close as German law¹⁰³ and Swiss law,¹⁰⁴ the differences may be important. Thus, in Swiss law the liability is (to be sure) objective, but none the less conditioned by the *illicit character* of the activity causing damage, which is not the case in German law.¹⁰⁵ In addition, while in German law the holder may be held liable, at least partially, for damage caused by *normal use* of its installation, the majority of the Swiss legal writers seem to accept that in these cases there will be complete exoneration of the defendant (*Rechtfertigungsgrund*).¹⁰⁶

Significant differences may also exist in respect of the *definition* and *scope* of the *damage* to be paid for. It should be pointed out first that the creation of a system of objective liability is often accompanied by a *limitation of the amount* to be paid,¹⁰⁷ which has the effect in particular of allowing a "potential" polluter to buy insurance against the risk that it faces. The *purely economic damages*, such as the financial losses of a hotel due to a reduction in its clientele after an ecological disaster, are often excluded from the system of environmental liability.¹⁰⁸ On the other hand, in Sweden and in Finland, these damages must be paid for when they are "considerable".¹⁰⁹ Finally, significant differences appear also as regards the *damages to what is, properly speaking, the environment* (ecological damages). These damages are often excluded from the provisions for environmental liability.¹¹⁰ In Greece, on the other hand, these damages are considered as being an *infringement on the rights of personality*. The damage caused to the environment is thus *individualised*, at least in relation to persons who are particularly affected by the infringement (as for example riparian landowners) and who

¹⁰¹ See the developments in VON BAR, *op. cit.* (footnote 52), pp. 307-313. For the evolution of the laws of the *Nordic* countries in particular, see MARIE-LOUISE LARSSON, *The Law of Environmental Damage, Liability and Reparation, Studies in Law*, Stockholm 1999, pp. 247-339.

¹⁰² The difference is however *modulated*, since under Russian law, fault is *presumed* and it is up to the polluter to exonerate himself. Likewise, where *dangerous activities* are at issue, art. 1079 of the Russian Civil Code, which provides for strict liability, applies. For more details, see ALEXANDER NEUMÜLLER, *Umwelthaftung in Russland*, Berlin 1997, p. 56 *et seq.*

¹⁰³ Law on Environmental Liability [Gesetz über die Umwelthaftung] of 10 December 1990, *Bundesgesetzblatt*, 1990, I 2643.

¹⁰⁴ Federal Law of 7 October 1983 on the Protection of the Environment (Art. 59a), *Recueil systématique* 814.01.

¹⁰⁵ FURRER/BÖLSCHER, *op. cit.* (footnote 100), pp. 119 and 126-127.

¹⁰⁶ *Ibid.*

¹⁰⁷ To give an example, the German Law on Environmental Liability sets a limit of 150 Million Deutschmarks (§ 15).

¹⁰⁸ This subject by itself would deserve an in-depth comparative law study. Work should undoubtedly be carried out in this area in the event that a Hague Convention on civil liability resulting from transfrontier environmental damage is to be drawn up. For a recent study, see JAN M. VAN DUNNE, *Liability for Pure Economic Loss: Rule or Exception? A Comparatist's View of the Civil Law – Common Law Split on Compensation of Non-Physical Damage in Tort Law*, *Revue européenne de droit privé* 1999, pp. 397-428.

¹⁰⁹ Section 1, para. 2 of the 1986 Swedish Environmental Damage Act; 1994 Finnish Act on Compensation for Environmental Damage. See LARSSON, *op. cit.* (footnote 101), pp. 302 and 336.

¹¹⁰ See for example Art. 59a, para. 1, second sentence, of the Swiss Federal Law of 7 October 1983 on the Protection of the Environment.

can therefore seek reparation of the damage.¹¹¹ Under paragraph 5, second paragraph, of the Finnish law of 1994 on compensation for damage caused to the environment, ecological damage is to be compensated by payment of a "reasonable amount", in function of the persistence of the troubles and of the damage.¹¹² Moreover, other systems provide for the recovery of ecological damages through the interposition of the State, acting as a trustee of the environmental heritage.¹¹³ Thus in Italy he who *nonchalantly* violates environmental law must compensate the State for the damage caused. This compensation may in particular take the form of restoration of the affected environment to its previous state.¹¹⁴ Finally, the solution provided in the law of 19 December 1991 of the Russian Federation on the protection of the environment deserves also to be mentioned.¹¹⁵ In case of harm to the "natural environment" (Art. 87), no *evaluation* is made of the damage caused. Instead, *fixed rates of indemnities* are applied. These rates are set in numerous legislative acts which thus attribute an abstract and normative value to a multitude of "natural items", taking into account their ecological and commercial importance. This liability is said to be "substantive" (*material'naja otvetstvennost*). It is only in the absence of fixed indemnities that the actual costs of restoring the state of the affected environment ought to be taken into consideration in order to determine the money damages. In this second situation, it will be a case of application of what is referred to as "civil" liability (*graž dansko-pravovaja otvetstvennost*).

C. General rules dealing with civil liability

In environmental matters, the general rules for civil liability may take on several different roles. They may first of all serve to *complement* the rules provided in a law on the protection of the environment (governing, for example, questions of the burden of proof or yet the availability of information to the injured party).

The general rules of civil liability may in addition apply where the environmental liability is not dealt with in a specific law. This is in particular the case for Spain¹¹⁶ and for France, where Article 1384 of the Civil Code continues to play an essential role even in environmental matters.¹¹⁷ The French Civil Code originally provided only for exceptional cases of liability for damage caused by things: liability for damage caused by animals or by buildings. But, with industrial development, to require that victims prove fault on the part of the person whose liability they seek to engage would amount to depriving many among them of reparation. The French court decisions then isolated a phrase out of Article 1384 of the Civil Code, which was in reality a simple transition announcing subsequent provisions, and drew from it a general principle of *liability without fault being proven*: "a person is liable [...] for the damage [...] factually caused by [...] the things that he has under his custody."¹¹⁸ This text applies nowadays to anything which has caused damage, without distinction as to whether it was or was not activated by a human hand and without distinction as to whether it was dangerous or not. Thus there remain outside of the sphere of Article 1384 only those things for which special rules of

¹¹¹ VON BAR, *op. cit.* (footnote 52), p. 314, with other references.

¹¹² MARKUS MÜLLER-CHEN, *Entwicklungen im europäischen Umwelthaftungsrecht*, *Revue Suisse de droit international et de droit européen* 1999, p. 231, with other references; LARSSON, *op. cit.* (footnote 101), p. 337.

¹¹³ This solution is reminiscent of the doctrine of the *public trust*; see *supra*, p. 19 *et seq.*

¹¹⁴ VON BAR, *op. cit.* (footnote 52), p. 315, with other references.

¹¹⁵ The developments which follow are based on the explanations by NEUMÜLLER, *op. cit.* (footnote 102), p. 100 *et seq.*, with numerous Russian references.

¹¹⁶ For a presentation of the situation in Spain, see in particular KATJA FACH GÓMES, *Acciones preventivas en supuestos de contaminación transfronteriza y aplicabilidad del artículo 5.3 Convenio de Bruselas*, *Zeitschrift für Europarechtliche Studien* 1999, pp. 583-607, esp. pp. 588-595.

¹¹⁷ Art. 1384, para. 1 of the French Civil Code reads as follows: "A person is liable not only for the damage he causes by his own acts, but also for that which is factually caused by the persons for whom he must answer, or by the things that he has under his custody" (translation by the Permanent Bureau).

¹¹⁸ See in particular the *Jand'heur* decision of the French *Cour de cassation* (Ch. Réun. 13 February 1930, D.P. 1930.1.57).

liability exist, such as exist for *radioactive* matter. On the other hand, Article 1384, paragraph 1, continues to be applicable for determining, for example, the liability of a manufacturer of chemical products in case of damage caused by gas which escapes from its factory. In order to be held liable, the defendant must be *the custodian* of the thing which originates the damage. That person is the custodian who has "the use, the direction and the control of the thing."¹¹⁹ The custodian may not exonerate himself or herself by proving that he or she has committed no fault, in other words has conducted himself or herself as a reasonable and prudent person. She may discharge herself of liability only by establishing that the damage is due to an independent cause (*accident* or *force majeure*).

The Italian Civil Code contains a similar rule in its Article 2051. However, contrary to the French Civil Code, it also provides a particular basis of liability for anyone engaging in a *dangerous activity*: if, in the context of such an *attività pericolosa* some damage is caused, the entrepreneur is held liable, unless he or she proves that he took all the measures that would be adequate to prevent the damage.

III. Preliminary conclusions from the overview of different national systems dealing with liability for damage resulting from environmental pollution

This review of various national systems of environmental liability has brought out important disparities, not only between States having distinct legal cultures, but also between States of similar legal culture. This result is not truly surprising, taking into account the difficulty and the technical nature of the subject. It seems clear that these differences as to the principles of liability and their manner of application engender the need for conflict of laws rules.¹²⁰ The next chapter will examine the different solutions which may be envisaged in this field.

Chapter 3 — The conflict of laws in the field of environmental liability

The purpose of this chapter is to examine the problems linked with the conflict of laws in the area of civil liability resulting from transfrontier environmental damage. At first, we shall try to examine the extent to which these questions have already been the subject of international regulation (I). The different approaches taken by the legislators or by national courts will be examined in a second part (II).

I. The international instruments

In this first section, we shall mention to begin with the international instruments bearing more particularly on the protection of the environment (A), before turning towards the instruments of a general character (B).

A. The instruments bearing on the protection of the environment

We shall distinguish once again between the instruments that deal with a field or a *specific* activity (1) and those that deal with the environment in general (2).

¹¹⁹ Uniform case law culminating in the *Franck* decision (Ch. réun. 2 December 1941, D.C. 1942.25).

¹²⁰ See this point already in the 1992 Note, *op. cit.* (footnote 2), p. 19.

1. The instruments dealing with a specific activity

The international instruments dealing with environmental liability in a specific field rarely contain rules of conflict of laws. These treaties have as their principal purpose the creation of unified rules of substantive law, with the result that conflict of laws rules become pointless.¹²¹ There are however some exceptions which moreover adopt divergent solutions.

The *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 (Art. 14).¹²² For any question with which the Convention does not deal, the court *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 (Art. 11).

Mention may also be made in this context of the *London Convention for the Prevention of Pollution from Ships*, adopted on 2 November 1973 within the framework of the IMO. The structure of this instrument – commonly called the MARPOL [Marine Pollution] Convention – is complex, since it consists, in addition to the main treaty, of three Protocols, five annexes and nine appendices, all accompanied by twenty-six resolutions adopted by the London Conference that had drawn up all the texts. Amendments were made in 1978 by a Protocol and its appendices.¹²³ We simply mention here that under 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 therefor 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 therefor under the law of that Party" (Art. 4, para. 2).

Conflict of laws rules for nuclear matters are also found in the *Agreement of 22 October 1986 between the Swiss Confederation and the Federal Republic of Germany* on the subject of civil liability in nuclear matters. Under Article 4 of this Agreement, the courts of the State on the territory of which the harmful event occurred, apply their own law (*lex fori*).

A different route was taken by the Bilateral Agreement of 19 December 1967 between Germany and Austria on the effects of the establishment and operation of the Salzburg Airport on the territory of Germany. Under this Agreement, the German courts have exclusive jurisdiction to decide upon actions concerning harmful effects linked to the operation of the Salzburg Airport on German territory; but under Article 4, paragraph 3, of this Agreement, the German courts will apply the law that is the most favorable to the injured party (*Günstigkeitsprinzip*).¹²⁴

2. The instruments that do not deal with a specific area

The *Nordic Convention of 1974 on the Protection of the Environment* sets out, in Article 3, provisions on international judicial jurisdiction.¹²⁵ Under this Article, an action for damages must be brought before the courts of the State from which the pollution emanates. Now Article 3 also contains a rule dealing with the *applicable law*. Under its paragraph 2, the request for damages "shall not be judged by rules which are less

¹²¹ VON BAR, *op. cit.* (footnote 52), p. 360; MANFRED WANDT, *Deliktsstatut und internationales Umwelthaftungsrecht*, *Revue suisse de droit international et de droit européen* 1997, pp. 151-152.

¹²² See *supra* p. 5 et seq.

¹²³ As of 30 June 1999, the Convention (in its 1978 version) was in force in 108 States with Annexes I/II, in 91 States with Annex III and in 94 States with Annex V. Annex IV has not yet entered into force.

¹²⁴ For a more general presentation of the *Günstigkeitsprinzip*, see *infra* pp. 30 and 32.

¹²⁵ See *infra*, p. 49.

favourable to the injured party than the rules of compensation of the State in which the activities are being carried out". This is not a conflict of laws rule in the classic sense. The court seised must, initially, determine the law applicable by virtue of its own private international law. The result reached by application of this law must, in a second stage, be compared with the result that would be obtained through application of the substantive rules of the State where the activity in question was exercised. The principle underlying this provision is, once again, the application of the rule which is the more favorable for the injured party (*Günstigkeitsprinzip*). Thanks to this reservation, the injured party does suffer no major disadvantage linked to the designation of the judicial jurisdiction of the State from which the pollution emanates.

B. Towards a Community instrument on the law applicable to torts (Rome II)

This section has for its purpose to present the principal developments concerning the drafting, within the European Community, of a Community instrument on the *law applicable to torts*. This instrument, called in the Community jargon "Rome II", is intended to complement the *Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations*.

1. A new context

A brief reminder should be made of the fact that 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 *Treaty on the European Union* and the *Treaty establishing the European Community*.¹²⁶ The Treaty of Amsterdam in particular transferred "judicial co-operation in civil matters" from the third pillar of the European Union's treaty – an intergovernmental pillar – to a new heading of the European Community's Treaty, entitled "visas, asylum, immigration and other policies linked with the free circulation of persons", which confers on the Council of the European Union the power to adopt measures also for private international law matters. 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". The same provision sets it out that, from this viewpoint, the Council is to draw up "measures in the field of judicial co-operation in civil matters as provided for in Article 65" (sub-para. c). In its turn, Article 65 sets it out that these measures are intended *inter alia* to promote "the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction" (sub-para. b).

With a view to better defining the objectives having priority and a calendar of the measures necessary for the achievement of the space of liberty, security and justice envisaged by the Treaty of Amsterdam, a *plan of action* was adopted by the Council at the beginning of December 1998, then presented to the European Council meeting in Vienna several days later.¹²⁷ Now this plan provides expressly that a legal instrument on the law applicable to torts is to be drawn up in a period of two years after the entry into force of the Treaty of Amsterdam.¹²⁸

A first draft of a Convention was presented in an internal working document prepared by the Austrian presidency of the Union in November 1998. This draft did not provide any explicit provision for injury caused to property or persons by environmental

¹²⁶ The Treaty of Amsterdam entered into force the 1st of May 1999.

¹²⁷ Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, *OJ C* 19 of 23 January 1999.

¹²⁸ No. 40 of the Plan.

damage. Since then, a working group has been formed and negotiations begun,¹²⁹ but at the time of writing, it is still too early to evaluate the content of this future instrument, which ought to take the form of a Community regulation.¹³⁰

2. The proposal of the European group on private international law

In the context of the same initiative, it should be noted that the European Group on Private International Law has drawn up a *Proposal for a European Convention on the Law Applicable to Torts*.¹³¹

For torts (as for quasi-contractual obligations) the linkage as a matter of principle is with the *law of the country with which the situation has the closest connection*. This principle is filled out and made more concrete by general presumptions which vary according to the various hypotheses of torts. These presumptions are moreover subject to an exception where the situation shows closer connections with another country.¹³² But the proposal also contains some special presumptions, among these being one that bears expressly on *injury to the environment* (Art. 4, sub-para. c). This presumption 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.

II. The national rules

A. The special conflicts rules concerning environmental damage

The instances of national legislation providing a special conflicts rule for environmental damage can still be counted on the fingers of one hand. Among the laws in force, Swiss private international law as yet constitutes the sole exception to our knowledge; but a proposal for an express rule in this matter has also been formulated in Japan. These two rules, which choose different approaches, are explained below.

¹²⁹ It should be pointed out that the Hague Conference does not participate in these negotiations.

¹³⁰ See, for a very recent presentation of the status of the discussions, ROLF WAGNER, Ein neuer Anlauf zur Vereinheitlichung des IPR für außervertragliche Schuldverhältnisse auf EU-Ebene, *EuZW* 1999, pp. 709-714, where it is indicated that the working group might favour as a general rule for torts committed from a distance the application of the law of the place of the damage (p. 711).

¹³¹ The text in French, adopted at the Eighth Annual Meeting of the Group held at Luxembourg 25-28 September 1998, is reproduced in *RCDIP* 1998, pp. 802-807, and in *IPRax* 1999, pp. 286-288. The English translation is reproduced in *NILR* 1998, p. 465.

¹³² See art. 3 of the proposal, which reads as follows:

- "1 A non-contractual obligation arising out of a harmful event shall be governed by the law of the country with which it is most closely connected.
- 2 When the author of the damage or injury and the person who suffers damage or injury are habitually resident in the same country at the time of the event, it shall be presumed that the obligation is most closely connected with that country.
- 3 When the author of the damage or injury and the person who suffers the damage or injury are habitually resident in different countries at the time of the harmful event, and the event which caused or is likely to cause the damage or injury and the damage or injury occurred or are likely to occur in the same country, it shall be presumed that the obligation is most closely connected with the latter country.
- 4 The presumptions in paragraphs 2 and 3 shall be disregarded if it appears from the circumstances as a whole that the obligation is more closely connected with another country.
- 5 In determining the country which has the closest connection, regard shall be had to any pre-existing or contemplated relationship between the parties."

1. Switzerland – the *Günstigkeitsprinzip*

The law applicable to torts is governed by Articles 132 to 139 of the Federal Law on Private International Law (LPIL). The provisions are divided into two sections. The first consists of Articles 132 and 133. Article 132 provides the possibility for a *choice of the applicable law* which, however, is limited to the law of the forum, in other words Swiss law; moreover, this choice can only be made *after* the event causing the damage has occurred. As for Article 133, it provides for a general connecting factor which applies whenever the parties have not reached agreement on the applicable law. The second section consists of Articles 134 to 139. This second section consists of *particular rules*, one of which is devoted to harmful emissions coming from an immovable property (Art. 138).¹³³ It should be noted that in Swiss *internal* law these claims derive from *real property* rights (neighbours' rights).¹³⁴ The legislator therefore has adopted a *different characterisation in private international law*, since this provision is found in the chapter (of the LPIL) devoted to the law of obligations (section on torts).¹³⁵ Article 138 reads as follows:

"Claims resulting from harmful emissions coming from an immovable property are governed, at the choice of the injured party, by the law of the State in which the real property is located or by the law of the State in which the result was produced."

This provision envisages situations such as emissions from an industrial installation (examples being emissions of smoke or gas), the noise of air traffic coming from airports located close to a frontier, pollution of watercourses, air, etc.

The Swiss legislator did not want to decide in favour of one or the other of the two laws which enter into consideration in such a transfrontier situation, either the *law of the State in which the real property is located* or the *law of the State in which the result was produced*. Article 138 LPIL makes the interest of the injured party prevail, that party being able to choose between these two laws. Contrary to a choice of the applicable law (Art. 132), this option is exercised unilaterally. The injured party thus profits from the application of the law which is more favorable to him or her (*Gunstigkeitsprinzip*); as for the party who has caused the emissions, he or she will have to submit to the law that is more restrictive from the point of view of the exercise of his or her rights as owner.¹³⁶

Article 138 does not set out *the manner in which the injured party is to choose*. It seems obvious however that the injured party must subject his or her claims, to the extent that they flow from a specific occurrence, to a *single* law. Indeed, it would scarcely be in line with the purpose of this provision to permit the injured party to vary his or her choice as a function of the claim invoked or according to the legal issue in question. That would obviously bring on very complex and unforeseeable legal situations for the defendant.¹³⁷ It should also be noted that the question as to what law

¹³³ The relationship between Art. 132 (possibility to choose the applicable law) and Arts. 134-139 (devoted to particular types of torts) is controverted. The question which is posed is whether the parties to the litigation may also choose the applicable law for the cases enumerated in Arts. 134-139, or whether this possibility is limited to the general hypothesis set out in Art. 133. The response to this question is not easy and the legal writers are divided. Drawing support from a systematic interpretation of the law, certain authors would exclude Art. 132 from the scope of application of Arts. 134-139; indeed, Art. 132 is placed under the marginal notation "in general" and ought not therefore apply to number 2 which bears the title "in particular" (along these lines is ANDREAS BUCHER, *Les actes illicites dans le nouveau droit international privé suisse in Le Nouveau Droit International Privé Suisse*, Publication CEDIDAC, vol. 9, Lausanne 1988, pp. 107-141, at 116). On the other hand, literal and historic interpretations tend to give Art. 132 a broader role which would allow, at least for certain of the hypotheses envisaged in Arts. 134-139, the possibility to be given to the parties to choose the applicable law.

¹³⁴ See *supra* p. 23 et seq.

¹³⁵ BERNARD DUTOIT, *Commentaire de la Loi fédérale du 18 décembre 1987*, 2nd ed., Basel 1997, at Art. 138, no. 2; see also VON BAR, *op. cit.* (footnote 52), pp. 361-363, with other references.

¹³⁶ Arts. 135 (products liability) and 139 (harm to the personality) of the LPIL also confer on the injured party a choice between several alternative connected laws.

¹³⁷ BUCHER, *op. cit.* (footnote 133), pp. 107-141, at 136.

should be applied when the injured party makes no choice is still subject to very much controversy in Swiss law.¹³⁸

The term "claim" in the sense of Article 138 includes not only suits for damages, but also actions for the elimination, cessation, or (physical) repair of the damage, as well as requests for protective or preventive measures. Let us note that Article 138 concerns only claims brought against private persons, to the exclusion of States.¹³⁹

The other damages to the environment which do not constitute emissions in the sense of Article 138 (for example, damage caused by the toxic vapours resulting from the explosion of a tanker truck or lorry), fall under Article 133, by virtue of which the law of the State where the result was produced is applicable, if the person causing it should have foreseen that the result would be produced there.

2. Japan – the *lex damni* (law of the place of the damage)

The principal source of private international law in Japan is the *Horei*, adopted in 1898.¹⁴⁰ The *Horei* did, to be sure, undergo an important revision in 1989, but this reform dealt essentially with the conflict rules of marriage and of parental relations. The other parts of the *Horei*, in particular those dealing with contracts and torts, have not undergone a major revision since 1898. A study group was formed in 1990 with the task of revising the provisions on the law which is applicable in contractual matters and in torts. The group presented the results of its work at the 91st meeting of the Private International Law Association of Japan, which was held at Hitotsubashi University, on 10 October 1994. Taking into consideration the comments made during this meeting, the group reexamined its proposal and presented a new draft of articles.¹⁴¹

Article 12 of the reworked draft contains a specific rule for *environmental pollution*, which reads as follows: "Liabilities for damage arising from environmental pollution shall be governed by the law of the place where the injury occurs".¹⁴² The proposal is followed by a brief commentary. It is specified there that with a view to protecting the interests of the injured persons, it is "considered necessary and sufficient to apply the law of the place of injury".¹⁴³ The commentary states in addition that the application of the law of the place of the damage is required where this law confers broader protection to the victims than does the law of the place of the wrongful conduct. On the other hand, the application of the victim's law is considered to be sufficient even if the law of the place of the wrongful conduct grants broader protection to the victims.¹⁴⁴ The commentary points out, moreover, that application of the law of the place of the wrongful conduct seems unjustified in cases of environmental pollution, since this place may be entirely fortuitous as regards the persons injured.¹⁴⁵ Finally, the commentary sets it out that the law of the place of the damage should apply even if the person causing the damage "did not predict the occurrence of the damage in that place". Indeed, according to the commentary, "it is not unreasonable to expect the tortfeasor to foresee the place of injury in the case of environmental pollution, while the degree of expectation should be

¹³⁸ On the question of the implementation of the injured party's choice in general, see JAN VON HEIN, *Das Günstigkeitsprinzip im Internationalen Deliktsrecht*, Tübingen 1999, pp. 222-268; on the specific question of finding the applicable law where the injured party does not make a choice, *ibid.*, pp. 239-242, with other references. It should be pointed out however that the latter question posed seems to us to be largely theoretical in so far as the court has an obligation to inform the injured party of the possibility to make a choice which is offered to him (at least according to the majority opinion of the writers).

¹³⁹ On the subject of Art. 138, see DUTOIT, *op. cit.* (footnote 135), pp. 399-400.

¹⁴⁰ Law No. 10 of 21 June 1898, as amended by Law No. 27 of 1989.

¹⁴¹ See Draft Articles on the Law Applicable to Contractual and non-Contractual Obligations (1), *The Japanese Annual of International Law* No. 39 (1996), and Draft Articles on the Law Applicable to Contractual and non-Contractual Obligations (2), *Japanese Annual of International Law* No. 40 (1997). The draft includes a total of 17 articles.

¹⁴² See *Japanese Annual of International Law* No. 40 (1997), p. 67.

¹⁴³ *Ibid.*, p. 68.

¹⁴⁴ *Ibid.*, pp. 68-69.

¹⁴⁵ *Ibid.*, p. 69.

low in the case of product liability in which the products could cause injury wherever they appear".¹⁴⁶

B. The tort caused from a distance – an overview of several conflicts rules

Where the private international law of a State does not have a specific rule for transfrontier pollution, the connection follows the general rules applicable for civil liability.¹⁴⁷ The solutions adopted by the national legislators or judges in this respect are however multifarious. In the account that follows, we shall try to give a brief overview of this variety.

1. The principle of the law that is more favourable for the injured party (*Gunstigkeitsprinzip*)

We have already seen that by virtue of the *Gunstigkeitsprinzip*, the victim of transfrontier pollution has the choice between the application of the law in force at the place of the damage suffered (State where the emission causes its effects, *Erfolgsort*) and that where the wrongful act was committed (State of the emission, *Handlungsort*).¹⁴⁸ The roots of this principle are found in German private international law. Brought out by the case decisions of the *Reichsgericht*,¹⁴⁹ this principle was taken up in the recent codification of private international law on torts,¹⁵⁰ even if it is not unanimously supported by German legal writers.¹⁵¹

Outside Germany (and Switzerland, but there it holds only in the context of certain torts¹⁵²), the principle of the application of the law which is more favourable to the interests of the injured party has been adopted in several other national codifications of private international law. To our knowledge, this principle is still found – in different forms – in the private international laws of *Greece*,¹⁵³ *Hungary*,¹⁵⁴ *Slovakia* and the *Czech Republic*,¹⁵⁵ the former *Yugoslavia*,¹⁵⁶ and, more recently, in the new codifications

¹⁴⁶ See *Japanese Annual of International Law* No. 40 (1997), p. 69.

¹⁴⁷ See in particular VON BAR, *op. cit.* (footnote 52), pp. 361-363, with other references.

¹⁴⁸ See *supra*, p. 30. We shall not deal here with the question of whether the choice must actually be made by the victim or if it should be made *ex officio* by the court; see on this question in particular VON BAR, *op. cit.* (footnote 52), pp. 373-375.

¹⁴⁹ Decision of 20 November 1888, RGZ 23, 305; see subsequently in particular OLG Saarbrücken NJW 1958, p. 752; OLG Saarbrücken IPRspr. 1962-1963 Nr. 38; BGH NJW 1974, p. 410; BGH NJW 1987, p. 1323.

¹⁵⁰ Art. 40, para. 1 of the EGBGB, as adopted by the "Gesetz vom 21. Mai 1999 zum Internationalen Privatrecht für ausservertragliche Schuldverhältnisse und für Sachen", which entered into force on 1 June 1999. More precisely, Art. 40, para. 1 provides in principle for the application of the law of the place of the dangerous activity (*lex loci actus*), but gives the injured party the possibility to opt for the application of the law of the State where the damage was produced. For a presentation of the new provisions, see ROLF WAGNER, Zum Inkrafttreten des Gesetzes zum Internationalen Privatrecht für ausservertragliche Schuldverhältnisse und für Sachen, IPRax 1999, pp. 210-212; the law is reproduced at pp. 285-286.

¹⁵¹ On the *Günstigkeitsprinzip* in general, see HEIN, *op. cit.* (footnote 138), 473 p., with many other references. – It should also be pointed out that a significant part of the German legal writings characterises the claims which, in internal law, arise from the law of neighbours in the category of *tort* law for the purposes of private international law.

¹⁵² See *supra* p. 30.

¹⁵³ See the references in VON BAR, *op. cit.* (footnote 52), p. 369, note 231, and PAUL R. BEAUMONT, Private International Law of the Environment, *Judicial Law Review* 1995, pp. 28-39, p. 33, note 25, which indicate that in spite of the way that Art. 26 of the Civil Code of 15 March 1940 reads, the injured party has an option in the case of a tort committed from a distance.

¹⁵⁴ §32, paras. 1 and 2 of Decree-Law No. 13/1979 of 31 May 1979; the reading of para. 2 seems however to indicate that it is not for the injured party to choose the applicable law, but rather for the court to determine *ex officio* the law which is most favourable to the injured party's interests.

¹⁵⁵ § 15 of the Law of Private International Law and International Procedure of 4 December 1963 (former law of Czechoslovakia, in force in Slovakia by virtue of Art. 152(1) of the Constitution of 1 September 1992 and in the Czech Republic by virtue of Art. 1(1) of the Constitution of 16 December 1992.

¹⁵⁶ Art. 28, para. 1 of the Law of 15 July 1982 Concerning Conflicts with Foreign Laws.

of private international law of *Estonia*,¹⁵⁷ *Tunisia*,¹⁵⁸ *Venezuela*¹⁵⁹ and *Italy* (law of 31 May 1995, no. 218), Article 62 of which reads as follows:

- "1 Liability for a wrongful act is governed by the law of the State in which the consequences occur. However the victim may request the application of the law of the State in which the causative conduct took place.
- 2 Where the wrongful act involves only persons having the nationality of the single State in which they are all resident, the law of this State applies."^{160, 161}

Finally, mention can also be made of a very interesting decision handed down by the Supreme Court of China. On 26 January 1988, this Court decided, in plenary session, that "the law of the place of the tort encompasses the law of the place of commission of the wrongful act and the law of the place where the damage occurs. In case these two places are different, the court has the right to choose one of them."¹⁶²

It is not intended here to proceed to a complete analysis of the validity of the *Günstigkeitsprinzip* for connecting up international torts in general. But it should be recognised that this principle is particularly useful in matters of *transfrontier pollution*¹⁶³ and that even authors who are hostile to this principle as a general rule for finding connecting factors favour its application in transfrontier pollution matters.¹⁶⁴ 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.¹⁶⁵ 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 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.¹⁶⁶ If

¹⁵⁷ § 164, para. 3 of the Law Of 28 June 1994 on the General Principles of the Civil Code, English translation in *IPRax* 1996, pp. 439-442.

¹⁵⁸ Art. 70, paras. 1 and 2 of Law No. 98-97 of 27 November 1998, bearing promulgation of the "Code of Private International Law", French text in *RCDIP* 1999, pp. 382-391; *IPRax* 1999, pp. 292-296. For a presentation of this law, see MOHAMED EL ARBI HACHEM, *Le code tunisien de droit international privé*, *RCDIP* 1999, pp. 227-244.

¹⁵⁹ Art. 32 of the Act of 6 August 1998 on Private International Law, which entered into force on 6 February 1999. For a presentation of this law, see GONZALO PARRA-ARANGUREN, *La loi vénézuélienne de 1998 sur le droit international privé*, *RCDIP* 1999, pp. 209-226; by the same author, *The Venezuelan 1998 Act on Private International Law*, *Netherlands International Law Review* 1999, pp. 383-396, esp. p. 391; E. HERNÁNDEZ-BRETÓN, *Neues venezolanisches Gesetz über das Internationale Privatrecht*, *IPRax* 1999, pp. 194-200, esp. p. 195, where he emphasizes the influence of the German court decisions concerning the *Günstigkeitsprinzip* (with other references).

¹⁶⁰ French text taken from the translation that appeared in *RCDIP* 1996, pp. 174-189, which formed the basis for the English translation by the Permanent Bureau.

¹⁶¹ It should also be pointed out that the private international laws of *Portugal* (Art. 45, para. 2 of the Civil Code) and of *Peru* (Art. 2097 of the Civil Code of 1984, reproduced in *RabelsZ* 1985, at p. 522 *et seq.*) provide for a similar solution: in the cases of torts committed from a distance, it is in principle the *lex loci actus* that applies; on the other hand, if in application of this law the tortfeasor will not be held liable, while the tortfeasor would be held liable under the law of the State where the damage was produced (*lex damni*) and should foresee that the result would be produced there, the law of that State applies.

¹⁶² Decision reported by XU DONGGEN, *Chronique de jurisprudence chinoise*, *Journal de droit international* 1994, p. 191.

¹⁶³ GEORGES DROZ, *Regards sur le droit international privé compare*, *Recueil des cours de l'Académie de droit international*, Tome 229 (1991-IV), no. 300; H.U. JESSERUN D'OLIVEIRA, *Le Bassin du Rhin, sa pollution et le droit international privé*, in *La réparation des dommages catastrophiques – Les risques technologiques majeurs en droit international et en droit communautaire*, Travaux des XIII^{es} Journées d'études juridiques Jean Dabin, Brussels 1990, pp. 165-166, as well as pp. 167-168; HEIN, *op. cit.* (footnote 138), pp. 121-126.

¹⁶⁴ See in particular VON BAR, *Internationales Privatrecht*, Tome II (1991), No. 668 *et seq.*; VON BAR, *op. cit.* (footnote 52), pp. 371-375; KROPHOLLER, *Internationales Privatrecht*, 3rd ed., Tübingen 1997, p. 460. For further references, see HEIN, *op. cit.* (footnote 138), p. 121, note 159. It should also be pointed out that the option conferred on the injured party is also the solution favoured by BEAUMONT, *op. cit.* (footnote 153), pp. 35-36.

¹⁶⁵ This cynicism is pushed even farther if a State looks first for the applicable law to the place of the damage (*lex damni*), but provides an exception for torts committed in the territory of the forum; the residents of the forum who are injured by the activity of a foreign polluter could benefit from the application of their own law, while in counterpart, national polluters would be protected from the application of a foreign law less favourable to them (see on this subject the remarks of BEAUMONT, *op. cit.* (footnote 153), p. 32.

¹⁶⁶ G. DROZ, *op. cit.* (footnote 163), no. 300.

this were the case, why should the victims in another State not benefit from these same advantageous provisions? Finally, it should not be forgotten that the advantage conferred on the victims by the *Gunstigkeitsprinzip* is doubled by a beneficial effect of *prevention* of injuries to the environment. The fact that the victim may choose the law which ensures him or her maximum recovery should in fact dissuade the operator of a polluting enterprise situated near a frontier from preferring profitability to good maintenance of his or her installations.¹⁶⁷ Under these circumstances, the principle favoring the injured party (*favor laesi*) has thus a completely desirable and welcome corollary: favoring nature (*favor naturae*).

On the other hand, it should be emphasised that efficient implementation of the *Gunstigkeitsprinzip* 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. Thus the notion of *damage* may cover very different realities from one jurisdiction to another. Moreover, it is not unusual for a law to be more favourable on one point, but less on another. One law might, for example, provide for liability based simply on causation, while the other would impose on the injured party the burden of proving fault on the part of the polluter; yet this latter law might provide on the other hand for unlimited liability, contrary to the former which, in this case, would have set a (monetary) ceiling on liability. In the framework of a worldwide Convention, the adoption of a system leading to the application of the law that is the most favourable to the injured party would perhaps necessitate the installation of a system of efficient co-operation between States, guaranteeing a rapid and precise exchange of information on the content and application of the different laws.

2. The law of the place of the damage (*lex damni*)

The law of the place of the damage (*lex damni*) can also be protective of the plaintiff's interests in that it often will correspond to the place of his or her residence and to the place where her property is located. It is also justified by the fact that the principal function of liability law is the *reparation of an injury* and not the *punishment of a fault*, all the more so since strict liability plays an important role when the environment is harmed.¹⁶⁸

The principle of the *law of the place of the damage* had in particular been expounded by the French *Cour de cassation* (Supreme Court) in a first decision of 1983: "In French private international law [...] the territorial law that is competent to govern civil liability in tort is the law of the place where the damage occurred".¹⁶⁹ But the true reach of this judgment had remained uncertain, since in the particular case, the fault and the damage were both localized in France. Consequently doubts persisted for the cases involving a real split between the elements comprising the tort. Now recently, another decision of the *Cour de cassation* has come along to dissipate these uncertainties.¹⁷⁰ The *Cour de cassation* approved, at least in its broad lines, the reasoning of the lower court (the Court of Appeals of Paris).¹⁷¹ This latter court had taken as its point of departure the principle of the *lex loci delicti* and had affirmed that in case of a split, it was necessary to apply "the law that has the closest connection with the situation in question"; emphasizing that the law of civil liability was "aligned principally on the reparation of damage", the Court of Appeals concluded that it is "in principle and in the

¹⁶⁷ PIERRE BOUREL, Un nouveau champ d'exploration pour le droit international privé conventionnel: les dommages causés à l'environnement, in *L'Internationalisation du droit, Mélanges en l'honneur de Yvon Loussouarn*, Paris 1994, pp. 93-108, at p. 103.

¹⁶⁸ See in particular VON BAR, *op. cit.* (footnote 52), pp. 370-371.

¹⁶⁹ Decision of 8 February 1983, handed down in the case of *Horn v. Prado*, *Journal de droit international* 1984, p. 123, note by G. Légier.

¹⁷⁰ Decision of 11 May 1999, handed down in the context of the collapse in the North Sea (British sector of the Continental shelf) of an offshore oil platform belonging to Mobil North Sea Limited, *Journal de droit international* 1999, p. 1048, note by G. Légier (this incident had already given rise to a first decision by the *Cour de cassation* in 1997; see *ibid.*, p. 1050).

¹⁷¹ Decision of 16 January 1997, *Journal de droit international* 1997, p. 986, note by G. Légier.

absence of exceptional circumstances, quite naturally with the country where the damage occurred and where the equilibrium of everyone's interests was found to be broken, that the situation giving rise to the action in tort presents a determinative connection". In summary, the Court of Appeals affirmed that in case of a split, it is the law of the place of the damage that applies, but only if it shows sufficiently close connections with the situation. In approving this decision, the *Cour de cassation* brought about a welcome clarification in French law.¹⁷² It had, moreover, itself contributed to the confusion by declaring in 1997 "that the law applicable to tort liability is that of the State of the place in which the wrongful act occurred [and] that this place means just as well that of the conduct generating the damage as the place where the damage occurred".¹⁷³ There was, at least a priori, nothing against interpreting this formula as a sign of greater receptivity to the *Gunstigkeitsprinzip*. And it was this greater receptivity precisely that the plaintiffs in the *Mobil North Sea Limited* case seized upon, claiming that the formula quoted above henceforth granted to the injured party a choice between the law of the place of the conduct and that of the place where the damage occurred. But the theory of the *Gunstigkeitsprinzip* was firmly rejected by the *Cour de cassation*, since it absolutely did not take into consideration any choice whatsoever made by the victim.

The principle of the law of the place of the damage now also applies in the *United Kingdom*, following the entry into force of the Private International Law (Miscellaneous Provisions) Act of 1995.¹⁷⁴ This latter Act broadly abolished the celebrated rule of "double actionability". Contrary to the *Gunstigkeitsprinzip*, this rule of double actionability provided, not for alternatives, but rather for *cumulative* conditions; a right of action existed only if the requirements of the law of the forum and the law of the place of the wrongful conduct were met.¹⁷⁵ Section 11, paragraph 1 of the Private International Law (Miscellaneous Provisions) Act of 1995 begins by posing as a general rule that the applicable law is that of the country in which the events constituting the tort in question occurred. Paragraph 2 specifies then that where parts of these events occurred in *different countries*, the applicable law is "for an action dealing with bodily damage caused to a person or to death resulting from the bodily damage, the law of the place where the person was when he suffered the damage" (sub-para. a) and "for an action dealing with property damage, the law of the country where the property was located at the time of the damage" (sub-para. b).¹⁷⁶ This latter rule is of particular interest in a case of a transfrontier *nuisance*.¹⁷⁷ Paragraph 2 of Section 11 also contains a rule (sub-para. c) which specifies that in the other cases, the law of the country where the most significant facts took place will apply.

¹⁷² For an analysis of this decision and the several divergences from the decision of the Court of Appeal, see the commentaries of Légier, *Journal de droit international* 1999, p. 1050 *et seq.*, more particularly pp. 1054-1055. – It should be pointed out here that the solution of the *lex damni* seems also to subsist in French legal writings; see in particular BATIFFOL/LAGARDE, *Droit international privé*, Tome II, 7th ed., Paris 1983, no. 561; P. MAYER, *Droit international privé*, 5th ed., Paris 1994, p. 448 *et seq.*; Audit favours "an analysis case by case, taking into account the effective allocation of connections and of goals pursued by the laws in presence", see B. AUDIT, *Droit international privé*, 2nd ed., Paris 1997, p. 641- 642.

¹⁷³ Decision of 14 January 1997, handed down in the case of *Société Gordon Breach Science Publishers et autres c. Association The American Institute of Physics et autres*, D. 1997 jur. 177, note by Santa-Croce; *RCDIP* 1997, p. 504. note by Bischoff. About this case, which bore on an allegation of denigration arising from the distribution in France of several copies of a foreign periodical, see AUDIT, *op. cit.* (footnote 172), pp. 641-642.

¹⁷⁴ See on this subject DICEY/MORRIS, *The Conflict of Laws*, 13th ed., London 2000, Vol. 2, Rules 201-204. This law entered into force on 1 May 1996. A French translation of this law was published in *RCDIP* 1996, pp. 377-382. It should be pointed out that defamation torts were excluded from the scope of the 1995 Law and that therefore they remain subject to the traditional rules developed by the Common Law.

¹⁷⁵ *Phillips v. Eyre* [1870] L.R., 6 Q.B. 1; see also the decisions in *Boys v. Chaplin* [1971] A.C. 356 and *Red Sea Insurance Co. Ltd. v. Bouygues S.A.* [1995] 1 A.C. 190 (P.C.) which had introduced exceptions to the rule. It should also be pointed out that the rule of double actionability has been abandoned in *Canada*; see in particular *Tolofson v. Jensen* [1994] 3 S.C.R. 1022; *Journal de droit international* 1999, p. 815, note by J.-G. Castel. In *Australia*, the rule has undergone significant refashionings; see PETER NYGH, *Conflict of Laws in Australia*, 6th ed., Sydney 1995, p. 340 *et seq.*

¹⁷⁶ *RCDIP* 1996, p. 380; see DICEY/MORRIS, *op. cit.* (footnote 174), Vol. 2, Rule 202, nos. 035-081 to 035-84.

¹⁷⁷ *Ibid.*, no. 035-84.

Finally, we should note that, as concerns torts committed at a distance, the principle of the *lex damni* is also applied in particular in *Spain*,¹⁷⁸ *Switzerland* (subject to Articles 135, 138 and 139 of the LPIL),¹⁷⁹ *Romania*,¹⁸⁰ *Turkey*¹⁸¹ and *Quebec*.¹⁸²

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

The rule of the law of the place of the dangerous activity (State of the emission) is, at least in principle, accepted in particular in *Austria*,¹⁸³ the *Netherlands*,¹⁸⁴ *Denmark*,¹⁸⁵ *Finland*¹⁸⁶ and *Sweden*.^{187, 188} It should however be emphasized that these systems permit in general the application of the law of another State, with which the litigation (or the parties) have closer connections.

4. The law of the place which has the "most significant relationship"

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

It should be recalled here that in the United States, each sister state of the federation defines its own rules of conflict of laws.¹⁸⁹ Now it must be said that as concerns torts,

¹⁷⁸ Art. 10, para. 9 of the Civil Code of 24 July 1889, in its version of 13 May 1981.

¹⁷⁹ Art. 133, para. 2, second sentence, of the LPIL. However, the law of the State where the result was produced can only be applied if the tortfeasor should have *foreseen* that the result would be produced in that State.

¹⁸⁰ Art. 108 of Law No. 105 of 22 September 1992 regulating relations of private international law, French text in *RCDIP* 1994, pp. 172-195; see O. CAPATÎNA, Das neue rumänische International Privatrecht, *RabelsZ* 1994, pp. 465-522, at p. 505 where it is specified that the unlawful character of the injurious act, as well as capacity to commit a tort, remain subject to the law of the place of the dangerous activity.

¹⁸¹ Art. 25, para. 2 of Law No. 2675 on Private International Law and International Civil Procedure. It should be pointed out however that if the injurious act is more closely linked with the law of another State, this latter law may be applied (para. 3).

¹⁸² Art. 3126, para. 1 of the Civil Code. As does the Swiss law, the Civil Code of Quebec provides that the law of the State where the result was produced can be applied only if the tortfeasor should have *foreseen* that the damage would appear in that State.

¹⁸³ § 48, para. 1, first sentence of the Law on Private International Law of 15 June 1978. It is true that the second sentence of this provision provides for an exception allowing the general rule to be set aside in favour of the law of another State with which the parties have closer ties. According to the majority of the legal writers, this exception does not apply however in cases of environmental liability (see WANDT, *op. cit.* (footnote 121), pp. 155-156, with other references; MANFRED SCHWIMMANN, *Internationales Privatrecht*, 2nd ed., Vienna 1999, p. 105). It should be pointed out that, contrary to the Swiss law and to the majority of the German legal writers, Austrian law characterises the claims which, in internal law, arise from the law of neighbours in the category of real property rights for the purposes of private international law (and not in the category of torts). Now, real property claims are subject to the law of the place of the immovable, with the result that the law of the *place of the damage* may apply by reason of this approach.

¹⁸⁴ L. STRIKWERDA, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, 5th ed., Groningen 1997, p. 205, but see also pp. 212-214.

¹⁸⁵ VON BAR, *op. cit.* (footnote 52), p. 367 *in fine*, with a reference to A. PHILIP, *Dansk international privat- og procesret*, Copenhagen 1981, p. 341 *et seq.*

¹⁸⁶ *Ibid.*, with other references.

¹⁸⁷ See ULRICH MAGNUS, Kollisionsrechtliche Fragen grenzüberschreitender Schäden, in KOCH/WILLINGMANN (eds.), *Grossschäden – Complex Damages, Rechtliche und alternative Regulierungsstrategien im In- und Ausland, Rostocker Arbeiten zum Internationalen Recht*, Vol. 1, Baden-Baden 1998, p. 140, with one other reference.

¹⁸⁸ For Germany, see in addition the explanations in footnote 150.

¹⁸⁹ Moreover, in terms of certain jurisdictional 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: *Klaxon v. Stentor Manufacturing Co.*, 313 U.S. 487 (1941). This principle does

there is great diversity among the approaches chosen. In a recent study, 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),¹⁹⁰ 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).¹⁹¹

This diversity however seems greater than it is in reality. It is in fact striking to realise 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 State's law, but have to expend considerable time and resources to learn another State's law."¹⁹²

5. Party autonomy

The question of whether the parties (tortfeasors 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. 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.¹⁹³ These concerns retain, in our opinion, all of their relevance.

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)¹⁹⁴ and in Austrian law;¹⁹⁵ it is also accepted in several other laws.¹⁹⁶ Such a rule might be inserted into an

not apply however in admiralty cases, which are under the exclusive jurisdiction of the federal courts. Thus, a federal court sitting in New York would apply the conflicts rules of the State of New York to an act damaging the environment committed on land or above the land, but it would apply the federal conflicts rules to an analogous act committed on the high seas. 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; see the 1992 Note, *op. cit.* (footnote 2), p. 197 and 199.

¹⁹⁰ The application of the *lex fori* is also provided for by art. 4 of the *Uniform Transboundary Pollution Reciprocal Access Act* of 1982 (see *infra*, p. 52 *et seq.*).

¹⁹¹ 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 at p. 266. The figures indicated in the text take into account, in addition to the 50 states, also the District of Columbia and Puerto Rico. For an overview of the subsequent developments, see, by the same author, *Choice of Law in the American Courts* in 1998: Twelfth Annual Survey, 47 *Am. J. Comp. L.* 327-392 (1999) [the table reproduced at p. 330 contains a small error; as the author himself says, *Florida* no longer applies the *lex loci delicti*.]

¹⁹² 562 N.W. 2d 466, 467-470 (Mich. 1997), quoted as in SYMEONIDES (footnote 191, study published in 1998), p. 240. The Court adds however that the *lex fori* approach may be set aside if there is a "rational reason" (p. 471). On this point, see in particular the study by SYMEONIDES that was published in 1999, pp. 375 *in fine* -377.

¹⁹³ See the 1995 Note, *op. cit.* (footnote 4), p. 77, No 13; see also VON BAR, *op. cit.* (footnote 52), pp. 376-377, with other references.

¹⁹⁴ But see the discussion in footnote 133. The possibility of a choice *subsequent* to the injurious act and limited to the law of the forum is also the solution favoured by VON BAR, *op. cit.* (footnote 52), p. 377.

¹⁹⁵ § 35 of the Austrian Law on Private International Law of 15 June 1978, which is very liberal.

¹⁹⁶ For French law, see in particular the decision of the *Cour de cassation* handed down in *Rohon v. Caron*, RCDIP 1989, p. 68, note by H. Batiffol. For Dutch law, see in particular the decision of 8 January 1979 handed down by the

international convention.¹⁹⁷ 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.

C. Conclusions for the work of The Hague

We have seen that, as to civil liability for damage resulting from injury to the environment, the national systems differ in several respects: *nature* (e.g. application of the rules of neighbours' rights for some, application of specific rules on environmental liability for others, etc.), *content* (strict liability for some, liability based on fault for others, etc.) and *effects* (for example as to reparation for purely economic damages or environmental damage, etc.). These divergences foster and accentuate the need for conflicts rules. Now it must be pointed out that in this respect the approaches are also multifarious. Unification of these rules at the worldwide level might therefore prove to be useful, since that would increase the foreseeability of the substantive rules that will be applicable in cases of transfrontier pollution. This foreseeability would benefit not only the injured persons, but also the industrial enterprises. Without wishing to favour here a specific solution, it is interesting to record that the *Gunstigkeitsprinzip* is more widespread than might have been thought at first sight and that, as to transfrontier pollution, this principle is favoured even by those who otherwise reject it as a *general* rule for connecting torts to an applicable law.¹⁹⁸ The choice of the *Gunstigkeitsprinzip* in an eventual Hague Convention would possibly entail the need to provide explicit rules on the precise conditions and modes tied to the option offered (deadlines for the injured party to effect his or her choice, the role of the judge, consequences in case of failure to make a choice, etc.).

Another delicate problem that would inevitably arise for the negotiators of an eventual Hague Convention would be to evaluate the need to develop a particular connection for applicable law for the cases in which the injurious effects of environmental pollution are felt in *several States*. If there were no specific rule in this respect, the different groups of victims would be subject to *different* laws; although victims of the *same* incident, their legal protection would vary one from the other. It is true that this "mosaic" solution was approved at the Osnabrück colloquium,¹⁹⁹ but the problem would undoubtedly deserve examination one more time.²⁰⁰

Finally, it is quite obvious that this Note cannot provide a complete survey of the problems linked to conflicts of law in the area of civil liability resulting from environmental damage. Among the other questions linked to conflicts of law that ought also to be given detailed study, those that particularly stand out are those of *renvoi* (especially in relation to States that are not Parties to the Convention),²⁰¹ those linked to a situation which implies *multiple parties who are liable*,²⁰² and, more particularly, the

Rotterdam Court in the case of the French potash mines, in which the subsequent choice in favour of Dutch law was honoured: *Ned. Jur.*, 1979, No. 113, note by J.C. Schultsz; *Ars Aequi* 1980, pp. 788-794, note by H.U. Jessurun d'Oliveira.

¹⁹⁷ See for example art. 8 of the Proposal of the European Group for Private International Law for a European Convention on the law applicable to non-contractual obligations (*supra* p. 29).

¹⁹⁸ It should be recalled here that the *Günstigkeitsprinzip* has already been adopted in at least two international instruments (Bilateral Accord between Germany and Austria; Nordic Convention; see *supra* p. 27).

¹⁹⁹ 1995 Note, *op. cit.* (footnote 4), p. 77, No. 13 *in fine*.

²⁰⁰ See on this subject WAGNER, *op. cit.* (footnote 130), p. 711.

²⁰¹ It should be recalled here that *renvoi* is traditionally excluded from the Hague Conventions. For an analysis of *renvoi* in the framework of national laws, see HEIN, *op. cit.* (footnote 138), pp. 164-179; VON BAR, *op. cit.* (footnote 52), pp. 377-380; WANDT, *op. cit.* (footnote 121), p. 154.

²⁰² In this respect, mention may be made of Art. 11 of the Council of Europe's Lugano Convention, which provides as follows: "When damage results from incidents which have occurred in several installations or on several sites where dangerous activities are conducted or from dangerous activities under Article 2, paragraph 1, sub-paragraph d, the operators of the installations or sites concerned shall be jointly and severally liable for all such damage. However the operator who proves that only part of the damage was caused by an incident in the installation or on the site where he conducts the dangerous activity or by a dangerous activity under Article 2, paragraph 1, sub-paragraph d, shall be liable for that part of the damage only."

question of rights to contribution as among joint tortfeasors,²⁰³ the effects of insurance policies, the liability of a parent company for the acts committed by one of its branches or subsidiaries abroad, etc.

III. The scope of the applicable law

A. In general

Regardless of the rule which is chosen for connecting with the applicable law, once the latter is designated, its scope must yet be defined. What are, in other words, the questions that must be examined when the law designated is being applied? Among the instruments already mentioned, at least two contain express rules on this subject. These are, on one hand, Article 5 of the proposal of the European private international law group, and, on the other hand, Article 142 of the Swiss LPIL.

Article 5 of the European group's proposal contains a catalogue of the issues submitted to the *lex delicti*. Under this provision, the *lex delicti* governs in particular:

- "1 the basis and extent of liability including the determination of whether persons are liable for acts which they commit;
- 2 the grounds for exemption from liability, any limitation of liability and any division of liability;
- 3 the existence and kinds of damage or injury for which compensation may be due;
- 4 within the limits of the powers conferred on the court by its procedural law, the measures which the court can take to ensure the prevention or termination of damage or injury, or compensation for damage or injury;
- 5 the assessment of damages in so far as it is governed by rules of law;
- 6 the extent to which the heirs of the victim may exercise the victim's rights;
- 7 the persons who have a right to compensation for damage or injury which they personally have suffered;
- 8 liability for the acts of others;
- 9 rules of prescription or limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of this period;
- 10 rules which determine the burden of proof or which raise presumptions of law."

Similar lists are also found in Article 8 of each of the Hague Conventions on the law applicable to traffic accidents of 1971 and on the law applicable to products liability of 1973.

The corresponding provision of the Swiss LPIL is more succinct, since it is limited to declaring the "[t]he applicable law determines in particular the capacity to commit a tort, the conditions and the extent of liability, as well as the person who is liable" (Art. 142, para. 1). It is not for us here to make a complete analysis of these provisions, whose enumeration is in no way exhaustive. Two points deserve to be mentioned. The first bears on the *tort liability of a legal entity for its organs*. At least in Swiss law, it is disputed whether this liability – of great interest in matters of

²⁰³ See on this subject in particular CLAUS-PETER FABIAN, *Schädigermehrheit und Regress im internationalen Umwelthaftungsrecht – Unter besonderer Berücksichtigung des anglo-amerikanischen Rechts*, *European University Publications*, Series II, Vol. 2774, Frankfurt 1999, 332 p.

environmental damage – is subject to the *lex delicti* or to the *lex societatis*.²⁰⁴ This question would have to be clarified in the context of an eventual Hague Convention. The second point bears upon the effect to be given to the *rules of security and of conduct in force in the place of the activity*. Under Article 142, paragraph 2 of the LPIL, these rules would have to be “taken into consideration” by the court;²⁰⁵ similar provisions are found in the Hague Conventions on the law applicable to *traffic accidents* (Art. 7) and *products liability* (Art. 9). The rules in question here are rules which are intended to establish a minimum standard of security through mandatory prescripts in a particular area (a good example is offered by the vehicle traffic rules or, in our field, by limits on emissions set for factories). Now these rules may be of great importance in the context of establishing the constitutive elements of civil liability, in particular fault and illegality. The principal problem is knowing which of these rules ought to be taken into consideration if the *lex delicti* itself also contains such rules, but these impose different standards (take the example of a factory located near a frontier which stays within the levels for emissions of the State on the territory of which it is situated, but its emissions none the less cause damage in the neighbouring State which has more restrictive levels). What may be deduced from the drafting of the provisions quoted above is that the rules of security and of conduct of the place of the activity cannot be imposed in an absolute and systematic way; that would obviously lead to the transfer of activities that are probably injurious into countries where the standards of security are the lowest.²⁰⁶ For this reason the balanced drafting of the provisions quoted above seems to us to be preferable to the sort of rigid connection provided in other laws.²⁰⁷

B. The effects of an administrative authorisation abroad

A problem linked with the difficulties that we have just mentioned is the impact, on a judicial action involving transfrontier pollution, that may arise from an *administrative authorisation abroad* which might have the effect of eliminating certain claims based on the civil laws. Take the example of an injured German who brings his action in Germany against a person who pollutes abroad and chooses German law; may the polluter defend on the grounds that, under the administrative authorisation (concession) issued by the authorities of his or her own country, the polluting activity is permitted and cannot be made the object of a request for an injunction prohibiting it? This question is among the most controversial in the area of civil liability resulting from transfrontier environmental damage. There is hardly any doubt that it would have to be the subject of a study in depth if a Hague Convention were to be drawn up in this field.²⁰⁸ We shall limit ourselves here to a few points for preliminary consideration.

1. Introduction: the effects of an administrative authorisation in national law

We should note first of all that the effects of an administrative decision granting a permit for the operation of a factory, nuclear installation or other potentially polluting enterprise vary greatly from one State to another. Thus, in German law, for example, an administrative authorisation granted to a factory within the framework of the *Wasserhaushaltsgesetz* – the law on the supplying of water – excludes any action against the permit holder based on private law; it does not matter whether the complaint bears on *the recovery of damages*, the *cessation* of the polluting activity, or yet the establishment of *measures of protection* – the permit holder may always raise a

²⁰⁴ See the reference in DUTOIT, *op. cit.* (footnote 135), ad Art. 142, No. 2, under letter c.

²⁰⁵ *Ibid.*, ad Art. 142, No. 3-7.

²⁰⁶ *Ibid.*, No. 7.

²⁰⁷ See in particular § 33, para.1 of Hungarian Decree-Law No. 13/1979 of 31 May 1979. Along the same lines, see VON BAR, *op. cit.* (footnote 52), pp. 381-384.

²⁰⁸ For recent studies of this spiny question, see in particular VON BAR, *op. cit.* (footnote 52), pp. 384-393; BORNHEIM, *op. cit.* (footnote 38), pp. 229-247, and WANDT, *op. cit.* (footnote 121), pp. 159-170, all with other references.

defense based on the authorisation delivered by the administrative authorities.²⁰⁹ To be sure, a brief comparative law analysis shows that this type of authorisation excluding *any* action based upon private law is unusual.²¹⁰ But there are other administrative authorisations, much more numerous, which, while not excluding them, none the less *limit* the claims based on the civil laws that a person injured by the activities of a factory which has a permit to operate may bring against it. The most frequent case is that the permit delivered excludes any suit for *an injunction against operation*, but leaves intact the possibility of seeking *money damages*.

2. The court faced with administrative authorisations granted abroad

What impact can such administrative authorisations have within the framework of a judicial proceeding carried on in the State where the activity giving rise to the litigation causes damage? What is at stake can be described in the following manner: if the affirmative defense based on the permit granted abroad were to be accepted, then the injured person would be deprived of legal protection which his national law (the law of the place where the damage was suffered) might otherwise provide. On the other hand, if the court cold-shoulders the permit granted by the authorities abroad, the injured person might recover damages that the persons injured in the country of the permit would have no possibility of obtaining from their own courts; in other words, the person injured abroad would be in a better situation than would the injured persons of the State that had granted the authorisation.

The legal writers seem to be in agreement on two points. Firstly, the *validity* of such an authorisation is governed by the law of the State that has issued it. Secondly, in an international proceeding, the question of the *effect* of such an authorisation is only posed if the law applied to the substance of the case (the *lex causae*) is not that of the State that granted the authorisation.²¹¹ As to the rest, on the other hand, the views of the legal writers are very divided.²¹² Several approaches have been proposed.

a) The principle of territoriality?

In the past, several jurisdictions have refused to give on their own territory any effect whatsoever to an administrative authorisation *granted abroad*: since an administrative act is an *expression of sovereignty*, its reach is limited to the territory of the State that issued it.²¹³ This position is increasingly questioned, rightly so in our view. In fact, such a strict application of the principle of territoriality might endanger the very existence of any factory with potentially dangerous activities which is situated near an international frontier. Indeed, if the neighbouring State completely ignores the permit issued by the authorities of the location of the factory in question, this factory may lose all legal protection against, for example, suits seeking an injunction against its activities. It is true that a decision ordering cessation of the activity would most likely be very difficult to enforce in the State where the factory is located. None the less, resort to the principle of territoriality seems to us to be misplaced in this context. To be sure, the principle of territoriality, at least in its classic conception, forbids a State to extend its sovereign power beyond its territory and *to impose* the effects of its own acts on another State. On the other hand, this same principle does not in any way prevent a

²⁰⁹ WANDT, *op. cit.* (footnote 121), p. 160. It must be added however that by virtue of a legislative modification which occurred in 1976, it is no longer possible to deliver an administrative authorisation for the pouring and the putting back of substances into the water.

²¹⁰ *Ibid.*, with other references.

²¹¹ VON BAR, *op. cit.* (footnote 52), p. 384.

²¹² To be sure, difficulties only arise if the damage is in fact due to the activity for which the authorisation was granted; if, for example, it is bad operation of the factory that is at the origin of the damage, the authorisation could not limit the claims of the injured party.

²¹³ See, for example, the decision of the *Bundesverwaltungsgericht* (Federal Administrative Court) of Germany dated 10 March 1978, *Deutsches Verwaltungsblatt*, 1979, 226 at p. 227, note by K. Küppers. The decision dealt with an action brought by neighbouring Germans who complained of the noise caused by air traffic at the airport of Salzburg in Austria.

State *taking into account*, at least partially, the effects flowing from a foreign administrative act.²¹⁴ This emerges clearly from two well-known judicial decisions. In the famous case of the *Mines de Potasse d'Alsace*, the Rotterdam Court stated the law as follows: "in examining the acts of the defendants, the fact that they had the benefit of French permits is not in itself without importance".²¹⁵ It is true that the Court in the end did not accept the defense based on the French permits, but this was for the sole reason that the permits themselves expressly preserved the *rights of third parties* (as do all administrative authorisations issued under French law). The second decision bears on an action brought by an Austrian resident against the putting into service of the *Wackersdorf* treatment plant located on German territory. In its decision of 15 January 1987, the Superior Court (*Oberlandesgericht*) of Linz explicitly took into account the operating permit delivered by the German authorities.²¹⁶ But if there is approval of this initial step, the question remains as to what law governs the exclusion of civil law claims which is linked to an administrative authorisation.

- b) The law governing the exclusion of civil law claims which is linked to an administrative authorisation

Two tendencies can be distinguished in this respect. The first favors the application of the law of the State that issued the authorisation,²¹⁷ while the other favors that of the place where the injury occurred (*lex causae*).²¹⁸

- (1) *The law of the State that issued the authorisation*

- (a) A law of immediate application?

A first opinion tends to justify the application of the law of the State that issued the administrative application, relying on the theory of special linkage with *foreign mandatory rules* (laws of immediate application).²¹⁹ According to the principal author who favours this approach, the conditions of the *mandatory character of the foreign rule* and of the *link between the situation and the foreign law* are met. The author adds that the foreign authorisation should in addition meet *minimum substantive requirements*, comparable to those provided in the forum State. Thus, the State originating the authorisation should grant to persons residing abroad the same possibilities to be heard in the administrative proceedings as its own citizens. The authorisation should in addition respect the principles of the protection of the environment established by *public international law*.

Firstly, it should be emphasized that the mechanism of laws of immediate application does not (yet) constitute a principle recognised worldwide, even if a tendency in this direction is emerging gradually, particularly in the Hague Conventions.²²⁰ In spite of this tendency, the utilisation of the theory of laws of immediate application might turn out to be too fragile as a basis to justify, before the court having jurisdiction, the exclusion of

²¹⁴ See, for example, BORNHEIM, *op. cit.* (footnote 38), p. 235, with further references.

²¹⁵ Judgment of 16 December 1983: see *Ned. Jur.* 1984, No. 341, under point 8.7 (see footnote 196); for an *English* translation of the decision, see *Netherlands Yearbook on International Law* 1984, 471 *et seq.*; for a *German* translation, see *RabelsZ* 1985, p. 741 *et seq.*

²¹⁶ *öJBl.* 1987, p. 577, decision confirmed by the Austrian Supreme Court on 20 December 1988: see *öJBl.* 1989, p. 239. The court set out three conditions for such a taking into consideration: firstly, the emissions coming from the plant should not be contrary to *public international law*; secondly, the obtaining of the foreign (German) authorisation should be subject to *conditions similar* to those imposed by the (Austrian) law of the forum; thirdly, the foreign authorisation should not have been delivered without the Austrian landowners concerned by the incoming emissions having had the possibility *to be heard*.

²¹⁷ Solution defended in particular by WANDT, *op. cit.* (footnote 121), pp. 168-169, and, with different reasoning, by GÜNTHER HAGER, *Zur Berücksichtigung öffentlich-rechtlicher Genehmigungen bei Streitigkeiten wegen grenzüberschreitender Immissionen*, *RabelsZ* 1989, pp. 293-319.

²¹⁸ Position defended in particular by VON BAR, *op. cit.* (footnote 52), pp. 390-393.

²¹⁹ See in particular HAGER, *op. cit.* (footnote 217), pp. 293-319.

²²⁰ DUTOIT, *op. cit.* (footnote 135), ad Art. 19, No. 2. See Art. 16 of the 1978 *Convention on the Law Applicable to Agency*, Art. 26 of the 1985 *Convention on the Law Applicable to Trusts and on their Recognition*, etc.

a civil judicial claim provided by a foreign law. Secondly, to establish as a requirement the respect for the principles of protection of the environment established by *public international law* seems perilous. Since these principles do not meet with a consensus – far from it – this requirement blemishes the theory with an obvious lack of predictability and legal security.

(b) Another construct

To accept the competence of the law of the State that issued the authorisation may seem doubtful, to the extent that persons injured in another State are subject to the mercy of that law. To this, the authors who none the less support linkage to this law reply with three observations. First of all, they say, if the *lex causae* were also to govern the question of the quantity of emissions that a foreign plant is allowed to produce, a decision handed down by the court of the place of injury and imposing a reduction of these emissions would not, in all probability, be enforced in the State that had issued the permit. Moreover, they add, if the law of the State that issued the permit excluded any action for money damages, the *public policy* exception might intervene.²²¹ In other words, the foreign permit might have effects in the forum's proceedings, if it provided effects *comparable* to those provided in the permits issued by the forum's administrative authorities.²²² Finally, they conclude, if the injured persons have not had the possibility to be heard during the administrative proceeding, any authorisation that might none the less be granted would be deprived of effects and could not even be applied by the courts of the State of origin of the permit. In this respect, the authors make reference to the decision of the administrative tribunal of Strasbourg, rendered in 1983, which annulled the authorisation granted to the *Mines de Potasse d'Alsace* to pour salty waters into the Rhine, for the reason that the initial authorisation had not taken into account the repercussions that this activity could have downstream.²²³

(2) *The lex causae*

This solution was in particular adopted by the Superior Court of Linz in the decision mentioned above; it is also favoured by some of the legal writers in Germany, at least where the *lex causae* corresponds to the law of the State in which the harmful effects occurred (the law of the injured party).²²⁴ The principal argument consists of saying that the producer of emissions is not to be protected if these emissions cause harmful effects abroad; therefore, the competence of the law of the State where the damage occurred could not be questioned. But these authors also emphasize that a foreign permit cannot simply be ignored. They seek therefore to co-ordinate the two laws in question, if necessary by substitution: it is for the *lex causae* to establish the framework, into which the effects of the foreign permit are to be inserted. There again, it can be seen that the foreign authorisation can only deploy its effects if these are comparable to those of an authorisation granted in the forum.

3. Conclusions

Once more, no position is to be taken here in favour of one or the other of the theories mentioned. It should however be emphasized that the problem examined is a further proof, if need there be, of the gaps that a possible Hague Convention might fill in a very

²²¹ WANDT, *op. cit.* (footnote 121), p. 168.

²²² See in particular KURT SIEHR, Deutsches Haftpflichtrecht für grenzüberschreitende Immissionen – Reaktionsmöglichkeiten auf die Unglücke von Tschernobyl und Schweizerhalle, in DUTOIT/KNOEPFLER/SCHWEIZER/SIEHR, *Pollution transfrontière / Grenzüberschreitende Verschmutzung: Tschernobyl/Schweizerhalle, Beihefte zur Zeitschrift für Schweizerisches Recht*, livret 9, Basel 1989, p. 83.

²²³ Decision of 27 July 1983 (Ref. 227/81 bis 232/81, 700/81 and 1197/81), cited here after WANDT, *op. cit.* (footnote 121), p. 169, note 68, with other references.

²²⁴ See the references in WANDT, *op. cit.* (footnote 121), p. 164, note 57.

useful way.²²⁵ The key is to be found, it seems to us, in the principles of *equivalence* of the authorisations and of *equality*. This latter principle requires that persons who reside abroad have been able to avail themselves of the *right to be heard* in the administrative proceeding that led to the grant of the authorisation. If this fundamental condition is fulfilled, the problem, it seems, loses much of its importance. Now, the implementation of such a possibility can only be carried out on the basis of close intergovernmental co-operation between the States concerned – co-operation that could be dealt with in a specific chapter of a future Hague Convention.²²⁶ It is in the light of problems such as the exclusion of civil claims linked with an administrative authorisation that the chapter on co-operation takes on all of its practical importance.

²²⁵ This is expressly confirmed by WANDT, *op. cit.* (footnote 121), p. 169.

²²⁶ The *Nordic Convention* serves as a model in this respect, since it guarantees an *equal right of access* not only in civil, but also in *administrative* proceedings (Art. 3, para. 1).

Part II:
***Specific aspects of judicial proceedings relating to civil liability
resulting from transfrontier environmental damage***

Judicial proceedings relating to the question of civil liability resulting from transfrontier environmental damage can raise a host of problems. The question of the applicable law that we have just considered in the first part of this Note is compounded by various procedural problems. There are, of course, the traditional questions of the *jurisdiction of the courts* and of the *recognition* and *enforcement* of foreign decisions. These aspects will be covered in Chapters 1 and 4 respectively of this Second Part. Yet legal proceedings relating to environmental liability can also raise more specific problems. To begin with, it should be stressed that an ecological disaster often causes damage to a very large group of people and thus leads to a *mass tort litigation*. In Chapter 2, we will consider some of the legal characteristics of such an action. Another sensitive issue raised by judicial proceedings relating to environmental pollution concerns *access to information*. This problem will form the substance of Chapter 3.

Chapter 1 — International jurisdiction

I. Introduction - The preliminary draft of a Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

The purpose of this first chapter is to consider some rules of international jurisdiction from which a possible Hague Convention on Civil Liability resulting from Transfrontier Environmental Damage might draw inspiration. We will first review the international instruments on the protection of the environment (I), before moving on to the national level in order to consider more particularly an old rule of common law jurisdiction, which continues to be applied in a number of courts and which has a certain interest where environmental questions are concerned (II).

Yet before turning our attention to the international instruments relating to environmental protection, the importance should be stressed of the ongoing negotiations in the Hague Conference on the elaboration of a worldwide Convention on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters. It should be noted at the outset that the preliminary draft Convention adopted in October 1999 *does not exclude* environmental damage from its substantive scope.²²⁷ If the Conference were to devote its attention to civil liability resulting from transfrontier environmental damage and if the terms of reference were to include the elaboration of rules on *jurisdiction*, it goes without saying that the text of the general Convention currently being negotiated would serve as a yardstick for the discussions. The task would be, above all, to consider what *additional* rules, if any, could be drawn up in order to perfectly satisfy the peculiarities of a procedure whose object is compensation for environmental damage. In this connection, what might be considered is rules relating to *collective actions* and *access to information*. These matters will be dealt with in Chapter 2 and Chapter 3. For the time being, we will confine ourselves to a brief presentation of the principal grounds of jurisdiction laid down in the preliminary draft General Convention, which are of particular interest for our purposes.

²²⁷ The text of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, as well as a number of preliminary documents, are available on the Website of the Hague Conference (<http://www.hcch.net>), under the heading *Work in Progress*. In view of this, we will not embark here on a comparative law study of the various regimes of international jurisdiction in tort matters in national legal systems and in other international conventions of a general nature.

The preliminary draft lays down to begin with a *general forum* for the defendant's habitual residence (*actor sequitur forum rei*, Art. 3), in this following a well-established trend in international conventions relating to jurisdiction. It also lays down a number of special jurisdictions which are added as alternatives to the defendant's forum. One of these special jurisdictions concerns *torts or delicts*. Article 10 reads as follows:

- "1. A plaintiff may bring an action in tort or delict in the courts of the State:
 - a) in which the act or omission that caused injury occurred, or
 - b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.
2. [...]²²⁸
3. A plaintiff may also bring an action in accordance with paragraph 1 when the act of omission, or injury may occur.
4. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State. Unless the injured person has his or her habitual residence in that State."

This provision therefore gives the injured person a choice between the forum of the place where the act resulting in damage occurred and the forum of the place of its effects. The former of the two alternatives takes account above all of the proximity of the court to the cause of the damage. This proximity may facilitate the establishment of a causal link between the conduct or the omission and the injury. The link to the place where the damage took place will, moreover, often correspond to the place of the habitual residence of the party whose conduct or omission is at issue. The second alternative on the other hand focuses on the situation of the party having suffered harm, as the place of the damage will very often coincide with that party's domicile. The reference to the place where the injury "arose" indicates that it is solely the place where the *direct* effects of the act at issue occurred. So the indirect harm does not constitute a satisfactory link. The preliminary draft lays down a second limitation, since the ground of jurisdiction at the place of the damage will only exist if the person whose liability is invoked could reasonably foresee that his or her act or omission was likely to produce injury of the same kind as in that State.²²⁹ In the area of environmental pollution, it is hard to see how the person claimed to be responsible could not reasonably foresee that his or her act or omission was likely to produce injury *in another State*.²³⁰

²²⁸ The second paragraph is irrelevant for our purposes.

²²⁹ Also, under para. 4, the courts of the place where the damage has occurred or is likely to occur only have jurisdiction for the damage which has occurred or may occur in that State. However, this limitation does not apply when the injured party has its habitual residence in that State.

²³⁰ See the comments relating to the draft Japanese law mentioned above, on p. 31. On the other hand, the question as to whether this person could reasonably foresee that an injury *of the same kind* might occur, will perhaps be more awkward to deal with (one has only to think of the injury caused by a chemical product whose toxic effects were not yet fully known at the time of the accident).

How does this system of jurisdiction²³¹ compare with the ones in the special Conventions on environmental protection? What are the lessons which can be learned from such a comparison for a possible Convention on Civil Liability resulting from Transfrontier Environmental Damage? It is this that we shall consider in the following section.

II. International instruments dealing with environmental protection

As in the first part of this Note, we will first consider the instruments dealing with a specific area (A), then the instruments of a general character (B).

A. Instruments dealing with a specific area

1. Nuclear energy

Under the 1960 *Paris Convention on Third Party Liability in the Field of Nuclear Energy* (Art. 13) and the 1963 *Vienna Convention on Civil Liability for Nuclear Damage* (Art. XI),²³² only the courts of the contracting State on whose territory the accident occurred have jurisdiction.²³³ There is therefore no possibility for a person injured abroad to bring an action in the courts of his or her State of residence. Although this system has the drawback of forcing the injured person to appear in the courts of a State whose language he or she most probably does not master and whose legal system he or she is unfamiliar with, it nevertheless seemed indispensable to the negotiators to fix international jurisdiction in favour of one single court, which they did in order to guarantee respect for the limitation of liability and to ensure that equitable apportionment of compensation was not made impossible in a case where the courts of several countries rule on disputes relating to the same accident.

As it stands, this system of jurisdiction does not seem to lend itself easily to transposition into a convention of a general kind. The possibility of bringing an action in the courts of the State where the injury occurred is commonplace in other instruments and ought certainly to be included in any Hague Convention on Civil Liability resulting from Transfrontier Environmental Damage. On the other hand, if this Convention also had to deal with problems associated with the apportionment of a compensation fund in the event of there being several sets of proceedings, either the model mentioned above could be used as basis or a system of international co-operation could be envisaged which would ensure that the various different interests involved were respected.

2. Petroleum

The 1969 *Brussels Convention on Civil Liability for Oil Pollution Damage*²³⁴ regulates the question of international jurisdiction as well as the question of the effects of foreign judgments. Jurisdiction forms the object of Article IX, paragraph 1, which, in the version of the 1992 Protocol, reads as follows:

²³¹ Let us also note that "[i]n exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Art. 4, or on Art. 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute" (Art. 22 of the Preliminary Draft).

²³² See *supra*, pp. 5 *et seq.*

²³³ The same solution is envisaged in Art. 3, para. 1, of the *Agreement between the Swiss Confederation and the Federal Republic of Germany on Civil Liability in Nuclear Matters*, see *supra* p. 27.

²³⁴ See *supra*, p. 7.

“Where an incident has caused pollution damage in the territory [...] of one or more Contracting States or preventive measures have been taken to prevent or minimise pollution damage in such territory [...] actions for compensation may only be brought in the Courts of any such Contracting State or States.”

The system of jurisdiction laid down by the Brussels Convention therefore excludes bringing an action in the courts of the State of *the habitual residence of the owner of the vessel*. The negotiators of the Convention were afraid that, when the vessel having caused the damage is flying a flag of convenience and the residence of the ship's owner coincides with that flag, the courts of that State should be called upon to rule in an action for civil liability.²³⁵ Here too, the existing system would scarcely seem to lend itself to transposition into a possible Hague Convention on Civil Liability resulting from Transfrontier Environmental Damage. Many other international instruments lay down a *general forum at the plaintiff's habitual residence*, so that it is hard to see how a possible Hague Convention could decide not to include this basis of jurisdiction. It would certainly be indispensable to lay down a *forum at the place where the damage arose*, but this forum should not be *exclusive* as in the Brussels Convention. Any possible doubts there might be about the impartiality or independence of courts should be considered in connection with the recognition or enforcement of the judgment, through the *public policy* reservation.

3. Carriage of dangerous goods

The *Convention of Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels* (CRTD) also sets out rules of direct jurisdiction.²³⁶ Under Article 19, a claim for compensation may be brought in the courts of the place where a) the damage was sustained as a result of the incident, b) the incident occurred, c) preventive measures were taken to prevent or minimise damage, or d) the carrier has his habitual residence. The plaintiff's choice will depend not only on the facts of the case but also on the State chosen by the carrier in order to constitute a *limitation fund* (Art. 11).²³⁷ In fact, a fund of this kind can be constituted even before any action is brought. The choice of the carrier is crucial since, after such a fund has been constituted, the courts of the State in which the fund is constituted *are exclusively competent to determine all matters relating to the apportionment and distribution of the fund* (Art. 19, para. 4). The victim – wishing to obtain compensation as soon as possible – will thus have every interest in bringing his action in the State in which the fund is constituted. The choice of courts offered to the plaintiff is thus not a genuine one, since it largely depends on a strategic decision by the defendant who, as it were, remains “master of the game”. However, it should be pointed out that if the carrier elects to set up a fund in the State party of his *habitual residence*, the validity of such a choice will depend on all the victims having their habitual residence in the same State Party (Art. 11, para. 1).

²³⁵ See ROLF HERBER, Haftung für Schäden durch Ölverschmutzung, *RabelsZ* 1970, pp. 223-252, p. 249, according to which the negotiators had doubts about the impartiality and independence of the courts of these States.

²³⁶ See *supra*, pp. 9 *et seq.* However, this Convention has not yet entered into force.

²³⁷ Such a fund must be constituted within the limitations of liability laid down in the Convention (Art. 9). In constituting such a fund, the carrier protects his other personal assets from claims for compensation. The fund may also be constituted by an insurer or by any person who provides the carrier with a financial guarantee. The provisions of Art. 11 are essentially procedural and technical and are intended to ensure the effective application of the principle of the limitation of liability and the prompt distribution of the moneys laid down for compensating the victims. The rules relating to the constitution and distribution of the limitation fund and all the rules of procedure relating thereto are governed by the law of the State Party in which the fund is constituted.

In a somewhat curious provision, Article 19, paragraph 1, of the CRTD also lays down that "notice of the commencement [of such an action for compensation] shall be given to the defendant". According to the explanatory report, this provision aims to give the insurers the necessary time to take the requisite measures for setting up a limitation fund.²³⁸

B. Conventions not relating to a specific area

1. The Nordic Environmental Protection Convention of 19 February 1974

Establishing a system of individual protection against all categories of harmful transfrontier emissions, the *Nordic Environmental Protection Convention*, which binds Denmark, Finland, Norway and Sweden, is of a very special kind. To our knowledge, the *Nordic Convention* was in fact the first multilateral treaty concluded in the field of environmental protection, whose substantive scope is not limited to a specific category of emissions (such as nuclear emissions), but which concerns *all* activities harmful to the environment.²³⁹

Article 3 of the Convention deals with *international jurisdiction*. Under paragraph 1, any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage. Under paragraph 2, the same principle applies to actions for *damages*. It is true, under this Article, the injured party should, where appropriate, bring his or her action in *foreign* courts. However, this drawback seems to us to be largely offset by the fact that the legal systems of the States parties to the Convention are similar. Further, thanks to the reservation in favour of the law which is most favourable to him or her, the injured party does not suffer any major disadvantage related to designating the jurisdiction of the State from which the pollution originates.²⁴⁰

2. The Council of Europe's Lugano Convention

The Lugano Convention of 21 June 1993 on Civil Liability for Damage resulting from Activities Dangerous to the Environment also contains rules on international jurisdiction. Article 19, paragraph 1, reads as follows:

- "1. Actions for compensation under this Convention may only be brought within a Party at the court of the place:
 - a) where the damage was suffered;
 - b) where the dangerous activity was conducted; or
 - c) where the defendant has his habitual residence."

The principles underlying this provision are comparable to those which form the basis of the preliminary draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. Both instruments make it possible to bring an action in the courts of the place of the *conduct*, of the place of the *damage* and of the place of *the defendant's habitual residence*. In this respect, the two instruments are comparable

²³⁸ United Nations doc. ECE/TRANS/84, p. 45. This provision is actually taken from Art. IX of the 1969 *Brussels Convention on Civil Liability for Oil Pollution Damage*.

²³⁹ These activities are defined in the first Article of the Convention; see also the Protocol annexed to the Convention, which slightly limits the definition.

²⁴⁰ See *supra*, p. 27.

therefore. Yet there are still major differences: the preliminary Hague draft expressly treats the *omission* on a par with the act, explicitly excludes as a basis of jurisdiction places where only *indirect* harm has been suffered, permits an action to be brought even if the act (or the omission) or the damage have not yet arisen but simply *may* arise and, lastly, limits - in principle at least - the jurisdiction of the courts of the place of the *damage* only to damage which has occurred or may occur *in that State*. The first three pointers are essential and should probably be taken up in a special convention on environmental damage. The fourth pointer, on the other hand, perhaps deserves fresh consideration. Indeed, such consideration would even prove indispensable if an attempt were to be made to introduce into the special Convention machinery for *grouping together the actions of victims from different States* and concentrating them *in one court*. This would probably represent one of the most complex challenges to solve in such a convention - yet also one of the most useful perhaps. However, before examining this question in further detail, the presentation of the rules of jurisdiction needs to be rounded off with a reminder of a common law principle which is not without importance for our subject.

III. Outline of the common law principles governing jurisdiction with respect to disputes relating to immovable property situated abroad (the so-called *Moçambique Rule*)

A. The problem

The main question considered in this Chapter may be illustrated by the following example: emissions from a factory situated in State A - a common law State - cause damage to an agricultural concern situated in a neighbouring State. The owner of the concern brings an action for damages in the courts of State A. Are the courts of State A competent to hear a dispute under their common law?

It should be pointed out straight away that the problem raised is not a uniform one for all common law systems. For a better understanding of this diversity, the development of the common law rules determining jurisdiction in disputes relating to immovable property situated abroad needs to be retraced.

B. The two facets of the *Moçambique Rule*

According to a well-established rule of common law, any action relating to a *right in immovable property* must be brought in the courts of the State where the immovable property concerned is situated.²⁴¹ Hence, even before the United Kingdom became party to the Brussels and Lugano Conventions, English courts were not competent to hear a dispute concerning the ownership of an immovable property situated abroad. Similarly, a foreign judgment relating to a right in immovable property was not recognised in England when the property concerned was situated in a State other than the original court.²⁴²

In the celebrated decision *British South Africa Co. v. Companhia de Moçambique* delivered in 1893, the House of Lords extended the principle referred to above and determined that it was not applicable just to an action *in rem*, but also to an action *in personam* relating to damages for trespass.²⁴³ In this case, a Portuguese company was claiming damages in the English courts against an English company for trespass on land, mines and dwelling houses situated in South Africa. The House of Lords declared that the English courts were *not competent* to rule on an action *in personam* relating to damage

²⁴¹ *Skinner v. East India Co.* (1666), 6. St. Tr. 710.

²⁴² *Duke v. Amler* [1932] 4 D.L.R. 529.

²⁴³ [1983] A.C. 602 (H.L.). The decision is also reproduced in MORRIS/NORTH, *Cases and Materials on Private International Law*, London 1984, pp. 535-540. For a brief description of action for trespass, see *supra* p. 17.

done to *immovable property situated abroad*.²⁴⁴ Since that time, there have been two facets to the *Moçambique* Rule - or local action rule - each of them *excluding* the jurisdiction of the English courts to rule in an action concerning immovable property situated abroad: the former excluded any action *in rem*, while the latter excluded an action *in personam* by which the plaintiff was seeking to obtain damages for trespass or any other offence (such as nuisance or negligence).²⁴⁵ Though criticised,²⁴⁶ the rule has been followed by a number of English,²⁴⁷ Australian²⁴⁸ and Canadian²⁴⁹ courts. In the United States, the principle has also been adopted by a number of courts.²⁵⁰

C. Analysis and development of the *Moçambique* Rule

Our purpose here is not to undertake a complete examination of the two facets of the *Moçambique* Rule. We would merely emphasise that *one* facet of the rule amounts in fact to conferring on the courts where an immovable property is situated exclusive jurisdiction to hear an *action in property in rem*. There seems to be no doubt about the merit of this universally applicable rule.²⁵¹ Only the authorities of the place where the immovable property is situated can effectively rule in an action in property *in rem*. The *other* facet however, which *excludes* all jurisdiction of a court to rule in an action *in personam* for compensation for damage caused to an *immovable property situated abroad*, seems more difficult to justify. In fact, in such a case, it is not the registration or validity of the title to the property in the State where the immovable property is situated which is at issue. So the link between the place where the immovable property

²⁴⁴ The origins of the *Moçambique* Rule date back to the old common law of the juries, according to which the juries determined questions of fact not on the basis of the testimonies heard, but on the basis of their own knowledge of the facts. This means that, in the bulk of cases, the action had to be brought in the courts of the place where the facts had occurred. It also meant that the courts did not have jurisdiction to rule on an action whose facts had occurred abroad. This inevitably created practical drawbacks and increased the cost of the proceedings, since many actions had to be brought abroad. To rectify this, the English courts began to allow the fiction of *videlicet* as it was called, which made it possible to imagine, in certain cases, that the foreign place where the facts had occurred was situated in England. This practice eventually led to a distinction being made between local actions and transitory actions. When a dispute concerned facts which could have occurred anywhere, the fiction applied and the English courts were competent (transitory action). When, on the other hand, the facts were inescapably linked to the place where they really occurred - as in the case of an action concerning immovable property - the defendant could overturn the fiction; then the English courts did not have jurisdiction and the action had to be brought abroad (local action). The next stage in the development of the rules of jurisdiction was marked by the Judicature Act of 1873. As this Act abolished local venues, the question arose as to whether the English courts were now competent to rule on an action *in personam* concerning damage to immovable property situated abroad. The Lords decided otherwise in the *Moçambique* case. For further details on the origins of the *Moçambique* Rule, see DICEY/MORRIS, *op. cit.* (footnote 174), vol. 2, Rule 114, Nos. 23-034 to 23-039. For the three accepted *exceptions* to the *Moçambique* Rule, see JAMES G. MCLEOD, *The Conflict of Laws*, Calgary 1983, pp. 322-327 (the rule did not apply when the dispute concerned a *contractual obligation* associated with the immovable property (a lease, for example), when a maritime law action *in rem* was involved or an action *in personam* between two parties subject to the jurisdiction of a court of equity).

²⁴⁵ It is generally recognised that the second facet of the rule was not limited only to actions for trespass, but also applied to other torts, see the decision of the Supreme Court of Ontario in the case *Brereton v. Canadian Pacific Railway*, [1898], 29 O.R. 57. On the same problem area in English law, see *The Tolten*, [1946], p. 135 (C.A.). See also DICEY/MORRIS, *op. cit.* (footnote 174), vol. 2, Rule 114, No. 23-038, footnote 89.

²⁴⁶ See WELLING/HEAKES, *Torts and Foreign Immovables Jurisdiction in Conflict of Laws*, (1979-80), 18 *W.O.L.Rev.* 295, with other references.

²⁴⁷ See, for example, *Hesperides Hotels v. Aegean Turkish Holidays*, [1979] A.C. 508.

²⁴⁸ *Commonwealth v. Woodhill*, (1917) 23 C.L.R. 482, see NYGH, *op. cit.* (footnote 175), p. 114. See also *Dagi v. The Broken Hill Proprietary Company and Ok Tedi Mining Ltd.* (1997) 1 Victorian Reports 428, and the critique by STEPHEN LEE, *The Ok Tedi River: Papua New Guinea or the Parish of St Mary Le Bow in the Ward of Cheap?* (1997) 71 *Australian Law Journal* 602. See also *Corvisy v. Corvisy*, (1982) 2 N.S.W.L.R. 557, but refer to footnote 254 below.

²⁴⁹ See, for example, *Albert v. Fraser Companies* [1937] 1 D.L.R. 39.

²⁵⁰ *Livingston v. Jefferson*, 15 Fed. Cas. 660, No. 8411 (C.C.D.Va. 1811).

²⁵¹ See, for example, Art. 16 (1a), of the Lugano and Brussels Conventions or Art. 13, para. 1, of the Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. See also, for example, Art. 97 of the (Swiss) Federal Act on Private International Law, Art. 3097 of the Civil Code of Quebec, Art. 51 of the new Italian Act on Private International Law, Art. 49 of the Romanian Act on Private International Law, etc.

is situated and the courts of the State of that place seems to us less obviously to require compliance.²⁵²

In the *United Kingdom*, the second facet of the *Moçambique* Rule was supplanted by the *Civil Jurisdiction and Judgments Act* of 1982, adopted with a view to accession to the Brussels Convention. *Section 30* of the 1982 Act now assigns to an English court jurisdiction to rule on an action for trespass or any other tort affecting an immovable property situated outside England.²⁵³ On the other hand, the second facet of the *Moçambique* Rule continues to be applied in a large part of *Australia*,²⁵⁴ in several states of the *United States*,²⁵⁵ as well as in the common law provinces of *Canada*.²⁵⁶ Hence, when an immovable property situated in Seattle has sustained damage as a result of an incident occurring in an installation in British Columbia and the action is brought in the Canadian courts, those courts would not have jurisdiction to rule under their common law. However, it should be pointed out that, where transfrontier environmental pollution is concerned, four Canadian provinces – Manitoba, Nova Scotia, Ontario and Prince Edward Island²⁵⁷ – have set aside the second facet of the *Moçambique* Rule by adopting the *Uniform Transboundary Pollution Reciprocal Access Act* of 1982.²⁵⁸ This Act grants the victims of transboundary pollution access to the courts of the place from where the pollution originates. *Section 3* of this Uniform Act reads as follows:

"A person who suffers, or is threatened with, injury to his person or property in a reciprocating jurisdiction caused by pollution originating, or that may originate, in this jurisdiction has the same rights to relief with respect to the injury or threatened injury, and may enforce those rights in this jurisdiction."²⁵⁹

In other words, access to the courts is only granted on the basis of *reciprocity*. The expression "reciprocating jurisdiction"²⁶⁰ is defined as a State, a district, a territory or possession of the United States of America or a province or territory of Canada, which

²⁵² For a critique of the second facet of the *Moçambique* Rule, see MCLEOD, *op. cit.* (footnote 244), pp. 327-329; see also RUSSELL J. WEINTRAUB, *Commentary on the Conflict of Laws*, 3rd ed., Mineola 1986, p. 228, who refers to a "senseless" rule.

²⁵³ "Jurisdiction of any court [...] to entertain proceedings for trespass to, or any other tort affecting immovable property shall extend to cases in which the property in question is situated outside [England] unless the proceedings are principally concerned with a question of title to, or the right to possession of that property." For the two exceptions to this principle, see DICEY/MORRIS, *op. cit.* (footnote 174), vol. 2, Rule 114, Nos. 23-040 to 23-050.

²⁵⁴ The only exception is the State of New South Wales. In fact, this State has completely done away with the *Moçambique* Rule by adopting the *Jurisdiction of Courts (Foreign Land) Act* of 1989. *Section 3* of this Act reads as follows: "The jurisdiction of any court is not excluded or limited merely because the proceedings relate to, or may otherwise concern, land or immovable property situated outside New South Wales." For further details see NYGH, *op. cit.* (footnote 175), pp. 113-117.

²⁵⁵ In fact a number of States have introduced the *Moçambique* Rule into their *venue statute* (laws defining the jurisdiction of the courts *rationae loci*). However, in cases of transfrontier pollution (whether international or inter-State), the action brought by a foreign plaintiff in the American courts will, in principle, fall within the jurisdiction of the federal courts and not the courts of a State (*concurrent jurisdiction*). The federal courts are subject to their own venue rules and the rules of the State venue statutes are not applicable to them. In two important decisions, the federal courts have *refused* to apply the local action rule in an action relating to damage caused to immovable property: *In re School Asbestos Litigation*, 921 F.2d 1310, 1319 (3d Cir. 1990), *cert. denied* 111 S.Ct. 1623 (1991) *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628 (D.S.C. 1992). The local action rule has been the butt of much criticism in the United States, see *Restatement of the Law Second, Conflict of Laws*, § 87; see also Secretariat of the Commission for Environmental Cooperation, *op. cit.* (footnote 60), pp. 22-25.

²⁵⁶ See J.-G. CASTEL, *Canadian Conflict of Laws*, 3rd ed., Toronto 1993, p. 434.

²⁵⁷ S.M. 1985-86, c.11; S.N.S. 1994-95, c.1, part. XVI; R.S.O. 1990, c.T.18; R.S.P.E.I. 1988, c.T-5.

²⁵⁸ This uniform law has been drawn up jointly by the *National Conference of Commissioners on Uniform State Laws* of the United States and the *Uniform Law Conference of Canada*. A French version of this text is reproduced in *The Transboundary Pollution Reciprocal Access Act of Manitoba* (lois du Manitoba 1985-86, c. 11 - Cap.T145).

²⁵⁹ For French translation, see *Act of Manitoba* cited above in footnote 258.

²⁶⁰ "Instance intéressée" in the French text, denoting a jurisdiction which grants reciprocity.

has enacted this Act or provides "substantially equivalent access to its courts and administrative agencies."²⁶¹ According to the Explanatory Report, the purpose of the latter reference is to cover cases where the law of a State, of a province or territory already provides for jurisdiction in favour of a person who does not reside within the jurisdiction of the court seised but who is the victim of pollution from that jurisdiction. The Report also explains that the Act applies neither to transboundary pollution between the United States and Mexico nor to pollution from any other State.²⁶² Further, the *substantive* scope of the Act is limited solely to laws of *States* or *Provinces*, to the exclusion of all *federal* legislation. Thus the principle of equal access to the courts does not apply to a very large part of environmental legislation. Let us also note that the *Uniform Transboundary Pollution Reciprocal Access Act* of 1982 lays down that the court seised will apply its own law (*lex fori*) in order to hear the dispute. Lastly, it should be emphasised that, hitherto, no decision has been rendered in application of that Act.²⁶³

D. Conclusions

Bearing in mind the relatively modest number of States and Provinces having adopted the 1982 *Uniform Transboundary Pollution Reciprocal Access Act*, its impact must be described as *limited*, especially as it only applies in cases of reciprocity. The second facet of the *Moçambique* Rule is therefore still in force not only in a large part of Australia, but also in most States and Provinces in North America. The courts of these States and Provinces would not, therefore, have jurisdiction to hear the dispute mentioned by way of introduction. Considering the strong criticism attracted by the second facet of the *Moçambique* Rule,²⁶⁴ this result seems unsatisfactory. An effective remedy might well be found in an *international treaty*, for example the future *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*. Indeed, under Article 10 of the preliminary draft of this Convention, the plaintiff can bring an action in tort or delict in the courts of the State "in which the act or omission that caused injury occurred" (para. 1 (a)). To date, the common law States which continue to apply this second facet of the *Moçambique* Rule have raised no objection to this basis of jurisdiction laid down in the Preliminary Draft Convention. When the Convention enters into force for one of these States, that State will have an international obligation to make this basis of jurisdiction *effective*. In other words, when the dispute falls within the scope of the Convention, that State will no longer be able to apply the second facet of the *Moçambique* Rule. If it contained a similar basis of jurisdiction, a future *Hague Convention on Civil Responsibility resulting from Transfrontier Environmental Damage* would naturally have the same corrective effect.

Chapter 2 – The environmental disaster: a mass tort litigation

While it is true that an environmental accident can have different forms and degrees, there is no denying that, in the most spectacular cases, an ecological disaster can cause

²⁶¹ In the United States, three States bordering on Canada have enacted this Act: *Michigan* (Mich. Comp. Laws §§ 324.1801 to 324.1807), *Montana* (Mont. Code §§ 75-16-101 to 75-16-109) and *Wisconsin* (Wisc. Stat. §144.995). Others which have enacted the Act are *Colorado* (Col. Rev. Stat. §§ 13-1.5-101 to 13.1.5-109), *Connecticut* (Conn. Gen. Stat. § 51-351b), *New Jersey* (N.J. Stat. §§ 2A:58A-1 to 2A:58A-8), and *Oregon* (Ore. Rev. Stat. §§ 468.076 to 468.089).

²⁶² See Secretariat of the Commission for Environmental Cooperation, *op. cit.* (footnote 60), pp. 82-84.

²⁶³ *Ibid.*

²⁶⁴ See the references in footnotes 246, 252 and 255.

serious (immediate or long-term) harm to a great number of people.²⁶⁵ It then leads to mass tort litigation: the same defendant or defendants confront a very large number of victims, who make multiple financial claims. In a traditional civil legal system, the injured parties act separately and make their own claims individually. Yet this has undeniable drawbacks: increased legal costs owing to the repetition of common questions, the risk of incompatible judgments, etc. There are a number of legal mechanisms – which nevertheless need to be clearly distinguished from one another – which seek to get round these difficulties.

I. Outline of some legal mechanisms for dealing with litigants as a group

To begin with, there are mechanisms grouping together litigants who assert *their own rights* and all of whom are *parties to the proceedings*. Among these mechanisms we might cite the joinder of proceedings ("*consorité*" or "*jonction d'instances*"),²⁶⁶ a mechanism widely known in civil law systems, or the *Joinder of Persons* laid down by Rules 19 and 20 of the *Federal Rules of Civil Procedure* (FRCP) in the United States.²⁶⁷ In each of these cases, a plaintiff puts his own claim. For each right claimed there is a corresponding injured person who is a party to the proceedings. Actions are joined for reasons of pure expediency. Furthermore, they remain legally *independent* of one another, apart from the fact that they must all be brought in the same competent court.²⁶⁸ Ultimately, these mechanisms serve only to group together a relatively small number of plaintiffs.

The second type of mechanism groups together *collective* or *representative* actions. A collective action is a legal action brought by a group of people who are all victims of the same harmful event or by an organisation dedicated to the promotion or defence of a general interest. These actions are common in the United States where, for example, they may take the form of a *class action* or *citizen suit*. In the following discussion, we shall try to set out the conditions and effects of these two types of actions, whose importance was already emphasised by the 1992 and 1995 Notes.²⁶⁹

²⁶⁵ It will be remembered that, in the Bhopal disaster in December 1984, hundreds of thousands of victims suffered physical injury; over two thousand others died in the week following the toxic gas escape.

²⁶⁶ Joinder of proceedings ("*consorité*") makes it possible to amalgamate into one a number of actions brought by different plaintiffs independently (*active* joinder of proceedings) or against different defendants (*passive* joinder of proceedings). It depends on the existence of a common legal relationship or identical or similar situations (e.g. the same injurious event). Joinder of proceedings may be *peremptory* (compulsory) when the interested parties are bound by a relationship of substantive law requiring that they should act in unison (e.g. a community of inheritors).

²⁶⁷ The Joinder of Persons may be compulsory (Rule 19) or permissive (Rule 20). In both cases it is subject to the condition that it should not deprive the court of its jurisdiction on account of the matter or the place. When jurisdiction is based on the diversity of citizenship of the parties, it must be complete and therefore exist between *all* the parties and the defendant. For further details, see the excellent work by ISABELLE ROMY, *Litige de masse - Des class actions aux solutions suisses dans les cas de pollutions et de toxiques*, Fribourg 1997, pp. 54 *et seq.* which will frequently be referred to in this Note. It should be emphasised that the permissive joinder is often used to group together the victims of the same pollution incident, see the references in ROMY, *op. cit.*, p. 55, footnote 81; in such a case the court can later certify a class action *proprio motu*. Since each plaintiff must not only meet the conditions of jurisdiction, but also appear in person, the Joinder of Persons is, in reality, limited to a small number of persons (the grouping together of only 40 plaintiffs has already been deemed impracticable).

²⁶⁸ See, for example, WALTER A. STOFFEL, *L'image du plaideur: du demandeur individuel aux intérêts de groupe*, in *L'image de l'homme en droit - Das Menschenbild im Recht, Mélanges publiés par la faculté de droit à l'occasion du centenaire de l'Université de Fribourg*, Fribourg 1990, pp. 502-503.

²⁶⁹ 1992 Note, *op. cit.* (footnote 2), pp. 199-203; 1995 Note, *op. cit.* (footnote 4), pp. 77-79, with a reference to H.U. JESSURUN D'OLIVEIRA, *Class Actions in relation to Cross-Border Pollution*, EUI Working Paper LAW No. 91/19, European University Institute, Florence 1991. Further to the 1992 Note, it should perhaps be said that no Hague Convention expressly covers the right to bring a collective action. What is more, Art. 2 (e) of the 1978 *Convention on the Law Applicable to Agency* excludes from the scope of the Convention "representation in connection with proceedings of a judicial character" and Art. 2 (d) excludes "agency by virtue of a decision of a judicial or quasi-judicial authority or subject to the direct control of such an authority." The Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters does not contain any provision on collective actions.

II. Class actions and citizen suits in the law of the United States of America - an outline

A. Class actions

1. Concept and nature of the class action

The *class action* is a *representative* action. One or more litigants assert their rights in court and the rights of a group of people in a situation similar to their own: the class or group.²⁷⁰ Formally, the representatives (who are also called named plaintiffs), are *the only parties to the proceedings*. They represent and defend their interests and those of the members of the *class* (unnamed or absent plaintiffs), who are fictitiously in the court and who will be bound by the judgment to be delivered. The representatives therefore gather behind them all the individual claims similar to theirs, whether or not they are already the subject of legal action, whether or not they lie in the present or the future. In this way, the class action groups together *claims* rather than parties.²⁷¹

By its very nature, the class action constitutes an exception to two important procedural principles, according to which: 1) each person is free to determine whether, when and how to have his or her substantive rights respected, and 2) each person has the right to be heard before his or her rights are affected by a judgment.²⁷²

In general, the class action serves two fundamental purposes. *Firstly*, it saves on legal expenses and on the resources of the parties, since it makes it possible to rule in one set of proceedings and in one single judgment on questions of fact and of law common to all the members of a group. In so doing, it avoids a rash of actions thereby lessening the risk of contradictory decisions. Let us take the example of a chemical concern, suspected of being the source of the contamination of water having caused physical injury or damage to tangible property involving many people. In the light of the cases of a few representatives, the court will rule, among other things, on the liability of the polluter with respect to the whole group. The class action thus saves on the proceedings and ensures equality of treatment of persons having related claims originating from one single incident.²⁷³ *Secondly*, the class action makes it possible to bring to justice claims which could otherwise not be because the damage sustained by the person concerned is too small or because the costs of the trial would be disproportionate in relation to the damage which has arisen. On the other hand, grouping together a number of similar claims in a class action enables persons having sustained the same damage to have access to justice and to defend their interests. In reality, as regards the type of conflicts which concern us in this Note, this second aspect of class actions seems to us to have relatively little practical importance, since where civil liability for environmental damage is concerned, the injured parties usually sustain quite substantial and sufficiently serious damage to bring individual actions. In mass tort litigation involving civil liability, the prime object of the class action is not to permit access to justice, but rather to ensure that justice functions efficiently and economically.²⁷⁴

²⁷⁰ For the discussion which follows, see ROMY, *op. cit.* (footnote 267), pp. 87 *et seq.*

²⁷¹ *Ibid.*, p. 88.

²⁷² *Ibid.*, with additional references.

²⁷³ *Ibid.*, p. 89.

²⁷⁴ *Ibid.*, pp. 89-90.

2. Rule 23 of the Federal Rules of Civil Procedure

a) Introduction

The origins of the class action go back to the Chancery Procedure in England, the first accounts of which appear in the 18th century.²⁷⁵ The United States Supreme Court drew inspiration from it in the 19th century in order to define the circumstances justifying the use of the class action in federal courts. This procedure was finally codified in *Federal Equity Rule 48*, adopted in 1842. It was later revised and renumbered as *Rule 38* in 1912, then *Rule 23* of the *Federal Rules of Civil Procedure* adopted in 1938. On the occasion of a fresh revision in 1966, *Rule 23* acquired its present-day form. It is this modern form of class actions which forms the basis of the discussion which follows. Yet before looking more closely at the Rule 23 system, it should be stressed that the principle of class actions is not universally accepted in the United States and that it continues to generate heated debate in the American legal profession. The advocates of the class action regard it as one of the most socially useful remedies, whereas its opponents denounce the abuse of Rule 23 by greedy lawyers, describing it as a form of legalised blackmail.²⁷⁶ In fact, it is hard to deny that problems of conflicts of interests can arise between the lawyers and the various members of the group concerned. These conflicts can arise, among other things, from the fact that, in principle, it is the lawyers who finance the litigation; they therefore have a major financial stake in the conflict – a stake which could quickly dwarf the stakes of the individual members of the group. Another source of disagreement is the fact that a class action can be brought solely to put pressure on the defendants and induce them to settle. One of the most worrying examples of this is the case of the *Heart Disease Research Foundation v. General Motors Corp.*,²⁷⁷ in which a class action was brought on behalf of the population of the United States “residing in the metropolises”, in other words, on behalf of some 125 million people, against certain car manufacturers, accused of conspiring to slow down, if not wreck the development of anti-air pollution devices. The plaintiffs were claiming no less than 125 trillion dollars in damages and 3 million dollars in costs. The action was eventually rejected on technicalities.²⁷⁸

b) Jurisdiction

In the United States, substantial mass tort litigations are generally dealt with by federal courts.²⁷⁹ Their jurisdiction may be based either on the *diversity of citizenship* of the parties²⁸⁰ or on the *federal question* jurisdiction.²⁸¹ When the jurisdiction of the federal courts is based on the diversity of citizenship of the parties, only the citizenship of the *representatives* of the group is considered, to the exclusion of that of the other members of the group.²⁸² It is important to stress that *each* of the representatives must

²⁷⁵ Since the Chancery Courts had a personal effect only (contrary to the decisions of the Common Law courts), they sought to broaden the scope of their decisions by naming all persons who might be affected by them, see STOFFEL, *op. cit.* (footnote 268), p. 506, with additional references.

²⁷⁶ ROMY, *op. cit.* (footnote 267), p. 91, with additional references.

²⁷⁷ 463 F. 2d 98 (2d Cir.1972).

²⁷⁸ ROMY, *op. cit.* (footnote 267), p. 91, footnote 19.

²⁷⁹ However, when the injured party and the defendant are citizens of the same state and the actions are not based on a federal law, they must be brought in a state court.

²⁸⁰ 28 U.S.C. § 1332. Under this provision, the federal courts have jurisdiction to rule on conflicts between nationals of different States provided the amount involved in the case is at least \$US 75,000.

²⁸¹ 28 U.S.C. § 1331. Under these provisions the federal courts have jurisdiction if, in support of their claim, the plaintiffs rely on a cause of action resulting from a breach of the Constitution, of a federal law or of an international treaty to which the United States is party. This jurisdiction is independent of the amount in dispute.

²⁸² ROMY, *op. cit.* (footnote 267), p. 92, which quotes, in particular, the judgment *Ben Hur v. Cauble* 255 U.S. 356 (1921).

have a claim exceeding \$US 50,000.²⁸³ This requirement is considerably weakened by the very elastic way in which it is assessed. For example, the allegations made by the plaintiffs on the harm sustained will be accepted if they appear to be in good faith; the court can only reject such claims if it can assert with "*legal certainty*" that they do not attain the requisite amount for a claim.²⁸⁴ Also, claims for punitive damages are added to claims for compensation in order to calculate the value of the case.²⁸⁵

c) Application of class actions to mass tort litigation

While it has long been accepted that Rule 23 applies to antitrust disputes and to other fields, its application to mass tort litigation relating to *civil liability* has been the subject of great controversy and still remains so.²⁸⁶ A number of courts, supported by a body of scholarly opinion, have actually refused to apply Rule 23 to this type of dispute. They have argued that the conditions for bringing into play the civil liability of the common defendant differ in the case of every injured party and that the size of the harm sustained, as well as the available defence, must be considered *individually*, in other words on a case by case basis, and not collectively. The opponents of class actions for mass tort litigation also hold that when the action involves damages, *each plaintiff should have a choice of forum*. Lastly, they consider that it is for the legislator to play his part and lay down fresh procedures for this type of dispute; pending that, they refuse to place a liberal interpretation on the conditions of Rule 23.²⁸⁷

However, since the end of the 1970s a broad trend has emerged in favour of the use of class actions in the area of mass tort litigation relating to civil liability. Indeed, a number of courts of first instance have started to apply this procedure to conflicts involving pollution and toxic substances, considering that the class action could substantially accelerate the resolution of common questions, in particular the general liability of the defendant. As the resistance of a number of appeal courts has gradually become less pronounced, mass tort litigation is nowadays more and more frequently brought in the form of a class action.²⁸⁸ In the view of the advocates of this mechanism, it helps to appreciably reduce the cost of proceedings, makes it possible to unify the discovery and to more equitably distribute the compensation moneys obtained. However, it should be emphasised that, in practice, the class action very often gives rise to a settlement or is only used to rule on certain aspects of the dispute. Conflicts having resulted in a ruling on all the questions raised are quite rare.²⁸⁹

²⁸³ ROMY, *op. cit.* (footnote 267), which also states that the claims of the injured parties are not totalled unless they claim "a single title or right in which they have a common and undivided interest", *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053 (1969). The latter condition is not met when the injured parties unite in order to claim the same remedy or only to defend themselves against the same opponent.

²⁸⁴ *Sterling v. Velsicol Chemical Corp.*; 855 F. 2d 1188, 1195 s. (6th CIR 1988).

²⁸⁵ *Watson v. Shell Oil Co*; 979 F. 2d 1014, 1021 (5th CIR 1992).

²⁸⁶ ROMY, *op. cit.* (footnote 267), pp. 94-98.

²⁸⁷ See ROMY, *op. cit.* (footnote 267), p. 95, with a number of references.

²⁸⁸ *Ibid.*, which refers, in particular, to the Judgment in *In re A.H. Robins Co., Inc.*, 880 F. 2d 709 (IVth CIR. 1989) for a detailed outline of the history of class actions in mass tort litigation and of the principal judgments delivered up to 1989. See also the case concerning *Watson v. Shell Oil Co.* 979 F. 2d 1014 (Vth CIR. 1992), in which a federal court of appeal confirmed the certification of a class action grouping together some 18,000 persons claiming 32 billion \$US in damages as compensation for physical injury and damage to tangible property sustained by the members of the group after an explosion in a refinery.

²⁸⁹ On these questions, see ROMY, *op. cit.* (footnote 267), pp. 143 *et seq.*

d) The different stages of the procedure

(1) Bringing the *class action*

A party wishing to bring a class action does so in his or her name and in the names of all those in a similar situation to his or hers. The description of the group may, for example, use the following wording: "All persons who happened to be or who were the owners of real property in the townships of A, B, and C, on 1 September 1995 and who sustained injuries to their person or whose property was affected following an explosion at plant Y on 1 September 1995". The description may be relatively vague since the litigant does not have to allege the exact number or identity of the members of the group.

(2) *Certification*

The court seised with the action decides as quickly as possible, either *proprio motu* or at the request of a party, whether the class action is sustainable in this form. This crucial phase is commonly called *certification* of the class action or the class. At the time of this certification, the court considers whether the conditions laid down in Rule 23 are met and whether the action can continue as such; in a second stage, the court then defines the 'class' (the group). At this stage, the court must not prejudge the validity of the action on the merits.

(a) The general conditions

The basic condition for obtaining certification is the existence of an identifiable group or class. There are a number of possible scenarios. If the pollution is purely local, the number of members is fairly easy to establish (for example, persons residing within a radius of X kilometres round an installation). On the other hand, if there was large-scale exposure to a toxic substance, the class may also group together unidentified injured parties, the number of persons forming the group thus being at best approximate. Lastly, the group may include *future plaintiffs* who suffer latent harm and who, for this reason, are not yet known. Furthermore, certification of the class action will only be granted if the joinder of cases is *impracticable* or *difficult*. The elements for consideration in this respect may be the number of potential members or the geographical dispersion of the injured parties. A *community of interests* must also exist between the members of the group. This condition is satisfied when there is at least one condition of fact or of law common to the members of the group. Complete coincidence of the rights is not a requisite. For example, it is enough for the members to have suffered harm from the same pollution. Another condition to which the certification of the class action is subject concerns the representative's claims. These claims must be *typical*, in other words, they must be based on an event, on conduct or on circumstances identical for all the members of the group. In other words, there must be a relationship between the representative's personal claims and those which he is making on behalf of the group. This condition ties up with that of the community of interests.²⁹⁰ Lastly, it is the representative's duty to defend the interests of the group equitably and adequately. If this condition is not satisfied throughout the proceedings, the absent members will not be bound by the eventual judgment (*due process*).

(b) Special conditions

The conditions for certification so far mentioned have all been of a general kind. But in order to be certified, the class action must also meet other, special conditions. An exhaustive presentation of these special conditions would exceed the bounds of this Note. We will therefore merely sketch in the broad outlines. To be certified, a federal class action must fall within one of the categories listed in Rule 23 (b). The distinction between the different types of class action is crucial, since their conditions differ and

²⁹⁰ *Ibid.*, pp. 104 to 105.

since certain class actions are obligatory.²⁹¹ The most often used class action in mass tort litigation is that laid down in Rule 23 (b)(3) entitled *common question class action*. This class action may be brought when two cumulative conditions have been met: 1) questions of law or of fact common to the members of the group prevail over questions affecting individual members, and 2) the class action is preferable to any other available method for resolving the dispute equitably and effectively. This class action is optional, the members of the group being free to opt out of the proceedings and to bring their own action separately (*opt-out*). Members who decide to opt out of the proceedings will not be bound by the eventual judgment.

The criteria which the court must take into consideration for certification of the class action are listed in *Rule 23 (b) (3)*. This list, which is not exhaustive, includes the following elements: the interest individual members may have in bringing separate actions and the opportunities for them to do so; the existence of actions pending in the same dispute involving members of the group; the advantages or drawbacks of concentrating the dispute in one single court; the probable difficulties of organising the class action. The latter criterion is important since it also encompasses the problems which can arise in applying the substantive law of a number of federal States. This is particularly apparent when a national class action is involved.

As regards certification, the court is obliged to compare the class action with the other existing procedures for solving the conflict, be they separate individual proceedings, the joinder of cases, intervention or consolidation. The class action will not be certified unless it seems *clearly preferable* to the other instruments referred to, not just better than them.²⁹² By contrast with the *separate action*, the *class action* has the following advantages: it avoids the repetition of procedures connected with the investigation and determination of common questions and reduces the associated costs; it ensures uniformity of decisions as well as equality of treatment of the injured parties; it allows the defendant to defend himself or herself in one single court;²⁹³ it allows the members of the group to pool their efforts and, lastly, it saves time and legal resources. Compared with *joinder* and *intervention*, the class action has the advantage of being able to group together a greater number of parties, since it also permits the claims of *future* plaintiffs to be considered. The grouping together process can be on a much larger scale, since only the *representatives* have to meet the conditions of the court (in particular as regards jurisdiction), not the absent members. *Consolidation* has a narrower scope than the class action since it supposes that the actions are already pending. Also, it does not make it possible to reach potential litigants who have not yet started proceedings. Lastly, in cases of consolidation, the plaintiffs are all formally parties, which is not so in a class action.²⁹⁴ On the other hand, a number of courts have considered consolidation preferable when personal matters predominated and when, for this reason, individual actions were inevitable. Thus, in the case concerning *Three Mile Island Litigation*, the court refused to certify a class action for compensation for the

²⁹¹ The class actions laid down in Rules 23 (b) (1) (A) [*Incompatible standards class action*], 23 (b) (1) (B) [*Limited fund class action*] and 23 (b) (2) [*Declaratory relief class action*] are obligatory. Let us take the example of the class action relating to limited compensation funds. This is the case for instance when the compensation funds are inadequate to compensate all the injured parties. This limitation may result from insurance cover, from a legal ceiling imposed on the defendant's liability or from the latter's insolvency. In these cases, the plaintiffs who are the quickest off the mark and who receive compensation could deplete the capital intended for compensation to the detriment of the other injured parties. Equality of treatment then justifies a compulsory class action in which the claims of all the members are dealt with at the same time and the compensation moneys apportioned equitably among them.

²⁹² *Commonwealth of Puerto Rico v. M/V Emily's*, 158 F.R.D. 9, 15 s. (D.P.R., 1994).

²⁹³ In the case concerning *Asbestos School Litigation* (789 F. 2d 996, 998 s. (3d Cir. 1986)), the three defendants accepted a national class action, preferring to be faced with one all-embracing action rather than thousands of scattered separate cases.

²⁹⁴ It should be explained here that, in American law, there are two separate provisions through which consolidation is brought into play, namely, Rule 42 of the Federal Rules of Civil Procedure or the Multidistrict Litigation Statute. While the former applies to all the proceedings pending in the same court, the purpose of the latter is to gather together the actions scattered over several courts. If consolidation is based on Rule 42, each applicant must meet the conditions regarding jurisdiction, in particular with respect to diversity.

emotional distress caused by the *Three Mile Island* nuclear accident, ruling that the varied personal claims of the members called for multiple individual actions.²⁹⁵

e) The effects of a class action

A judgment delivered in a class action is binding on all the members who have not opted out of the proceedings. However, this binding effect only comes into play if the absent members have been adequately represented, if the members have been notified of the existence of the class action instituted on their behalf and if they have had the right to be heard. This stems from the constitutional principle of due process as well as from Rule 23 itself.²⁹⁶

f) Conclusions

What conclusions can be drawn at the end of this brief presentation of the system of class actions in the law of the United States of America?

We have already emphasised the advantages of the system of class actions. But the system of class actions nevertheless raises a number of problems.²⁹⁷ To begin with, it should be underlined that the class action does not always prevent a repetition of the proceedings. This is because the members of class actions are able to opt out of them and bring actions individually in other courts. This inevitably increases the risk of incompatible judgments as well as of the depletion of the compensation fund by the victims who are the first to win their cases. It is for these reasons precisely that the *American Law Institute*, supported in this by a number of authors, is proposing to *make all class actions compulsory* and to prohibit the members from bringing separate actions, at least until certain collective aspects of the dispute have been resolved.²⁹⁸ Also, the class action cannot necessarily be considered a *neutral* procedure. This is especially true in relation to the role of the court. For the court actually ends up being assigned the task of looking after the interests of absent members and of administrator of the dispute. This role enables the court to develop its own strategy for bringing, not to say forcing, the parties to reach a settlement.²⁹⁹ Furthermore, when the class action involves the future injured parties, there is a clear risk that not all the future injured parties will be notified of the class action. This is particularly serious since the class action determines their procedural and substantive rights. The class action therefore introduces a new definition of due process for mass tort litigations.³⁰⁰ In addition to these repercussions on procedural law, the class actions system can also have consequences for substantive law, to begin with for civil liability systems. Once the defendant's liability has been established with respect to the representatives, the other members of the group no longer have to establish the conditions of the liability individually. The collectivisation of the liability is even taken a little further when the damages are assessed *comprehensively* and not for each of the injured parties individually.

Overall, and despite the dangers referred to, it may legitimately be concluded that the class actions system has shown its true worth in mass tort litigations and that its use is on the increase.

²⁹⁵ 87 F.R.D. 433 (M.D.P.a. 1980).

²⁹⁶ For further details on this question, see ROMY, *op. cit.* (footnote 267), pp. 129 to 132 and 169 to 171.

²⁹⁷ *Ibid.*, pp. 172-175.

²⁹⁸ See the references in ROMY, *op. cit.* (footnote 267), p. 173, footnote 372.

²⁹⁹ *Ibid.*, pp. 173-174, with a reference to the *Agent Orange* case, in which the uncertainties which Weinstein insinuated regarding the validity of the action on the merits finally pushed the defendants to reach a settlement.

³⁰⁰ ROMY, *op. cit.* (footnote 267), p. 174.

B. Citizen suits

In the United States, the application of numerous federal laws is ensured by the possibility of bringing citizen suits. The *citizen suit*, which is an action brought by a citizen, gives an individual *private right of action* to defend *the public interest* in court. An individual may act against any person violating certain legal norms in order to oblige that person to comply with them and may also act against the administration in order to oblige it to perform a task which is not discretionary. *Citizen suits* must be brought in federal district courts which have jurisdiction regardless of the amount in dispute and the citizenship of the parties. It should be noted that not only can the basis of such an action be a law in the formal sense, it can also be the theory of the *public trust* or the doctrine of *nuisance*.

The first law having conferred upon members of the public the right to bring an action was the *Michigan Environmental Protection Act* promulgated in 1970. The Michigan Act served as model for the provision on citizen suits inserted into the *Air Pollution Control Act* or *Clean Air Act* when it was revised in 1970. Section 304 of the *Clean Air Act* thus became the first federal provision to authorise *any person* to bring a civil action in the federal courts, either against the Government to force it to perform its obligations laid down in law, or against any person having violated the laws.³⁰¹ However, it should be noted that the right granted by Section 304 of the *Clean Air Act* is more limited than that granted by the Michigan legislator, in that it only permits an action to be brought against *certain* violations of the law and *qualified omissions* of the administration.³⁰² These restrictions were the result of the controversy which split members of Congress during the debates on the introduction of the federal citizen suits, a controversy which finally resulted in a number of special agreements which it is not our task to go into here. On the other hand, it is important to stress that the provisions of the *Clean Air Act* do not envisage payment of damages as such, so that a citizen suit can only relate to an injunction or a notice to comply. Despite these restrictions, Section 304 of the *Clean Air Act* reflects a deliberate choice by Congress to broaden access by citizens to the federal courts to ensure that the law is upheld. In adopting the federal citizen suits, Congress aimed to confer on the citizens the status of *private public prosecutor*, recognising that they would thus be performing a true public service in bringing an action for enforcement.³⁰³

Section 304 of the *Clean Air Act* has served as a model for the provisions subsequently promulgated in federal law. Admittedly, these provisions sometimes deviate from federal law for reasons linked to the structure and peculiarities of the laws concerned. They may even be subordinated to different conditions.³⁰⁴ Despite these differences, all of them are aimed at enabling citizens to verify that laws are applied, whether by inducing the administration to perform a mandatory duty or by appealing against the latter's inaction.^{305, 306}

³⁰¹ ROMY, *op. cit.* (footnote 59), p. 87.

³⁰² *Ibid.*

³⁰³ *Ibid.*, p. 88.

³⁰⁴ See, for example, Section 505 of the *Federal Water Pollution Control Act*, or *Clean Water Act*, which expressly draws on Section 304 of the *Clean Air Act*, but with two important modifications: firstly, the *Clean Water Act* stipulates that an action can be brought by any citizen defined as "a person or persons having an interest which is or may be adversely affected", while the *Clean Air Act* authorises everyone to act, without any other limitation. Also, the *Clean Water Act* lays down the possibility, for the plaintiff to claim payment of civil penalties, which was not included in the original version of Section 304 of the *Clean Air Act*.

³⁰⁵ ROMY, *op. cit.* (footnote 59), p. 89.

³⁰⁶ What is the relation between citizen suits and the means provided by common law? This question is an important one, since the scope of application of the citizen suits and the means provided by common law differ. The standing to sue is, in principle, broader in the provisions on citizen suits than in the common law actions for nuisance which require not only that the applicant should suffer harm, but that this harm should distinguish him or her from the public in general. Subject to this one reservation, common law actions nevertheless have a broader scope than citizen suits because they are not limited to *specific* breaches of the law. For example, a citizen suit is excluded if the holder of a tipping permit respects the terms of his permit, even in the case of imminent danger. The same applies when the citizen suit is aimed at a pollution not regulated by federal law (for the references, see ROMY, *op. cit.* (footnote 59), p. 99, footnotes 359 and 360). On the other hand, it still remains possible to bring an action for

III. Actions brought by professional associations

A professional association may be qualified to act as a *representative* or *substitute*.³⁰⁷ In the former, the capacity is derived, in that the association cannot bring an action which could not be brought directly by its members. On the other hand, in the latter case, the association's capacity to bring an action does not depend on the rights held by its members; it can act without its interests being prejudiced or directly threatened.

Article 18 of the *Council of Europe's Convention of 21 June 1993 on Civil Liability for Damages resulting from Activities Dangerous to the Environment* (Lugano Convention) deals with claims by organisations. It reads as follows:

- "1. Any association or foundation which according to its statutes aims at the protection of the environment and which complies with any further conditions of internal law of the Party where the request is submitted may, at any time, request:
 - a) the prohibition of a dangerous activity which is unlawful and poses a grave threat of damage to the environment;
 - b) that the operator be ordered to take measures to prevent an incident or damage;
 - c) that the operator be ordered to take measures, after an incident, to prevent damage; or
 - d) that the operator be ordered to take measures of reinstatement.
2. Internal law may stipulate cases where the request is inadmissible.
3. Internal law may specify the body, whether administrative or judicial, before which the request referred to in paragraph 1 above should be made. In all cases provision shall be made for a right of review.
4. Before deciding upon a request mentioned under paragraph 1 above the requested body may, in view of the general interests involved, hear the competent public authorities.
5. When the internal law of a Party requires that the association or foundation has its registered seat or the effective centre of its activities in its territory, the Party may declare at any time, by means of a notification addressed to the Secretary General of the Council of Europe, that, on the basis of reciprocity, an association or foundation having its seat or centre of activities in the territory of another Party and complying in that other Party with the other conditions mentioned in paragraph 1 above shall have the right to submit requests in accordance with paragraphs 1 to 3 above. The declaration will become effective on the first day of the month following the expiration of a period of three months after the date of its reception by the Secretary General."

Like a number of citizen suits, this provision concerns only applications seeking an *injunction* from a court or competent administrative authority, addressed to the polluter or the potential polluter. On the other hand, it does not provide for the payment of

nuisance. In view of this divergence, the question arises as to whether the plaintiff has a *choice of actions*, whether they compete with one another or whether they are mutually exclusive (*ibid.*, pp. 100-104). The situation may be summarised as follows: When people have sustained harm caused by activities regulated by a law which includes provision for citizen suits, these are the only means provided by federal law. The injured parties do not in particular have any action for damages or an injunction under federal common law.

³⁰⁷ See, in particular, STOFFEL, *op. cit.* (footnote 268), pp. 509 *et seq.*

damages or even the reimbursement of costs to the organisation bringing the action.³⁰⁸ An association wishing to file such an application must meet quite different conditions laid down by the law of the court, with the exception of the possibility envisaged in subparagraph 5.

Furthermore, it should be pointed out that according to the *White Paper on Environmental Liability* adopted by the Commission of the European Communities,³⁰⁹ for cases concerning environmental damage, public interest groups promoting environmental protection should have a right to act in substitution for public authorities, where these are responsible for dealing with environmental damage, but have not acted. This approach should apply to administrative and judicial review, as well as to claims against the polluter. In urgent cases, such groups may also be allowed to take action if there is need to prevent damage.³¹⁰

IV. Conclusions – assessment of collective actions in the context of a possible Hague Convention on Civil Responsibility resulting from Transfrontier Environmental Damage

The system of collective actions, and class actions in particular, undoubtedly has a number of advantages for dealing with a mass tort litigation. Is it both possible and conceivable to transpose these advantages to the international level and to include rules relating to collective actions in a possible Hague Convention on Civil Liability resulting from Transfrontier Environmental Damage? Let us note straight away that there would certainly be a great many questions and major difficulties. But would they be such as to condemn all efforts to achieve this from the outset?

If the Conference were called upon to draw up such a Convention, further studies would no doubt be necessary in order better to understand the mechanics of other collective or representative actions. Such an appraisal should include a systematic and comparative analysis of these various types of actions: the precise conditions of their application (personal, substantive and procedural conditions), the *penalties* they lay down (injunctions, damages, civil penalties and costs), as well as *the effects* (substantive and procedural) of a decision made on the basis of such an action. A *questionnaire* ought perhaps to be drawn up in this connection. An additional study of this kind would make it possible to identify the true difficulties of private international law associated with this type of action.

Yet even failing such a study a number of specific problems can still be identified now. One initial fundamental question would be to ascertain whether the Convention should lay down *substantive rules* on collective actions (unified substantive regime), provisions dealing solely with matters of *private international law* or a *mixture* of the two. Were the Convention to be limited solely to the conflictual law aspects, the catalogue of questions for consideration would include, among other things, that of ascertaining whether the courts of a Contracting State, whose law provides for collective actions – and class actions in particular – should agree to hear an action brought on behalf of a group by a representative designated under a *foreign* law. In fact this question has already been raised by the *Bhopal* case. In that dispute, the Indian Government was first designated the representative of the group of victims of the disaster under Indian law; then it brought an action in the American courts on behalf of the group. Since the American courts declared that they had no jurisdiction under the doctrine of *forum non conveniens*, the question raised did not have to be decided. Yet there are good reasons for thinking that the constitution of a group under a foreign law would not have been

³⁰⁸ The 1992 Note, *op. cit.* (footnote 2), p. 201, already emphasised that this raised the question as to whether, once in force, the Convention was going to have priority and, therefore, would eliminate the rights of this kind which national legislation might recognise.

³⁰⁹ See *supra*, p. 15.

³¹⁰ See White Paper, section 4.7., *Access to justice*.

accepted. In fact, the possibility of bringing a collective action and the conditions which govern it are essentially procedural matters which in principle must fall under *lex fori*.³¹¹

The same reasoning applies to a question already raised in the 1992 Note³¹² and which concerns the *scope* of the designation of *lex causae* in a convention on the law applicable to civil liability: did the right recognised by national law to bring an action in the interests of a whole group fall within the context of the applicable law designated by such a convention? In our view this question must be answered in the negative. In other words, the court seized could not apply the regime on collective actions laid down by the foreign law.

Another awkward question to be solved in connection with a future Hague Convention would concern the effects abroad of a decision made on the basis of a collective action. Can such a decision be recognised and enforced in another State in the same conditions as an individual decision? Should a distinction be drawn between the representatives and the absentees in a class action (bearing in mind that, under United States law, only the *representatives* of the class are considered for determining the direct jurisdiction of a court seized with a collective action, to the exclusion of the absent members)? Is the enforcement of such a decision possible in a State which does not make provision for collective actions?³¹³ What would be the impact, in the State addressed, of the *negative effect* of the admission of a mandatory class action, namely the loss, for each individual victim, of his or her right of personal action? Can this loss be considered as contrary to human rights?³¹⁴

In the light of the foregoing, it seems to us that what might be termed a *mixed* approach could serve as guide for drawing up a rule on collective actions in the context of a future Hague Convention on Civil Liability resulting from Transfrontier Environmental Damage. This rule could, in fact, contain *both* elements of substance and elements of conflicts of laws. The basic elements would lay down the material conditions for the admission of a collective action. Let us consider the example of a chemical accident in a plant situated in State A, close to the frontier with States B and C. Residents of all three countries sustain serious bodily injury, all of the same kind. Let us also suppose that the Convention (to which all three States are Parties) permits the victims to bring an action both in the courts of the State where the injurious act occurred (State A) and also in the courts of the States where the harm was sustained (States A, B and C). Under these rules on international jurisdiction, the plant in question must therefore expect to face proceedings in the courts of the three States. In such a case, the possibility of bringing a *collective action in one single court* would no doubt have a number of advantages. It would lead to a *single* decision, on *all* the claims, thus obviating the danger of ending up with conflicting decisions. The injured parties – all of them victims of the same incident and having sustained the same bodily injury – would be indemnified under the same system. The process of reviewing the evidence would also take place under one system, etc. In short, in such circumstances, a collective action could help to improve the *efficiency* of the legal system. Admittedly, the system of such an *international collective action* would not be entirely problem-free. To start with, it presupposes that the victims are agreed on the forum in which the action would be brought. It is clear that this choice would largely depend on the substantive rules applicable to the merits and the system of liability they provide for. There is no doubt that the victims would seek to choose the court most advantageous to them. The possibility of such a choice would not really be unjust as regards the enterprise at issue, since, by locating close to the three frontiers, it might reasonably expect to be subject

³¹¹ VON BAR, *op. cit.* (footnote 52), p. 356, with other references.

³¹² 1992 Note, *op. cit.* (footnote 2), p. 203.

³¹³ See DAVID MCLEAN, Procedural Matters, in VON BAR, *op. cit.* (footnote 5), pp. 199-201.

³¹⁴ See the 1995 Note, *op. cit.* (footnote 4), p. 79, No. 21, which rightly stresses that this negative effect is already broadly accepted in bankruptcy law.

to each of these three systems.³¹⁵ Furthermore, if the future convention also included the applicable law, the argument based on unforeseeability would lose even more weight, since the substantive rules applicable to a civil liability action for environmental damage would be easy to determine, even before the harmful event occurred.

If such a mixed system were to prove over-ambitious, the system of collective actions could be limited solely to cases grouping together victims *from one single State*.

Lastly, where *actions brought by an association* are concerned, Professor von Bar recently proposed an interesting distinction in his course of lectures at the Hague Academy of International Law.³¹⁶ In his view, if the rights asserted by the association can in reality be attributed to individual persons, its action could be likened to a class action; like the class action, it must meet the conditions laid down by *lex fori*. On the other hand, if the association asserts rights which cannot, in general, be attributed to individual persons, such as a claim for compensation for ecological damage, the situation would be different; in that case, the association would assert its own rights, so that the admissibility of the action would have to be subject to *lex causae*.³¹⁷ Under this rule, a Dutch environmental association, whose national law entitles it to bring an action,³¹⁸ could request, in a German court, measures of reinstatement against a German polluter, even though German law does not confer this right on associations in this field. It is the application of Dutch law as *lex causae* which would make this possible.

Lastly, another question is whether a possible Hague Convention should include a rule on the possibility of challenging in court an environmental protection organisation which has not performed its preventive role of protection and where damage has resulted therefrom.³¹⁹

Chapter 3 – Access to information

The 1992 and 1995 Notes rightly stressed the fact that, in legal proceedings concerning liability for damage to the environment, it was particularly important to have *access to information*, even if only to establish the causal link.³²⁰ Two international instruments include explicit provisions on this: the Council of Europe's Lugano Convention and the recent Aarhus Convention drawn up by the United Nations Economic Commission for Europe.

³¹⁵ The possibility of such international collective action also supposes that the rule of the kind laid down in Art. 10, para. 4, of the Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (see *supra*, p. 50) should be set aside. The idea of an international collective action would, on the contrary, be that even the court competent solely by virtue of the place where the damage arose could rule on all the damage caused.

³¹⁶ VON BAR, *op. cit.* (footnote 52), pp. 356-359.

³¹⁷ In this connection Professor VON BAR quotes a decision of the Dutch *Hoge Raad*: "[I]n the event these interests [of environmental protection] are harmed by violations of norms which protect them, this constitutes unlawfulness towards legal persons, whose object and purpose, according to their articles of association, is to protect these interests and therefore the groups are entitled in any event to apply for a prohibition of further breaches" (English translation taken from G. BETLEM, Cross-Border Water Pollution: Two Paradigmatic Dutch Cases, *European Review of Private Law*, 1996, pp. 159 *et seq.*)

³¹⁸ Art. 3:305a, NBW.

³¹⁹ See 1995 Note, *op. cit.* (footnote 4), p. 79, No. 24.

³²⁰ See 1992 Note, *op. cit.* (footnote 2), p. 203; 1995 Note, *op. cit.* (footnote 4), p. 79, No. 22.

I. The Council of Europe's Lugano Convention

Chapter 3 of the Council of Europe's Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (*Lugano Convention*)³²¹ contains very detailed rules on access to information (Arts. 13-16). These rules draw a distinction between whether the information is held by the public authorities (Art. 14), bodies with public responsibilities for the environment (Art. 15) or by operators (Art. 16).

Under Article 16, paragraph 1, "[t]he person who suffered the damage may, at any time, request the court to order an operator to provide him with specific information, in so far as this is necessary to establish the existence of a claim for compensation under this Convention." Under paragraph 2, the operator concerned "may request the court to order another operator to provide him with specific information, in so far as this is necessary to establish the extent of his possible obligation to compensate the person who has suffered the damage, or of his own right to compensation from the other operator." Paragraph 3 stipulates the type of information that an operator must provide under the Convention. This is "elements which are available to him and dealing essentially with the particulars of the equipment, the machinery used, the kind and concentration of the dangerous substances or waste as well as the nature of genetically modified organisms or micro-organisms".³²² But it is important to stress the fact that the scope of these provisions is *limited* by Article 19, paragraph 2, according to which requests for access to information may only be submitted at the court of the place where the dangerous activity is conducted or where the operator who may be required to provide the information has his *habitual residence*. Access to information is therefore not guaranteed if the action is brought *at the place where the damage was suffered*.³²³

II. The Aarhus Convention drawn up by the United Nations Economic Commission for Europe

The *Aarhus Convention of 25 June 1998 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*³²⁴ was adopted under the auspices of the *United Nations Economic Commission for Europe* (ECE), which embraces the countries of North America, Western, Central and Eastern Europe as well as Central Asia. The Convention has not yet entered into force, but has already collected 39 signatures, those of the European Community among them.³²⁵ Article 3, paragraph 9, would appear to be the key provision of this Convention. It states that:

"Within the scope of the relevant provisions of this Convention, the public shall have access to environmental information, have the possibility to participate in decision-making and have access to justice in environmental matters *without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities*." [Emphasis added].

³²¹ See *supra*, p. 12 *et seq.*

³²² It should be noted that, under Art. 14, para. 2, the internal law of a State Party to the Convention may restrict the right of access when the request affects public security, commercial and industrial confidentiality, including intellectual property, matters which are or have been *sub judice*, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings, etc. The operator may also refuse to provide information when it would incriminate him (Art. 16, para 6).

³²³ This had already been raised by the 1992 Note, *op. cit.* (footnote 2), p. 205.

³²⁴ The text can be found on the ECE Internet site at the following address:
<http://www.unece.org/env/europe/ppconven.htm>.

³²⁵ Pursuant to its Art. 20, the Convention will enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.

Each Party to the Convention must ensure that “public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation”, and should do so “without an interest having to be stated” (Art. 4, para. 1).³²⁶ Compared with the Lugano Convention, the Aarhus Convention is therefore less ambitious, exclusively relating as it does to information held by the public authorities, thus excluding the operators. The scope of the Aarhus Convention is further limited by Article 3, paragraph 6, which states that “[t]his Convention shall not require any derogation from existing rights of access to environmental information, public participation in environmental decision-making and access to justice.” Lastly, the provision which comes under the heading *Access to Justice* (Art. 9), lays down that “[e]ach Party shall, within the framework of its national legislation, ensure that any person who considers that his/her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.”

III. Conclusions

If the Hague Conference were to decide to prepare a Convention on Civil Liability resulting from Transfrontier Environmental Damage, careful consideration would need to be given to whether it is appropriate to include specific provisions on access to information. Rules of this kind could well prove very useful, but a proper assessment would need to be made *against whom* the right of access to information may be asserted (public authorities and/or operators) and what relationship these rules would have with other systems, in particular with the *1970 Hague Convention on the Taking of Evidence Abroad*. This point was raised by the 1992 Note.³²⁷ Particularly in relation to the Lugano Convention, the 1970 Hague Convention seems more restrictive in scope, in that it expressly stipulates that a “[l]etter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated” (Art. 1, para. 2). Further, under Article 23 of the Hague Convention, a Contracting State may “declare that it will not execute Letters of Request issued for the purpose of obtaining *pre-trial discovery of documents* in Common Law countries.”

Chapter 4 – Recognition and enforcement of foreign decisions

Our consideration of matters relating to the recognition and enforcement of foreign decisions can be very brief. For these matters do not seem to raise any *particular* problems for judgments concerning environmental damage,³²⁸ which means that we can refer the to Chapter 3 of the Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. There is all the more justification for doing so as the Preliminary Draft contains not only a definition of the term “judgment” (Art. 23), rules relating to procedure (in particular, Arts. 27, 29 and 30), as well as a catalogue of the grounds for refusal of recognition or enforcement (Art. 28), but also provisions expressly relating to punitive damages (Art. 33, paras. 1 and 3), as well as to *grossly excessive* damages (Art. 33, paras. 2 and 3). In a world-wide convention on the effects of foreign judgments, the latter two questions are certainly among the trickiest to resolve. The system envisaged in the Preliminary Draft thus seems very complete and perfectly adapted for application to judgments on environmental damage.

³²⁶ The grounds for refusal listed in Art. 4, para. 3, are similar to those set out in the Lugano Convention.

³²⁷ 1992 Note, *op. cit.* (footnote 2), p. 205.

³²⁸ See for example the 1995 Note, *op. cit.* (footnote 4), p. 77, No 19.

Simple reference to the Convention currently being prepared at the Hague Conference is also justified in the light of the rules on the recognition and enforcement of foreign judgments set out in the special conventions on the protection of the environment. In general, there is fundamentally nothing to distinguish these rules from the system laid down in other international instruments.³²⁹ However, one major exception should be indicated. At least two international instruments relating to the protection of the environment decline to make the violation of public policy a ground for refusal of recognition and enforcement. These are the 1969 *Brussels Convention on Civil Liability for Oil Pollution Damage* (see Art. X) and the 1989 *Geneva Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels* (see Art. 20).³³⁰ Such a liberal approach seems scarcely conceivable in the case of a possible Hague Convention. The Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial matters continues, moreover, to include manifest incompatibility with public policy among the grounds for refusal of recognition and enforcement. The same formula ought probably to be included in a future Convention on Civil Liability resulting from Transfrontier Environmental Damage.

³²⁹ See, for example, Art XII of the 1963 *Vienna Convention on Civil Liability for Nuclear Damage* or Art. 23 of the 1993 *Lugano Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment*.

³³⁰ NB: The CRTD has not entered into force.

Part III:
International co-operation in the environmental field

There is no doubt that the problems raised by transfrontier damage to the environment can in the end only be solved effectively by *international co-operation*. Anchored in the United Nations Charter, this principle underpins the whole of international law on the environment. Also, it has already been stated in many international instruments.³³¹ The aim of this, the third and last part of this Note, is briefly to present the principal international instruments laying down a framework for international co-operation in the environmental protection field. For the purposes of this presentation, we will draw a distinction between, on the one hand, the agreements essentially relating to *the technical and scientific assistance* required in disasters for instance (Chapter 1) and, on the other hand, the agreements which expressly invite States to *co-operate with a view to adopting rules on liability* for damage resulting from environmental pollution (Chapter 2). The conclusions will summarise the aspects in relation to which it would be particularly useful to include cooperation machinery in a possible Hague Convention of Civil Liability resulting from Transfrontier Environmental Damage (Chapter 3).

Chapter 1– Technical and scientific co-operation

I. Introduction

International customary law makes it an obligation on States to urgently *inform* any other State likely to be affected by an event which can suddenly cause harmful effects to its environment. This principle is a common feature of treaties relating to watercourses³³² or co-operation between neighbouring States in connection with disasters. This obligation also entails the duty to *assist* States which are victims of accidents affecting their environment. The procedure for translating this duty to assist into practice in general has to be laid down by means of specific arrangements between States. The *Vienna Convention of 26 September 1986 on Assistance in the Case of a Nuclear Accident or Radiological Emergency* is an important example in this field (but which it is not our task to go into here). Comparable rules are found in a number of instruments adopted by the *United Nations Economic Commission for Europe*. We will refer to these instruments in turn, as well as the main objectives of the *North American Agreement on Environmental Cooperation*, an instrument which forms a parallel to the North American Free Trade Agreement (NAFTA).

³³¹ See, for example, A.-C. KISS, *Environnement, Répertoire de droit international*, Dalloz, Vol. II, Paris 1998.

³³² The *Convention of 12 April 1999 on the Protection of the Rhine* is the most recent example of this. Under Art. 5, para. 1, the Contracting Parties undertake "to strengthen their cooperation and to inform one another, in particular, of the measures taken in their territory to protect the Rhine". Also, in case of events or accidents whose effects might pose a threat to the quality of the waters of the Rhine, the Contracting Parties undertake to notify the International Commission for the Protection of the Rhine without delay, as well as the Contracting Party/Parties which may be affected thereby. This notification is to be made according to plans established and coordinated by the Commission. Note also that, under Art. 14 of the Convention, the Commission "shall cooperate with other intergovernmental organisations" and may make recommendations to them. Also, the Commission may recognise as observers "intergovernmental organisations whose work is related to the Convention" (Art. 14, para. 2(b)).[Unofficial translation].

II. The work of the United Nations Economic Commission for Europe (ECE)

A. The *Helsinki Convention of 17 March 1992 on the Transboundary Effects of Industrial Accidents*

This instrument is very broad in scope and places *obligations on both operators and States*.³³³ It applies to undertakings which carry on “dangerous activities”, in other words, to installations in which hazardous substances are present in quantities in excess of the threshold quantities indicated in Annex I to the Convention; furthermore, the activity in question must be capable of causing transboundary effects in the event of an industrial accident.³³⁴ Like a number of other instruments, the Helsinki Convention is based on a twofold approach: on the one hand the *prevention* of accidents and, on the other, the creation of mechanisms which make it possible to offset as far as possible *the effects of an accident once it has occurred*.

Where the *pre-accident* phase is concerned, the Convention envisages a number of measures. For example, it obliges the States Parties to *identify* the hazardous activities in their territory, if need be in co-operation with the other States (Art. 4 and Annexes II and III). The Convention also urges States to induce action by operators to reduce the risk of industrial accidents (Art. 6 and Annex IV). The latter point expressly extends to decisions relating to the siting of new hazardous activities and to significant modifications to existing hazardous activities (Art. 7 and Annex VI). States must also *draw up contingency plans* for use in the event of such accidents (Art. 8 and Annexes V and VII). Lastly, the Contracting States must ensure that adequate information is given to the public in the areas capable of being affected by an industrial accident arising out of a hazardous activity (Art. 9 and Annex VIII). Where the *post-accident* phase is concerned, the Convention lays down a procedure for *speedy and efficient notification* (Art. 10 and Annex IX), the obligation to *take adequate response measures* to deal with the effects of the accident (Art. 11), particularly by means of *mutual assistance* (Art. 12, Annex X).³³⁵ The Convention further provides that States Parties should *co-operate on research* into methods and technologies for the prevention of, preparedness for and response to industrial accidents (Art. 14) and facilitate the exchange of technology in this field (Art. 16). This aspect explains why the Helsinki Convention is of particular interest to the States of Central and Eastern Europe; in becoming Parties to the Convention, these States gain direct access to the most recent know-how in the field of the security of installations.

B. The *Espoo Convention of 25 February 1991 on Environmental Impact Assessment in a Transboundary Context*

The significance of the duty of exchanging information and of international consultation has also been pinpointed in the *Espoo Convention of 25 February 1991 on*

³³³ This Convention will probably enter into force in the near future. Under Art. 30 of the Convention, entry into force requires the deposit of sixteen instruments of ratification, acceptance, approval or accession. To date, *fifteen* States have deposited their instruments: Albania, Armenia, Austria, Bulgaria, Finland, Germany, Greece, Hungary, Luxembourg, Norway, Republic of Moldova, Russian Federation, Spain, Sweden and Switzerland. The Convention has also been *signed* by the following States: Belgium, Canada, Denmark, Estonia, France, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, United Kingdom and the United States of America. As the *European Community* also approved the instrument (on 24 April 1998), it is anticipated that the ceiling of sixteen instruments will soon be reached.

³³⁴ On the other hand, the Convention does not apply to accidents during land-based *transport* of hazardous goods off the site of the hazardous activities.

³³⁵ KISS, *op. cit.* (footnote 331), § 80.

Environmental Impact Assessment in a Transboundary Context.³³⁶ The fundamental principle of the Convention is that States must see to it that the potentially harmful impact on a foreign territory of any project must be assessed before the decision to authorise or implement it is taken. The activities which must form the subject of environmental impact studies are listed in Appendix I of the Convention. The documentation drawn up must be notified to the State potentially affected and distributed to the authorities and the public in the areas likely to be affected. Any comments must be transmitted to the State of origin and consultations may be entered into between the two States. An important innovation of the Espoo Convention is the introduction of a post-project analysis procedure (Art. 7), which is actually akin to an *environmental audit*. This analysis procedure may be requested by any Party to the Convention. In particular, it includes monitoring to ensure that the conditions set out in the texts authorising the activity are met and determining any adverse transboundary impact.

C. The Geneva Convention of 13 November 1979 on long-range transboundary air pollution

This Convention³³⁷ lays down a vast framework of co-operation, the principal aim of which is the limitation and, as far as possible, gradual reduction and prevention of long-range transboundary air pollution (Art. 2). The States Parties must exchange information on and review their policies, scientific activities and technical measures aimed at combating the discharge of air pollutants (Art. 4). A Contracting Party affected by or exposed to a significant risk of long-range transboundary air pollution may request another Contracting Party which is the originator of the pollution or danger of pollution that consultations "be held at an early stage" (Art. 5). Lastly, the Contracting Parties undertake to consider measures aimed at the reduction of certain pollutants. The Convention does not set any quantitative objective but lays down a general framework of co-operation aimed, on the one hand, at reducing scientific uncertainty relating to the quantities, fluxes and effects on human health and the environment of certain pollutants and, on the other hand, at promoting the development and implementation of techniques for controlling air pollution. Originally, these activities focused above all on reducing the effects of *acid rain* by controlling sulphur emissions; later on, their scope was widened to take account of the formation of smog (tropospheric ozone) and, more recently, persistent organic pollutants (POPs) and heavy metals. To date, 7 Additional Protocols have been adopted in the framework of these activities.³³⁸ But it should be recalled at this point that none of these instruments regulates the question of *liability* for damage resulting from long-range transboundary air pollution.³³⁹ Furthermore, the

³³⁶ On 31 August 1999, this Convention numbered 27 States Parties, including some States from Central Europe, Eastern Europe, as well as Canada. On the other hand, it should be noted that neither Germany, the United States nor France have yet ratified the Espoo Convention. For comments, see KISS, *op. cit.* (footnote 331), § 24-25.

³³⁷ See *supra* footnote 57 and accompanying text.

³³⁸ Protocol of 28.09.1984 on *Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe* (on 25 October 1999, this Protocol was in force in 38 States); Protocol of 08.07.1985 on the *Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent* (21 States); Protocol of 31.10.1988 concerning the *Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes* (26 States); Protocol of 18.11.1991 concerning the *Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes* (17 States); Protocol of 14.06.1994 on *Further Reductions of Sulphur Emissions* (22 States); Protocol of 24.06.1998 on *Heavy Metals* (not yet in force); Protocol of 24.06.1998 on *Persistent Organic Pollutants* (not yet in force). For a brief presentation of these instruments, see BOISSON DE CHAZOURNES/DESAGNÉ/ROMANO, *op. cit.* (footnote 33), pp. 534-536.

³³⁹ The same conclusion also applies to another very important instrument in the environmental field, namely the *Vienna Convention of 22 September 1988 on the Protection of the Ozone Layer*, in force in no less than 164 States. This framework Convention lays down the general objectives and establishes a framework for *cooperation* in the scientific, technical and legal fields, whereas the protocols subsequently negotiated lay down precise quantitative objectives (Montreal Protocol of 1987 and Kyoto Protocol of 1997). The cooperation envisaged by the Vienna Convention in the legal field concerns the means "relevant to the protection of the ozone layer." (Annex II, para. 6).

co-operation measures envisaged by these various instruments relate essentially to *scientific* information aimed at subsequently finding the most rational political solutions.

III. North American Agreement on Environmental Cooperation

The North American Agreement on Environmental Cooperation (NAAEC) has a number of general objectives listed in Article 1.³⁴⁰ It aims, among other things, to “foster the protection and improvement of the environment in the territories of the Parties” (sub-paragraph a), to “promote sustainable development based on cooperation and mutually supportive environmental and economic policies” (sub-paragraph b), to “increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna” (sub-paragraph c) and to “strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices” (sub-paragraph f). The NAAEC also sets out a number of “general obligations”, such as the periodic publication of reports on the state of the environment or the promotion of education in environmental matters, including environmental *law* (Art. 2).

Under Article 3, “each Party [shall] ensure that its laws and regulations provide for high levels of environmental protection and [...] strive to continue to improve those laws and regulations”. A Party must also “effectively enforce its environmental laws and regulations through appropriate governmental action” (Art. 5)³⁴¹ and ensure that “interested persons” are able to request the competent authorities to “investigate alleged violations of [...] environmental laws and regulations” (Art. 6).³⁴² Article 6 also sets out the rights to which a private Party must have access under the domestic law of a Party. Among other things, these include “the right to sue another person under that Party’s jurisdiction for damages”, “the right to seek sanctions or remedies such as monetary penalties, emergency closures or orders to mitigate the consequences of violations of its environmental laws and regulations” and “to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conduct by another

³⁴⁰ For a fuller presentation of this Agreement, see TREBILCOCK/HOUSE, *The Regulation of International Trade*, London 1995, pp. 354-357. It should be noted that an agreement similar to the one presented here has been drawn up between Canada and Chile (*Agreement on Environmental Cooperation between Canada and Chile* (AECCC); see on this subject the information on the Internet site of the National Canadian Secretariat (at the following address: <http://can-chil.gc.ca/English/Resource/Agreements/AECCC/Default.cfm>).

³⁴¹ The duty to ensure the effective enforcement of its environmental rules is a *heavier one than might seem at first sight*. Indeed, this duty is seen as “hard” trade law” (TREBILCOCK/HOUSE, *op. cit.* (footnote 340), p. 354 *in fine*), since it is accompanied by machinery for *sanctions* in the event of violation. If “there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law” (Art. 22, para. 1), dispute settlement machinery similar to that laid down in Chapter 20 of the North American Free Exchange Agreement (NAFTA) applies (Arts. 22-36). This machinery envisages, among other things, the setting up of a panel which could, as a final resort, impose the payment of monetary compensation (a “monetary enforcement assessment”) to the Party having failed to effectively enforce its environmental law (Art. 34, para. 5(b)). Furthermore, if the Party fails to pay a monetary enforcement assessment within 180 days after it is imposed, “any complaining Party or Parties may suspend [...] the application to the Party complained against of NAFTA benefits in an amount no greater than that sufficient to collect the monetary enforcement assessment” (Art. 36, para. 1 (b)). The enforcement of monetary compensation imposed on *Canada* needs a little more explanation (see Annex 36A of the Agreement). The fact is that, if Canada does not pay a monetary enforcement assessment imposed upon it, the panel’s determination is filed “in a [Canadian] court of competent jurisdiction” (Annex 36A, para. 2(a)), which will then have to issue an order “for purposes of enforcement” (para. 2(c)). The panel’s decision is thus treated on a par with a decision made by a foreign court in a civil or commercial matter which Canada is asked to enforce (TREBILCOCK/HOUSE, *op. cit.* (footnote 340), pp. 355-356, whose authors underline the fact that this artifice enabled the Canadian Government in power when this treaty was negotiated to assert that it had been successful in its attempt to dissociate commercial penalties from a breach of environmental obligations).

³⁴² The NAAEC does not give any definition of the term “interested person”. The question whether, for example, a non-governmental organisation can make such a request therefore depends on the internal law of each of the Parties (but see also the comments below, in footnote 344).

person under that Party's jurisdiction contrary to that Party's environmental laws and regulations or from tortious conduct" (para. 3). The administrative, judicial or quasi-judicial proceedings referred to in Articles 5 and 6 must also be "fair, open and equitable" and comply with a number of other procedural guarantees listed in Article 7.

However, the NAAEC envisages above all the establishment of an important environmental cooperation system between the Parties. The cornerstone of this system is the *Commission for Environmental Cooperation* (Art. 8), consisting of a *Council*,³⁴³ a *Secretariat*³⁴⁴ and a *Joint Public Advisory Committee*³⁴⁵ (Arts. 9-19). The Council is the Commission's governing body (Art. 10 (1)). It may make recommendations on a wide range of topics related to the environment (Art. 10 (2 a-s)). Among the topics which the Council may study, there are two which are of particular interest to our study, concerning as they do "transboundary and border environmental issues" (g) and, especially, access to courts and administrative agencies regarding transboundary pollution. Indeed, Article 10 (9) of the NAAEC states that the Council shall consider

"the provision by a Party, on a reciprocal basis, of access to and rights and remedies before its courts and administrative agencies for persons in another Party's territory who have suffered or are likely to suffer damage or injury caused by pollution originating in its territory as if the damage injury were suffered in its territory".

It is precisely on the basis of this provision that the Secretariat of the Commission recently published an excellent information report entitled "Access to Courts and Administrative Agencies in Transboundary Pollution Matters".³⁴⁶ This report concluded that

"existing barriers do indeed diminish or eliminate transboundary access to courts or administrative recourses, particularly in Canada and the United States. Some of these barriers arise from common law jurisprudence, such as the "local access rule" [*Moçambique Rule*]. The interpretation of federal, state and provincial statutes that address a range of environmental issues

³⁴³ The Council consists of cabinet-level or equivalent representatives of the Parties; it must convene at least once a year (Art. 9).

³⁴⁴ The Secretariat has a permanent staff who provide technical and administrative support to the Council. It is headed by an Executive Director chosen by the Council for a three-year term, which may be renewed for one additional three-year term. The position of Executive Director rotates consecutively between nationals of each Party (Art. 11). The Secretariat prepares an annual report, a draft of which is reviewed by the Council; the report covers, among other things, the actions taken by each Party in connection with its obligations under the Agreement, including data on the Party's environmental enforcement activities (Art. 12). Lastly, Arts. 14 and 15 lay down a procedure for a non-governmental organisation or private person to contact the Secretariat asserting that a Party is failing to effectively enforce its environmental law. The Secretariat prepares a factual record if the Council, by a two-thirds vote, instructs it to do so. (Art. 15, para. 2). The Secretariat considers any information furnished by a Party; it will also consider any relevant technical, scientific or other information (Art. 15, para. 4). The final factual record is submitted to the Council (Art. 15, para. 6). The latter, may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission (Art. 15, para. 7). There is no provision for any other penalty or dispute settlement procedure in the event of a factual record unfavourable to the Party concerned. On the other hand, it goes without saying that such a report or record would constitute a solid basis for a complaint against the Party concerned under Arts. 22-36 of the Agreement (for a brief description of this dispute settlement machinery, see *supra* footnote 341).

³⁴⁵ The Joint Public Advisory Committee is, in principle, composed of 15 members, each Party appointing an equal number of members (Art. 16, para. 1). The Joint Public Advisory Committee may provide advice to the Council on any matter within the scope of the Agreement, including on any documents provided to it, and also on the implementation and further elaboration of the Agreement. The Joint Public Advisory Committee may also perform such other functions as the Council may direct (Art. 16, para. 4).

³⁴⁶ Montreal, May 1999, 86 p. This document has already been quoted a number of times in this Note.

also raises concerns for transboundary access of citizens in the other country to domestic legal and administrative processes.³⁴⁷

This conclusion once again highlights - if there were any need - the necessity to lay down clear and precise rules of international jurisdiction to make it possible to bring an action for compensation for transfrontier environmental damage.

Chapter 2 – Legislative cooperation

I. Introduction - Numerous invitations to draw up civil liability rules

A number of international instruments *expressly* invite the Contracting States to cooperate either directly or through *competent international organisations* with a view to drawing up rules on *liability* for environmental damage. In general, it is not specified whether the aim is to develop a system of *unified substantive law*, *rules of private international law* or a *mixed regime*. Yet there is quite clearly no reason to automatically exclude the development of rules of private international law from these invitations.

Let us take the example of the two 1992 *Helsinki Conventions*, adopted under the auspices of the United Nations Economic Commission for Europe. The former Convention relates to the *transboundary effects of industrial accidents*,³⁴⁸ the latter to the *protection and use of transboundary watercourses and international lakes*.³⁴⁹ These two instruments contain an identical provision (Art. 13 of the Convention on Industrial Accidents, Art. 7 of the Convention on Watercourses), which states that:

"The Parties shall support appropriate international efforts to elaborate rules, criteria and procedures in the field of responsibility and liability."

It should be stressed here that the Permanent Bureau has been given confirmation that this provision (also) related to *civil* liability. This means that the Parties to these Conventions could, at least partially, give concrete form to their commitment by approving and supporting an initiative of the Hague Conference aiming at the drawing up of rules of private international law on civil liability resulting from transfrontier environmental damage.

The conclusion is the same for a number of other conventions. In fact, provisions similar to the one just quoted are found in the *Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region*,³⁵⁰ the *Convention on the Protection of the Marine Environment of the Baltic Sea Area*³⁵¹ or in the *Convention on*

³⁴⁷ Secretariat of the Commission for Environmental Cooperation, *op. cit.* (footnote 60), p. 7. However, it must be stressed that the Commission's report also concludes that "[t]he situation in Mexico is, in some ways, different. Mexico has few legal obstacles to equal access" (*ibid.*).

³⁴⁸ See *supra* pp. 70 *et seq.*

³⁴⁹ This Convention, which has not yet been referred to in this Note, entered into force on 6 October 1996. On 2 August 1999, it numbered 24 States Parties (see the ECE Internet site at the following address: <http://www.unece.org/env/water/welcome.html>).

³⁵⁰ Under Art. 14 of the Convention, the Contracting Parties must *cooperate* with a view to adopting appropriate rules and procedures, which are in conformity with international law, in the field of *liability* and *compensation* for damage resulting from pollution of the Convention area.

³⁵¹ A first Convention on the Protection of the Marine Environment of the Baltic Sea Area was adopted in 1974. It was replaced by a new instrument in 1992, which entered into force on 17 January 2000. Art. 25 of the Convention lays down that the Contracting Parties undertake to accept rules concerning responsibility for damage resulting from acts or omissions in contravention of the Convention.

the Protection of the Mediterranean Sea against Pollution.³⁵² And there is a similar invitation in the United Nations Convention on the Law of the Sea.

II. The United Nations Convention on the Law of the Sea

The *Convention on the Law of the Sea (Montego Bay Convention)*,³⁵³ adopted on 10 December 1982 by the Third United Nations Conference on the Law of the Sea, entered into force on 16 November 1994. It is almost universal in character, since over 130 States are parties to it. The new Convention on the Law of the Sea constitutes as it were a general and complete code of all the provisions relating to maritime spaces; it consists of 320 articles and 9 annexes and deals with questions as varied as the regime of the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf and the high seas, the protection and preservation of the marine environment, the conservation and management of the biological resources of the sea, right of access of land-locked States to and from the sea, global and regional cooperation, etc.

For the purposes of this Note, Article 235 is of particular interest. Under the first paragraph of this provision, States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment (Part XII of the Convention); it reminds States that they may be liable in accordance with international law. Paragraph 2, reads as follows:

“States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.”

While these words may not be free from ambiguities,³⁵⁴ this provision can legitimately be seen as applying also to relations *between private persons*.³⁵⁵ The advantage of such an approach seems clear, in that the pollution of the marine environment by a natural juridical person “under the jurisdiction”³⁵⁶ of State A can cause serious harm to persons having their habitual residence or their seat in State B. In the former case, one might imagine a group of fishermen who, as a result of the pollution, are prevented from exercising their profession and find themselves deprived of an income; in the latter case, one might imagine a hotel complex the bulk of whose clientele stop coming and whose commercial viability is greatly affected by the marine pollution. In the courts of which State are these injured parties going to bring their actions? Which law would be applicable to such an action, etc.? The “prompt and adequate” recourse that State A should implement to allow for compensation for damage caused by persons “under its

³⁵² Under Art. 4 of this Convention, signed in 1976, the Contracting Parties shall individually or jointly take all appropriate measures to prevent, abate and combat pollution of the Mediterranean Sea area and to protect and enhance the marine environment in that area. Under Art. 12, the Contracting Parties undertake to adopt rules on liability for the pollution of the marine environment deriving from violations of the provisions of the Convention and Protocol. More than twenty years after its adoption, this undertaking has still not yet been given concrete form although discussions are ongoing. In September 1997, the plan of action for the Mediterranean held its first meeting of technical and legal experts entrusted with the task of drawing up rules and procedures for determining liability and compensation for damage resulting from the pollution of the marine environment in the Mediterranean. However, the participants considered that it was still too soon to adopt a protocol in this field. The meeting therefore requested the Secretariat to continue to gather information on international practice in this sphere so that it may study it at a subsequent meeting.

³⁵³ See UN Doc. A/CONF.62/122 of 7 October 1982; the French and English texts of this Convention are found, *inter alia*, in BURHENNE, *op. cit.* (footnote 13), under No. 982:92/001.

³⁵⁴ It should be noted that, for the purposes of the Convention, pollution of the maritime environment means “the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities” (Part I, Art. 1, para. 1(4)).

³⁵⁵ See, for example, ANTONIO FILIPO PANZERA, *The Montego Bay Convention and the Procedural Means for Enforcing International Rules on the Protection of the Marine Environment*, in: *Essays on the New Law of the Sea*, B. Vukas (ed.), Zagreb 1985, p. 390, for whom Art. 235 constitutes one of the *exceptions* where the Convention touches on the *civil* aspects of the damage caused by pollution of the marine environment.

³⁵⁶ On the subject of this expression, see *infra*, p. 76.

jurisdiction" will only be available if the applicable rules of private international law confer jurisdiction on that State and if, in addition, its own law is applicable.³⁵⁷ If the courts of State B were to be seised, the recourse provided for by State A could not be brought into play unless the conflict rules of State B make them applicable. Furthermore, why would the harm caused by pollution always be judged under the law of the polluter? The comparative study in Part I of this Note has shown that the application of *lex loci actus* is only one of a number of solutions. There is no reason to adhere solely to the link in favour of the law of the polluter and to automatically exclude the application of any other law.

Also, Article 235, paragraph 2, can thus legitimately be considered as relating to private law and the terms of reference laid down as only being satisfied if the substantive rules adopted by a State are accompanied by unified rules of conflict. These rules should relate not only to questions of jurisdiction and effects of foreign judgments, but also to the question of the applicable law. The necessity to extend the terms of reference to the rules of private international law seems to us all the more essential as the *Montego Bay* Convention is of virtually universal application, yet without imposing a unified civil liability regime. Over 130 States are invited to adopt provisions for "prompt and adequate" compensation or other relief in respect of damage caused by pollution of the marine environment. The various regimes adopted will necessarily vary one from another, whence the necessity of laying down rules which will determine which will apply in a case of international pollution. Relatively speaking, it is no exaggeration to say that a possible Hague Convention on Civil Liability for Environmental Damage could have the same relationship to the *Convention on the Law of the Sea* as the Hague Conventions on the adoption or abduction of children have to the *United Nations Convention on the Rights of the Child*. This complementarity between different international instruments seems to us all the more desirable in that Article 235, paragraph 3, of the *Convention on the Law of the Sea* expressly states that with the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, "States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes". This is an expression of clear and manifest political will which cannot be ignored by the international community of States.

Lastly, let us also note that, if one accepts the idea that Article 235 of the Convention also applies to private law claims, the expression "under their jurisdiction" should perhaps be clarified, not to say amended. One has only to think of the problem of a company incorporated or formed under the law of State A, but all of whose activities are conducted from State B, or the situation in which the damage is imputable to a branch of a multinational. Which jurisdiction do these entities come under? There can be no doubt that, here too, a possible Hague Convention could provide a good many clarifications and offer solutions to the problems which the *Montego Bay* Convention declined to resolve.

³⁵⁷ The question whether the injured parties may claim *economic damage* will, for example, come under the law applicable to the merits (*lex causae*).

Chapter 3 – Conclusions

In the light of the foregoing, what conclusions can be drawn regarding the content of a chapter on international cooperation in a future Hague Convention on Civil Liability resulting from Transfrontier Environmental Damage?

Let us note to begin with that major structures already exist for promoting *the exchange of technical and scientific information* relating to ecological accidents. This aspect of the matter ought therefore not to constitute the principal focus of a possible Hague Convention in this field.³⁵⁸ The focus, in our view, should rather be on the following elements. One first crucial point concerns *administrative authorisations*. We have already noted that in order to tackle the problems which a court seized with an action for civil liability resulting from transfrontier environmental damage may experience with an administrative authorisation issued by a foreign authority “immunising”, partly at least, the beneficiary of the authorisation against claims for compensation, a system of *cooperation* between the two States should be developed.³⁵⁹ This cooperation would have a dual purpose. For one thing, it would seek to ensure the *equitable participation* of persons residing in another State in the procedure leading to administrative authorisation (right to be heard); also, for the *effects* linked to the authorisation issued by the foreign authority to be recognised in the forum State, they should be *similar* to those which the forum State attaches to its own authorisations. This international cooperation would therefore seek to give concrete form to the principles of *the equivalence* of the authorisations and of *the equality* of the potential victims.

A system of international cooperation would also be beneficial as regards questions relating to *access to information*. The principal objective would be to ensure that a victim of an ecological accident has access to specific information he or she needs in order to establish a right to compensation, notably to prove the causal link between the accident and the damage sustained. We have already emphasised that such a system should be very carefully considered, bearing in mind the various interests at stake. One of the things that would have to be done would be to carefully weigh up *against whom* such a right of access to information could be exercised and what the *procedure* would be.³⁶⁰

A third point which would deserve consideration concerns *collective actions*. The chief advantage of this type of action is that it groups together claims, thus avoiding a proliferation of proceedings. We have seen that, in the United States, the *class actions* system makes it possible not only to group together the victims from one single State, but the victims of two or more States also.³⁶¹ Consideration should be given to whether the advantages of such a system can be transposed to the international plane and, if so, whether rules relating to collective actions should be inserted into a Hague Convention on Civil Liability resulting from Transfrontier Environmental Damage. One of the first questions for consideration would be the nature of these rules: should the Convention lay down *substantive rules* on collective actions, provisions dealing solely with matters of *private international law*, or a *mixed* system? If it were to be decided to draw up substantive rules, one of the things which would have to be evaluated is the necessity for regulating how the grouping together of the victims is organised. Is it, for instance, conceivable to establish a *system of cooperation* with, in each State, an authority which, in the event of an incident abroad, would be instructed to invite, in the press for

³⁵⁸ While it cannot be excluded that the future Hague Convention may make it an obligation for every Contracting State in whose territory an industrial accident occurs to warn and inform all the other States in danger of being affected by the effects of the accident, it must be acknowledged that, to be really effective, such a system should operate round the clock, seven days per week.

³⁵⁹ See *supra*, pp. 40 *et seq.*

³⁶⁰ See *supra*, pp. 65 *et seq.*

³⁶¹ Let us recall that, when the jurisdiction of the federal courts is based on the *diversity of citizenship of the parties*, only the citizenship of the *representatives* of the group is considered, to the exclusion of that of the other members of the group, see *supra* p. 56.

example, all persons considering themselves to have been the victims of damage resulting from this incident *to make themselves known* within a certain time-limit and to *inform* them of the possible procedure for collective action? Furthermore, if the damage were to occur in several States, collaboration between the authorities of these different States might well be envisaged.³⁶²

Another task which might be entrusted to such national authorities would be to inform the other authorities of the *content* and *the application of substantive law* on environmental liability in their country. An exchange of information of this kind would be especially welcome if the Convention, in one form or another, were to envisage a link to the law most favourable to the injured party (*Günstigkeitsprinzip*).

Lastly, if the Hague Conference were to be given the task of preparing a Convention on Civil Liability resulting from Transfrontier Environmental Damage, it might perhaps be appropriate to look at the possibility of laying down, in an additional protocol for instance, an *alternative dispute settlement procedure*. Indeed, it cannot be ignored that ecological accidents do not always give rise to judicial proceedings and that the party responsible for the accident, in order to preserve his image, often makes the first move and "voluntarily" indemnifies the victims. It might be appropriate to provide a formal framework for such action and make it more predictable by adopting rules relating essentially to organisation and cooperation between the various parties involved (those responsible, the victim(s), legal and technical expert(s), etc.).

It goes without saying that the few elements mentioned here are no more than a first outline and that further, more detailed studies of them would be required were the Hague Conference to be given the task of preparing a Convention on Civil Liability resulting from Transfrontier Environmental Damage.

³⁶² See *supra*, pp. 54 et seq.

Résumé and conclusions

I. Résumé

The main aim of this Note was to give the experts who will attend the forthcoming *Special Commission on General Affairs and Policy of the Hague Conference on Private International Law* (May 2000) certain information indispensable to the task of deciding whether or not the Conference should prepare a Convention on Civil Liability resulting from Transfrontier Environmental Damage. The aim was, in particular, to present the main international instruments already drawn up in this field and to outline – where possible – the different subjects which might be discussed in a possible Hague Convention. The results of our study may be summarised as follows:³⁶³

As regards the *first* part of the Note (applicable law):

- 1) A regime of *unified substantive law* on civil liability for damage caused to the environment, broadly ratified and operating satisfactorily, is only in place for two types of ecological disasters: incidents associated with the use of *nuclear energy* and *petroleum*. These two fields would not, at first sight, appear to require the preparation of a Hague Convention.
- 2) For the other types of natural disasters, while a regime of unified substantive law may have been developed in the context of the *Lugano Convention of 21 June 1993 on Civil Liability for Damages resulting from Activities Dangerous to the Environment*, there is no escaping the fact that this Convention has not yet entered into force and that its future looks uncertain. Also, it is not an instrument intended for global application.
- 3) A brief survey of a number of *national regimes* on environmental liability or responsibility has brought to light some major *disparities*, not only between States with a distinct legal culture, but also between States with a similar one. These regimes differ in several respects: *nature, content* and *effects*.
- 4) These differences between national systems foster and enhance the need for rules on conflicts of laws. From this standpoint, there can scarcely be any doubt that the drawing up of unified rules on conflicts of laws in the area of civil liability resulting from transfrontier environmental damage would be justified. As to the content of such rules, we will simply say that the principle of the application of the law most favourable to the interests of the injured party (*Günstigkeitsprinzip*) is more widespread than would appear at first. Also widespread is the link to the law of the place where the damage occurred (*lex damni*). Lastly, there is another trend in favour of the law of the forum (*lex fori*). In the context of a possible Hague Convention, the role to be assigned to party autonomy should also be studied carefully.
- 5) Another problem for which a possible Hague Convention might provide a solution concerns the effects of a *foreign administrative authorisation* (a plant operating permit for example) relied on by the defendant in legal proceedings. Can such an authorisation limit (or even exclude) the plaintiff's claims? The solution outlined in this Note is to promote

³⁶³ The reader is asked to refer to the table of contents to identify the pages where the subjects mentioned are discussed in greater detail.

international cooperation with a view to guaranteeing the *equitable participation* of foreign residents in the procedure leading to the granting of the authorisation (right to be heard) and to ensure that there is a certain *equivalence* in the effects of the administrative authorisations.

- 6) Among the other problems which should also be dealt with in a future Hague Convention, we will only mention here the consideration by the court of the forum of the rules of security and conduct in force at the place where the harmful act occurred, the plurality of persons liable, the right of recourse as between persons jointly liable, the effects of an insurance contract concluded by the polluter and the liability of a parent company for acts perpetrated by one of its branches abroad.

As regards the *second* part of the Note (procedural questions):

- 1) The chief bases of jurisdiction a possible Hague Convention might envisage are the place of the *harmful act*, the place where the *harm* occurred and the place of the *defendant's habitual residence*. The omission should be treated on a par with the act. Places where only *indirect* harm has been sustained ought probably to be excluded as bases of jurisdiction. Also, it should be permissible to bring an action even if the act (or omission) or the harm have not yet occurred, but are merely *likely* to occur.
- 2) The question whether the jurisdiction of the courts of the place where the *harm* occurred should be limited solely to harm which has actually occurred (or could occur) *in that State* deserves detailed consideration. In fact, ecological disasters often claim victims in *several States*. What is more, they often give rise to *mass tort litigation* involving a large (or even enormous) number of victims. It may therefore be wondered whether the principle of the effective administration of justice does not require *one single court to be able to rule on all the damages*. Such comprehensive jurisdiction might perhaps be conferred on the court of the place of the *defendant's habitual residence*, but perhaps also on the courts of one of the places where harm has occurred.
- 3) In view of the fact that ecological accidents often give rise to *mass tort litigation*, a possible Hague Convention should also deal with the question of *collective actions*. In this connection, the first question to resolve would probably be whether the Convention should lay down *substantive rules* (unified substantive regime), provisions dealing only with questions of *private international law*, or a *mixture* of the two.
- 4) Another question requiring careful consideration concerns *access to information*. In a civil liability action, it can be crucial for the plaintiff to have access to specific information, for example in order to establish the causal link between emissions from an installation and the damage sustained. Were such rules to be prepared, careful consideration would have to be given to the issue of *against whom* the right of access to information could be asserted (public authorities and/or operators), as well as to the relationship between these rules and other regimes, notably the 1970 *Hague Convention on the Taking of Evidence Abroad*.
- 5) The recognition and enforcement of foreign judgments should not pose any further difficulties over and above those tackled in the Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.

As regards the *third* part of the Note (international cooperation):

- 1) International environmental law grants great importance to *transfrontier cooperation*. This principle has already been given concrete expression in many international instruments. A possible Hague Convention might draw inspiration from them in several respects. For instance, there would appear to be a need for international cooperation to ensure that the authorities of a State take account of the interests of persons residing in another State before authorising a potentially dangerous activity.
- 2) A system of international cooperation could also be set up to ensure that the different interests at stake are respected when a party wishes to have *access to information* abroad.
- 3) International cooperation could also form part of a system for *collective actions* (each State might, for example, designate an authority responsible for organising on its territory *a call for victims to come forward* after an ecological accident on the territory of another State).
- 4) Consideration should also be given to the possibility of laying down *rules promoting the non-contentious settlement of disputes*.
- 5) Lastly, it has been noted that a number of international instruments already drawn up in the environmental protection field *invite the States Parties to support the appropriate international initiatives aimed at drawing up rules on liability*. Although these invitations do not always make it clear what type of liability is entailed (international or civil), there is nothing which automatically excludes the drawing up of private international law rules.

II. Conclusions

For several years now the subject of civil liability for environmental damage has featured on the Hague Conference agenda. It must be acknowledged that the principal issues to be dealt with in a possible Hague Convention have not basically changed or developed over the past few years. Although the difficulties associated with such a project should not be underestimated, it also needs to be emphasised that the nature of the principal problems is known and that, technically speaking, it seems perfectly feasible to develop solutions.

Let us remind ourselves again that Principle 22 of the *Stockholm Declaration* of 16 June 1972 and Principle 13 of the *Rio Declaration* of 13 June 1992 call upon States to cooperate to develop further the international law regarding liability and compensation for the victims of pollution. *Principle 22 of the Stockholm Declaration* states that:

"States 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."

And *Principle 13 of the Rio Declaration on Environment and Development*, adopted by the United Nations Conference on Environment and Development states that:

"States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction."

The preparation of a possible *Hague Convention on Civil Liability resulting from Transfrontier Environmental Damage* would not only give concrete form to these undertakings, but would also provide a very useful complement to the network of international instruments which already exist in the field of environmental protection. Indeed, if environmental law has long remained the exclusive preserve of *public* international law, it is because *private* international law did not offer a sufficiently relevant regime. The Conference could change all this and thereby contribute to the rapprochement which is increasingly desired between public international law and private international law. At the same time, it would help to fashion the image of the new century, for, as the *Worldwatch Institute* states in its recent report on the *State of the World in 2000*: "[I]t is environmental trends that will ultimately shape the new century."