Private Remedies for Transfrontier Environmental Damage: a Critique of OECD's Doctrine of Equal Right of Access

E. Willheim
Senior Assistant Secretary, Attorney-General's Department*

> Suppose a factory in country A discharges its industrial waste into a river which flows through country B. X, a downstream farmer in country B, uses the contaminated riverwater for irrigation, and his crops are damaged.
>
> or
>
> Suppose the same factory in country A discharges chemicals into the atmosphere and those chemicals are borne into country B, causing damage to the crops of farmer X in country B.

Farmer X wishes to sue the factory owner to obtain compensation for the damage to his crops. Should X sue in country A or in country B?

Here we have two classic examples of what is now commonly referred to as 'transfrontier pollution damage'. An activity in one country has caused environmental damage in a neighbouring country. The victim of that damage wishes to obtain compensation by bringing an ordinary civil action for damages.[1] The question is whether he should sue in the courts of the State in which the activity causing the damage took place (country A, in the above example) or in the courts of the State where the damage was sustained (country B). The Council of the Organisation for Economic Co-operation and Development (OECD), in a series of Recommendations based on studies by its Environment Committee and Transfrontier Pollution Group, has in effect decided that the first alternative is preferable.[2] The Council's Recommendations establish principles directed at the facilitation of the bringing of such an action in the courts of the State where the pollution originated, by affording the foreign victim of the polluting activity 'equal right of access' to those courts. The OECD's work in this area has already attracted widespread attention,[3] although its

---

* The views expressed herein are those of the writer personally and do not necessarily reflect those of the Attorney-General's Department.

1. It may be that the circumstances in the two examples will also give rise to international responsibility and liability on the part of State A, in accordance with Principle 21 of the Declaration of the United Nations Conference on the Human Environment (see below fn 26). This article will, however, deal only with private law remedies, through domestic legal systems.
2. C(74)224, C(76)55 (Final), C(77)28 (Final).
3. Eg in the Asian-African Legal Consultative Committee (AALCC) - see Brief of

conclusions have not always been supported.[4] It will be maintained in this article that the approach adopted in the OECD is likely to be more favourable to the originator of the pollution damage than to the victim of that damage and that although the principle of equal right of access may have some merit in a regional framework, or between a group of relatively homogeneous countries such as those that make up the OECD, it is not the best approach and should not be adopted on a universal basis. From the point of view of the victim of transfrontier pollution damage, a preferable approach is that he should be in a position to bring an action for compensation in his own courts, that is in the courts of the State where the damage was sustained. Ideally, the victim should have a choice of forum.

Summary of Relevant OECD Council Recommendations

The OECD's first foray into this area came as part of the wide ranging Council Recommendations on Principles Concerning Transfrontier Pollution, adopted on 14 November 1974.[5] In that instrument, the Council recommended that 'Member countries should be guided in their environmental policy by the principles covering transfrontier pollution contained in this Recommendation and its Annex'. Title D of the Annex is headed 'Principle of Equal Right of Hearing'. The Principle is in two parts. The first part deals with rights of standing in relation to public investigation of a new activity or course of conduct, and will not be dealt with further here. The remainder of the principle is as follows:

> 'Countries should make every effort to introduce, where not already in existence, a system affording equal right of hearing, according to which:
> (a) . . .
> (b) whenever transfrontier pollution gives rise to damage in a country, those who are affected by such pollution should have the same rights of standing in judicial or administrative proceedings in the country where such pollution originates as those of that country, and they should be extended procedural rights equivalent to the rights extended to those of that country.'

The Council also instructed its Environment Committee 'to investigate further the issues concerning equal right of hearing'.[6]

Progress in the OECD on this subject was speedy. By April 1976 the Environment Committee had presented a comprehensive report on Equal Right of Access in Relation to Transfrontier Pollution[7] and on 11 May

---

Documents on Environmental Law prepared by the AALCC Secretariat for the Eighteenth Session of the Committee, Baghdad, February 1977; and in the United Nations Environment Programme (UNEP)—see UNEP/WG.8/2.

4. Eg in UNEP: see UNEP/1G.7/3 (10 February 1977) pp 16-17, UNEP/WG.8/3 (6 April 1977), para 17.
5. C(74)224.
6. Ibid, paragraph V.
7. C(76)55.

1976 the OECD Council adopted its first Recommendation on the specific subject of equal right of access.[8] For the first time, the concept of equal right of access was defined. The Annex to the Recommendation, 'which constitutes an integral part of this Recommendation',[9] sets out the 'constituent elements of a system of equal right of access'. The first paragraph merits quotation in full:

> '1. A system of equal right of access is made up of a set of rights recognised by a country in favour of persons who are affected or likely to be affected in their personal and/or proprietary interests by transfrontier pollution originating in such country and whose personal and/or proprietary interests are situated outside such country (hereafter referred to as "persons affected by transfrontier pollution").'

Paragraph 2 of the Annex sets out the circumstances in which this system of equal right of access is to be applied. The paragraph deals in part with the application of equal right of access in the case of new projects or activities, which are not material here. So far as relevant, the remainder of the paragraph is as follows:

> '2. . . . the rights accorded to "persons affected by transfrontier pollution" should be equivalent to those accorded to persons whose personal and/or proprietary interests within the territory of the country where the transfrontier pollution originates are or may be affected under similar conditions by a same pollution, as regards:
>
> . . . . .
>
> (b) recourse to and standing in administrative and judicial procedures (including emergency procedures);
>
> in order to prevent pollution, or to have it abated and/or obtain compensation for the damage caused.'

An OECD Council Recommendation is not, of course, binding on the member States of the OECD,[10] but it carries considerable weight. Operative paragraphs I, II and III of the Recommendation set out clearly the action that the Council 'recommends' that members take. First, they 'should endeavour to remove . . . the obstacles which may exist in their legal systems to the implementation of a system of equal right of access'.[11] But mere removal of obstacles is not enough. Positive action is also called for. 'Member countries, even where their legislation already implicitly provides for equal right of access, should introduce into their legislation and regulations relating to the environment any explicit provisions that may appear to them to be necessary to ensure a system of equal right of access'.[12] Finally, there is a call for international action. 'Member countries should consider . . . the advisability of concluding . . . agreements

8. C(76)55 (Final), Recommendation of the Council on Equal Right of Access in Relation to Transfrontier Pollution.
9. Ibid, Operative paragraph I.
10. Only decisions are binding: see Convention on the Organization for Economic Co-operation and Development (1960), Article 5.
11. C(76)55 (Final), operative paragraph I.
12. Ibid, Operative paragraph II.

on environmental protection designed to ensure the application of the principle of equal right of access'.[13] Again, the council also instructed its Environment Committee to go deeper in its work on equal right of access.[14]

Progress continued to be speedy. In little more than a year the OECD Council, on 17 May 1977, adopted a comprehensive Recommendation for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution.[15] It appears that this is intended to be the final, and definitive, recommendation in the series, as on this occasion there is no call for further work. Somewhat surprisingly, this Recommendation is not accompanied by a report of the OECD's Environment Committee.[16] Rather, there is a Report by the OECD Secretary-General,[17] to which the Council has regard in its Recommendation.[18] Again the Recommendation is not binding on members; the Council 'Recommends that Member countries, in regard to each other, take into account the principles concerning transfrontier pollution set forth in the Annex to this Recommendation, which is an integral part of it, in their domestic legislation . . .'.[19]

On this occasion, the Annex is more wide ranging than the Annex to the 1976 Recommendation;[20] it is reminiscent rather of the Annex to the original 1974 Recommendation[21] and its coverage extends far beyond the concepts of equal right of access and non-discrimination. Indeed, much of the Annex is directed not only at the facilitation of private remedies for transfrontier pollution but also at the conduct of States at the public law level. Only paragraph 4, under Title B, 'Legal Protection of Persons', need be considered here. Paragraph 4 is as follows:

> '(a) Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution, should at least receive equivalent treatment to that afforded in the Country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status.
>
> (b) From a procedural standpoint, this treatment includes the right

13. Ibid, Operative paragraph III.
14. Ibid, Operative paragraph IV.
15. C(77)28 (Final).
16. From conversations with several participants in the Transfrontier Pollution Group and the Environment Committee, the writer understands that this change is to be explained by the absence of consensus within the Transfrontier Pollution Group and the Environment Committee. Indeed, it seems that the impetus for this Council Recommendation came more from the OECD Secretariat than from member Governments.
17. Report on the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, being Appendix I to C(77)28, 18 March 1977.
18. C(77)28 (Final), Preamble, para 4.
19. This is the only 'operative' paragraph.
20. C(76)55 (Final).
21. C(74)224.

> to take part in, or have resort to, all administrative and judicial procedures existing within the Country of origin in order to prevent domestic pollution, to have it abated and/or to obtain compensation for the damage caused.'

Although couched in somewhat different terms from the earlier Recommendations,[22] this paragraph does not appear in substance to add anything new. The object of the Recommendation is explained in the accompanying Secretariat Report.[23] It is said that such a regime of equal right of access aims to ensure that the protection against transfrontier pollution is not inferior to that existing in relation to pollution occurring within the Country of origin of the transfrontier pollution. The regime should contribute in particular to giving victims of transfrontier pollution possibilities of protecting their environment no less effective than those available to victims of comparable pollution within the Country of origin of transfrontier pollution.[24] The Secretariat Report goes on to claim that the implementation of such a regime could lead to the avoidance of a large proportion of transfrontier pollution problems.[25] How this will result is not altogether clear, although one may agree with the Secretary-General that by facilitating the use of domestic proceedings such a regime should enable many transfrontier problems to be resolved in a direct manner and might reduce the need to involve the public law responsibility and liability of the Country of origin.[26]

In short, the OECD Council has on three occasions, after detailed consideration by its Environment Committee and Transfrontier Pollution Group, chosen the State in which the pollution originates, the State in which the polluting activity takes place, as the appropriate forum for the adjudication of private actions in respect of transfrontier pollution damage. The highest organ of the OECD has recommended that member countries of the OECD should, in effect, adopt in their domestic legislation provisions that would, especially from a procedural viewpoint, facilitate this course.

Impact of the OECD's Work

Although the OECD is not the only international body to have examined the question of private remedies for transfrontier pollution damage, it appears to have examined the question in greater depth than has been possible elsewhere. For this reason, and because of the great importance of the OECD as an international organization, the OECD's work in this

22. See C(74)224, C(76)55 (Final).
23. C(77)28, Appendix I.
24. Ibid, para 6.
25. Ibid, para 7.
26. Ibid. For the argument in support of the use of public law remedies, see Hoffman, 'State Responsibility in International Law and Transboundary Pollution Injuries', (1976) 25 ICLQ 509. A recent UNEP Expert Working Group has, however, favoured 'low level solutions'—see the Report of the Group of Experts on Liability for Pollution and other Environmental Damage and Compensation for such Damage, 6 April 1977, UNEP/WG.8/3, para 10.

area is already attracting widespread political and academic attention.[27] For example, it has already been cited within the Asian-African Legal Consultative Committee[28] and the United Nations Environment Programme (UNEP).[29] It is therefore timely that the principles adopted within the OECD should be subject to analysis and criticism lest by default they become accepted as the norm suitable for adoption on a universal basis.

Arguments in Support of the OECD Approach

Undoubtedly there are a number of cogent legal and policy arguments to support the exercise of jurisdiction by the courts of the State where the act or omission that gave rise to the damage took place—the *lex loci delicti commissi*. The courts of this State will have jurisdiction according to the traditional private international law rules in force in a number of legal systems, especially civil law systems.[30] If the State where the polluting activity took place is also the State where the polluter is resident or domiciled, or carries on business, then *prima facie* the courts of that State will have jurisdiction according to almost all legal systems.[31]

It is undoubtedly consistent with normal expectations, at least in situations not having an international element, that an activity will be regulated in the place where it is carried out. The courts in that place will in many respects be in the best position to judge the culpability of the activity. If the act or omission complained of caused damage in a number of other States, this approach will enable all claims arising out of that act or omission to be dealt with in the one jurisdiction. From the defendant's

27. For academic comment, see Stein, 'The OECD Guiding Principles on Transfrontier Pollution' (1976) 6 Georgia J of Int and Comp Law 245; McCaffrey, 'The OECD Principles Concerning Transfrontier Pollution: a Commentary', (1975) 1 Env P and L 2; Rest, 'Transfrontier Environmental Damages: Judicial Competence and the Forum Delicti Commissi', (1975) 1 Env P and L 127; (hereinafter cited as 'Rest, Article'); Seidl-Hohenveldern, 'Alternative Approaches to Transfrontier Environmental Injuries', (1976) 2 Env P and L 6; Smets, 'The OECD Approach to the Solution of Transfrontier Pollution Problems', and McCaffrey, 'Private Remedies for Transfrontier Pollution Injuries', both in Nowak (ed), *Environmental Law, International and Comparative Law, a Symposium* (1976); also McCaffrey's larger work, *Private Remedies for Transfrontier Environmental Disturbances* (IUCN Environmental Policy and Law Paper No 8, 1975); the Draft Convention on Compensation for Transfrontier Environmental Injuries prepared by Rest and the commentary to that Convention (published by the Erich Schmidt Verlag, FUST project no 56, hereinafter cited, respectively, as 'Rest, Convention' and 'Rest, Commentary'); and Kiss, *Survey of Current Developments in International Environmental Law* (IUCN Environmental Policy and Law Paper No 10, 1976) pp 37-40.

28. See Brief of Documents on Environmental Law prepared by the AALCC Secretariat for the Eighteenth Session of the Committee, Baghdad, February 1977.

29. Eg UNEP/WG.8/2.

30. See, eg Germany, Rules of Civil Procedure, para 32; France, Code of Civil Procedure, Article 46. But see also fn 65 below concerning the jurisdiction of the courts of the place where the damage occurred.

31. Thus in England a court normally has jurisdiction to entertain an action *in personam* if the defendant is in England and is served with the writ in England (Dicey and Morris, *Conflict of Laws*, 9th ed (1973) p 158). But see below for circumstances that may prevent the exercise of jurisdiction, for example, where an action involves damage to real property outside the jurisdiction.

point of view, this is likely to simplify the adjudication of claims; it is arguable also that it is likely to ensure equity as between claimants. Moreover, if the defendant is exposed to legal proceedings only in his own courts, then on the assumption that the dispute will be adjudicated according to the *lex fori*,[32] he can predict with greater certainty the legal consequences of his conduct, and regulate his affairs accordingly; for example, he is in a position to assess the legal risks to which he exposes himself and to insure against them. Finally, judgments of courts in the State where the activity took place will readily be enforceable against the defendant.

If it is desirable that the action be brought in the courts of the State where the act or omission that gave rise to the damage took place, then of course any obstacles that would hinder access to those courts by a foreign plaintiff should be removed. The legal obstacles may be substantial. Thus a foreigner may not have a right of access to the courts. Financial assistance, or legal aid, may not readily be available. Security for costs may be required. Courts may not have jurisdiction to protect certain foreign interests, or to adjudicate upon disputes involving foreign property, especially foreign land. It is against obstacles of this kind that the principle of equal right of access is directed. In short, the foreign plaintiff should have the same access to the courts of the State where the pollution originates as would the domestic victim of pollution damage.

Arguments Against the OECD Approach

It will have been apparent that most of the arguments advanced to support the exercise of jurisdiction by the courts of the State in which the pollution originates are developed from the perspective of the defendant polluter. From the perspective of his foreign victim the scenario is somewhat different. The ordinary victim of transfrontier pollution damage is likely to be shocked and dismayed when his legal advisers inform him that to recover compensation he must litigate in a foreign State. It is unlikely that he will have the same confidence in the impartiality of the foreign courts as he would have in respect of his own courts. The availability of 'equal right of access' will be but small consolation when he is faced with the daunting prospect of litigation in a place that is geographically remote, probably conducted in a foreign language, according to foreign procedures, and almost certainly according to a foreign legal system. As has already been observed, legal aid is less likely to be available, and he may be called upon to provide security for costs. Time limits for instituting proceedings may be different. The list goes on.

The reaction of the layman to advice that litigation must be instituted abroad will therefore almost certainly be 'since the damage was caused here, why cannot the courts of this country provide a remedy'. From the victim's viewpoint, the logic of this simple argument is compelling. After all, it is the originator of the transfrontier pollution damage, and not his foreign victim, who has engaged in activity having international conse-

32. The question of applicable law is discussed in greater detail below, pp 193 et seq.

quences. Why should the involuntary victim of that activity be the one who is obliged to go into a foreign jurisdiction and to bear the extra burden of foreign litigation.[33]

Nor are obstacles such as remoteness, language, unfamilarity and expense the only objections to the exercise of jurisdiction in the State where the pollution originated. A number of sound jurisprudential arguments favour the exercise of jurisdiction in the State where the damage was sustained.

Most private actions seeking compensation for pollution damage will be brought in tort. Both the act or omission that caused the damage and the damage itself are legally relevant. The OECD approach emphasises the act or omission as the predominant factor in the suit. But the suffering of damage will be as intrinsic a part of the cause of action as the activity which gave rise to that damage.[34] Indeed, in actions involving pollution damage, it is surely the harmful consequences of the act, rather than the nature of the act itself, which is legally most significant.[35] This follows both from the nature of the subject matter and the public interest in pollution damage. Thus there are no *a priori* reasons for preferring the courts of the place where the activity was carried out over the courts of the place where the damage was sustained. Rather, the reverse is the case.

An additional consideration is that much of the litigation will concern the assessment of the damages actually incurred. There are obvious difficulties and disadvantages in having an assessment of damages carried out by courts other than those in the State where the damages were sustained.[36]

Finally, there need to be mentioned three important technical legal difficulties which, as the OECD Environment Committee noted,[37] are encountered in giving effect to any regime of equal right of access. First, according to the legal systems of many States, persons injured in a foreign State frequently do not have a legal interest that will be protected

---

33. For a contrary argument, that the interest of the plaintiff is given less weight because it is he who disturbs the tranquillity and seeks the litigation, see Smit, 'Common and Civil Law Rules of in Personam Adjudicatory Authority: An Analysis of Underlying Policies', (1972) 21 ICLQ 335, 351.
34. The relevance of these factors to the question of choice of law is considered further below.
35. This argument was strongly pressed by the Government of the Netherlands in its argument before the Court of Justice of the European Communities in *Handelskwekerij G J Bier B V and the Reinwater Foundation v Mines de Potasse d'Alsace S A*, case No 21/76, [1977] CMLR 284, [1977] 3 WLR 479. The case is discussed at greater length below, pp 184-5.
36. The Convention on the Protection of the Environment adopted by the Scandinavian countries on 19 February 1974 attempts to meet this problem by making provision for environmental authorities in the State where the damage was sustained to make on-site inspections (Article 10). The close international legal co-operation necessary for the successful execution of these arrangements is of course practicable only between a closely knit group of States, such as the Scandinavian States.
37. See the OECD Environment Committee's Report of 22 April 1976: Equal Right of Access in Relation to Transfrontier Pollution, C(76)55.

by the courts or tribunals.[38] It seems that in civil law systems administrative law has a territorial application, in the sense that it only protects interests within the national territory and cannot protect interests outside this territory.[39] Since, in some civil law systems, actions against public authorities must be brought in the administrative courts, it seems that a foreign victim of transfrontier pollution damage caused by a public authority faces substantial obstacles in the way of proceeding in the country where the pollution originates. Secondly, according to some legal systems, only the court of the place of the damage has jurisdiction.[40] The principle of equal right of access has little value if the court to which access is given has no jurisdiction in respect of damage outside the State. Legislation would be necessary to overcome this obstacle. Thirdly, in many common law countries, courts have no jurisdiction in relation to disputes concerning foreign land. This ancient rule has been much criticised but its continued application in England was confirmed by the House of Lords decision in *British South Africa Co v Companhia de Moçambique*[41] which laid down in unequivocal terms that an English court would not exercise jurisdiction in respect of title to or possession of land situated abroad and that it would not entertain an action for trespass to land situated abroad.[42] The decision has been followed in Canada, where is has been applied to actions for negligence and nuisance involving damage to foreign land,[43] and in Australia.[44] The significance of the rule in relation to actions for transfrontier pollution damage is perhaps best illustrated by the circumstances of the well known *Trail Smelter Arbitration*,[45] where the rule would have prevented the courts of British Columbia from exercising jurisdiction in respect of damage in the United States. That is, the United States farmers who suffered pollution damage

38. C(76)55, fn 37 above Annex I, para 6, Annex II, paras 7, 8 and Smets, op cit at p 8. It should be noted, however, that the mere fact that the plaintiff is an alien is not normally an obstacle: 'Limitations upon the alien's legal and procedural capacity have virtually disappeared' (Ehrenzweig, *A Treatise on the Conflict of Laws* (1962) p 41).
39. See Smets, op cit. For discussion of the application of this doctrine in a case involving the expansion of an Austrian airport causing increased noise in Germany, see McCaffrey, *Private Remedies for Transfrontier Environmental Disturbances*, p 74.
40. C(76)55, supra note 37, Annex I, para 6, Annex II, paras 7 and 9. For a brief description of the position in Germany and France see McCaffrey, *Private Remedies for Transfrontier Environmental Disturbances*, pp 66-68.
41. [1893] AC 602; in *Hesperides Hotels Ltd v Muftizade* [1978] 3 WLR 378, the House of Lords refused to modify the rule.
42. [1893] AC at 624-625, 629, 632.
43. *Brereton v Canadian Pacific Railway Co* (1898) 29 OR 57; *Albert v Fraser Companies Ltd* [1937] 1 DLR 39, where the Canadian Supreme Court held that a New Brunswick court did not have jurisdiction in an action seeking compensation for flooding damage to land and personalty in Quebec caused by the defendant's alleged negligence in allowing logs to accumulate and dam a river in New Brunswick. It is noteworthy that jurisdiction was denied notwithstanding that the defendant's alleged negligence occurred in New Brunswick.
44. *Commonwealth v Woodhill* (1917) 23 CLR 482, 487; *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30.
45. (1941) 3 UNRIAA 1905: See Read, 'The Trail Smelter Dispute' (1963) Can YBIL 213, 222-3.

from the fumes of the Trail smelter would not have been able to obtain compensation through the Canadian courts. Legislation would seem to be necessary to overcome the effect of the rule. The position appears to be generally similar in the United States, although a number of exceptions have been developed, both by the courts and by statute.[46]

Assessment: An Alternative Approach

Whichever of the two approaches is adopted, there will be difficulties. These difficulties follow inevitably from the international character of the dispute. If conduct in one State causes damage in another State and it is sought to adjudicate the dispute on a private law basis, in the municipal courts or tribunals of one of the States concerned, then one or other of the parties will be faced with the difficulties inherent in the conduct of litigation in a foreign State and according to a foreign legal system. The question is, which of the parties, the originator of the pollution damage or his victim, should carry this burden. By adoption of the principle of equal right of access, which is directed at the facilitation of litigation in the courts of the originator of the pollution damage, the member States of the OECD have shown how one group of States believes the question should be answered.

It seems that the member States of the OECD to whom the principle of equal right of access is primarily directed are those members situated in continental Western Europe.[47] As between a group of highly industralised countries, each generating substantial levels of pollution, situated in close geographic proximity to each other and clearly wishing to countenance a level of transfrontier pollution but at the same time not wishing the victims of the pollution to be entirely without legal recourse, this approach undoubtedly has some merit. Certainly the countries concerned are at comparable stages of development and have generally similar social and legal systems, so that the difficulties inherent in litigating in a foreign legal system will not be as substantial as they otherwise might be.

---

46. Thus there is some United States authority for not applying the rule where the place in which the damage originated and the place where the damage was sustained are not in the same jurisdiction, especially where the damage was caused by an act within the jurisdiction: see McCaffrey, 'Trans-Boundary Pollution Injuries: Jurisdictional Considerations in Private Litigation between Canada and the United States' (1973) 3 Cal W Int L J 191, at 210-211, 218 et seq, citing *inter alia Armendiaz v Stillman* 54 Tex 623 (1881), *Bulwer's case* (1584) 7 Co Rep 1a; *Mannville Co v City of Worcester* 138 Mass 89 (1884). See also *Ducktown Sulphur, Copper & Iron Co v Barnes* 60 S W 593 (1900). Ehrenzweig, op cit, pp 140-141, argues that jurisdiction will usually be assumed where the trespass emanated from the forum state. The American Law Institute's *Restatement on the Conflict of Laws* 2d (1971) states unequivocally that a State may entertain an action that seeks to recover compensation for a trespass upon or harm done to land in another State. But the subsequent commentary makes it clear that to date the majority of courts have refused to entertain actions for trespass to foreign land (para 87 and see generally pp 260-262).

47. It is important to note, however, that the OECD is not a regional organization and its non-European members include the United States, Canada, Japan, Australia and New Zealand. Its members include the Western world's principal industrialised countries and they have generally similar economic systems.

The same considerations may not apply as between States at different stages of development or having different social or legal systems. Furthermore, the OECD approach is weighted heavily in favour of the interests of the polluter.[48]

If it is accepted that the predominant objective of a private law regime relating to liability and compensation for transfrontier environmental damage should be not the protection of the industrial polluter but rather the provision of the best possible system of remedies for the innocent victim of that damage, who will normally be the weaker party in the dispute, the 'equal right of access' approach will not always be sufficient. Rather, a way needs to be found to redress the imbalance that already favours the polluter.

The preferable approach will be to examine the opportunities available to the victim to institute proceedings in his own courts and to encourage the development of rules and principles that will enable those courts to exercise jurisdiction and judgments or awards so obtained to be readily enforceable against the foreign polluter.

Examples of an Alternative Approach

The approach just outlined is of course quite different from that adopted by the OECD but it is neither novel nor revolutionary. Thus the International Convention on Civil Liability for Oil Pollution Damage[49] provides that actions for compensation in respect of oil pollution damage covered by the convention may only be brought in the courts of the Contracting State in whose territory or territorial sea the damage was caused;[50] reasonable notice of any such action is to be given to the defendant.[51] Provision is made for the recognition and enforcement of judgments so obtained.[52] The earlier Convention on the Liability of Operators of Nuclear Ships[53] is even more favourable to the victim in that it affords him a choice of forum. Article X of that Convention provides that an action for compensation shall be brought, *at the option of the claimant*, either before the courts of the licensing state (in effect, the flag state of the nuclear ship) or before the courts of the Contracting State in whose territory nuclear damage has been sustained. Again, provision is made for the recognition and enforcement of judgments so obtained.[54]

The choice of forum approach was favoured by the Court of Justice of the European Communities, in a recent landmark decision, *Handelswekerij G J Bier B V and the Reinwater Foundation v Mines de Potasse d'Alsace S A.*[55] Bier, a farmer in the Netherlands, and the Reinwater

48. That the OECD approach is favourable to the polluter appears to be well accepted; see eg Seidl-Hohenveldern, op cit, pp 6, 8.
49. Brussels, 1969. Text in (1970) 9 ILM 45.
50. Article IX.
51. Ibid.
52. Article X. The question of recognition and enforcement of judgments is dealt with at greater length below p 190-193.
53. Brussels, 1962. Text in (1963) 57 AJIL 268.
54. Article XI(4), see below pp 190-193.
55. Case No 21/76, Reported in [1977] CMLR 284; [1977] 3 WLR 479 (hereinafter cited as

Foundation, an organisation formed to promote the improvement of the quality of the water in the Rhine, instituted proceedings in a Netherlands court alleging that the defendant, Mines de Potasse d'Alsace, an industrial undertaking in France, had by discharging waste into the Rhine polluted the water thereby causing damage to Bier who used the water for irrigation. The Netherlands court held it had no jurisdiction to entertain the action and a Netherlands appellate court referred the question of jurisdiction to the Court of Justice of the European Communities. Technically, the question whether the Netherlands court had jurisdiction depended on the interpretation of a provision in a regional European Convention.[56] However, the European Court determined that the language of that Convention left open the question whether the defendant may be sued in the place of the event giving rise to the damage or the place where the damage occurred,[57] and it determined the matter on the basis of the practice of States and arguments based on the merits. The decision is therefore of general interest. The Court decided that it was not appropriate to opt for one of the two connecting factors to the exclusion of the other;[58] the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage.[59]

The most recently adopted convention on liability for pollution damage, the Convention on Civil Liability for Oil Pollution Damage from Exploration for and Exploitation of Sea Bed Mineral Resources,[60] also gives the victim a choice of forum. Article II provides that actions for compensation under the Convention may be brought only in the courts of any State Party where pollution damage was suffered as a result of an incident or in the courts of the State which exercises sovereign rights over the area where the relevant installation is situated.

Turning specifically to the transfrontier pollution field, it is noteworthy that provision for alternative jurisdictions is made in Rest's pioneering Draft Convention on Compensation for Transfrontier Environmental Injuries.[61] It seems that this option is already available under the domestic

---

Bier and Reinwater v Mines de Potasse d'Alsace); see Rest, 'Transfrontier Pollution: Plaintiff can choose his Court' (1977) 3 Env P and L 41.

56. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968), Article 5(3), which provides for the exercise of jurisdiction by the courts of 'the place where the harmful event occurred'. The Convention came into force on 1 February 1973. See Bartlett, 'Full Faith and Credit Comes to the Common Market: an Analysis of the Provisions of the Convention on Jurisdiction and Enforcement of Judgents in Civil and Commercial Matters' (1975) 24 ICLQ 44.
57. [1977] CMLR at 300; [1977] 3 WLR at 490.
58. Ibid.
59. [1977] CMLR at 301; [1977] 3 WLR at 491.
60. London, 1976. Text in (1977) 16 ILM 1451.
61. Above fn 27; see Article 25(2). It is to be noted that Article 25 (1) appears to have been based on an incorrect interpretation of the existing legal position in the European Communities—see *Bier and Reinwater v Mines de Potasse d'Alsace* (above fn 55).

law in force in a number of European States.[62] Finally, it may be noted that two expert groups established by the United Nations Environment Programme (UNEP) have also found themselves unable to endorse the OECD approach.[63]

The Problems of an Alternative Approach

Neither approach is without its legal problems. For a victim of trans-frontier pollution readily to be able to institute proceedings in the State where the pollution originated, legislation to give him 'equal right of access', and to confer upon the courts of that State jurisdiction in respect of the protection of foreign interests and damage to foreign property, may be necessary. Conversely, legislation may also be necessary to enable proceedings instituted in the State where the damage was sustained to be brought to a successful conclusion. It is not practicable to catalogue with certainty all the legal obstacles that might need to be removed without first undertaking a survey of representative legal systems.[64] However, two problem areas may be noted: it is necessary to ensure, first, that courts will be in a position to exercise jurisdiction, notwithstanding that the defendant may be physically outside the State and, secondly, that judgments and awards obtained in the State where the damage was sustained will be recognised and enforceable against the defendant in the State where the pollution originated. These two questions will be briefly considered.

Jurisdiction

Legislation may be necessary in some States to enable jurisdiction to be exercised solely on the basis of damage within the State. In civil law systems, the difficulties do not appear to be large. For example, the new section 46 of the French Code of Civil Procedure expressly provides plaintiffs with a choice of the court of the place where the act occurred or the court of the place where the damage was sustained.[65] More generally, in European States parties to the Convention on Jurisdiction and

62. Eg France and Germany, see *Bier and Reinwater v Mines de Potasse d'Alsace*, [1977] CMLR at 290-1; [1977] 3 WLR at 484-5; see also below p 186-190.
63. See the Report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States on the Work of its Third Session, UNEP/1G.7/3 of 10 February 1977, pp 16-17, and the Report of the Group of Experts on Liability for Pollution and Other Environmental Damage and Compensation for Such Damage 6 April 1977, UNEP/WG.8/3 para 17. The writer participated in the latter group as the expert nominated by the Australian Government.
64. The OECD carried out such a survey in relation to the exercise of jurisdiction by the courts of the State where the pollution originated—see ENV(76)1.
65. See also *Bier and Reinwater v Mines de Potasse d'Alsace*, [1977] CMLR at 290; [1977] 3 WLR at 485. French courts, interpreting the earlier Article 59, have declared that the court of the place where the damage occurred has jurisdiction. Arguments to the contrary by some European writers (eg Rest, Commentary p 37) appear to be based on a narrow view which the above decision has shown to be incorrect. For the position in Germany, see Rules of Civil Procedure, para 32.

Enforcement of Judgments in Civil and Commercial matters[66] the plaintiff has a choice of jurisdiction. But in common law systems the exercise of jurisdiction has traditionally been based on physical presence within the jurisdiction. Thus at common law an English court had jurisdiction in actions *in personam* only if the defendant was in England and was served there with the writ.[67] Service outside the jurisdiction was regarded as 'prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign power where service is to be effected'.[68] Personal service within the forum was also the traditional basis for the exercise of jurisdiction in the United States.[69] This rule would frequently have prevented the exercise of jurisdiction against a foreign polluter.

The traditional English approach is of course unduly restrictive for modern needs. Fortunately, the basis for the exercise of jurisdiction in England and other common law countries has now been significantly enlarged by legislation.[70] For example, English courts and indeed most other common law courts now have statutory jurisdiction in certain cases affecting land within the jurisdiction.[71] Provision is also made for jurisdiction to be exercised in England in actions founded on a tort committed in England.[72] A similar but possibly wider provision in New South Wales enables jurisdiction to be exercised in 'a cause of action arising in the State'.[73] The effect of these latter two provisions on actions concerning transfrontier pollution is not altogether clear. There is considerable authority, especially in negligence actions involving defective products, for the view that the cause of action arises, or the tort is committed, in the place of the wrongful act or omission and that the mere fact that damage was suffered within the jurisdiction is not sufficient to found jurisdiction.[74] However, the Privy Council, in a decision on appeal from New South

66. See above fn 56 and see the discussion of *Bier and Reinwater v Mines de Potasse d'Alsace*, above pp 184-5.
67. Dicey and Morris, op cit, p 158.
68. *George Monro Ltd v American Cyanamid and Chemical Corporation* [1944] KB 432 at 437.
69. Ehrenzweig, op cit, p 88. But Ehrenzweig casts doubt on the rule and cites authority that every citizen was, on principle, 'entitled to the process of the courts to enforce his rights of action against non-residents' (see pp 88, 106).
70. In England, see now Rules of the Supreme Court (1965) Order 11.
71. In England, see now Order 11, rule 1(1)(a), 1(1)(b).
72. Order 11, rule 1(1)(h).
73. See the Supreme Court Act (NSW) Fourth Schedule, Part 10, rule 1(a). For the position in Australia and New Zealand generally, see Nygh, *Conflict of Laws in Australia*, 3rd Ed (1976) pp 34-36, 38, 273.
74. Eg *George Monro Ltd v American Cyanamid and Chemical Corporation* [1944] KB 432 at 437. In Australia see *Lewis Construction Co Pty Ltd v Tichauer SA* [1966] VR 341; *Buttigeig v Universal Terminal and Stevedoring Corp* [1972] VR 626; in Canada see *Abbott-Smith v Governors of University of Toronto* (1964) 45 DLR (2d) 672; cp *Moran v Pyle National (Canada) Ltd* (1973) 43 DLR (3d) 239, where the Canadian Supreme Court treated the damage suffered as the predominating element and decided that the forum in which the damage was suffered was entitled to exercise jurisdiction over the foreign manufacturer. For a criticism of the English and earlier Canadian cases, see Gerber, 'Tort Liability in the Conflict of Laws' (1966) 40 ALJ 44, especially at p 45.

Wales, has recently taken a radically different, policy oriented, approach: 'The search is for the most appropriate courts to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor'.[75] It has also been held in several jurisdictions that the tort of defamation is committed where the defamatory material is published and not where it is written or spoken.[76]

Statutory provisions in other common law countries have conferred jurisdiction in a wider range of cases than in England. In New Zealand and Queensland jurisdiction may be exercised where any act for which damages are claimed was done within the jurisdiction.[77] The view has been taken that the suffering of damages in itself may qualify as an 'act done in New Zealand' on the footing that it is the suffering of damage which is the foundation of tortious liability,[78] but the Queensland provision has been interpreted more narrowly[79] and other common law authorities may not support the New Zealand view.[80] An even wider provision in New South Wales authorizes the exercise of jurisdiction where the proceedings are founded upon 'damage suffered wholly or partly in the State caused by a tortious act or omission wherever occurring.'[81] A provision of this kind would clearly enable jurisdiction to be exercised in actions in respect of transfrontier pollution damage suffered in the State.

Provision for 'constructive' or 'substituted' service outside the jurisdiction is common in the United States, particularly in suits against non-resident motorists in respect of accidents within the jurisdiction.[82] Foreign corporations are generally regarded as subject to the jurisdiction of a State if they conduct business within the State.[83] According to the American Law Institute's (Second) *Restatement of the Conflict of Laws*, American courts will now exercise jurisdiction over an individual who causes effects within the jurisdiction by acts done elsewhere,[84] on the

75. See the decision in *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 467.
76. *Bata v Bata* [1948] WN 366; *Jenner v Sun Oil Co Ltd* (1952) 2 DLR 526; *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181.
77. New Zealand: Code of Civil Procedure, Rule 48 (a); Queensland: Rules of the Supreme Court, Order 11, r 1(4).
78. *Adastra Aviation Ltd v Airparts (NZ) Ltd* [1964] NZLR 393 at 395; see also *My v Toyoto Motor Co Ltd* [1977] 2 NZLR 113.
79. In *Macgregor v Application des Gaz* [1976] St R Qd 175 Matthews J held that the Queensland provision should be construed more narrowly than rules which give jurisdiction for 'a tort committed within the jurisdiction' or if 'the cause of action arose within the jurisdiction'.
80. Contrast *George Monro Ltd v American Cyanamid and Chemical Corporation; Distillers Co (Biochemicals) Ltd v Thompson.*
81. Supreme Court Act (NSW), Fourth Schedule, Part 10 rule 1(e); in *Keevers v O'Neill* [1977] 1 NSWLR 587 at 593 Ash J gave the rule a very narrow construction, but his remarks were *obiter.*
82. See Ehrenzweig, op cit, pp 96-7.
83. Originally on the basis that the corporation was deemed to have consented to the exercise of jurisdiction (see *Simon v Southern Railway Company* 236 US 115 (1915)) but later according to whether the degree of contact with the State made the exercise of jurisdiction reasonable (see *International Shoe Co v Washington* 326 US 310 (1945)).
84. The *Restatement* (2d) provides for jurisdiction over an individual who causes effects

basis that a State has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere.[85] A significant factor will be the nature and quality of the effects which occur in the state. For example, jurisdiction will be exercisable where the effects are highly dangerous.[86] A leading American commentator (and critic of the *Restatement*) also sees a trend on the part of both courts and legislatures to support the exercise of jurisdiction in cases of foreign acts causing forum injury.[87]

The new approach has been given practical application in the environmental field. Thus the Minnesota Environmental Rights Act 1971 provides for the exercise of personal jurisdiction over any foreign corporation or non-resident individual who commits or threatens to commit any act outside the State which would impair, pollute or destroy the air, water, land or other natural resources located within the State.[88] The United States Supreme Court, in a case in which it declined itself to exercise jurisdiction in a suit brought by the State of Ohio in respect of acts in Canada causing pollution in Ohio,[89] has clearly supported the exercise of jurisdiction by the courts of Ohio, the State where the pollution damage was sustained.

These statutory and judicial modifications of the former common law rules make good sense: the occurrence of damage within a State is at least as sound and sensible a basis for the exercise of jurisdiction as, for example, the deemed presence of the defendant within the State by virtue of his carrying on business within that State. It is certainly a more satisfactory ground on which to found jurisdiction than the mere service of process on the defendant during the latter's fleeting presence within the jurisdiction. From a policy viewpoint, if the exercise of jurisdiction is to be founded on the interests of the State, then damage to property within a State or injury to its residents establishes a good and sufficient interest for the courts of that State to exercise jurisdiction and provide a remedy.[90] Moreover, the interests of the plaintiff in seeking the protection of his own courts rather than having to go to a foreign court justify the exercise of jurisdiction in the State where the damage was sustained as the *forum*

---

in the State by an act done elsewhere with respect to any cause of action arising from these effects unless the exercise of such jurisdiction is unreasonable (para 37).

85. *Restatement* (2d) at p 156. Jurisdiction will not be exercised if the nature of the effects and of the individual's relationship to the State make the exercise of such jurisdiction unreasonable.
86. Ibid, p 158.
87. Ehrenzweig, op cit p 116.
88. Section 11 (Minnesota Statutes 116 B. 11, 1971).
89. *Ohio v Wyandotte Chemicals Corp*, 401 US 493 (1971) at 500-501.
90. See also the 'degree of connexion' test propounded by the Privy Council in *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458.

conveniens.[91] The same result is reached if 'fairness to the parties' is the determing factor, as appears to be the case in the United States.[92]

In short, if legislation is sometimes necessary to confer jurisdiction on the courts of the State where the damage was sustained, this legislation will be consistent with principle and developing practice. Of course, jurisdiction ought to be exercised in any particular case only if the defendant was properly notified of the action and given an adequate opportunity to be heard.[93]

As has already been noted, a number of international conventions dealing with liability for pollution damage already provide for claims to be brought before the courts of the State where the damage has been sustained.[94]

Recognition and Enforcement of judgments

The utility of a judgment obtained in the courts of the State where the damage was sustained is, of course, dependent upon the prospects for its implementation, that is, for its enforcement against the polluter. Unless the polluter has assets in the State where he caused damage, enforcement will need to be effected abroad, usually in the courts of the State where the pollution originated. At the present time, in the absence of specific provision for the purpose, the enforcement of foreign judgments and awards is often a lengthy and complex process. Indeed, the courts in the State where the damage was sustained may go so far as to decline to exercise jurisdiction in circumstances where an award or order would not be effective for the reason that it would not be recognised and enforceable against a foreign defendant.

It seems to have been these problems of recognition and enforcement, more than anything else, which have led some who would otherwise have agreed that it was preferable for jurisdiction to be exercised in the place where the damage was sustained to conclude that the more practical course is to facilitate the victim's access to the courts in the place where the pollution originates.[95] The difficulty is of course substantial. But it is

91. See Nygh, op cit, pp 29-31. Ehrenzweig, op cit, p 126. For a development of the policy argument in favour of providing a local forum for the plaintiff, see Smit, 'Common and Civil Law Rules of in Personam Adjudicatory Authority : An Analysis of Underlying Policies' (1972) 21 ICLQ 335.
92. Ehrenzweig, op cit p 78. Smit, op cit, pp 347-8.
93. Notice and a reasonable opportunity to be heard are essential to the exercise of jurisdiction in the United States; see *Restatement* (2d), para 25.
94. Eg Convention on the Liability of Operators of Nuclear Ships (Brussels, 1962) Article X; International Convention on Civil Liability for Oil Pollution Damage (Brussels, 1969), Article IX; and the Convention on Civil Liability for Oil Pollution Damage from Exploration for and Exploitation of Sea-Bed Mineral Resources (London, 1976), Article II. See above pp 184-5.
95. Eg Kiss, *Survey of Current Developments in International Environmental Law* (IUCN Environmental Policy and Law Paper No 10, 1976), p 37, although Kiss appears to base his view very much on the decision of the court of first instance in *Bier and Reinwater v Mines de Potasse d'Alsace*. That decision was of course reversed by the Court of Justice of the European Communities (see above fn 55). See also Seidl-

the writer's submission that this difficulty is no more insuperable than the many legal and practical obstacles in the way of satisfactory implementation of a regime of equal rights of access.

Indeed, there are already in existence a number of arrangements for the international recognition and enforcement of judgments. Foremost among these is the British Commonwealth scheme, based on legislation in Commonwealth countries along the lines of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (Imp). All the Australian States, except South Australia (which has a scheme of its own) have enacted such legislation. The scheme is confined to final money judgments of superior courts of countries that have been proclaimed for the purpose, on the basis of reciprocity.[96] A foreign judgment of a court to which the scheme applies must be registered in the appropriate court in the jurisdiction where it is to be enforced, and may then be enforced as a judgment of that court.[97] Wider in scope is the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (1965) but that convention has attracted only two ratifications.[98]

Provision for the recognition and enforcement of judgments are also increasingly common in bilateral,[99] regional and functional agreements, although proposals for such provisions have at times been rejected.[1] Notable among the regional agreements is the European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,[2] the subject of the litigation in *Bier and Reinwater v Mines de Potasse d'Alsace.* That convention provides that decisions

---

Hohenvelder, op cit 8. The OECD Secretariat regard this difficulty as 'frequently insurmountable' : see ENV(76) 1, p 60.

96. See for example, Foreign Judgments (Reciprocal Enforcement) Ordinance 1954 (ACT). Proclamations have been made applying the legislation to a wide range of countries, but the proclamations have not been kept up to date. For example, some refer to countries which no longer exist. Moreover, there is no uniformity, between the Australian States, as to the foreign courts that have been proclaimed. The legislation takes a somewhat restrictive view of the circumstances when a foreign court will be regarded as having jurisdiction, but jurisdiction is recognised in respect of actions involving land in the foreign country (section 8(2) (b)).
97. Foreign Judgments (Reciprocal Enforcement) Ordinance 1954 (ACT) section 6.
98. Netherlands, Cyprus.
99. Eg the recently initialled Convention between the United Kingdom of Great Britain and Northern Ireland and the United States of America Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters (initialled at London, 26 October 1976); see Hay and Walker, 'The Proposed Recognition of Judgments Convention between the United States and the United Kingdom' (1976) 11 Texas Int LJ 421. The Convention has not yet been ratified, apparently because of British concern about the high level of damages awards in the United States that would become enforceable in the United Kingdom.
1. Eg in November 1976, a conference convened by IMCO, and dominated by maritime states, overwhelmingly rejected proposals for the inclusion of provisions on the recognition and enforcement of judgments in the Convention on Limitation of Liability for Maritime Claims, 1976. Text in (1977) 16 ILM 606.
2. Brussels, 1968. The Convention came into force on 1 February 1973. Text in (1969) 8 ILM 229. For a discussion of the Convention, see Bartlett, op cit.

rendered in one Contracting State are to be recognized in the other Contracting States, without requiring special proceedings for this purpose.[3] Under no circumstances is a foreign judgment to be subject to a review for illegality.[4] Decisions rendered in a Contracting State that are enforceable therein may be enforced in another Contracting State after a writ of execution has been issued upon request of the interested party.[5]

A number of important functional agreements which deal with liability for various forms of pollution damage and make provision for the international recognition and enforcement of judgments have already been noted.[6] Thus the Convention on the Liability of Operators of Nuclear Ships which, it will be recalled, gives the victim a choice of forum, provides that final judgment entered by a court having jurisdiction pursuant to the Convention shall be recognized in the territory of any other Contracting State and shall be enforceable in another Contracting State, in accordance with the formalities required in that State;[7] the merits of the claim are not to be subject to further proceedings.[8] Similar provision is made in the International Convention on Civil Liability for Oil Pollution Damage. That Convention, it will be recalled, provides for jurisdiction to be exercised only in the courts of the Contracting State where pollution damage has been caused.[9] The Convention goes on specifically to state that any judgment given by a Court with jurisdiction in accordance with this provision and enforceable in the State of origin is to be recognized in any Contracting State and enforceable as soon as the formalities required in that State have been complied with; again, the formalities shall not permit re-opening of the merits.[10] A virtually identical provision is included in the recently adopted Convention on Civil Liability for Oil Pollution Damage from Exploration for and Exploitation of Sea-Bed Mineral Resources[11] (which also gives the victim a choice of jurisdiction)[12]. Many other examples could be cited.

It will be apparent that provision for international recognition of enforcement of judgments is neither novel nor unusual. Indeed, provision for this purpose has been made in many recent treaties dealing with liability for various forms of pollution damage. While more widespread acceptance of regimes for recognition and enforcement of judgments covering all forms of international pollution damage may yet prove difficult, in an era of increasing international legal co-operation those difficulties ought not to be exaggerated unduly. Problems relating to international recognition and enforcement of judgments should not,

3. Article 26.
4. Article 29.
5. Article 31.
6. Above pp 184-5.
7. Article XI(4).
8. Ibid.
9. Article IX.
10. Article X.
11. Article 12.
12. Article 11.

therefore, be regarded as rendering impracticable the exercise of jurisdiction in the place where the damage was sustained. Rather, efforts should be encouraged to develop further, especially on a regional and functional basis, international arrangements that will facilitate the recognition and enforcement of judgments so obtained.

Digression: Applicable Law

(i) *Principles and practice in municipal law*

A question likely to have a significant bearing on the outcome of an action to recover compensation for transfrontier pollution damage is the system of municipal law that is applied to the adjudication of the dispute. Legal systems differ significantly in relation to such vital questions as the proof of causation that is required and the heads of damage in respect of which compensation may be claimed.

The OECD principle of equal right of access is of course intended primarily as a procedural rule, directed to questions such as standing before and access to courts and tribunals, rather than to the substantive law that will be applied. Within the framework of the OECD Recommendations questions concerning the choice of substantive law, to the extent to which they are dealt with at all, are covered under the rubric of 'non-discrimination'.[13] In a sense, therefore, it is beyond the scope of the present article to consider what system of substantive law should be applied. In practice, however, this question is likely to be significantly affected by the choice of forum. For choice of law questions fall to be determined, according to the appropriate rules of private international law, by the courts in the State where the action is maintained. Although courts sometimes apply foreign law, especially to certain subsidiary issues such as personal capacity, the general practice of courts adjudicating upon tort actions, in both civil law and common law systems, appears to be to apply local law to substantive questions,[14] especially where the proceedings involve damage to land within the jurisdiction. As a result of the natural weight given to *lex fori*, procedural questions relating to choice of jurisdiction and substantive questions concerning choice of law are in practice closely linked.[15]

Moreover, as it is often desirable that actions in respect of transfrontier

13. See C(74) 224, Title C, para (d). Those who interpret C(74)224 as establishing a choice of law rule in favour of the country where the pollution originates are presumably relying on this paragraph. See OECD Secretariat Report on Equal Right of Access ENV(76)1, at p 11; McCaffrey, 'The OECD Principles Concerning Transfrontier Pollution : A Commentary' (1975) 1 Env P and L 2 at 4; Seidl-Hohenveldern, op cit, p 7. For a wider interpretation of the 'non-discrimination' rule, see the OECD Secretariat paper ENV(76)1, p 59 discussed below p 197.
14. See Ehrenzweig, op cit pp 317-326, for a survey of both continental and Anglo-American practice in applying the law of the forum. For a criticism of this approach, in so far as it applies in common law countries, see Gerber, op cit. German courts apply the law that is more favourable to the injured party—see below p 196. In England, see now *Boys v Chaplin* [1971] AC 356.
15. For a recent discussion of the merits, in English law, of treating the measure of damages as a procedural question see *Boys v Chaplin*, [1971] AC at 393, 395.

pollution damage should be maintainable in the courts of the State where the damage was sustained, so too there are often compelling reasons why such actions should be adjudicated according to the laws of that State. In brief, the primary object of damages is to compensate the victim, and that object is usually most justly achieved according to the legal system where the victim is situated and suffers his damage.[16]

Thus, it is submitted that the victim of transfrontier environmental damage should be able to recover in respect of all the heads of damage normally applicable in the place of injury, and the originator of the damage should not be able to shelter behind restrictive defences available only under his own legal system. A brief example will serve to illustrate this proposition. Suppose an activity originating in a socialist State causes pollution damage in a neighbouring capitalist State. Justice demands that the victim should be able to recover compensation in respect of such matters as pain and suffering, loss of profits and loss of future earning capacity, notwithstanding that no corresponding heads of damage may be available under the socialist legal system of the defendant.

Furthermore, the polluter ought not to be relieved of liability solely by reason of the fact that his activity was lawful in the State where it was conducted. It is no consolation to the foreign victim of pollution damage that the polluting activity was sanctioned by the municipal law of the State of origin. Indeed, if the only pollution damage was transfrontier, the lack of domestic prohibition of the activity may well have been based on the absence of any domestic harm.

While the foregoing approach might seem at first sight onerous to the defendant, it is readily justifiable on the basis that one who by his act or omission causes damage in a foreign State must abide by the consequences as they arise in that foreign State. Thus it is scarcely unreasonable to require the modern industrial polluter to have regard not only to local circumstances but also to the consequences of his activity abroad. Once this is understood it is clearly appropriate for the originator of international pollution damage to be required fully to compensate his foreign victim, in the sense of restoration of the condition that would have existed if the damage had not occurred,[17] expressed in well known maxim, restoration of the *status quo ante*.[18] From the victim's point of view, he ought not to be disadvantaged, in relation to his right to recover compensation or the amount of compensation that is recoverable, by the fortuitous circumstance that the wrongdoer was situated abroad.

---

16. If the courts where the damage occurred exercise jurisdiction on the basis that the tort was committed there (see above fns 72, 73) no choice of law problem arises.
17. This principle was adopted in the Convention on International Liability for Damage Caused by Space Objects (1971), Article XII.
18. Cp Rest, Convention, Article 11, and his Commentary, pp 55-56. Rest, while agreeing that the applicable law should normally be 'place of the occurrance' (sic) (Article 19(1)) goes on to propose a separate rule in respect of intentional or negligent activities (Article 19(2)). It is difficult to see why the applicable law should be a function of the intention of the defendant. In any event, where the existence of intent or negligence is itself in issue, Rest's proposal becomes impracticable.

European writers opposed to this approach appear to be unduly influenced by concepts of domicile and nationality.[19] Thus they seem to take the view that conduct should not incur liability if it is legal and valid at the place of action. But to exonerate conduct from liability on that basis ignores the international element involved in transfrontier pollution. Similarly, the traditional requirement in English law, that for a foreign act to be actionable in England it must be a wrong in both England and the foreign place where it was committed,[20] has been developed entirely in the context of suits brought in England in respect of foreign acts *causing damage abroad.* The rule does not appear to have been applied in respect of a foreign act causing damage in England. It is this added international or transfrontier element, where an act committed in one State has caused damage in another State, that renders many of the traditional private international law rules inappropriate to cases of transfrontier pollution.

The special character of international torts has been recognized in the United States;[21] where courts have had to cope with activity in one State (of the United States) causing damage in another, and the English approach has been abandoned. Several approaches developed, including the so-called 'obligatio' or 'vested rights' theory[22] and the 'local law theory'.[23] For some time the 'last event' or 'place of harm' rule prevailed,[24] but the mechanical application of these doctrines appears now to have been displaced by a more sophisticated approach which applies the local law of the State which 'has the most significant relationship to the occurrence and the parties'.[25] The place where the injury occurred is of course one of the 'contacts'[26] to be taken into account.

---

19. See Rest, Convention, Article 19, and *Commentary*, pp 59-60.
20. *Phillips v Eyre* (1870) LR 6 QB 1 at 28-29; 'First, the wrong must be of such a character that it would have been actionable if committed in England; . . . secondly, the act must not have been justifiable by the law of the place where it was done'. See also *Machado v Fontes* [1897] 2 QB 231; *Boys v Chaplin* [1971] AC 356.
21. For a comparison between English and American developments, see Shuman and Prevezer, 'Torts in English and American Conflict of Laws : The Role of the Forum' (1958) 56 Mich L Rev 1067.
22. See Justice Holmes' classic statement 'the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done': *American Banana Co v United Fruit Co* 213 US 347 at 356.
23. This view was succinctly put by Goodrich: 'Suppose the defendant carelessly does an act in State A which results in harm to the plaintiff in State B. The law of B controls. The plaintiff does not sue the defendant for the latter's negligence, but because the negligence has caused the plaintiff harm. The tort is complete only when the harm takes place and it is the law of the State where this happens that determines the existence of the plaintiff's claim' (Goodrich, *Handbook of the Conflict of Laws* (1927), p 191). For an early discussion of these two views, and the (first) *Restatement*, see Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924), pp 311-346; see also Cavers, 'The Two Local Law Theories', (1950) 63 Harv L Rev 822.
24. Cook, op cit, p 323.
25. *Restatement* (2d) para 145. Ehrenzweig, a leading United States authority, is highly critical of this approach (op cit, (2d) pp 543-546).
26. *Restatement* (2d), para 145. The commentary goes on to argue that 'persons who cause injury in a state should not ordinarily escape liabilities imposed by the local law of that state on account of the injury' (p 419).

The American approach (which is beginning to influence English judicial thinking[27]) is, it is submitted, consistent with the more flexible approach to choice of law questions now being developed in a number of jurisdictions. In particular, it is consistent not only with the interests of the victim but also with the interests of the forum State in having its own law applied to damage within that State. Both the victim and the victim's State have an interest in, respectively, securing and affording protection against the hazards of foreign industrial activity. In those legal systems which apply a policy approach to choice of law questions, such as seeking to find 'the proper law of the tort',[28] the law of the State where the transfrontier pollution damage was sustained will normally be the law which is of greatest relevance, or has the 'most significant relationship', and should be selected as the proper law.

It may be added that in modern industrial societies a great part of the law of tort is becoming increasingly concerned with loss distribution rather than with punishment of the defendant. This is especially true in the case of hazardous or dangerous activities, where 'fault' is gradually being displaced by stricter forms of liability. In most actions in respect of industrial pollution damage, including transfrontier pollution damage, the real concern of the law is not so much with assessment of the culpability of the defendant's conduct but with the protection of, and the provision of compensation for, the victim.[29] For this reason also the circumstances of the plaintiff and the place of harm are more relevant than the nature of the conduct of the defendant and the law of the place where the polluting activity was conducted.

Against this background it is interesting to note the approach taken in Germany: German law applies the law that is most favourable to the injured party. Thus in *Poro v The Coal Mines of Lorraine*,[30] an action by the proprietor of a resort including an open air restaurant in Germany against a mining company in France, in respect of damage from coal dust and smoke, the German court pursuant to this principle applied French law which, unlike German law, did not require proof of fault.

(ii) *Treaty practice*

Turning from the domestic law of States to treaty practice, it needs to be said that few multilateral treaties deal in depth with the law that is to be

27. *Boys v Chaplin.* [1971] AC 356. Cp, in Australia, *Schmidt v Government Insurance Office of New South Wales* [1973] 1 NSWLR 59.

28. See Dicey and Morris, op cit, pp 936, 969; *Restatement* (2d) para 145; Morris, 'The Proper Law of a Tort' (1951) 64 Harv L Rev 881. Morris was concerned to reject the *mechanical* application of the last event doctrine or the law of the place of wrong but himself suggested tests remarkably similar to those now in paragraph 145 of the *Restatement* (2d). He considered that 'in many, perhaps most, cases there would be no need to look beyond the law of the place of wrong' (p 894). Contrast Ehrenzweig, 'The Not So "Proper" Law of a Tort: Pandora's Box', (1968) 17 ICLQ 1.

29. Ehrenzweig seems to support the application of the law of the forum in cases of 'enterprise liability', at least where the economic impact is calculable and insurable by the defendant (17 ICLQ at p 5).

30. OLG Saarbrucken, 22 October 1957, 11 Neue Juristiche Wochenschrift (1958) p 752. See Rest, Commentary, 62, Kiss op cit, pp 38-9.

applied in the determination of damages. Sometimes the principles according to which compensation is to be determined are set out. Thus the Convention on International Liability for Damage Caused by Space Objects provides that compensation under the Convention 'shall be determined in accordance with international law and the principles of justice and equity, in order to provide such reparation in respect of the damage as will restore the person . . . to the condition which would have existed if the damage had not occurred'.[31] Compensation is normally to be paid in the currency of the claimant State.[32] An interesting example in the private law field is the Convention on the Law Applicable to Products Liability.[33] The considerations relevant to the subject matter of that Convention, namely 'the law applicable, in international cases, to products liability',[34] are remarkably similar to the considerations relevant to choice of law questions in cases of transfrontier pollution damage. And the rule adopted is that '(the) applicable law shall be the internal law of the State of the place of the injury'.[35] A different approach is adopted in the Scandinavian Convention on the Protection of the Environment,[36] a regional convention negotiated by a small and homogeneous group of States: 'The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out'.[37] This approach is developed further in Rest's Draft Convention on Compensation for Transfrontier Environmental Injuries, which, in the second of two alternative texts on the question, provides that the applicable law is the law which is more beneficial to the injured party.[38] The first alternative in Rest's draft Convention appears to make the applicable law dependant upon the nature of the activity. If the activity is intentional or negligent, then the applicable law is the law of the place where the defendant began to act; otherwise, it seems that the law of the place where the injurious result occurs is to be applied.[39] The justification for this distinction is not immediately evident,[40] and the 'more beneficial law' approach in the second alternative is clearly preferable. The principle of the non-discrimination initially adopted by the OECD Council[41] appeared to require the

31. Article XII.
32. Article XIII.
33. Adopted by the Hague Conference, 1972. Text in (1972) 11 ILM 1283.
34. Preamble.
35. Article 4. The rule applies if that State is also the place of the habitual residence of the person directly suffering damage.
36. Stockholm, 1974. Text in (1974) 13 ILM 591.
37. Article 3.
38. Article 19(2), second alternative.
39. Article 19(2), first alternative.
40. Seidl-Hohenveldern, op cit, pp 7-8, seeks to explain it by the conflict between pragmatic reasons and the author's sympathy for the victims of pollution.
41. C(74)224, Title C, paragraph 4(d) 'persons affected by transfrontier pollution should be granted no less favourable treatment than persons affected by a similar pollution in the country from which such transfrontier pollution originates'. The Secretariat interpretation of this provision is that it 'is intended to provide persons affected by transfrontier pollution, even in their own courts, with treatment no less favourable

application of the more favourable law in all cases, whether action was brought in the courts of the victim or the courts of the polluter, but in its later development[42] the principle is confined to discrimination within the country of origin of the pollution.[43]

Applicable law: Summary

Choice of law rules in a number of legal systems are inappropriate to cases of transfrontier pollution damage where an act committed in one State has caused damage in another State. The 'more favourable law approach' which has been incorporated in a number of treaties is on its face attractive but may prove difficult to apply where a number of issues are to be decided. Unless the more favourable law is to be selected in respect of each issue in the litigation, it may be difficult to determine which law is the more favourable to the injured party overall, for example, where causation is easier to establish pursuant to the one legal system but the law relating to the assessment of damages is more favourable to the plaintiff under the other system. Application of the law of the place where the damage occurred does not create the same difficulties, is justifiable on the basis of legal principle and municipal practice, and achieves justice as between the parties.

Conclusion

The adjudication of transfrontier pollution disputes at the private law level gives rise to a number of complex legal difficulties. These difficulties are the inevitable consequence of the international character of the dispute, involving the location of the parties in different legal jurisdictions. One way of reducing those difficulties is to facilitate access by the foreign victim of transfrontier pollution damage to the courts of the State where the pollution originated. That is the approach adopted by the OECD. It is an approach that has some merit, especially as between countries at similar stages of development and having similar social and legal systems, and its adoption by the OECD is a significant milestone in the development of environmental law. It is, however, more favourable to the polluter than to his victim. From the point of view of the victim it is not the best means of obtaining compensation for transfrontier pollution damage. Having regard to the burden of litigating in a place that is geographically remote, in a foreign language, according to foreign procedures and foreign legal system, it will normally be in the interests of the victim for him to be able to litigate transfrontier environmental disputes in his own courts and to have those disputes determined according to his

than that accorded to nationals of the country where the pollution originates in similar cases of pollution taking place entirely within such latter countries'—see ENV(76)1, pp 59-60.

42. C(77)28, Annex, Title A, para 3(b).

43. An interesting *bilateral* approach is adopted in the agreement of 19 December 1967, between Germany and Austria, for the compensation of individuals living in the vicinity of Salzburg airport (situated in Austria but near the German border). The agreement provides for the application by German courts of either German or Austrian law, whichever is more favourable to the victim.

own legal system. This will be especially important where the social and legal systems of the States concerned are significantly different. Since it is the polluter who by his conduct has created the international element in the dispute, justice demands that a regime governing adjudication of the dispute should assist his involuntary victim to overcome the special difficulties created by this international element. Moreover, the injured party is likely to be the weaker party in the dispute and therefore deserving of protection. It follows that solutions adopted in relation to such questions as the jurisdiction of courts and choice of law should favour the victim. Analytical considerations also support the exercise of jurisdiction in the place where the damage was sustained. Accordingly, the approach adopted by the OECD should not be regarded as adequate and should not be generally followed. Ideally, the victim of transfrontier pollution damage should have the option of suing either in the courts of the polluter or in his own courts. This option is already available in some States. A less favourable but still satisfactory course, suitable for adoption on a general basis, is for the victim to be able to sue in his own courts. This approach, although favourable to the victim, is also not without legal difficulties, for example, in relation to the jurisdiction of courts against foreign defendants and the recognition and enforcement of judgments. Legislative and treaty action should therefore be encouraged to ensure first that the courts in the State where the damage is sustained will have the necessary jurisdiction to entertain a claim, even if the defendant is outside the jurisdiction and, secondly, that judgments and awards so obtained will be internationally recognised and enforceable against the defendant.