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OPEN-ENDED AD HOC WORKING GROUP OF
LEGAL AND TECHNICAL EXPERTS ON
LIABILITY AND REDRESS IN THE CONTEXT OF
THE CARTAGENA PROTOCOL ON BIOSAFETY
Second meeting
Montreal, 20-24 February 2006
Item 3 of the provisional agenda*

TRANSNATIONAL PROCEDURES INCLUDING THE WORK OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW IN THIS FIELD, INCLUDING CASE-STUDIES

Note by the Executive Secretary

I. INTRODUCTION

1. The Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (the "Working Group", hereinafter) held its first meeting from 25 to 27 May 2005 in Montreal. At that meeting, the Working Group considered and further developed scenarios of damage resulting from the transboundary movements of living modified organisms (LMOs), options, approaches and issues for further consideration relating to liability and redress, that were initially identified by a technical group of experts that met earlier to undertake preparatory work for the first meeting of the Working Group.

2. The Working Group also concluded that it needs further information in several areas that it considered pertinent to accomplish its tasks specified in its terms of reference. In that regard, it requested, among other things, the Secretariat to gather information on transnational procedures, including the work of the Hague Conference on Private International Law in this field, and cases involving transnational procedures. This document has been prepared by the Executive Secretary in response to this request.

3. Part II of this document provides an overview of relevant concepts in private international law related to civil liability for transboundary environmental damage and includes two case-studies of courts applying these concepts in practice. Part III discusses relevant transnational procedures, processes and instruments on private international law related to civil liability for transboundary environmental damage. Finally, part IV presents international processes and instruments pertaining to the related subject of access to justice and non-discrimination.

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II. RELEVANT CONCEPTS AND DEFINITIONS INCLUDING EXAMPLES & CASE-STUDIES

4. In the context of transboundary environmental damage, civil liability proceedings allow a victim a direct and immediate action against the author of the damage and represent a means of implementing the polluter pays principle instead of turning to inter-State claims or the complex system of the law of State responsibility. In the absence of harmonization of the rules of civil liability for transboundary environmental damage at the global level, the differences in the national and international systems in place with regard to civil liability for damage resulting from injury to the environment will have to be reconciled. These divergences foster the need for conflict of law rules and underline the need for private international law and international procedural law to reconcile the various bodies of different national or international provisions dealing with transboundary environmental damage.

5. Private international law, also known as conflict of laws, covers a broad spectrum of fields of law including family law, commercial law (e.g. contracts), and admiralty as well as extra-contractual liability. The basic issues in all these areas of private international law concern: (i) the international jurisdiction of the courts; (ii) the applicable law; and (iii) the recognition and enforcement of subsequent judgments. Most countries have their own rules on each of these issues which fall into a number of categories.

A. Jurisdiction

6. Jurisdiction, in this context, refers to the authority of a court to hear and decide a case as well as the appropriateness of a court exercising this authority. 1/ In tort cases in particular, it is the plaintiff who decides when and where to bring an action. The court must then decide whether it has jurisdiction over the case. In the common law tradition, it is also possible for the defendant to challenge the plaintiff's choice of jurisdiction by arguing that the chosen court is not the most appropriate forum to adjudicate the dispute.

7. Courts examine a variety of factors in determining whether or not they have jurisdiction over a case. These include the connections of the plaintiff to the forum (e.g. residence, domicile, nationality), the connections of the defendant to the forum (e.g. the location of assets), and the connection of the cause of action to the forum (e.g. the location of the activity causing damage, the location where the harm was suffered).

8. For example, under article 3148 of the Civil Code of Quebec, for "personal actions of a patrimonial nature" (which includes extra-contractual liability), Quebec courts have jurisdiction where: "(i) the defendant has his domicile or his residence in Québec; (ii) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec; (iii) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec; (iv) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship; (v) the defendant submits to its jurisdiction."

9. At international law, a number of treaties harmonizing substantive rules related to transboundary environmental damage also include provisions on jurisdiction. These can be divided into four general categories. The first category includes treaties that grant jurisdiction to the courts of the state where the pollution or damage has been suffered. Included here are the 2001 *International Convention on Civil Liability for Bunker Oil Pollution Damage* 2/ (Article 9(1)), the 1977 *Convention on Civil Liability for Oil*

1/ David McClean & Kisch Beevers, *The Conflict of Laws*, 6th ed. (London: Sweet & Maxwell Ltd., 2005) at p. 57.

2/ This Convention is not yet in force.

Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources 3/ (Article 11(1)), and the 1996 *International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea* 4/ (Article 38 (1)). The second category is treaties that grant jurisdiction to the courts of the state where the incident occurred. Numerous of the nuclear treaties are in this category including the 1960 *Convention on Third Party Liability in the Field of Nuclear Energy* (Article 13(1)), the 1963 *Vienna Convention on Civil Liability for Nuclear Damage* (Article XI(1)), and the 1997 *Convention on Supplementary Compensation for Nuclear Damage* 5/ (Article XIII (1)). The third and final category is treaties that offer a choice of jurisdiction. The choices include courts of the State where the damage was suffered, where the incident occurred, where the defendant has its habitual residence, and/or where the defendant has its principal place of business. Examples include the 1989 *Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail & Inland Navigation Vessels* 6/ (Article 19 (1)), the 1999 *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal* 7/ (Article 17 (1)), and the 2003 *Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters* 8/ (Article 13 (1)). Reference may also be made to Article 14 of the Kiev Protocol which allows for disputes between persons claiming for damage pursuant to the Protocol and persons liable under the Protocol to be submitted to final and binding arbitration where this is agreed to by the parties to the dispute.

10. Some countries also follow the Mocambique or local action rule. Under this rule, courts do not have jurisdiction over:

(a) Actions relating to a right in immovable property (*in rem*); and/or

(b) Actions against a person (in personam) relating to damage done to immovable property, e.g. trespass, nuisance

where this property is situated abroad. In these situations, the court of the country where the property is situated has exclusive jurisdiction over the action. The rule originated in England although the second part concerning actions *in personam* has now been overturned in that country. 9/ Both aspects of the rule have been adopted in numerous parts of Australia, the United States and Canada.

11. Under the doctrine of *forum non conveniens*, a court may decline to exercise its jurisdiction over a claim where there is a more appropriate forum in which the case can be heard. Different countries have different tests for determining whether another forum is better suited to hearing a claim but generally the factors considered go to efficiency (e.g. the location of material evidence, or the residences of the parties, witnesses and experts), or justice (e.g. the need to have the judgment recognised in another jurisdiction). The doctrine of *forum non conveniens* is widespread in common law countries but largely unknown in civil law systems, with a few exceptions (e.g. Quebec).

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3 Not yet in force.

4 Not yet in force.

5 Not yet in force.

6 Not yet in force.

7 Not yet in force.

8 Not yet in force.

9 Carlos Manuel Vázquez, "Jurisdiction and Choice of Law for Non-Contractual Obligations – Part II: Specific Types of Non-Contractual Liability Potentially Suitable for Treatment in an Inter-American Private International Law Instrument" (OAS/Ser. Q CJI/doc. 133/03, 4 August 2003) at p. 18-19.

B. Applicable Law – Choice of Law

12. Once a court has decided to exercise its jurisdiction over a claim, it may then need to choose whose law to apply. In order for a choice of laws question to come before a court:

(a) There needs to be a local choice of law rule that refers to foreign law (this rule may be found in a code, statute or in judicial precedent);

(b) There cannot be a prohibition in local law against applying foreign law in the particular circumstances in question (e.g. many countries prohibit the application of foreign penal laws in their courts); and

(c) The plaintiff must have pleaded and proven the foreign law it wishes a court to apply.

13. Regardless of the choice of law rule used by a court and the substantive law that is finally applied to the facts of the case, courts will still apply their own procedural rules. These can vary quite significantly between countries and affect the availability of discovery mechanisms, jury trials, contingency fees, and awards for punitive damages. This highlights the importance of the choice of forum that is made by the plaintiff and the taking of jurisdiction by a court.

1. The law of the place of the tort – lex loci delicti

14. The set of factors considered in a choice of laws question is similar to that in the jurisdiction analysis. The courts will look for factors connecting a person to one set of laws or another, and/or factors connecting the cause of action to one set of laws or another. In torts, the dominant rule has been that the court will apply the law of the place of the tort – *lex loci delicti.* This rule applies in most of the countries of Latin America, ten of the American states, throughout Canada, and, until recently, in nearly all of Europe. 10/ This rule begs the question of where is the place of the tort? In the context of damage arising from the transboundary movements of LMOs, is it the law of the country where the LMO originated, the law of the place of the damage, or the law of another country that also has some connection to the claim?

2. The law of the place where the act was performed – lex loci actus

15. The rule of *lex loci actus* is largely self-explanatory. In adjudicating a claim for extra-contractual liability, a court applying this rule will apply the law of the place where the allegedly tortious act was performed. One of the consequences of this rule is that an operator can only be held liable to the extent of the law of the state in which it carries out its activity.

16. The Private International Law Code of 1928 11/ and the Montevideo Treaties on international commercial law 12/ set the applicable law as that of the place where the activity occurred. This rule is also applied in Austria, the Netherlands, Denmark, Finland and Sweden although these states also permit the choice of law of another state that has a closer connection to the litigation or the parties. According to Vàzquez, the international trend has been away from the *lex loci actus* rule. 13/

10/ Vázquez, *supra* note 9 at p. 12. It should be noted that in federal countries like Canada and the United States, the individual units of the federation (e.g., provinces, states, territories) often have their own rules of private international law and, at least for the purposes of private international law, these units are in effect their own countries.

11/ The Private International Law Code of 13 February 1928, also known as the Bustamante Code, is a regional code on private international law that was adopted at the Sixth International Conference of American States.

12/ The Montevideo Treaties of 1888-1889 and 1936-1940 were approved in the South American Congresses of Private International Law.

13/ Vázquez, *supra* note 9 at p. 13.

3. The law of the place of the damage – lex damni

17. The rule of *lex damni* is similarly self-explanatory. In adjudicating a claim for extra-contractual liability, a court applying this rule will apply the law of the place where the damage resulted from the alledgedly tortious act. The law of the place of damage will usually correspond to the place of the plaintiff's residence and to his or her property. It can also be justified on the grounds that the principal purpose of liability law is to repair damage and not to punish fault.

18. Different variations of the *lex damni* choice of law rule are found in the United Kingdom, Spain, Romania, Turkey, Switzerland, Japan and Quebec.

4. The principle of ubiquity

19. The principle of ubiquity permits the application of either the law of the place where the act was performed or the law of the place of the damage, whichever is more favourable to the plaintiff.

20. There are two approaches to the principle of ubiquity. In one, it is for the plaintiff to decide between the *lex loci actus* and the *lex damni.* This is the approach adopted in Switzerland, Germany and Italy. Indeed, Article 138 of the Swiss Federal Law on Private International Law specifically addresses transboundary environmental damage. The article provides: "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."14/

21. The second approach to the principle of ubiquity leaves it to the court to decide between the *lex loci actus* and the *lex damni.* This approach is found in several civil codes such as those of Peru, Venezuela and Quebec as well as case law from China. 15/

22. Within these two approaches, there are different variations to the principle of ubiquity. Some States allow the choice of law in all circumstances, others only when one law would hold the defendant liable but the other would not, and others allow the choice of *lex damni* only where the defendant should have foreseen that its activity could cause damage in that jurisdiction.

23. Other states that also use the principle of ubiquity include Greece, Hungary, Slovakia, the Czech Republic, the former Yugoslavia, Estonia, Tunisia, and Portugal. Furthermore, Article 3 of the 1974 *Nordic Convention on the Protection of the Environment* also provides that in proceedings concerning compensation for damage caused by environmentally harmful activities, "[t]he 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".

5. Other choice of law rules

(a) The law of the place with the 'most significant relationship'

24. The most frequent source for this rule is the United States Second Restatement of Conflict of Laws from 1971. The Second Restatement states that courts apply the law of the place with "the most significant relationship to the occurrence and the parties" when determining the rights and liabilities of parties with respect to an issue in tort (§145 (1)). The contacts or relationships to be considered in determining the most significant relationship are the place where the damage occurred; the place where

14/ Christophe Bernasconi, "Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?", Preliminary Document No. 8 of May 2000 at p. 30.

15/ Vázquez, *supra* note 9 at p. 14-15; Bernasconi, *ibid.* at p. 33.

the act that gave rise to the damage was committed; the domicile, residence, nationality, place of incorporation or the place of business of the parties, and the place where any relationship between the parties is centred (§145(2)). This is in contrast to the First Restatement which stated that the applicable law was the *lex loci delicti*, where the place of the tort was the place "where the last event necessary to make an actor liable for an alleged tort takes place."16/ In tort, this was usually the place where the damage occurred. Twenty-two states now apply the law of the place with the most significant relationship including Florida, Texas, Delaware, Vermont and Washington. 17/

25. The Second Restatement also includes rules on applicable law for particular torts. In the case of both personal injuries and injuries to tangible things, the applicable law is the *lex damni* unless another state has a more significant relationship to the occurrence, the thing and the parties, in which case the law of the other state applies (§146 and §147).

26. Other choice of law rules used in different American states are a test of 'significant contacts', a theory of 'interest analysis', a theory of the 'better law', or some combination of the different rules. 18/

(b) Party autonomy

27. Party autonomy allows the parties to a dispute to agree between or among themselves – after the event giving rise to the claim has occurred – the law that will apply to the case. This choice of law rule exists in Switzerland (although it is limited to choosing the law of the forum), Austria, France and the Netherlands. 19/

(c) Double actionability

28. The double actionability rule does not so much result in a choice of the law applicable to the dispute as it does result in the application of both sets of law. In order for a suit to be maintained under the double actionability rule, it must present a cause of action under both the law of the forum and the law of the place where the conduct occurred. This rule originated in England but has been abolished there. It is still used in other countries, however, including many Caribbean states. 20/

(d) *Lex fori*

29. *Lex fori* simply means that the court will apply the law of the forum to the dispute at hand regardless of links that the dispute may have to the law of other jurisdictions. This approach is used in Kentucky, Michigan and Nevada as well as Mexico, amongst other fora. 21/

C. Recognition and enforcement of judgments

30. If a plaintiff is successful in its cause of action, it must then try to enforce the judgment against the respondent. This entails having the judgment recognized in the jurisdiction where the defendant's assets are located and then enforcing the judgment in order to receive restitution from the defendant's assets (assuming the judgment is an award for damages or costs.)

16/ *Restatement (First) of the Law of Conflict of Laws* §377 (1934).

17/ Symeon C. Symeonides, "Choice of Law in the American Courts in 2004: Eighteenth Annual Survey" 52 American Journal of Comparative Law 919.

18/ *Ibid.*

19/ Bernasconi, *supra* note 14 at p. 37.

20/ Vázquez, *supra* note 9 at p. 12.

21/ Symeonides, *supra* note 17; Vázquez, *supra* note 9 at p. 13.

31. There are a number of grounds on which a court may refuse to recognise a judgment from another, foreign court that are commonly found in states' rules on private international law. These include a lack of jurisdiction of the foreign court over the cause of action; an earlier decision on the same facts involving the same parties either in the state where recognition is sought or elsewhere (and, in some instances, a requirement that the two judgments be irreconcilable); judgments issued in default of appearance of the defendant unless the plaintiff can show that the defendant was served with the documents initiating the proceedings; and judgments that are contrary to public order or public policy.

32. Again, a number of treaties harmonizing substantive rules related to transboundary environmental damage also include provisions on recognition and enforcement of judgments. These include the 2001 *International Convention on Civil Liability for Bunker Oil Pollution Damage* (Article 10), the 1977 *Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources* (Article 12), the 1992 *International Convention on Civil Liability for Oil Pollution Damage* (Article X), the 2003 *Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters* (Article 18), and the 1999 *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal* (Article 21). The various treaties include some or all of the grounds for denying recognition of a judgment described above. Once a judgment has been recognized, however, they require it be enforced once the formalities of the state where enforcement is sought have been complied with. These formalities are not allowed to include a re-opening of the merits of the case.

D. Case-studies on private international law involving transnational proceedings

33. As part of its request for information to the Secretariat, the Working Group requested case-studies on transnational procedures. Two case-studies are presented below: the transnational litigation that followed the Bhopal disaster in 1994 and the Mines d'Alsace dispute between French and Dutch parties from the mid-1970s. The studies are intended to illustrate the application of some of the rules of private international law discussed in parts A through C above but are by no means exhaustive of the different situations that may arise.

Bhopal

34. The litigation following the Bhopal disaster illustrates some of the private international law questions that must be considered when plaintiffs and defendants are in different jurisdictions.

35. The release of a lethal gas from a chemical plant operated by Union Carbide India Limited (UCIL) in Bhopal, India in 1984 killed or injured tens if not hundreds of thousands of people and polluted the environment around the site. Following the disaster, the Indian Government brought suit against UCIL's majority shareholder, Union Carbide Corporation (UCC), in New York state, UCC's corporate headquarters. The Indian Government had a number of reasons for wanting to bring suit in the United States. These included more advantageous procedural and discovery rules as well as a speedier and more efficient justice system in the United States versus in India. 22/ UCC argued that the New York court should decline jurisdiction on the basis of *forum non conveniens*. The court agreed that New York was not the most appropriate forum and so declined to take jurisdiction. Its rationale was that India was both an alternative and adequate jurisdiction, that there were numerous private interest factors such as the location

22/ Tullio Scovazzi, "Industrial Accidents and the Veil of Transnational Corporations" in Francesco Francioni & Tullio Scovazzi, eds., *International Responsibility for Environmental Harm* (London: Graham & Trotman, 1991) 395 at p. 407-408.

of sources of proof and witnesses as well as public interest factors such as high administrative costs and the likelihood that Indian law would have been the applicable law that favoured another jurisdiction. 23/

36. The Indian Government then filed suit in India. Lower courts issued orders requiring UCC to pay interim compensation. Scovazzi describes the possibility of enforcing these orders in the United States as "very doubtful". 24/ Ultimately, the case was settled and UCC agreed to pay approximately US$400 million to the Government of India. 25/

The Mines d'Alsace case

37. In this dispute, some Dutch gardeners brought suit in the Netherlands against a French company – the Mines de Potasse d'Alsace. The plaintiffs alleged that the discharge of saline waste from the operations of the defendant into the Rhine River led to the excessive salinization of the river. The gardeners relied on water from the Rhine for irrigation. They alleged that the high salt content of the water caused damage to their plantations and obliged them to take expensive measures to limit that damage. They brought suit to establish the liability of the Mines de Potasse d'Alsace for the damage.

38. The court of first instance in Rotterdam held that it did not have jurisdiction over the dispute, finding that under Article 5(3) of the 1968 Brussels *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* ("Brussels Convention"), the claim came under the jurisdiction of the French court for the area in which the discharge at issue took place. The plaintiffs appealed the judgment and a question concerning the interpretation of Article 5(3) of the Brussels Convention was referred to the European Court of Justice (ECJ). The ECJ ruled that Article 5(3) gave jurisdiction to both the place where the damage occurred and the place where the act leading to the damage took place. 26/ (This decision is discussed in more detail in paragraph 59, below.)

39. The case returned to Dutch courts where Dutch law was applied as the Mines de Potasse d'Alsace did not oppose the plaintiffs' claim to this effect. 27/ By 1988, the case had reached the Supreme Court of the Netherlands which was set to rule in favour of the plaintiffs when the parties settled out of court and the company agreed to pay approximately US$ 2 million in compensation. 28/

III. TRANSNATIONAL PROCEDURES CONCERNING PRIVATE INTERNATIONAL LAW

40. Various transnational processes and instruments are seeking to harmonize the rules of private international law. These processes and instruments include:

- the Hague Conference on Private International Law;
- the Inter-American Specialized Conferences on Private International Law of the Organization for American States;
- the Brussels Convention, the Lugano Convention and the Rome Convention from Europe; and
- the International Law Association.

23/ *Ibid.* at p. 409.

24/ *Ibid.* at p. 412.

25/ *Ibid.* at p. 412.

26/ *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA*, 1976, European Court of Justice, case 21/76.

27/ René Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, Developments in International Law, v. 24 (The Hague: Kluwer Law International, 1996) at p. 257.

28/ *Ibid.* at p. 257-8.

Different fora address some or all of the three elements of private international law, i.e. jurisdiction, applicable law, and recognition and enforcement.

41. Other transnational processes and instruments are seeking to create unified substantive law on particular issues in an attempt to avoid conflicts of laws in the first place. These processes include numerous of the treaties mentioned in part II, above. The Secretariat has previously prepared documents related to these processes and treaties in the context of the Cartagena Protocol on Biosafety, including documents UNEP/CBD/ICCP/2/3 and UNEP/CBD/BS/COP-MOP/1/9/Add.1. This document therefore focuses on processes to harmonize the rules of private international law.

42. The starting point for discussing transnational procedures on private international law are the 1972 Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration") and the Rio Declaration on Environment and Development ("Rio Declaration"). Both include principles on transnational processes for liability rules related to damage to the environment. Principle 22 of the Stockholm Delcaration provides 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." Principle 13 of the Rio Declaration provides in part that "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." While some of the procedures discussed below predate either or both the Stockholm and Rio Declarations, these Declarations nonetheless help to set the context for work in this area and are important statements of intent by states.

A. The Hague Conference on Private International Law

43. The Hague Conference on Private International Law is an intergovernmental organization that works towards a progressive unification of the rules of private international law. The first session of The Hague Conference on Private International Law was convened in 1893 by the Government of The Netherlands. The 19th plenary session was held in 2001-2002. There are three areas where the Conference has been active that are of particular relevance to the Working Group: negotiations for the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, discussion of a possible Convention on Civil Responsibility resulting from Transfrontier Environmental Damage, and the 1971 *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.*

1. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

44. The 1971 *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* ("Judgments Convention") sets rules for when judgments are to be recognised and enforced as well as procedures for obtaining recognition and enforcement. The conditions required for recognition and enforcement are: a decision given by a court of a Contracting State in accordance with the proper exercise of its jurisdiction within the meaning of the Convention; the decision is no longer subject to ordinary forms of review in the state of origin; and the decision is enforceable in the state of origin (Article 4). Recognition or enforcement of a decision may be refused on grounds like those described above including where such recognition or enforcement would be "manifestly incompatible" with the public policy of the state to which the recognition or enforcement is addressed, where the decision was obtained by procedural fraud, where proceedings between the same parties based on the same facts and having the same purpose are pending before a court of the state addressed and were instituted first or have resulted in an earlier decision, and where a decision has been rendered in default unless the defendant received notice of the institution of proceedings in sufficient time to allow a defence to the proceedings

(Articles 5 and 6). The Convention also prohibits reviewing the merits of a decision when the decision is being recognized or enforced (Article 8). The Convention includes rules for determining where a court had jurisdiction for the purpose of the court to which recognition or enforcement is addressed determining whether this will be allowed. The default rule is that a court has jurisdiction where the defendant has its habitual residence, seat, place of incorporation or principal place of business in the state. In the case of damage to persons or property, a court will have jurisdiction where the facts occasioning the damage occurred in the state of that court and the author of the damage was present in the territory when the facts occurred (Article 10).

2. Negotiations for the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

45. Work at the Hague Conference on a possible convention on jurisdiction and foreign judgments in civil and commercial matters began in 1993. The negotiations initially had a very broad scope, including questions of personal jurisdiction in international civil and commercial matters. The negotiations stalled, however, as countries were unable to make compromises that would reconcile their different legal systems. Ultimately, agreement was reached in June 2005 on a convention with a much narrower scope – the *Convention on Choice of Court Agreements*. The Convention concerns jurisdiction and the recognition and enforcement of judgments from exclusive choice of court agreements between businesses. It specifically excludes from its scope personal injury claims of natural persons as well as tort or delict claims for damage to tangible property (Article 2.2 (j) and (k)) as well as exclusive choice of court agreements "to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party" (Article 2.1 (a)). The other issues – including torts – that had been part of the negotiations for a Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters may be addressed again in the future but negotiations are not imminent.

3. Discussion of a Convention on Civil Responsibility resulting from Transfrontier Environmental Damage

46. The Hague Conference began its deliberations on civil liability for transboundary environmental damage in the early 1990s. This work was itself premised on a 1960s memo by Bernard Dutoit, then-Secretary at the Permanent Bureau of the Conference, recommending against the development of a convention on the law applicable to torts in general and instead favouring the creation of numerous instruments that each focused on a specific area of extra-contractual liability. In 1992, the Permanent Bureau distributed a "Note on the Law Applicable to Civil Liability for Environmental Damage" to its Member States providing background on the topic and seeking their views as to whether this might be a viable topic for a future international convention. In the Note, the Permanent Bureau concluded that this was essentially an untreated area in international treaties.

47. On the basis of the 1992 Note, the Hague Conference decided to include this item on the agenda for the work programme of the Conference. In April 1994, the Conference sponsored a colloquium held at Osnabrück entitled "Towards a Convention on the Private International Law of Environmental Damage". The conclusions are known as the 'Ten Points of Osnabrück' and were described in a 1995 note by the Permanent Bureau. The participants in the colloquium were generally well-disposed to the drafting of a private international law convention on transboundary environmental harm. They believed the convention should address both the issues of jurisdiction and choice of law. On jurisdiction, they endorsed a rule allowing the plaintiff to choose from bringing suit in the place of the defendant's habitual residence, the place of the dangerous activity, or the place where the damage was suffered. 29/ On applicable law, the

29/ "Note on the law applicable and on questions arising from conflicts of jurisdiction in respect of civil liability for environmental damage", Preliminary Document No. 3 of April 1995 in *Proceedings of the Eighteenth Session* (1996), Tome I at p. 77.

participants endorsed the principle of ubiquity under which the plaintiff can choose between the law of the principal place of business of the author of the damage and the law of the place where the injury was suffered. In its note on the Colloquium, the Permanent Bureau recommended that the Conference also consider using *lex loci actus* and *lex damni* as possible choice of law rules, among others. On recognition and enforcement of judgments, the participants in the colloquium endorsed the model commonly used in the Hague Conventions, namely that in the event of international jurisdiction where more than one court may have been be able to exercise its jurisdiction over the case, "and subject to the reservation of *ordre public*, a substantive revision of the decision must be excluded."30/

48. At the Eighteenth Session of the Hague Conference in 1996, the Special Commission on General Affairs and Policy decided to retain the topic on the Conference's agenda although it was given third priority. The Commission decided that the topic should be the subject of further study by the Permanent Bureau. Accordingly, the Bureau released an extensive note on "Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?" in 2000. The note discussed all three elements of private international law – jurisdiction, choice of law, and enforcement of judgments – including international and national rules particularly as these relate to environmental damage.

49. The issue of civil liability resulting from transfrontier environmental damage and the potential role of the Hague Conference was again on the agenda of the Special Commission in May 2000. The Commission considered the note prepared by the Bureau. While some experts felt that the topic was important and promising and spoke in favour of giving it priority, the majority of members of the Special Commission decided that no priority should be given to the preparation of an agreement on the conflict of jurisdictions, applicable law and international judicial and administrative cooperation in respect of civil liability for environmental damage. The reasons for this decision included the complex interplay between public and private international law, the potential for overlap with other existing instruments, and other work in other fora including the Council of Europe, the European Union, and the Organization of American States. 31/ As a result, the subject has remained on the agenda of the Hague Conference, but without priority, and hence no concerted action on this subject is being taken by the Permanent Bureau at this time. The status of the subject will be discussed again in April 2006 at the next meeting of the Special Commission. The Permanent Bureau of the Hague Conference remains attentive to the main developments on this subject and is considering preparing a note on the private international law aspects of environmental treaties.

B. Inter-American Specialized Conferences on Private International Law (CIDIP)

50. The harmonization of private international law has been an ongoing process in the Americas since the late nineteenth century. Currently, work is being carried out by the Inter-American Specialized Conferences on Private International Law (known by their Spanish acronym CIDIP) under the auspices of the Organization of American States (OAS). The CIDIP works to harmonize private international law rules in specific areas of law. The first CIDIP was held in Panama City in 1975 and the Conferences have been convened every four to six years thereafter with the most recent – CIDIP-VI – having taken place in Washington, D.C. in February 2002.

51. CIDIP-V had recommended eight items for the agenda of CIDIP-VI including 'conflict of laws on extracontractual liability (limited to a specifically defined scope)', and 'civil international liability for cross-border contamination; aspects of private international law'. The inclusion of international civil liability for transboundary pollution originated from a proposal by Uruguay. Ultimately, the number of topics included on the agenda was narrowed to three including conflict of laws on extracontractual

30/ *Ibid.*

31/ Vázquez, *supra* note 9 at p. 28.

liability with an emphasis on competency of jurisdiction and applicable law with respect to civil international liability for transboundary pollution.

52. In February 2000, Uruguay, the rapporteur for the agenda item on international civil liability for transboundary pollution, circulated a document proposing particular approaches to both choice of law and jurisdiction in relation to extra-contractual liability for transboundary pollution. At a Meeting of Experts later in the month, Uruguay presented a document entitled "Bases for an Inter-American Convention on Applicable Law and Competency of International Jurisdiction with Respect to Civil Liability for Transboundary Pollution", which set forth a draft convention on the topic. At the meeting it was agreed that a drafting committee would be formed and Uruguay would chair.

53. In October 2000, the Permanent Council of the OAS distributed to Member States a "Preliminary Draft Inter-American Convention on Applicable Law and Proper International Jurisdiction in Matters of Civil Liability for Cross-Border Pollution" (OEA/Ser. G CP/CAJP-1688/00) prepared by Uruguay. The proposed article on jurisdiction would have allowed the plaintiff to choose from among the jurisdiction of the state in which the polluting activity was performed; in which the harm was suffered; or in which the plaintiff or respondent had his domicile, usual place of residence, or commercial establishment. The proposed article on applicable law would also have given the plaintiff the choice of applicable law between the law of the state in which the pollution originated or in which the injury was suffered.

54. As CIDIP-VI began in February 2002, Uruguay shifted its focus and presented a document proposing a convention on jurisdiction and choice of law for extra-contractual liability in general, not just in the area of transboundary pollution. In the end, no agreement on a convention – on either extra-contractual liability generally or specifically focused on transboundary pollution – was reached during CIDIP-VI. The Conference did, however, adopt a resolution (CIDIP-VI/Res.7/02) in which it resolved:

(a) To continue work on the subject. (The resolution included guidelines to be taken into account in considering an international instrument on applicable law and competency of international jurisdiction with respect to extra-contractual liability);

(b) To request the Permanent Council of the OAS to entrust the Inter-American Juridical Committee (IJC) with issuing a report and drawing up recommendations and possible solutions to be presented to a meeting of experts; and

(c) To request the General Assembly of the OAS to convene a meeting of experts to consider the possibility of preparing an international instrument on the matter to be presented to the General Assembly of the OAS at its regular session in 2003.

55. Subsequently, a resolution of the Permanent Council (CP/Res. 815 (1318/02)) instructed the IJC to examine the documentation regarding the applicable law and competency of international jurisdiction with respect to extra-contractual civil liability, bearing in mind the guidelines from the CIDIP-VI resolution, and to issue a report on the subject including recommendations and possible solutions. These were to be presented to the Permanent Council.

56. The IJC discussed the issue of extra-contractual civil liability during its 60th and 61st regular sessions in 2002 as well as its 62nd and 63rd regular sessions in 2003. In a resolution on extra-contractual civil liability, the Committee concluded that "because of the complexity of the subject and the wide variety of diverging forms of responsibility encompassed within the category of 'non-contractual civil liability', it would be more appropriate to recommend initially the adoption of inter-American instruments to regulate jurisdiction and choice of law with respect to specific sub-categories of non-contractual civil liability, and only afterwards, should the proper conditions exist, pursue the adoption of a general inter-American instrument to address jurisdiction and choice of law for the entire field of non-contractual liability" (CJI/Res.59 (LXII-O/03), para. 2). More specifically, on the topic of jurisdiction and choice of law with respect to non-contractual liability arising out of transboundary environmental damage, the

Committee concluded that elaborating an inter-American instrument on the subject would be considerably more challenging than the same activity in two of the other areas it had considered – product liability and non-contractual obligations arising from traffic accidents. Extra-contractual civil liability has now been removed from the IJC's agenda. 32/

57. Planning and preparatory work is underway for CIDIP-VII. The current work is focused on selecting the topics for inclusion on the agenda for the Conference. To date, both Uruguay and El Salvador have proposed the inclusion of extra-contractual civil liability on the agenda. Uruguay initially proposed the topic with particular reference to cross-border pollution. In a December 2004 summary of its position, the country indicated it was willing to discard the emphasis on cross-border pollution to examine extra-contractual civil liability in general if this would facilitate the inclusion of the item on the agenda. El Salvador's proposal is for an item on "extracontractual civil liability for Environmental Pollution" (OEA Ser. G P/CAJP-2094/03 add.2).

C. Transnational Procedures in Europe

58. Two sets of transnational procedures in Europe are of interest here. The first concerns jurisdiction and the enforcement of judgments in civil and commercial matters. The second concerns the development of a private international law instrument on the law of torts.

1. Jurisdiction and the enforcement of judgments in civil and commercial matters

59. Rules on jurisdiction and enforcement of judgments in Europe began with the 1968 Brussels *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* ("Brussels Convention"). Part of the purpose of the Brussels Convention is to implement the provision in Article 293 (formerly 220) of the 1957 *Treaty establishing the European Community* (as amended) wherein Member States agree to enter into negotiations, "with a view to securing for the benefit of their nationals: … [*inter alia*] the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." To this end, the Brussels Convention sets out rules identifying the Member State whose courts will have jurisdiction over a particular dispute. The default general jurisdiction rule is based on domicile: "persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State" (Article 2). Under Article 53, "the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile." Sections 2 through 6 of Title II of the Brussels Convention set out additional grounds on which a court may exercise its jurisdiction. For causes of action in tort, delict or quasi-delict, a person domiciled in one Contracting State may also be sued in the courts of the place where the harmful event occurred (Article 5(3)). The meaning of this article was clarified by the Mines d'Alsace decision of the European Court of Justice in 1976. The Court interpreted the phrase 'the place where the harmful event occurred' in Article 5(3) to mean both the place where the damage occurred and the place of the act giving rise to the damage. The result of this interpretation is that a plaintiff can choose to sue either in the courts of the place where the damage occurred or in the courts of the place of the act that gave rise to and is at the origin of the damage. 33/

60. Title III of the Brussels Convention addresses the recognition and enforcement of judgments. It requires the judgments given in one Contracting State to be recognized in the other Contracting States without any special procedure being required (Article 26). Article 27 provides for circumstances where judgments are not to be recognized. These include many of the grounds listed in paragraph 31, above, including if recognition is contrary to public policy; where the judgment was given in default of

32/ *Annual Report of the Inter-American Juridical Committee to the General Assembly*, OEA/Ser.Q/VI.34, CJI/doc.145/03, 29 August 2003 at p. 28.

33/ *Mines de potasse d'Alsace SA, supra* note 26.

appearance if the defendant was not served with the documents initiating the proceedings in sufficient time to enable him to arrange for his defence; and if the judgment is irreconcilable with another judgment in a dispute between the same parties in the State where recognition is sought.

61. The Brussels Convention does not contain any rules specifically on jurisdiction or the recognition and enforcement of judgments in cases of transboundary environmental damage.

62. In 1988, the member states of the European Community and of the European Free Trade Association (EFTA) agreed to the Lugano *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* ("Lugano Convention"). The purpose of the Lugano Convention was to apply the principles of the Brussels Convention to the wider number of countries covered by the two groups. Since the Lugano Convention was concluded, a number of states have left the EFTA to become members of the European Union such that the Lugano Convention now only applies to Iceland, Norway and Switzerland.

63. The Lugano Convention includes the same rules on general and exclusive jurisdiction as well as the recognition and enforcement of judgments as does the Brussels Convention, described above. The Lugano Convention also does not contain any rules specifically on jurisdiction or the recognition and enforcement of judgments in cases of transboundary environmental damage.

64. The final instrument to be discussed is the *Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* ("Brussels I"). This regulation was developed under the rubric of Article 61 of the 1957 *Treaty establishing the European Community* (as amended). This article provides, *inter alia*, that the Council will adopt "measures in the field of judicial cooperation in civil matters as provided for in Article 65" in order "to establish progressively an area of freedom, security and justice". Article 65, in turn, provides more details on the subject matter and purposes of the measures to be adopted. These include, *inter alia*, "improving and simplifying: … the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; … [and] promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction" (Article 65(a) and (b)).

65. Brussels I supersedes the Brussels Convention in all Member States of the EU except Denmark, which exercised an opt-out power. The provisions in Brussels I are very similar to those of both the Brussels and Lugano Conventions. The general jurisdiction rule is also based on domicile. In causes of action in tort, delict or quasi-delict, courts of the place where the harmful event occurred or may occur can also exercise their jurisdiction. The parties to the dispute may also agree to give a court jurisdiction over the dispute. On recognition and enforcement of judgments, a judgment given in one Member State must be recognised in the other Member States "without any special procedure being required" (Article 33(1)). Furthermore, a judgment that is given in one Member State and is enforceable there is to be enforced in another Member State when it has been declared enforceable there (Article 38(1)). Brussels I does not contain any provisions specifically addressing jurisdiction and the recognition and enforcement of judgments in cases of transboundary environmental harm.

2. Development of a private international law instrument on the law of torts

66. Also under Articles 61 and 65 of the 1957 *Treaty establishing the European Community* (as amended), the Community is to adopt measures in the field of judicial cooperation in civil matters in so far as necessary for the proper functioning of the internal market. Recent work has focused on the

development of a Regulation to harmonize conflict of law rules in the area of non-contractual obligations in civil and commercial matters. This work is known as "Rome II". 34/

67. The Regulation has not yet been concluded but a proposal for a Regulation on the issue was presented by the European Commission in 2003 (COM(2003) 427). The proposal includes draft text.

68. Under the draft Regulation, the general rule for choice of law in tort or delict is *lex damni* – "the law of the country in which the damage arises or is likely to arise" (Article 3). The wording of the choice of law rule means that the draft Regulation applies not just to obligations related to damage that has already occurred but also to obligations related to damage that is likely to arise. The general rule requires, however, that where the claimant and the defendant have their habitual residence in the same country then the law of that country will apply. Furthermore, in instances where it is clear that the non-contractual obligation is "manifestly more closely connected with another country", the law of that country will apply (Article 3(3)).

69. The draft Regulation also contains a specific rule for non-contractual obligations arising out of a violation of the environment, i.e. "damage to property and persons and damage to the ecology itself, provided it is the result of human activity." 35/ In these instances, the general rule of *lex damni* will apply unless the claimant prefers to base his claim on the *lex loci actus*, the law of the place where the activity giving rise to the damage occurred (Article 7). According to the explanatory text in the proposal for the Regulation, this approach is in conformity with recent trends in environmental liability. The default rule of *lex damni* is "conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries, which removes the incentive for an operator to opt for low-protection countries. The rule thus contributes to raising the general level of environmental protection." 36/ An exclusive application of *lex damni*, however, would prevent a claimant in a country with low protection from benefiting from higher levels of protection in other countries and "could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country's laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the "polluter pays" principle." 37/ Allowing the claimant to choose the *lex loci actus* avoids this situation and will not only "respect the victim's legitimate interests but also … establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity." 38/

70. A further relevant provision is Article 13 on 'Rules of safety and conduct'. It provides that: "Whatever may be the applicable law, in determining liability account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage." This is to provide for situations where an activity has been authorized and is legitimate in one country but causes damage in another.

34/ Earlier work on codifying the rules on contractual obligations and conflicts of laws in the Community resulted in the 1980 *Convention on the law applicable to contractual obligations*, known as the "Rome Convention" or "Rome I". It is for this reason that the subsequent negotiations on extra-contractual obligations and conflicts of laws are known as "Rome II".

35/ Commission of the European Communities, "Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II")", COM(2003) 427 final, 22 July 2003 at p. 19.

36/ *Ibid.*

37/ *Ibid.* at p. 19-20.

38/ *Ibid*. at p. 19.

71. Article 10 of the proposed Regulation allows the parties to a dispute to enter into an agreement, after their dispute has arisen, submitting the non-contractual obligations (other than those on infringement of intellectual property rights) to the law of their choice. Article 11 sets out the scope of the law applicable to non-contractual obligations, i.e. once the applicable law is determined it will apply, *inter alia*, to questions of the conditions and extent of liability, grounds for exemption from liability and any limitation or division of liability, the existence and kinds of injury or damage, measures a court can take to prevent or terminate injury or damage or ensure the provision of compensation, and the assessment of damage. In a similar vein, Article 24 provides that where the application of a provision of the law designated by the Regulation has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded, this will be contrary to Community public policy.

D. The International Law Commission

72. In 1997, the Executive Council of the International Law Association (ILA) established a Committee on Transnational Enforcement of Environmental Law. The mandate of the committee is:

> To consider: All aspects of the transnational enforcement of environmental law (both national and international) through national legal systems. In particular, the committee's mandate would include: (1) jurisdiction of national courts with respect to transboundary environmental damage or risk; choice of law and forum shopping in environmental litigation; (2) transboundary access to justice and public interest litigation in environmental cases; (3) the use of national courts by foreign plaintiffs seeking redress against multinational companies. 39/

73. To date, the Committee has prepared two reports. In the first report, the Committee examined obstacles to the transnational enforcement of environmental law (discussed in more detail in section IV), the use of human rights law in environmental cases, and the issue of access of non-governmental organizations to transboundary environmental litigation. In the second report, the Committee continued to examine obstacles to transnational enforcement of environmental law as well as possible solutions. The obstacles examined are primarily related to the private international law rules, discussed above. One obstacle is the choice of law barrier and the uncertainty over whose law should be applied based on the different choice of law rules discussed above. From a comparative examination of these different rules, the Committee concluded that for the purposes of environmental protection, current law supported a three-part solution. First, there should be a bilateral choice of law/party autonomy rule where the parties can agree on the law that will apply after the harmful event has occurred. In the absence of agreement or choice by the parties, the law should allow the victim the unilateral choice of law. Finally, in the absence of any choice, the court should apply the law of the place where the damage occurs (*lex damni*). 40/

74. Another potential obstacle concerns the meaning of 'civil and commercial matters' as used in the Brussels and Lugano Conventions and now Brussels I, and the extent to which the term may exclude from the scope of these measures civil claims brought by public authorities. The Committee suggests that civil actions by public authorities that involve ensuring compliance with environmental law could be distinguished from other types of civil actions by public authorities and the term 'civil and commercial matters' interpreted to include the former to help ensure the recognition and enforcement of judgments. 41/

39/ International Law Association, Committee on Transnational Enforcement of Environmental Law, "First Report" (New Delhi Conference 2002) at p. 1.

40/ International Law Association, Committee on Transnational Enforcement of Environmental Law, "Second Report" (Berlin Conference 2004) at p.14.

41/ *Ibid.* at p. 8-9.

75. The Committee also examined the effects "of an administrative licence on the civil liability of a polluter who is being sued before the courts of not his home State but the State where cross-border environmental damage occurs."42/ The defendant will frequently argue that the permit from its home state is a defence to liability. This creates two possible outcomes: "If the affirmative defence based on the permit granted abroad … is accepted, the injured person will be deprived of the legal protection which his national law … might otherwise provide. On the other hand, if the court rejects the permit granted by the authorities abroad, the injured person might recover damages that the persons injured in the country of the permit would not have the possibility of obtaining from their own courts."43/ The Committee concludes that two principles should be applied in this situation. The first is a principle of equality of access where if persons who reside abroad have not been given the right to participate in the administrative proceedings that led to the grant of the permit in the first place then the foreign permit should not be given any effect. The second is a principle of equivalence of authorizations which requires that a court only take a foreign permit into account if it could also find liability despite the existence of a permit issued by domestic public authorities. Finally, courts should only take a foreign permit into account if there is a rule distinguishing between injunctions and suits for damages, and that requires "foreign weighty societal interests [to be] taken into account on an equal footing with domestic ones."44/

76. The report also identified what it terms 'global principles of jurisdiction' relevant to environmental disputes and which are recognized almost universally. These global principles include a general jurisdiction rule allowing the plaintiff to bring suit in the courts of the defendant as well as alternative grounds of jurisdiction in tort cases that allow a plaintiff to bring an action either before the courts of the State where the act causing the injury occurred or where the damage arose. The courts of the latter forum will not have jurisdiction, however, if the defendant could not foresee that damage would occur there. The final global principle is that parties to a dispute can agree on a chosen court. 45/ A final issue discussed in the report is the growing trend in both practice and doctrine for civil claims against multinational corporations for the acts of subsidiaries in countries other than that of the head office. The Committee concludes that the law on this point is in a state of transition. 46/ The issue will be examined in more detail in the third report.

77. The Committee foresees preparing one more report for the 2006 Conference of the ILA. This report will, *inter alia*, set forth the Committee's overall conclusions on the transnational enforcement of environmental law. The conclusions will likely be in the form of draft principles or articles.

IV. ACCESS TO JUSTICE AND NON-DISCRIMINATION

78. Related to the harmonization of private international law rules pertaining to transboundary environmental damage are questions of access to justice and non-discrimination. These issues apply both before the private international law rules discussed above come into play – e.g. before a court has to decide whether it has jurisdiction over a case, the claimants must first have standing to bring a dispute before the court – and while the private international rules are being implemented – e.g. does one court discriminate against another in recognising and enforcing judgments? To this end, access to justice and non-discrimination tend to go beyond private international law and include aspects of public international law as well. Some of the key features and processes on access to justice and non-discrimination are summarized below.

42/ *Ibid.* at p. 16.

43/ *bid.* at p. 17.

44/ *Ibid.* at p. 20.

45/ *Ibid.* at p. 3.

46/ *Ibid.* at p. 23.

79. According to the Organisation for Economic Cooperation and Development (OECD), there are four rights to be accorded to foreign persons as part of an equal right of access. These are:

(a) The right *to be informed* in an equivalent way to "nationals" of projects, new activities or courses of conduct which may give rise to a significant risk of transfrontier pollution;

(b) The right to have *equal access to information* published or made accessible to concerned "nationals" by the authorities responsible for such questions;

(c) The right to *participate* in hearings and enquiries prior to the taking of a decision and, to *make objections* in relation to proposed decisions by the public authorities which could directly or indirectly lead to transfrontier pollution, under the same conditions as those applicable to "nationals";

(d) The right to have *recourse* under equivalent conditions, in particular in matter of standing, as "nationals" to *administrative and judicial procedures* (including emergency procedures) to prevent transfrontier pollution or to obtain its abatement, with compensation for damage caused by such pollution. 47/

80. The origins of access to justice and non-discrimination can be traced to various human rights treaties. For example, Article 7 of the 1948 *Universal Declaration of Human Rights* provides that "All are equal before the law and are entitled without any discrimination to equal protection of the law" while Article 14 of the 1966 *International Covenant on Civil and Political Rights* states that "All persons shall be equal before the courts and tribunals." Principles of access to justice and non-discrimination have also been included in soft law instruments such as the Stockholm and Rio Declarations. For example, Principle 10 of the Rio Declaration includes the requirement that "Effective access to judicial and administrative proceedings, including redress and remedy shall be provided."

81. In 1974, Denmark, Finland, Norway and Sweden agreed to the *Convention on the Protection of the Environment.* Article 3 of the Convention addresses both access to justice and non-discrimination. It provides that any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State has the right to bring an action concerning the permissibility of these activities, including measures to prevent damage and questions on compensation for damage, before a court or administrative body of that state. The person also has the same right to appeal the decision of the court or administrative body as would a legal entity of the state in question.

82. The OECD was the first international organisation to engage in a detailed elaboration of the principles of access to justice and non-discrimination. In the mid-1970s, the Environment Committee of the Organization prepared a series of studies and reports on access to justice and non-discrimination in the context of transfrontier pollution. The Council of the OECD adopted three recommendations related to equal access, non-discrimination and transfrontier pollution. In 1974, a "Recommendation of the Council on Principles Concerning Transfrontier Pollution" (C (74) 224) included an annex setting out "Some Principles Concerning Transfrontier Pollution". These included a principle of non-discrimination whereby "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" (Title C, 4(d)), and a principle of equal right of hearing under which "[c]ountries should make every effort to introduce, where not already in existence, a system affording equal right of hearing, according to which: … 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

47/ "Report on Equal Right of Access in Relation to Transfrontier Pollution" prepared by the Environment Committee for the OECD Council at para. 6, emphasis in original, in OECD, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977).

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" (Title D, 5(b)).

83. In 1976, the Council adopted a recommendation on the equal right of access in relation to transfrontier pollution (C (76) 55 (Final)). It included a recommendation to member states of the OECD to remove obstacles in their legal systems to the implementation of an equal right of access. It also included an annex describing the constituent elements of a system of equal right of access in relation to transfrontier pollution. These elements echo the four rights that form a right of equal access as described above.

84. In 1977, the Council adopted a recommendation "For the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution" (C (77) 28). The principles in the annex to the recommendation include, *inter alia*, principles on the legal protection of persons. Under this title, countries of origin of transfrontier pollution should ensure that any person who has suffered damage from transfrontier pollution or is exposed to significant risk of transfrontier pollution will at least receive equivalent treatment to that afforded in the country of origin, and this treatment "includes the right 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" (para. 4(b)). If countries allow domestic non-profit environmental groups to bring actions to safeguard environmental interests, the principles state that they should grant the same right to comparable groups from countries exposed to the transfrontier pollution. Countries should also consider allowing public authorities from exposed countries to participate in administrative or judicial proceedings if domestic authorities are similarly allowed to do so under domestic law.

85. Following on from the work at the OECD, the American Bar Association and the Canadian Bar Association created a Joint Working Group on Settlement of International Disputes in the mid-1970s. The mandate of the group was to research the settlement of disputes between the two countries. One of the areas where it issued substantive recommendations was equal access to domestic legal remedies for harm caused by transboundary pollution. 48/ The group prepared a "Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution". The Draft Treaty contains very similar provisions to those in the 1977 recommendation from the OECD Council, i.e. that persons in the exposed country are to at least receive equivalent treatment to that afforded in the country of origin and this treatment includes the right to take part in, or have resort to, administrative and judicial proceedings to prevent domestic pollution, abate it or obtain compensation for damage caused. While the American and Canadian Governments took note of the Draft Treaty, they never entered into negotiations to turn it into a binding agreement.

86. At the recommendation of the Joint Working Group of the American and Canadian Bar Associations, the American and Canadian organizations dedicated to the promotion of uniform laws (the United States National Conference of Commissioners on Uniform State Laws and the Uniform Law Conference of Canada, respectively) established a liaison committee to discuss drafting uniform legislation for both countries on access to justice and non-discrimination in situations of transboundary pollution. The result was the model *Uniform Transboundary Pollution Reciprocal Access Act.* The Act abolishes the *in personam* aspect of the local action rule and allows victims of transboundary pollution equal access to the courts of the jurisdiction where the pollution originated if the jurisdiction of the victim of the pollution also grants equal access to its courts. Section 3 of the Act provides the same right to relief for injuries or threatened injuries from transboundary pollution to persons in a reciprocating jurisdiction

48/ ABA/CBA Joint Working Group on the Settlement of International Disputes, "Report to the Executive and to the 1979 Annual Meeting of the Canadian Bar Association" (July 1979) in American Bar Association and Canadian Bar Association, *Settlement of International Disputes Between Canada and the USA: Resolutions Adopted by the American Bar Association on 15 August 1979 and By the Canadian Bar Association on 30 August 1979 with Accompanying Reports and Recommendations* (Chicago: Section of International Law of the American Bar Association, 1979) at p. xxxiii-xxxiv.

as if the injury or threatened injury occurred domestically. Section 4 of the Act also includes an applicable law rule for proceedings under the Act. According to the provision, the applicable law is to be the law of the forum. To date, three Canadian provinces – Manitoba, Ontario, and Prince Edward Island – and seven American states – Colorado, Connecticut, Michigan, Montana, New Jersey, Oregon and Wisconsin – have enacted the legislation but there are no reported cases under the respective statutes.

87. In 1980, the Hague Conference agreed to a *Convention on International Access to Justice*. Much of the Convention concerns legal aid but chapter II of the Convention concerns security for costs and enforceability of orders for costs. Article 14 provides: "No security, bond or deposit of any kind may be required, by reason only of their foreign nationality or of their not being domiciled or resident in the State in which proceedings are commenced, from persons (including legal persons) habitually resident in a Contracting State who are plaintiffs or parties intervening in proceedings before the courts or tribunals of another Contracting State." In order to ensure the enforcement of orders for costs, Article 15 provides that any orders for costs made in one Contracting State against a person exempt from providing security under Article 14 or the law of the state where the proceedings commenced, are to be enforceable without charge in any Contracting State on the application of the person entitled to the benefit of the order.

88. In 1993, when Canada, the United States and Mexico agreed to the *North American Free Trade Agreement*, they also entered into the *North American Agreement on Environmental Cooperation*. Article 6 of the Agreement requires the parties to ensure that persons with a "legally recognized interest" have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of national environmental laws. Furthermore, the article elaborates on what constitutes private access to remedies including rights to sue another person under that party's jurisdiction for damages; to seek sanctions or remedies to mitigate the consequences of violations of environmental rules; to request competent authorities to enforce environmental rules; and to seek injunctions where a person suffers or may suffer harm as a result of conduct under a party's jurisdiction contrary to that party's environmental rules or from tortious conduct. Article 7 requires the parties to ensure that their administrative, quasi-judicial and judicial proceedings are fair, open and equitable.

89. Article 10(9) of the Agreement requires the Council of the Commission for Environmental Cooperation (CEC) to "consider and, as appropriate, develop recommendations on 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 or injury were suffered in its territory." To this end, the Secretariat of the CEC prepared a "Background Paper on Access to Courts and Administrative Agencies in Transboundary Pollution Matters" in 1999. The paper provides a survey of the rights and remedies available before courts and administrative agencies in Canada, the United States and Mexico for persons who have suffered or are likely to suffer damage or injury caused by pollution and of the barriers to equal access by foreigners. The paper concludes that there are barriers to transboundary access including the local action rule, the territorial scope of laws, and residency requirements. Few jurisdictions appear to provide unrestricted access to all their legal remedies but several governments have taken steps to reduce barriers to equal access in some areas.

90. Access to justice and non-discrimination have perhaps found their most explicit elaboration in the United Nations Economic Commission for Europe's *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* from 1998. Article 3(9) of the Convention provides that: "Within the scope of the relevant provisions of this Convention, the public shall have access to 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."

91. The Convention also makes specific reference to genetically modified organisms, although primarily in relation to access to information and public participation concerning these organisms. The preamble to the Convention recognizes "the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field". The definition of 'environmental information' in Article 2 includes information on genetically modified organisms. Article 6 on 'public participation in decisions on specific activities' was amended at the second Meeting of the Parties to the Convention in 2005 to preclude its application to decisions on whether to permit the deliberate release into the environment and the placing on the market of GMOs. A new Article 6 bis and an Annex I bis are inserted into the Convention creating modalities specific to public participation in the aforementioned types of decisions. The modalities in Annex I bis require the Parties to lay down arrangements for effective information and public participation for decisions on the deliberate release into the environment and the placing on the market of GMOs in their regulatory frameworks; allow for exceptions to the public participation procedure of the Annex; and list types of information that are not to be considered confidential; amongst other provisions. More generally, Article 6 bis requires Parties to "provide for early and effective information and public participation prior to making decisions on whether to permit the deliberate release into the environment and placing on the market of genetically modified organisms", and these requirements should be complementary and mutually supportive of the provisions of Parties' national biosafety frameworks, consistent with the objectives of the Cartagena Protocol on Biosafety. The amendment to the Convention will enter into force once it has been ratified by at least three-quarters of the Parties.

92. Article 9 of the Convention also includes specific provisions on access to justice. These require Parties to the Convention to provide access to courts or other tribunals to members of the public with a 'sufficient interest' or 'maintaining impairment of a right' to challenge the legality of a decision, act or omission under Article 6 ('access to information') of the Convention. This provision is to be interpreted broadly with the objective of giving wide access to justice, and non-governmental organizations may also be considered to have 'sufficient interest' under the Article. Parties are also to ensure access to justice for members of the public to challenge "acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment" (Article 9.3) Access to review procedures by a court or other tribunal is also to include adequate and effective remedies.

93. Access to justice and non-discrimination have also figured in the work of the International Law Commission (ILC). Article 15 of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities adopted by the Commission at its 53rd session in 2001 is a non-discrimination clause providing that, "[u]nless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress." Furthermore, at its 56th session in 2004 the ILC adopted a set of eight "Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities". Article 8 of the draft principles provides that the principles and any implementing provisions should be "applied without discrimination such as that based on nationality, domicile or residence."

94. The EU *Parliament and Council Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage* makes brief mention of access to justice. The Directive grants access to a court or other competent public body to review acts or failures to act under the Directive. Article 13(2) provides that the Directive is "without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings."

95. As mentioned above, the Committee on Transnational Enforcement of Environmental Law of the International Law Association has also examined obstacles to transnational enforcement in its two reports to date. The obstacles include both non-legal and legal barriers. Non-legal barriers are often financial in nature and may include court fees, and the availability of affordable legal representation and contingency fees. 49/ Legal barriers may include sovereign immunity, lack of clarity over the applicable law which "may easily be used by defendants for tactical manoeuvres to delay the action", and rules concerning the awarding of costs. 50/

49/ International Law Association, "First Report", *supra* note 39 at p. 3.

50/ International Law Association, "Second Report", *supra* note 40 at p. 9.