Law and Business Review of the Americas

Volume 6 | Number 2 Article 5

2000

Liability for Transboundary Damage

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I. Introduction.

One of the topics the International Law Commission of the United Nations (ILC) included in the agenda for its 30th session in 1978 was that of "International Liability for the Injurious Consequences of Acts Not Prohibited by International Law." It was difficult for the ILC to draft an instrument without having a clear idea of its outline and content, as there were no precise substantive rules in regard to transboundary damage caused by activities that inherently represented a risk.

Three fundamental issues were brought up for discussion: (1) the relationship between state and civil liability, (2) which damages should be subject to compensation, and (3) the amount of the indemnification. In regard to the first aspect, the Special Relator stated that three options were available: one single regime for civil liability, one single regime for liability of the State, or a combination of these two. The option adopted was the last one, and as a result the operator originally had to bear indemnification for causing transboundary damage in accordance with the legal provisions applicable to liability, accompanied by a subsidiary liability of the State.

Several opinions were put forward regarding the manner in which to allocate liability between the private operator and the State. An equitable solution, in the minds of the members of the ILC, was to provide for joint liability between the State and the operator. Nevertheless, it was necessary to determine which of the two would bear the greater burden. The aspects to be taken into account to determine this burden were, among others, the following: if the State had or had not taken all reasonable precautions to prevent transboundary damage, if the private operator was solvent, and the identification of the operator.

In addition, some commissioners pointed out that it was not necessary to go into detail with respect to the subject of non-contractual liability arising from transboundary damage and to try to harmonize domestic laws. The suggestion was made to address only the most essential issues regarding civil liability, such as the one concerning the inclusion of a non-discrimination clause with respect to remedies and court access.

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When discussing the matter of indemnification, several members agreed that the fundamental principles underlying this matter were that the non-guilty victim should not bear the loss, and the application of the maxim *sic utere tuo ut alienum nom ledas.*

The ILC determined that activities undertaken under the jurisdiction or control of another State that caused material and significant physical damages and injuries to persons or property subject to the jurisdiction or under the control of a State would be damages giving rise to transboundary international liability.

Years later, on June 21, 1993, the most ambitious convention addressing this issue was adopted: the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. Subsequently, in 1995, the Special Commission of the Hague Conference on Private International Law agreed, among other matters, to recommend that the agenda of the conference include the issue of adopting a Convention on Civil Liability for Damages, to address the issues of conflicts of law, competent jurisdiction, procedural issues, and the problems regarding insurance.

II. Liability of the State for Transboundary Damage.

The liability of the state for transboundary damage should be considered as exceptional, as it only arises as a result of lawful activities that are dangerous that cause transboundary damage.

Robert Quentin-Baxter, Special Relator of the ILC Draft Articles of the Convention on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law Draft, lists the items to be taken into account in a Convention governing this type of liability as follows:

1. The purpose and object of the Convention must be such as allows the States freedom to choose the lawful hazardous activities that are to be carried out within their territory or in an area under their control, while providing adequate protection of the interests of affected States.
2. Affording adequate protection requires preventive measures to avoid, insofar as may be possible, the risks of loss or damage, and when this is not possible, provide for recovery or redress.
3. An innocent victim should not have to bear the consequences of a loss or damage inflicted on it. The expenses for providing adequate protection should be allocated taking into account the distribution of the benefits generated by the activities involved. The degree of protection should be determined by considering the means available to the liable State, the norms applied in the affected State, and regional and international practice.
4. When the liable State has not informed an affected State of the nature and effects of a lawful, albeit hazardous, activity that may cause transboundary damage, the affected State shall have recourse to the assumption of facts and circumstantial proof or evidence. This will allow the affected State to determine if the activity causes or may cause a loss or damage, and will constitute a cause of action to determine the applicable international liability.[1]

1. *See Report of the International Law Commission*, U.N. GAOR, 46th Sess., Supp. No. 10, at 299, U.N. Doc. A/46/10 (1991).

The present wording of the Draft expressly refers to the concepts of territory, damage, State of origin, and affected State.[2]

The concept of territory as contemplated in the Draft is limited, and for this reason use is made of the terms "jurisdiction" and "control." The phrase "jurisdiction of a State" includes the activities carried out within a territory of a State and such activities over which a State, in accordance with international law, is authorized to exercise its jurisdiction and control.[3]

It should be specifically mentioned that there will be times when there shall be no connection between the territory of a State and the injurious activities for which it may be held liable, for example, those occurring in outer space or on the open sea. In these cases, the relevant international instruments determine the liability of the State, of natural or juristic persons, and provide the criteria to determine jurisdiction. Thus, the 1982 United Nations Convention on the Law of the Sea provides that the applicable jurisdiction in various legal controversies shall be that of the State of the flag.

Furthermore, the activities might take place at sites where, according to international law, there is more than one State with power to exercise particular jurisdictions that are not inconsistent. The most common areas having combined functional jurisdictions are navigation, transit over territorial waters, neighboring zones, and exclusive economic zones. In these circumstances, the coastal State is authorized to exercise its jurisdiction over the activity that is carried out in compliance with the relevant provisions.

Damage is defined as that caused to persons, property, or the environment, and transboundary damage is that caused within the territory or other places under the jurisdiction or control of a State other than the State of origin, regardless of whether or not the States have a border in common.[4]

Article 2 of the Draft also defines the risk of causing a sensitive transboundary damage as a risk that has a low probability of causing catastrophic damage and a high probability of causing an additional sensitive damage.[5] The risk of causing a transboundary sensitive damage refers to the combined effect of a probability of producing an accident and the magnitude of injurious effects.[6] The ILC used as a basis the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (Code of Conduct), adopted by the Council of Europe in 1999. Article 1, item f, states that risk is to be understood as the combined effect of the probability of an unwanted incident occurring and of its magnitude.[7]

The Draft states that the State of origin is the State in whose territory, or under whose jurisdiction or control, the activities causing damage take place. The affected State is that in whose territory the sensitive transboundary damage may be caused, or the State having jurisdiction or control over any other place where the damage might be caused.[8]

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2. *See Report of the International Law Commission*, U.N. GAOR, 52nd Sess., Supp. No. 10, at 12-73, U.N. Doc. A/52/10 (1997).
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See Code of Conduct on Accidental Pollution of Transboundary Inland Waters*, Council of Europe, DOC. NO. UNECE/1225 (1990).
8. *See id.*

Liability as contemplated in the Draft originates with a risk of causing a sensitive transboundary damage or when the damage has already been caused, provided a causal link is established between the activities contemplated therein and the physical consequences of such activities.[9]

Article 16 of the Draft was of the utmost importance in preparing the Draft of the Convention for Civil Liability for Transboundary Damage, which states that unless the States involved have agreed otherwise, in order to provide protection to natural or juristic persons who are or may be exposed to the risk of suffering a sensitive transboundary damage as a result of the activities contemplated within the scope of application of the Draft, States will not discriminate on the basis of nationality, residence, or place where the damage may occur, and will afford such persons, in accordance with their internal law, access to any judicial or other procedures providing them protection or other adequate relief.[10]

The Draft mentions as means for the settlement of disputes in these matters any peaceful means, obviously including mediation, arbitration, and judicial proceedings.

III. Civil Liability for Transboundary Damage.

A sizable number of international instruments have been adopted in the area of civil liability and the compensation for damages caused to persons, property, and the environment as a result of potentially harmful activities posing a risk. These instruments are usually structured along the following guidelines:

- activities to which the instrument is applicable and geographical scope of their application;
- identification of potential natural or juristic persons who may be liable and the scope of subsidiary liability of the State;
- the possibility of creating an international fund to indemnify for damages that cannot be settled by the operator;
- the damages for which indemnification is available within the scope of the validity of the international instrument;
- the degree of protection afforded;
- limits to financial liability;
- statutes of limitation for claims;
- the courts having jurisdiction; and
- enforcement of judgments by domestic courts.

Most of the treaties on this matter have taken into account legal precedents, among which we find the following.

A. *W. Poro v. Houillires du Bassin de Lorraine* (HBL) (France and West Germany).

In *W. Poro v. Houillires du Bassin de Lorraine* (HBL), the Court of Appeals (Oberlandesgericht) of Saarbrucken, Germany issued judgment on October 22, 1957. The owner of the Rebenof Hotel in the town of Kleinblittersdorf in the vicinity of the French

9. *See id.*
10. *See id.*

border presented a claim for damages against the French Lorraine Bassin Mining Company, which had been operating a power company in the city of Grossbliederstroff in France since 1954.

This plant spewed forth a considerable amount of smoke that caused damage to agriculture and crops, as well as to recreational areas found on the other side of the river in German territory. In 1957, the situation became serious and 4,000 residents of Kleinblittersdorf protested and submitted their complaint to Parliament.

The court sustained that under the rules of private international law, as applied in Germany, the law that favored the claimant the most should be the applicable law. After comparing German and French laws on the matter, the court decided that French law was the one to do so, and therefore confirmed the judgment of the lower court.[11]

B. *Handelskwekerij G.V. Bier B.V. and Stichting Rheinwater v. Mines de Posse d'Alsace S.A.*

The District Court of Rotterdam, the Netherlands, decided this case on May 12, 1975. A Dutch proprietor of a greenhouse located in the lower Rhine and a multinational environmental protection agency brought a claim against an important French mining company located in the upper Mulhouse (France) in October of 1974. The claimants accused the mining company of polluting the water and causing damage due to mining wastes discharged into the Rhine at Alsace (11,000 tons of chlorides per day) that increased the salinity of the river to dangerous levels. The pollution caused approximately thirteen million dollars a year in damages to Dutch agriculture.

The court found that it did not have jurisdiction, and based its finding on article 5, paragraph 3 of the 1968 European Convention on Jurisdiction and Application of Civil and Commercial Judgements. That Convention provided that non-contractual claims be brought in the place where the act causing the damage occurred.

On February 27, 1976, it was decided to bring the case regarding jurisdiction before the Court of Justice of the European Community, in accordance with the Protocol of June 3, 1971 of the Brussels Convention of 1968. On November 30, 1976, the court confirmed the jurisdiction of the Rotterdam court.[12]

C. The Lindane Case.

This case also deals with transboundary damage caused on German territory originating in a French pesticide manufacturing company on the other bank of the Rhine River, near Basle. On August 5, 1975, a first instance court in Freiburg interpreted article 5, paragraph 3 of the above-mentioned Brussels Convention of 1968, in a sense that was the exact opposite of the one in the prior case. The court found that the Freiburg Court had jurisdiction because it was located where the damage occurred.[13]

11. *See* Luis Miguel Díaz, Responsabilidad del Estado y Contaminación – Aspectos Jurídicos 104-105 (1982).
12. *See id.* at 111.
13. *See id.* at 112.

D. THE SANTA BARBARA CASE.

In January 1969, an oil drilling rig in the Santa Barbara channel, thirty miles off the coast of California, exploded while exploring for oil. The explosion caused a gigantic oil slick into the sea that covered approximately 400 square miles.

On March 21, 1969, after the accident, the U.S. and Canadian governments requested the Joint International Commission, created by these two countries under a treaty signed in 1909, to prepare a special report concerning safety in subterranean operations relating to Lake Erie, to stop or prevent the oil from causing undue harm to the lake. This case attracted attention because although the transboundary damage occurred in the United States, the U.S. government did not hesitate to resort to the Joint International Commission with Canada.[14]

E. THE TORREY CANYON CASE.

Maybe one of the most spectacular accidents of recent years was the Torrey Canyon incident off the Cornwall coast and the isles of Scilly on March 18, 1967. The tanker Torrey Canyon was carrying 119,000 tons of oil, valued at half a million pounds. The conditions for oil cleanup were adverse. On May 21, a fire broke out during salvage operations, which fortunately was controlled. Fifty thousand tons of oil spread during the month of May and covered 1,800 square kilometers three days later. On May 26, the ship's hull cracked, releasing thousands of tons of oil into the sea.

The Barracuda Tanker Corporation in Bermuda owned the ship, and was associated with Union Oil Company of California. When the accident occurred, the ship was on a charter voyage for British Petroleum. In spite of the contractual relationship, there was no corporate relationship between Union Oil and Barracuda Tanker Corporation; therefore, this second company was liable for all damage caused.

In determining the compensation to be paid for the damage caused, the negotiators discussed whether the proprietor of the ship would be liable if it could prove that the accident was the result of a negligent act, or if the party presumably liable was subject to strict liability and should bear indemnification in full, regardless of fault.

The Liberian Board of Inquiry found that Barracuda Tanker Corporation was negligent. The provisions then in force regarding liability were those set forth in the 1957 Convention. This Convention stated that the limit for indemnification for damage to property was sixty-seven dollars per ton, with respect to the ship's tonnage. The Torrey Canyon accordingly had to pay U.S.$59,308, the amount corresponding to 61,224 tons.

Any damages that exceeded the amount mentioned above would be borne by the victim, and in this case, estimated damages far exceeded that limit. Nevertheless, the Liberian Board of Inquiry considered that due to the negligent acts of the liable company, this limitation was not applicable. When the inquiry conducted by the Liberian Board concluded, the French and British governments signed an agreement on November 11, 1968, which contemplated the following resolution:

1. The French and British governments undertook to pay an amount equal to three million pounds sterling.

14. *See id.*

2. The proprietor of the ship and the company that chartered it undertook the obligation of indemnifying private parties who suffered damages in an amount not to exceed 25,000 pounds sterling. The Ministry of Foreign Affairs of France published a notice on November 11, 1969, stating that a reasonable solution had been reached.[15]

Recent conventions taking up the issue of civil liability for transboundary damage impose strict liability upon the operator. These instruments rest on the assumption that there is no reason why the victim should have to prove the operator's wrongful act or negligence. The fact that damage has been caused by a hazardous activity or substance suffices to establish liability.[16]

Strict liability is applied to hazardous activities and substances. Hence, the operator or owner assumes the risks and consequences of engaging in an activity of this kind or using hazardous substances. The basis of this legal regime on environmental matters is found in Principle 13 of the Rio Declaration on Environment and Development, which provides that the one who pollutes, pays.[17] Other Conventions addressing similar matters have also adopted this criterion.

The exceptional circumstances under which the operator is released from liability as set forth in the Convention on Civil Liability from Damage Resulting from Activities Dangerous to the Environment, also known as the Lugano Convention, and the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, are those arising from armed conflicts, natural phenomena, willful action with the intent of causing damage to a third party, and those resulting from a measure imposed by a public authority.[18]

We should mention that a claimant must prove the cause and effect relationship between the activity and the resulting damage in order to establish liability. Article 10 of the Lugano Convention contains a provision that is similar to the one included in the domestic laws of some countries in regard to this issue. The communication addressed by the Commission to the Council of Europe and Parliament, and the Economic and Social Committee, contains the following wording:

> To obtain compensation for damage, the injured party must prove that the damage was caused by an act of the liable party, or by an incident for which the liable party was responsible. Special problems arise in the case of environmental damage. As discussed in the section on chronic pollution, establishing a causal connection may not be possible if the damage is the result of activities of many different parties. Difficulties also arise if the damage does not

15. *See id.* at 78-83.
16. *See* Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, Council of Europe, http://www.coe.fr/eng/legaltxt/150c.htm. *See also* Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, Sept. 19, 1998, International Atomic Energy Agency, http://www.iaea.org/worldatom/updates/annexl.html.
17. See *The Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, U.N. Doc. A/Conf.151/5/Rev.1 (1992).
18. *See* Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, *supra* note 16; *see also* Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, *supra* note 16.

> manifest itself until after a lapse of time. Finally, the state of science regarding the causal link between the exposure to pollution and damage is highly uncertain. The liable party may try to refute the injured party's evidence of causality with alternate scientific explanations for the damage.[19]

We find that the Conventions we have mentioned contain statutes of limitations in regard to claims involving liability for transboundary damage. For example, article 17 of the Lugano Convention establishes that action must be brought within a term of three years counted as of the date the claimant was reasonably aware of the damage and identified the operator.[20] In addition, it states that no claim may be brought after thirty years from the time the incident giving rise to the damage occurred.[21]

In this regard, the 1969 Protocol to the Convention on Civil Liability for Oil Pollution Damage allows the claimant five years counted as of the date on which it was reasonably aware of the damages and the parties responsible for such damages.[22] Under no circumstance may action be brought within a time range of ten to thirty years as of the date of the incident causing the transboundary damage.

The Conventions also provide for ceilings to the liability expressed in pecuniary terms that the operator may incur. The amount varies from one Convention to another according to the matter being regulated. Thus, amounts are much higher in cases involving nuclear damage than they are for injurious effects caused by oil pollution.

It is for this reason that the provision is made, in cases where the operator engages in hazardous activities, of imposing upon it the obligation of contracting for adequate insurance. In other cases, a compensation fund is set up to cover such damages as are not covered by the operator, but that do affect the victim. In this context, the Convention on the Oil and Petroleum Compensation Fund (IOPC Fund) provides for additional compensation for the victims when, under the provisions of the 1969 Convention on Civil Liability for Oil Pollution Damage, compensation commensurate with the damage caused is not made. The IOPC Fund is maintained with the contributions of the parties to the Convention and provides victims adequate compensation.

IV. Determination of Courts Having Jurisdiction.

Domestic laws and conflicts provisions usually impose restrictions with regard to the courts before which a claim for transboundary damage may be brought. In contrast, civil liability Conventions include a series of provisions allowing the victim a choice of forums, with the exception of the Conventions of Paris and Vienna on Nuclear Damage,

19. Julio Barboza, *International Liability for the Injurious Consequences of Acts Not Prohibited by International Law and Protection of the Environment, in* RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 377 (1994).
20. *See* Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, *supra* note 16.
21. *See id.*
22. *See* Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3. *See also* Protocol to Amend the Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992.

which establish that the only courts having jurisdiction in these cases are those of the State where the nuclear facility is located.[23]

International instruments that do contemplate the choice by the injured party include, by way of example, the following forums: (a) the place where the damage is suffered, (b) the place where the activity causing the damage is carried out, and (c) the place of habitual residence of the defendant.[24] Similarly, the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail, and Inland Navigation Vessels (CRTD) sets forth in its article 19, in addition to the options mentioned before, the place where preventive measures to forestall and minimize the damage should have been adopted, and the State of registration of the vehicle or ship.[25]

Parties to these Conventions undertake to ensure that their courts have proper power and authority to take cognizance of claims seeking redress for transboundary damage, and that nondiscriminatory treatment be provided. Therefore, States must take proper care that this latter principle be applied in two manners. First, with regard to the activity being carried out within the territory or under the jurisdiction or control of the other State, it is required that the same treatment be given to damage caused in the other State and damage caused within the territory of the State of origin. Second, discriminatory treatment by reason of nationality, domicile, or residence should not be given to victims to whom damage has been caused.[26]

The issue of enforcement of judgments is also contemplated in the Conventions on the matter we are examining. These contain precepts establishing the obligation of the parties of enforcing the judgments rendered in other party states when certain conditions are met, all to facilitate and ensure due compensation for the victims. For example, the Lugano Convention states, in article 23, that judgments rendered by a court having jurisdiction as set forth in article 19 shall be enforced by the party states without requiring any ordinary review procedure, unless: (1) its recognition is contrary to public policy; (2) the judgment was rendered in default of appearance; (3) if due service of process was not observed; (4) the judgment is irreconcilable with another judgment issued with respect to another controversy between the same parties; or (5) the judgment is inconsistent with a prior judgment issued by another State involving the same cause of action and parties.[27]

Similar provisions are included in the Vienna Convention on Nuclear Damage under its article XI, which provides as exceptions that the judgment was obtained in a fraudulent manner, in default of appearance, or is contrary to public policy. Exceptions in article 20 of the CRTD are fraud, the defendant was not given reasonable notice and a fair opportunity to present his case, the judgment is irreconcilable with an earlier judgment

23. *See* Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 1974 U.N.T.S. 335. *See also* The Vienna Convention on Civil Liability for Nuclear Damage, *supra* note 16.
24. *See* Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, *supra* note 16.
25. *See* Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail, and Inland Navigation Vessels, U.N. Economic Commission for Europe, U.N. Doc. ECE/TRANS/79 (1989).
26. *See* Barboza, *supra* note 19, at 376.
27. *See* Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, *supra* note 16.

given in the state where the recognition is sought, or with a judgment of a party state having jurisdiction when involving the same cause and parties.

V. Applicable Law.

The traditional connecting factors with regard to choice of law in matters concerning civil liability for transboundary damage are the place of origin of the activity causing the damage and the place where the damage is caused. In some countries, the determination of applicable law leans toward the place where the damage is caused. For example, Brazilian law "regulates public civil suits regarding liability for damage caused to the environment, to the consumer, to property and rights of artistic, aesthetic, historic, touristic and scenic value . . . , and lays down other provisions."[28] This law states in article 2 that "suits provided for in the Law shall be initiated in the forum of the locality where the damage occurred, the court of which district shall have competence to process and judge the case."[29]

In Great Britain, the application of *lex fori* was the golden rule for a long time, nevertheless, there has been a change towards the application of *lex loci delicti.* In this regard, Guillermo Palao Moreno mentions the case *Red Sea Insurance Co. Ltd. v. Bourgues S.A. and others,* in which the Privy Council took a decisive step in the development of English precedents with respect to applicable law concerning non-contractual civil liability by introducing a new exception to the traditional rule that had been established by *Phillips v. Eyre* in 1870, thus bringing English binding precedent closer to the present English and Scottish draft of amendment with respect to this matter.[30]

With respect to the Mexico-U.S. border, let us mention a recent case occurring on the border known as the Alco-Pacífico case. Alco-Pacífico was an American corporation located on the Tijuana-Tecate highway, engaging in the recycling of lead until April 1991, processing raw materials brought into Mexico from the United States. In 1992, the company declared itself bankrupt, and abandoned approximately 20,000 tons of polluting wastes, without complying with its legal obligation of returning them to their country of origin.

The judge of the court sitting in Los Angeles County authorized the deposit of two million dollars with the Los Angeles attorney's office, to be used in cleaning up the site, a job involving the loading, transporting, and final disposal of the wastes in a site for the controlled confinement of hazardous wastes. These procedures for damage redress were carried out applying the laws of Mexico.[31]

We should underscore the fact that, in addition to traditional approaches, this area seems to be evolving in consonance with international laws on the matter towards determining that the applicable law is that of the court having jurisdiction, which in turn seems to be the one most beneficial towards the injured party, since the Conventions allow the victim the choice of forum.

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28. Decreto No. 7.347, de 24 de julio de 1985, D.O. de 24.07. 1985.
29. *Id.*
30. *See* Guillermo Palao Moreno, *Novedades En Materia de Ley Aplicable a la Responsabilidad Civil No Contractual En Derecho Internacional Privade Ingles,* 47 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 339-42 (1995).
31. *See* REPORT PRESENTED BY THE MEXICAN FEDERAL ENVIRONMENTAL PROTECTION AGENCY TO THE MEXICAN MINISTRY OF FOREIGN AFFAIRS, DOC. NO. CAI/318/99.

The 1997 Vienna Convention on Civil Liability for Nuclear Damage clearly illustrates the developments mentioned, as in its Annex II referring to supplementary compensation for nuclear damage, it states in article XIV that the applicable law shall be that of the court having jurisdiction, with the understanding that the victim is free to choose such a court.[32]

Likewise, article 3 of the Convention on the Protection of the Environment between Denmark, Finland, Norway, and Sweden, dated February 19, 1974, provides that persons suffering injuries as a result of activities injurious to the environment in another contracting State shall have the right to challenge before the competent court or administrative authority of such State the legality of the activity involved, including the issue regarding the measures that ought to have been taken to prevent the damage, and to appeal the decision of the court or administrative authority insofar as allowed to legal entities of the State where the activities are carried out.[33]

VI. Closing Considerations.

Regarding liability for transboundary damage, strict liability should be the standard, thus, the operator should be liable in the event damages are caused, regardless of whether there was any negligence on the operator's part.

Recent Conventions addressing the issue of liability for transboundary damage, since the Declaration of Rio, include provisions that victims have to be adequately indemnified for the damages suffered.

The choice of forum must be left to the victim, offering a range of options, such as the place of origin of the activity causing the damage, the place where the damage is caused, the habitual place of residence of the defendant, or the place where preventive measures were taken.

Concerning the determination of applicable law, the tendency should be toward application of the law of the forum, as the victims will choose from the options available to them.

For enforcement of foreign judgments on this matter, no further requirements should be established in addition to those of due service of process, due process, judgments not be contrary to public policy, nor fraudulent, their enforcement not be irreconcilable with the enforcement of prior judgments rendered on the same case and involving the same parties, nor irreconcilable with a judgment rendered in a case involving the same parties and whose recognition was requested in accordance with the specific Convention on each matter.

32. *See Report of the International Law Commission*, U.N. GAOR, 53rd Sess., Supp. No. 10, at 70, U.N. Doc. A/53/10 (1998).
33. *See id.*