Some Private International Law Aspects of Transboundary Environmental Disputes

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I. Introduction

"Transboundary environmental disputes" is prima facie a broad and vague expression with several implications. The reason is primarily the meaning which may be attributed to the term "environment". The term is usually given a rather broad content "embracing a number of the social as well as natural contexts of man's activities like human settlements, health care, housing, education and job." However, in order to simplify the discussion of the main problem, i.e., the role of the private international law in the settlement of the transboundary environmental disputes, a narrower definition has been adopted in this study to refer only to the natural environment.

The most common cause of environmental conflicts is the pollution of the air or water and its ensuing effects on human beings and their properties. In transboundary environmental disputes, the place of act which causes the damages and the place of its injurious impact is separated by a boundary line. The existence of the boundary line turns such disputes into international cases, subject either to the principles of public international law or the rules of private international law of the countries involved.

As regards the settlement of this sort of disputes, lawyers can be roughly put into two distinct groups. A major group holds the view that settlement of this kind of disputes should be effected by due recourse to the rules of private international law concerning transnational torts. It is thereby assumed that an action for recovering transboundary environmental damages may arguably be considered as an action in tort largo sensu. This group generally denies the appropriateness of the application of public international law partly because of the ineffectiveness of the enforcement machinery and partly due to the alleged inadequacy of international environmental law, which is still at its embryonic stage of development.

Moreover, the dictates of the principle of the exhaustion of the local remedies, which is a principle of public international law, require, according to this group, that all domestic procedures will be availed first. Another group of lawyers seeks the solution to the problem in the principles of public international law. They refute any private law approach on the ground that the rules concerning the choice of forum and the choice of law as well as the private international law rules relating to the establishment of the burden of proof with respect to causation in the case of actions in tort are far from clear. Another problem may be the multiplicity of the jurisdictions involved. If the defendant is an individual, national of the State where the act has been performed, the domestic court entertaining the case has to deal with at least two jurisdictions. On the other
hand, if the defendant is a national of a third State or is a multinational corporation, the court most probably has to take into account a number of jurisdictions.

While in the realm of public international law judicial settlement of disputes relating to transboundary environmental damages by an international forum is virtually limited to one single case — Trail-Smelter Arbitration — both the court decisions in recent years and the bulk of literature on the subject tend to support more or less the exclusive use of domestic procedures.4

Subscribed to the view of those who believe in the suitability of public international law for dealing with this sort of disputes, it is the purpose of this article to touch upon certain problems related to the adjudication through recourse to domestic courts. It should be borne in mind that the solutions to environmental disputes can vary from case to case depending on many factors which make each case unique. However, it is intended here to study the possible responses of the domestic courts to the questions of jurisdiction and applicable law in cases which are more common and have certain similarities.5

It may be noted that in the event the defendant is a State agent, considerations of State immunity can come into play. Depending on the nature of governmental activities being acts jure imperii or acts jure gestionis, the State may claim immunities from the other State’s jurisdiction. In this study, the assumption is that the defendant is a private person or otherwise the governmental activities responsible for the environmental damage can be placed, beyond any reasonable doubt, in the category of acts jure gestionis.

II. Choice of Forum
The first issue before any domestic court dealing with a transboundary dispute relating to environmental damages is that of the jurisdiction. The rule generally accepted is locus delicti commissi, i.e., the place where the injurious event occurred. This rule, which is a major component of private international law regulations of most States, has also been incorporated in several bilateral and multilateral conventions.6 It has even found expression in Article 5(3) of the EEC Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters. (hereinafter referred to as EEC Convention on Enforcement)”

“The place of injurious event” is evidently a vague expression and lacks the necessary legal precision. At least two interpretations of the expression are imaginable; it may refer to the place where the activity which has allegedly caused the damage was carried out, or the place where the related damage was suffered.

The vagueness of this expression in respect of transboundary environmental disputes became more evident when in the middle of the 1970s two different judgements in the Federal Republic of Germany and the Netherlands provided for two opposite interpretations.

In a case concerning the transboundary pollution damages to German farmland from a French insecticides factory across the Rhine near Basle, the German court in Freiburg interpreted locus delicti commissi in Article 5(3) as the place where the injurious effects had come about, i.e., Germany.8