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Abnormally dangerous activities in frontier areas (for example, nuclear power plants of hazardous waste dumping sites at the border) have become one of the main topics in international environmental law.[1] The difficult legal issues of this emerging field of law get particularly complicated when they are combined with legal differences between West Germany and East Germany. The situation becomes especially complicated when individuals demanding judicial attention have insufficient international legal protection. These circumstances sometimes force an action against international pollution to appear before national courts ruling under domestic law. The "Schoenberg Case" exemplifies this situation.

The waste dump Schoenberg is located in the district of Rostock, East Germany, about six kilometers east of the border checkpoint Luebeck-Schlutup. It is a 500 acre state-owned enterprise. Since 1981, West Germany and other European countries have dumped more than one million metric tons of household refuse and highly toxic, water-soluble, persistent wastes (that is, heavy metals and chloridized hydrocarbons) on an area of approximately 150 acres. In all probability, the waste plant does not meet West German safety standards.

Situated on the southeastern slope of the 240-foot high Ihlenberg mountain, the waste plant creates a long-term threat to groundwater and rivers in the Hanseatic City region of Luebeck, West Germany. Schoenberg is based on a porous, marly soil and is surrounded by several water sources. Originating from this point, a few streams—Palinger Bach and Lüdersdorfer Graben—flow across the intra German frontier and fall into the river Wakenitz; the latter flows into the river Trave in downtown Luebeck and later empties into the Baltic Sea. The Hanseatic City of Luebeck owns Wakenitz and Trave and also holds the fishery rights to these rivers.

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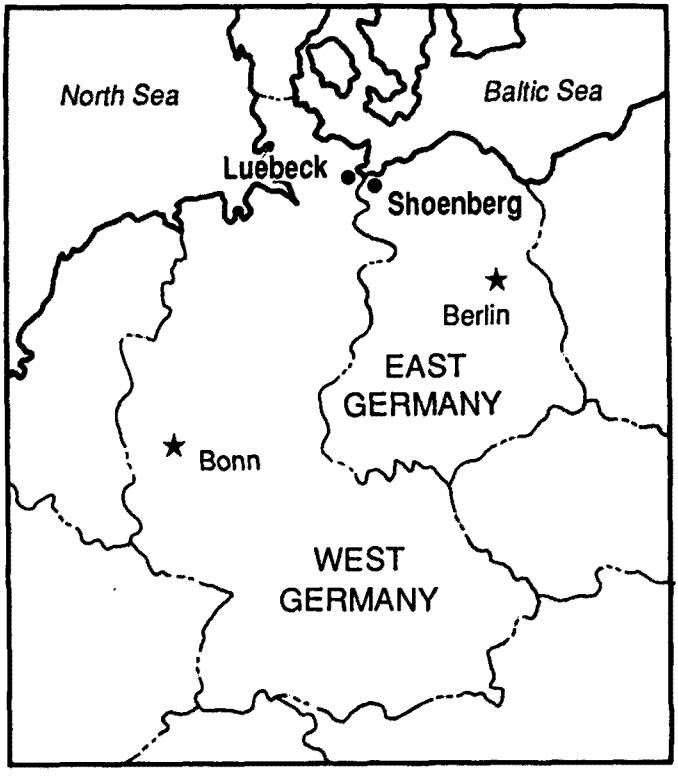
1. *See* Handle, *Territorial Sovereignty and the Problem of International Pollution*, 69 Am. J. Int'l L. 50, 74 (1975); Handle, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 Am. J. Int'l L. 525 (1980); Handle, *An International Legal Perspective on the Conduct of Abnormally Dangerous Activities in Frontier Areas: The Case of Nuclear Power Plant Siting*, 7 Ecology L. Q. 1 (1978); Kindt, *International Environmental Law and Pollution: An Overview on Transboundary Pollution*, 23 San Diego L. Rev. 583 (1986); Randelzhofer & Simma, Das Kernkraftwerk an der Grenze, 389 (1973) (Festschrift fur F. Berber); Kloepfer & Kohler, Kernkraftwerk und Staatsgrenze (1981) (Berlin).



Map by Carol Cooperrider.

Furthermore, the Federal Water Act[2] entitles the Hanseatic City to operate waterworks on the Wakenitz's northern bank so that it may satisfy the urban population's demand for drinking water. The waste dump stands within nine kilometers of the waterworks, within four kilometers of the eastern bank of the Trave, and within ten kilometers of the isle Spieringshorst in the Wakenitz. Plaintiff B and his family live on this isle. His estate does not draw from the public water supply. To meet water requirements, plaintiff B operates a forty-eight foot well. Since, according to official estimates, the Wakenitz's subsoil filtrate partially feeds into this well, the local health authority regularly supervises it. Both Luebeck and plaintiff B apprehend a health risk. They fear contamination of the subsoil and of the drinking water due to water percolating across the border from the waste plant. Both solicited legal protection from international, European, and East and West German law.

2. Section 8 Federal Water Act (of Sept. 23, 1986), Federal Law Gazette 1986 I 1529; § 12 Water Act of the Land Schleswig-Holstein (of Jan. 17, 1983), State Law Gazette 1983 at 24.

INTERNATIONAL LAW

Although East Germany and West Germany are not considered foreign to each other,[3] according to federal constitutional law, one accepts the applicability of international law to the relations between the two states. Yet the international treaties binding them do not govern the present case: either they are limited to require the exchange of information regarding transfrontier environmental damages;[4] or, they do not apply to transboundary subsoil contamination or to the protection of the transboundary watercourses in this region.[5] Customary law does not improve the prospects for success for the plaintiffs. State responsibility still follows the principles of the famous "Trail Smelter Case"[6] of 1941. This case limited liability to a question of circumstances "when the case is of serious consequence and the injury is established by clear and convincing evidence."[7] International law, however, does not define specific criteria for the purpose of distinguishing between significant and normal, concrete and probably long-term damages. As a result, state practice is still not as unequivocal as to assume a prohibition under customary law, despite efforts to codify a ban on the emission of extremely hazardous wastes, enumerated in core lists (like several conventions on the dumping of wastes at sea[8]). Furthermore, the UN Global Convention on the Control of Transboundary Movements of Hazardous Waste[9] has not come into force yet, and the relevant decisions and recommendations of the Organization of Economic Cooperation and Development are limited to mutual notification requirements, or are not directly binding on the member states.[10] Although the constitution of East Germany guarantees a fundamental right to a sound environment, this right remains inadequately

3. *See* Fed. Const. Ct. L. Rep. Vol. 36, p. 1 [17].

4. *See* "Agreement on Principles of Damage Control Along the Border between FRG and GDR," Sept. 20, 1973, Fed. L. Gaz. 1974 II 1237.

5. For dissimilar provisions, see Agreement on the International Commission for the Protection of the Rhine against Pollution, 994 U.N.T.S. 3. For agreements on the protection of the Rhine against pollution through chemicals or chlorides, see Fed. L. Gaz. II 1053, 1065 (1978).

6. U.N.R.I.A.A. Vol. III at 1907.

7. See similar wording in GA-Res 2995 (XXVII) of Dec. 15, 1972 for "significant harmful effects."

8. *See, e.g.*, Annex I, II of the London Convention on the Dumping of Wastes at Sea, 11 I.L.M. 1291 (1972); D. Rauschning, Allgemeine Völkerrechtsregeln zum Schutz gegen grenzüberschreitende Umweltbeeinträchtigungen 557, 571 (1981) (Berlin) (Festschrift fur H.J. Schlochauer).

9. *See* United Nations Environment Programme, Environmental Policy and Law 18, 103 (1988).

10. *See, e.g.*, Decision and Recommendation of the OECD Council on Transfrontier Movements of Hazardous Waste, Feb. 1, 1984, C(83) 180 (final), 23 I.L.M. 214 (1984); *see* Smets, *Transfrontier Movements of Hazardous Wastes*, Envtl. Pol. & L. 14, 16 (1984); OECD, Recommendation on a Comprehensive Waste Management Policy, C (76) 155 (Final), Sept. 28, 1976; OECD, Recommendation on Equal Rights of Access to Information, Participation in Hearings and Administrative and Judicial Procedures by Persons Affected by Transfrontier Pollution, C (76) 55 (Final), 15 I.L.M. 1218 (1976).

guarded, due to the socialist judiciary's lack of independence, and is subject to global economic constraints.

Even if the environmental damages caused by Schoenberg turned out to be sufficiently serious and concrete so as to violate international environmental law standards, neither Luebeck nor plaintiff B would be in a position to hold East Germany liable[11] since they are not subjects of international law. A partial legal capacity of individuals in international law based on a "Human Right to Environmental Protection" has not yet been recognized in the practice of states and codifications.

The plaintiffs' attempt to claim diplomatic protection by the Federal Government in order to enforce a claim in international or arbitral court against East Germany as operator of the waste plant would not be successful either: although the "Grundgesetz" (Federal Constitution) guarantees a right to diplomatic protection, its exercise with regard to foreign affairs is within governmental discretion.[12] Considering the insufficient and much more expensive hazardous waste dump sites in West Germany,[13] neither the Federal Government nor the Länder Government would take an interest in stopping the waste exports to Schoenberg. Moreover, diplomatic protection would presuppose the local judicial remedies in the waste receiving country to be exhausted.[14]

The major risk of litigation prevented the plaintiffs from filing a suit in East German courts. Although the constitution of East Germany guarantees a fundamental right to a sound environment[15]—in this respect even surpassing the Grundgesetz—such rights remain inadequately guarded, due to the lack of independence of the socialist judiciary, and are subject to global economic reservation.[16]

Finally, the law of the European Economic Community (EEC) does not provide for judicial remedies against polluters of non-EEC countries. The EEC has, however, laid down several directives on transfrontier

11. On this issue, see U.S.-Mexican Arbitration Commission, re "Dickson Wheel Comp. vs. United States of Mexico" (1931), U.N.R.I.A.A. Vol. IV at 678; for further explanations, see Schwarze, *Rechtsschutz Privater bei völkerrechtswidrigem Handeln fremder Staaten*, 24 Archiv des Völkerrechts 408, 411 (1986). On the various controversial questions—not dealt with above—regarding strict liability, fault liability and claims for damages, see Schwarze, *supra* at 417; I. Brownlie, Principles of Public International Law 476 (3d ed. 1979) (Oxford).

12. *See* Fed. Const. Ct. L. Rep. Vol. 36, p. 1 [36]; Fed. Const. Ct. L. Rep. Vol. 66, p. 39 [61]; similar ruling in the "Barcelona Traction Case" I.C.J. Rep. 1970, p. 3 [44]. On the various aspects of diplomatic protection in transfrontier pollution, see Schwarze, *supra* note 11, at 426.

13. The Hanseatic City of Hamburg, for instance, being the largest and most highly industrialized city in West Germany with 1.6 million inhabitants, has no hazardous waste dump at all.

14. For "Local Remedies" rule, see Mavrommatis, P.C.I.J., (ser. A) No. 2, 1924.

15. *See* Akademie der Rechts- und Staatswissenschaft der DDR, Sozialismus und Umweltschutz 52 (1982) (East Berlin); Lücke, *Das Umweltschutzrecht der DDR*, in Umweltschutz im Recht 165, 168 (W. Thieme ed. 1988) (Berlin).

16. *See* Lücke, *supra* note 15, at 169.

shipment of hazardous waste[17] similar to the efforts of the United Nations Environment Programme (UNEP) and the Organization of Economic Cooperation and Development (OECD). Nevertheless, according to article 189 of the EEC Treaty,[18] these directives only address themselves to the member states, obliging them to transform the regulations into the domestic legal order. They do not give direct rights to EEC citizens.

FORUM SHOPPING—THE APPLICATION OF THE FEDERAL WASTE ACT

The dim prospect of successful appeals against the waste dump under international and foreign law led Luebeck and plaintiff B to take another approach. Instead of trying to close down the waste plant directly, they sued competent authorities in West German administrative courts under West German law. In this way, they hoped to contravene the licenses for the transport of toxic wastes from West Germany to Schoenberg. They did not, however, substantiate their claim by pointing out the risks of transporting hazardous substances within the federal territory, but continued to stress the environmental dangers of the dump site itself.

According to article 13 of the Federal Waste Act,[19] transborder movements of toxic waste require a permit for the transaction between the waste generator and the waste carrier. Under German administrative law, this license represents an administrative act which at the same time results in a benefit to the carrier, but may affect third persons, who—subject to restrictive legal requirements—have a right to appeal. Both objection and action suspend the effect of the administrative act, that is, authorities and beneficiary must not enforce it.[20] Nevertheless, the licensing authority may declare the permit immediately enforceable, thus legally voiding the suspension.[21] Similarly, the beneficiary may illegally make use of his license by disregarding the suspension. In both cases, the affected third party holds the right to file an application for reconsideration or declaration

17. *See, e.g.*, EEC-Directive 84/631, Official Journal of the European Communities L 326 of Dec. 13, 1984, at 31; EEC-Directive 85/469, Off. J. L 272 of Oct. 12, 1985, at 1; EEC-Directive 87/11, Off. J. L 48 of Feb. 17, 1987, at 31; *see* Kelly, *International Regulation of Transfrontier Hazardous Waste Shipments: A New EEC Environmental Directive*, 21 Texas Int'l L. J. 85 (1985); Friedrich, *Rechtsprobleme der nationalen, völkerrechtlichen und europarechtlichen Regelungen der grenzüberschreitenden Abfallverbringung*, 4 Umwelt- und Planungsrecht 8 (1988); Szelinski, *Nationale, internationale und EG-rechtliche Regelungen der "grenzüberschreitenden Abfallbeseitigung,"* 4 Umwelt- und Planungsrecht 364 (1984); Chr. Offermann-Clas, *Das Abfallrecht der Europäischen Gemeinschaften*, 96 Deutsches Verwaltungsblatt 1125 (1981).

18. Art. 189, para. 3, EEC Treaty.

19. Section 13 Federal Waste Act of Aug. 27, 1986.

20. Section 80 para. 1 of the Verwaltungsgerichtsordnung (VwGO) (= Rules of the Administrative Courts (RAC)), of Jan. 21, 1960 (Fed. L. Gaz. 1960 I 17).

21. Section 80 para. 20 No. 4 RAC.

of the original suspension.[22] This motion was brought in by the Hanseatic City of Luebeck and plaintiff B.[23]

Luebeck and plaintiff B derived their assumed rights from the regulations on the licensing procedure for transborder shipments of waste,[24] the fundamental rights to life, health, and property,[25] and the constitutional guarantee of local self-government.[26]

Under the Federal Waste Act,[27] a license for transfrontier movement of waste is granted under specific conditions: transport and disposal must not cause detriment to the public welfare; the carrier's reliability must be beyond question; priority must be given to domestic waste disposal whenever possible; the receiving country must give its written consent and certification for disposal; and transboundary disposal must not injure public welfare within federal territory. This last condition aims to prevent "retroactive pollution," that is, to prevent wastes—after exportation from West Germany—from damaging the West German environment from outside the country. Overall, the Federal Waste Act, named "lex Schoenberg,"[28] determines that injury to the public welfare in West Germany precludes an export permit even if the environmental dangers are caused by actions or omissions of foreign states. Sovereignty does not exclude an evaluation of foreign state's reliability in the licensing procedure.

The main legal issue is whether the wording "public welfare" under section 13 of the Federal Waste Act[29] intends to protect *inter alia* subjective

22. Section 80 para. 5 RAC.

23. The proceedings under § 80 para. 5 RAC represent a summary procedure independent of the main issue, and deal only with the suspensive effect. The legal purpose is to prevent accomplished facts, before the case is decided on its merits. It requires the same admissibility standards as the main suit. The Administrative Court shall balance the public interest and the interest of the parties concerned and shall take into consideration the chances of success of the main issue. In order to protect the legal position of the beneficiary, the Court will refuse the request for suspensive effect, if the main remedy is apparently non-admissible; on the other hand the Court will grant the application, if the lawfulness of the license is reasonable in doubt or if the third party's interest in a restitution of the suspensory effect outweighs the public interest in an immediate enforcement of the act.

In particular, the motion is to be rejected if the plaintiff cannot establish a standing to sue (§ 42 para. 2 RAC). Under procedural rules for administrative courts in West Germany, a mere objective illegality of an administrative act will not result in the annulment of the latter; rather the suitor must assert own subjective rights be injured. A "quivis ex populo" has no right of action. The plaintiff must establish on the contrary that it is not a *limine* impossible, that the assumed rights exist and are both due to him and in fact infringed (see 44 Fed. Admin. Ct., L. Rep. Vol. 44, p. 1 [3]). The subjective legal position of the plaintiff follows from rules of public law which intend not solely to further the public interest but to protect, *inter alia*, the specific subjective rights of the suitor.

24. Section 13 Federal Waste Act.

25. Art. 2, para. 2, 14 Fed. Constitution.

26. Art. 28, para. 2 Fed. Constitution.

27. Section 13 Fed. Waste Act.

28. In fact, § 13 Fed. Waste Act was initiated mainly by the Seveso affair in 1983 (when 41 barrels of highly toxic dioxine wastes—residues from the explosion of a chemical plant near Seveso, Italy in 1976—were transported and disposed of throughout Europe without control and finally disappeared for 8 months) and the subsequent EEC Directive 84/631, *supra* note 17.

29. Section 13, para. 1, no. 4 lit. c) Fed. Waste Act.

rights of individuals or juristic persons as Luebeck and plaintiff B. This point of law has been disputed in appropriate literature as well as in eight orders of the (Higher) Administrative Courts hitherto published.[30] The legal concept of the "public" in general environmental law[31] as well as in the Waste Act[32] does not incontestably generate subjective rights and a standing to sue of individuals, since it fails to define a distinguishable category of persons, protected interests, or acts of infringements. Therefore, the Administrative Court Hamburg,[33] as well as some authors,[34] rejected a right of action and thus the restoration of the suspension for the benefit of plaintiff B. Nevertheless, the other (Higher) Administrative Courts diverged giving constitutional reasons.[35]

All of the decisions of the Administrative Courts rejected standing to sue based on the constitutional right to property,[36] since according to the Federal Constitutional Court, it neither protects the property of public corporations nor includes the use of groundwater.[37] These things are granted only by federal law. On the other hand, the Administrative Courts of Schleswig and Darmstadt used the constitutional right to local self-government to derive a subjective right for Luebeck, which includes the operation of public services such as waterworks.[38]

30. For orders concerning the Hanseatic City of Luebeck, see Administrative Court Darmstadt, Order of Nov. 10, 1986—III/2 H 1677/86, in Neue Zeitschrift fur Verwaltungsrecht [NVwZ] 1987, p. 350; Administrative Court Darmstadt, Order of Mar. 8, 1988—III/2 H 116/87, in NVwZ 1988, p. 569; Admin. Court Schleswig, Order of Nov. 21, 1986—12 D 33/86, in NVwZ 1987, p. 352; Higher Admin. Court Lüneburg, Order of June 12, 1987—7 B 40/87, in NVwZ 1987, p. 999; Higher Admin. Court Bremen, Order of Oct, 15, 1987—OVG 1 B 60/87, in Die öffentliche Verwaltung [DöV] 1988, p. 611; Higher Admin. Court Hamburg, Order of Aug. 25, 1987—Bs VI 31/87, in NVwZ 1987, p. 1002. For order concerning Suitor B, see Admin. Court Hamburg, Order of Sept. 18, 1986—18 VG 2970/86, in NVwZ 1987, p. 354; Higher Admin. Court Lüneburg, Order of Jan. 24, 1986—7 B 39/85, in NVwZ 1986, p. 322.

31. *See* § 5 para. 1 No. 3 Federal Emission Control Act (Bundes-Imissionsschutzgesetz) of Mar. 15, 1974 Fed. Law Gaz. 1974 I 721.

32. *See* §§ 2 para. 1, 8 para. 1, 8 para 3 s. 2 No. 1 Fed. Waste Act.

33. *See* Order of Sept. 18, 1986—18 VG 2970/86, in NVwZ 1987, p. 354.

34. *See* Kunig, *Grenzüberschreitender Umweltschutz—Der Einzelne im Schnittpunkt von Verwaltungsrecht, Staatsrecht und Völkerrecht*, in Umweltschutz im Recht 213, 224 (W. Thieme ed. 1988) (Berlin); Kunig, Schwermer & Versteyl, Abfallgesetz (Kommentar) 29 (1988) (§ 13) (München).

35. By majority, the courts considered Art. 19 para. 4 Fed. Const., which guarantees an effective legal protection and recourse to the courts whenever rights are infringed by public authorities; they inferred that this article provides the wording "public welfare" with a *praesumptio iuris* as to intend protection of individual interests; *see* Higher Admin. Court Lüneburg, Order of Jan. 24, 1986—7 B 39/85, in NVwZ 1986, p. 322 [324].

36. *See* Admin. Court Schleswig, Order of Nov. 21, 1986—12 D 33/86, in NVwZ 1987, 352 [354]; Higher Admin. Court Lüneburg, Order of Jan. 24, 1986—7 B 39/85, in NVwZ 1987, p. 322 [324] (1986).

37. *See* Fed. Const. Ct. Case "Sasbach," Vol. 61 at 82 [108 s]; Case "Nabauskiesung," Vol. 58 at 300 [332 ss].

38. *See* Arts. 28 para. 2 Fed. Const., 39 para. 1 Const. of the Land Schleswig-Holstein; Administrative Court Darmstadt, Order of Nov. 10, 1986—III/2 H 1677/86, in NVwZ 1987, 350 [352]; Admin. Court Schliewig, Order of Nov. 21, 1986—12 D 33/86, in NVwZ 1987, 352 [354].

The eight orders mentioned above varied significantly in both their decisions and their *ratio decidendi:*

The Administrative Court Hamburg, which denied even the existence of subjective rights,[39] and the Higher Administrative Court Lüneburg, which excluded in fact the possibility of a dangerous contamination by groundwater from the dump area[40] dismissed the motion of plaintiff B, emphasizing that plaintiff B had no right to a specific water quality and underlining the periodic control by local health authorities.

The other (Higher) Administrative Courts affirmed that Luebeck had a right of action, and granted the city application for restoration of the suspension. As a matter of fact, the courts considered an endangerment of the groundwater and of the water of the Wakenitz—even on a long-term basis—not to be impossible, and stressed the high safety standards of the Federal Water Act and its legal purpose to reduce "waste tourism" and to effectively check waste disposals abroad. The Higher Administrative Court Lüneburg and the Administrative Court Darmstadt[41] expressly stated that section 13 of the Federal Waste Act obliges the competent authorities of the waste-exporting land to carefully examine by themselves in the receiving country whether a proper disposal is ensured. They considered allowing a delegation of foreign authorities to examine disposal facilities, but only if foreign examination standards are recognized in West Germany as well. Up to this point, any check of the dump itself was considered to be within the exclusive jurisdiction of East German authorities. The last-mentioned argument of both courts seems quite unrealistic. It is beyond doubt that the East German Government will not admit any environmental controls on its territory by West German authorities, nor is there any obligation under international law binding East Germany in this respect. Furthermore, there is reasonable doubt as to whether a projection of domestic environmental standards on foreign activities and criteria may be legitimate. West Germany still lacks uniformity regarding the varying levels of technology being used for purposes of waste disposal in the different federal states.[42] Thus, in Germany, the court orders were partly upheld, partly refused.[43]

It is worth mentioning that the applications for restoration or declaration of the suspension, which had been filed by the Hanseatic City of Luebeck, were sustained without exception, while those submitted by plaintiff B

39. *See* Order of Sept. 18, 1986—18 VG 2970/86, in NVwZ 1987, p. 354.

40. *See* Order of Jan. 24, 1986—7 B 39/85, in NVwZ 1986, p. 322.

41. *See* Order of Nov. 10, 1986—III/2 H 1677/86, in NVwZ 1987, 350 [352]; Order of Jan. 24, 1986—7 B 39/85, in NVwZ 1986, p. 322 [324].

42. *See* Versteyl, *Abfallexport und Drittschutzwirkung von § 13 AbfG*, in Neue Zeitschrift fur Verwaltungsrecht 296, 298 (1987); Kunig, *supra* note 35 (notes 42 on § 4, Federal Waste Act).

43. *See* Versteyl, *supra* note 43; Kunig, *supra* note 35, at 224; Kunig, *supra* note 35, at 29 (on § 13, Federal Waste Act).

were both rejected. Although the status of both plaintiffs in the proceedings was equal, the legal protection of the rights of juristic persons—at least with regard to pollution—still seems to be more effective than the rights of individuals.

Presently, we do not have a final judgment. Not only do the cases await a final decision on the merits, but also many points of law remain unresolved until the Federal Administrative Court addresses them. These cases, however, could serve as a prototype of (international) "forum shopping." At least in cases of "retroactive pollution," the inadequacy of international legal remedies could be balanced through and overcome by remedies provided under domestic jurisdiction.