Piercing the state veil in pursuit of environmental justice

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1 Environmental law and justice across state borders

State borders do not mark out correctly who is concerned by decisions, acts and omissions – whether by public authorities or private entities – that affect health and the environment. Nor do state borders adequately define how far pursuits for justice should go in such cases. Rather, basic legal conceptions of state sovereignty and responsibility, jurisdiction and civil liability are challenged by transboundary effects on health and the environment and by transboundary corporate structures; and these features trigger particular concerns of procedural, distributive and corrective justice across state borders.

Situations of transboundary effects on health and the environment range from local settings, where only two neighbouring countries are involved, to global contexts; and they pertain to pollution, use of natural resources, stress on ecosystems, and trade in hazardous goods and wastes. These transboundary features reflect the current paradigm of international environmental law, which is primarily focused on inter-state concerns. Yet, as I will argue, it is not sufficient to consider these cases as inter-state only. From a justice viewpoint, it should be considered which interests are taken into account and who is capable of participating in decision-making and challenging decisions concerning activities with transboundary impact. Are they the interests only of those persons in the state of the activity or also those affected across state borders? And in which state, that of the activity or that of the harm, should justice be pursued?

The expansion of transnational corporations, fuelled by economic globalisation, also raises transboundary justice considerations, but of a different kind. In these cases, the transboundary element is found in the corporate structure and subjectivity of the actor responsible for the harm. From a justice perspective, the main concern is whether the locals – i.e. those affected in the state of the activity/harm – may make the transnational corporation responsible, so as to prevent or remedy harm, through legal proceedings outside that state, for example in the home state of the parent company.1 If no such opportunities are available, or if international law so prevents,

1 I discuss the transboundary dimensions of corporate responsibility in Ebbeson 2006. See also Schwartz in Chapter 22 of this volume with regard to transnational mining corporations in Sierra Leone.
transnational corporations can benefit from inadequate national institutions and laws, and abuse jurisdictional borders so as to avoid taking appropriate measures to prevent, restore or compensate for harm. Moreover, if the units in a corporation – the parent company and its subsidiaries – are perceived as distinct legal persons in all respects, splitting a corporation into several bodies in different jurisdictions may help the parent company to circumvent responsibility and liability over its subsidiaries, even though it maintains full de facto control of the activities. In other instances, a foreign company, which imposes overwhelming de facto control on a local sub-contractor, making the latter virtually dependent upon the former, may escape responsibility for harm. Although this situation is most likely to occur in states with inadequate legislation and institutions, it may arise also in states with effective laws and institutions if the operator has no assets in that state to compensate for or remedy the harm caused.\(^2\) In either situation, the justice implications are clear.

This essay has the dual purpose of identifying legal hurdles for pursuing justice in transboundary contexts, and examining the relevant legal principles and concepts in such cases from a justice point of view. I first discuss why justice considerations in transboundary cases should not be limited to inter-state concerns, but should take individual members of the public (and possibly also non-human species) into account. I then examine whether state sovereignty and accepted principles of jurisdiction preclude pursuits for justice across state borders. In that context, I also consider the possible choices of law in transboundary context. This is followed by an analysis of how international law responds to justice issues that arise in different constellations of the (likely) harm, the cause and the forum to resolve the conflict related to health and the environment.

### 2 Individuals rather than states as the measure

Deliberations of procedural, distributive and corrective justice in transboundary contexts hinge on whether states (or peoples) or individuals are the measure of justice. Taking states as the unit means focusing on the procedural opportunities, the distribution of burdens and benefits, and corrective effects of and between states only, while effectively leaving justice concerns within each state at its own discretion.\(^3\) The alternative, a more cosmopolitan conception of justice, is to place members of the public at the centre also in transboundary justice deliberations.\(^4\)

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\(^2\) One such case is the mine in Aznalcòllar, Spain, which at the time of the severe collapse in 1998 was operated by a subsidiary of the Swedish corporation Boliden. After various legal procedures in Spain, the corporation did not have enough assets in Spain to cover the clean-up costs. A concise account of the case and its aftermath is given by Moreno 2006–7.

\(^3\) This is further debated by Nollkaemper in Chapter 13 of this volume.

\(^4\) I leave aside at this stage that individual non-human species also should be considered subjects to justice deliberations. See Nussbaum 2006 at 325–407.
The state-centred approach is in line with John Rawls’ theory of the ‘law of peoples’, which he distinguishes from the principles of justice for individuals within a fixed society. Rawls rejects the notion of cosmopolitan justice or global justice for all persons in part because he thinks it requires too much of states; some degree of toleration is needed and all states cannot be expected to be liberal democracies. Instead of expanding his theory of justice to transboundary cases and putting individuals in the ‘original position’, he replaces them in a ‘second original position’ by representatives of peoples (states). Peoples, he argues, have equal reciprocal rights of recognition, and their representatives ‘will want to preserve the equality and independence of their own society’. In essence, this means that justice considerations stop at the state borders in favour of the law of peoples, whereas justice considerations are left to the discretion of each state. Apparently, this much resembles the logic of the traditional conception of international law.

Rawls has been strongly criticised for keeping his theory of justice to ‘closed societies’ rather than transcending it across state borders. As argued by Martha Nussbaum, his analogy fails on several accounts because it fundamentally assumes incorrect features of states. First, many nations of the world do not have governments that represent the interest of the people as a whole. Second, states and their basic domestic structures are not as fixed as Rawls presumes, and groups within states may turn to international norms in order to change domestic injustices. Third, by making a too close analogy with the domestic relations of individuals, Rawls assumes that each society is effectively self-sufficient, while in real life the situation is often different. He is not troubled by multinational corporations and does not pay much attention to international or supranational organisations. Nor does he take into account the interdependence of states in other ways, in particular that many ‘Southern’ states are affected by ‘domestic’ events in certain, predominantly ‘Northern’, states. Thus, by insisting on this analogy and thus disregarding essential facts, Rawls ‘loses useful contact with reality’.

These shortcomings of course matter for justice appraisals in transboundary cases of harm to health and the environment. There are numerous real life situations where harm is caused to human health and the environment in transboundary settings, without the government(s) acting so as to limit the harm to citizens on either side of the border. There are also situations where transnational corporations operate in

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6 Rawls 1999 at 82–3.
7 Rawls 1999 at 23–30 (where he describes why he prefers the term ‘people’ to ‘state’, although many similarities remain), ibid. at 32–5 (where he explains the second original position) and ibid. at 41 (quote).
9 Pogge 1989 at 256 and 262, where he gives the illustrative example of how the changes in US interest rates or certain domestic speculative trades can have tremendous impact on poor states that have significant foreign debt and rely on certain exports.
10 Nussbaum 2006 at 233. Similar criticism is put forth by Twining in Chapter 4 of this volume.
states with weak governments as well as weak, or even non-existing, environmental legislation and control.

From a justice viewpoint, the ideal situation of environmental decision-making should as far as possible include the interests of all individuals (and possibly also non-human species) who are affected or concerned by decisions regarding the distribution of burdens and benefits, whether within or outside a particular state. This is not the case in real life. While territorial borders constitute the dominant, formal delimitations of societies in international law, state borders do not mark correctly who is concerned or affected by decisions, acts and omissions with regard to health or the environment. Nor should they prevent us from taking individuals as the measure in justice deliberations, for instance when examining international law and international institutions.

Thomas Pogge, when ‘globalising the Rawlsian conception of justice’, convincingly shows how the theoretical starting-point for cosmopolitan justice, that transcends state borders, can be founded on Rawls’ social contract theory (although Rawls did not do that himself).\(^{11}\) Cosmopolitan justice requires that the influence of, opportunities for and effects on each and every individual concerned be taken into account. Policies, decisions, acts and omissions cannot be justified only by referring to the positive effects for certain groups, while the interests of others are ignored. Thus, decisions, acts and omissions within a territory – regardless of the form or effects of the ruling – are not immune from justice considerations simply by reference to the sovereignty of that state.

Placing individuals rather than states as the measure for justice calculations in transboundary contexts does not rule out the value of self-determination and some conception of state sovereignty, provided it is not perceived as absolute. Rather, it should be understood as equal self-determination and autonomy of states, with possibilities of permeating the veil in certain cases.\(^{12}\) When outlining the global application of the Rawlsian ‘original position’ as the test for justice deliberations, Pogge argues:

\(^{11}\) Pogge 1989 at 211–79. Cosmopolitan claims for justice can also be founded on the notion of certain basic entitlements – ‘human capabilities’ – to be given to all individuals across national borders. Nussbaum 2006 at 69–95 draws on notions of natural law, and takes human capabilities as the core measure of justice, rather than utility or the distribution of resources to individuals. Sen 1999 at 54–86 considers freedom as the foundation for justice, and sees ‘capability’ as the substantive freedoms of a person to achieve alternative lifestyles. He contrasts this with, for example, Rawls’ priority of liberty.

\(^{12}\) Cf. Cohen 2005, who argues in favour of adapting the conception of sovereignty so as to be compatible with cosmopolitan principles inherent in human rights norms. Pogge 1989 at 271–2, without referring to state sovereignty, when considering the global application of the Rawlsian ‘original position’ as the test for justice deliberations, argues that ‘[t]he global parties are not constrained by any prior criterion of domestic justice; and they will then specifically decide how much room to leave for differences in national institutional arrangements and in national conceptions of domestic justice’. Cf. Nussbaum 2006 at 316, who suggests that ‘[n]ational sovereignty should be respected, within the constraints of promoting human capabilities’.
The global parties are not constrained by any prior criterion of domestic justice; and they will then specifically decide how much room to leave for differences in national institutional arrangements and in national conceptions of domestic justice. Seeing how the original position is described, the parties decide this question by balancing two desiderata...: They want to enable citizens to choose and revise their own domestic constitution, even their own conception of domestic justice, so long as such choice results from and guarantees for the future free and informed decisions. Yet they also want to preclude institutions that tend to produce severe deprivations or disadvantages for some participants.13

Nor does a cosmopolitan conception of justice imply that norms and policies from one region or state can be imposed on others without any justifiable reason; that would amount to environmental imperialism rather than pursuing environmental justice. The crux is to agree on the leeway for national self-determination, while ensuring due respect for the opportunities and interests of all persons concerned by decision-making.14

The limits for self-determination are reflected not only in the constraints for domestic institutional arrangements and conceptions of justice, but also in the extent to which states accept overlapping competences and jurisdictions. For transboundary pursuits of justice in environmental matters, the element of overlapping jurisdictions, and whether such overlapping amounts to unacceptable interference, is most relevant. Fairness and justice require that, in cases of transboundary effects to health and the environment, those affected have access to adequate decision-making procedures and remedies in the state of the activity or elsewhere. It also requires that, in cases of transnational corporations, if there is no opportunity to take part in decision-making or to challenge the harmful conduct of private corporations in the state of the harm and activity, those affected have access to remedies abroad.15

Despite my emphasis on the opportunities for the persons concerned to engage themselves in the decision-making, as an essential element in the conception of justice, this does not preclude other institutional arrangements to promote the protection of health and the environment. On the contrary, such institutional arrangements may in many cases promote justice when health and the environment are at stake; and sometimes more effectively than when individuals act alone. Public authorities in the state of the activity and/or the state of the harm are often better equipped to deal with

14 For Nussbaum 2006 at 316, ‘[n]ational sovereignty should be respected, within the constraints of promoting human capabilities’. Cohen 2005 suggests adapting the conception of sovereignty so as to be compatible with cosmopolitan principles in human rights norms.
15 Cf. Pogge 1989 at 245–6, arguing that persons abused by their own governments have no official remedies and must rely on the willingness of other governments or agents to intercede in their behalf, and that, if Rawls’ notion of ‘original position’ were to be applied to persons in an international context, ‘the parties would prefer international law to afford some remedies to persons against abuse by their own governments, some incentives for societies to reform themselves’.
transboundary effects and act against powerful operators than the persons affected by the activity. Thus, establishing public environmental authorities, or allowing non-governmental organisations to initiate or participate in decision-making, may be instrumental to providing distributive or corrective justice for individual members of the public. Moreover, while the distinction between private and public interests is often blurred in environmental matters, a functioning public administration is necessary to ensure the effective protection of public environmental interests, such as public health and nature conservation.

3 Procedural, distributive and corrective justice in transboundary contexts

All forms of environmental decision-making – for example, the issuance of permits and concessions for harmful activities, approval of plans and environmental impact assessments, administrative requests for safety measures, banning of harmful substances, litigation for compensation or injunctive relief, protection of sensitive ecosystems, initiation of criminal procedures, and request for judicial review – have justice implications, in many cases across state borders. The first aspect of justice concerns the procedural opportunities to initiate or participate in such procedures and influence the decision-making: how is the group of persons with such opportunities defined, and to what extent do state borders matter for this delimitation? The second issue, decisive for the distribution of burdens and benefits, regards the interests to be considered and their relative weight: which interests are given priority when balanced against other interests, and again to what extent do state borders matter in these balances?

As stated, procedural justice also requires that persons on the other side of the border, potentially affected by environmental laws and policies, are given a right to participate and be represented in the law-making processes. Although beyond the scope of this essay, similar arguments can be raised for the legitimacy, i.e. the general acceptance, of laws in a transboundary context. If the legitimacy of national laws in democratic states rests on the understanding that citizens are the ‘authors’ of the law, then we face a lack of democratic legitimation in situations where national

16 Cf. Fraser 2005 at 82, who sees in the ‘all-affected principle’ the most promising candidate for a ‘postwestphalian mode of frame-setting’, meaning that all those affected by a given social structure or institution have moral standing as subjects of justice in relation to it. Thus, she argues, ‘what turns a collection of people into fellow subjects of justice is not the geographical proximity, but their co-imbrication in a common structural or institutional framework, which sets the ground rules that govern their social interaction, thereby shaping their respective life possibilities in patterns of advantage and disadvantage’.

17 Cf. Habermas 1979 at 178: ‘Legitimacy means that there are good arguments for a political order’s claim to be recognized as right and just: a legitimate order deserves recognition. Legitimacy means a political order’s worthiness to be recognized.’ Emphasis in original.

18 Cf. Habermas 2001 at 101: ‘The citizens of a democratic legal state understand themselves as the authors of the law, which compels them to obedience as its authors.’ The theoretical premises for this is further set out in Habermas 1996.
laws affect subjects and interests across state borders that have not been represented. A weak form of such legitimation may be provided by increasing the participation of civil society not only in international negotiations (mainly through NGOs), but also by the transboundary participation of civil society in environmental decision-making. While increasing opportunities for such participation concerning plans, programmes and activities with transboundary impact may not meet the standards for ‘cosmopolitan democracy’, it would at least promote a cosmopolitan conception of justice. To do so, equal opportunity must be provided for transboundary participation as for domestic participation, but mere non-discrimination would not be sufficient: it would also require some minimum standard for procedural opportunities. Thus, a state with no or only marginal opportunities for its own citizens would not meet the standard of justice simply by providing equally poor opportunities to those concerned across the border.

In international environmental law, ‘access to justice’ has come to refer largely to the procedural and informational aspects of justice, including the possibility of challenging decisions, acts and omissions by public authorities and private persons, with a bearing on health or the environment. The assumption, one may say, is that procedural justice is instrumental to achieving justice also in the distributive and corrective senses.

While these opportunities should primarily be available at the place of the decision, act or omission that may affect health or the environment, in some situations alternative procedural opportunities should also be available elsewhere. When the case involves a transboundary effect or risk of an activity, the most relevant alternative would be to prevent or remedy the situation in the state where the harm occurs. When transnational corporations are involved, and the corporate structure of the operator constitutes the transboundary element, the alternative would be to pursue the case in the state to which the corporation has some link, for example by means of nationality, registration, ownership (parent company) or de facto control. In either case, to

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19 In this respect, the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 38 International Legal Materials (ILM) (1999) 515, is a special case. While requiring the parties to ensure certain minimum participatory rights also in the drafting of general norms, they are also not allowed to discriminate, on the basis of domicile, citizenship etc., when providing the public with participatory opportunities.


21 This draws on the Rawlsian conception of ‘equality of opportunity’, although he refers to constitutional rights and liberties of a fundamental political character within a society rather than the detailed design of environmental decision-making in transboundary contexts; cf. Rawls 1972 at 195–201, 228–34. For Rawls 1972 at 60–1, 83–90, the fair equality of opportunity has to match certain basic civil and political liberties and rights. Cf. Nussbaum’s (2006 at 76–7) claim for ‘minimum core social entitlements’, which she describes as central human capabilities, also includes some minimum standards of a procedural kind. While Rawls comes close to civil and political human rights, without any detail on how to consider environmental issues, Nussbaum’s list stretches further as it also includes social, economic and environmental elements.

22 See Ebbesson 2002 at 1, 7–8 and 12–15.
provide adequate opportunities, the institutional arrangements must not be so com-
plicated, time-consuming and costly that, while available in principle, the persons
concerned are effectively barred for economic or social reasons from making use of
them.

The decision-making procedures mentioned involve different considerations with
regard to the distribution of burdens and benefits, and the balancing of interests and
priorities, for instance how the interests of the applicant to run the harmful activity
are to be balanced against the interest of protecting health and the environment. In
part, the corrective concerns overlap the distributive aspects. Claims for civil liability
and torts, where harm is compensated for, and other reparative and remedying claims
such as clean-up, may also produce corrective effects, and so can criminal liability for
harm to health and the environment.

4 Sovereignty, jurisdiction and environmental policy

Since self-rule and self-determination are fundamentals for political legitimacy and
justice considerations in decision-making procedures, the quest for justice outside the
state of the harm/activity needs to be balanced against the imperative of not generally
imposing the law on a people from outside. If the law for using natural resources or
permitting harmful activities is decided by other states or peoples, those concerned
in the state of the activity would have no say in how the burdens and benefits should
be allocated. As argued, such a lack of opportunities for the persons concerned to be
engaged in law-making would rather amount to a kind of environmental imperialism,
where standards are imposed from abroad. Even so, there are cases where those
concerned have legitimate reasons to seek justice outside, because the government in
the state of activity does not in fact represent the peoples in that state or because there
is no functioning legal or administrative system to provide means for preventing,
remedying or redressing cases of harm to health or the environment.

The fear for having external laws and regulations imposed was critical for the newly
independent states in the 1960s and 1970s, as reflected in the 1962 UN Resolution on
Permanent Sovereignty over Natural Resources:

The exploration, development and disposition of such resources should be in
conformity with the rules and conditions which the peoples and nations freely
consider to be necessary or desirable with regard to the authorization, restriction
or prohibition of such activities.\(^{23}\)

In addition to pronouncing the self-determination of states vis-à-vis each other, the
resolution also stresses the duty of foreign companies to abide by the national laws
where the activities are carried out. Full and permanent sovereignty over natural

\(^{23}\) UNGA Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources (1962), para. 2.
resources, ‘including possession, use and disposal’, over natural resources, is also set out in the 1974 UN Resolution on the Charter of Economic Rights and Duties of States, which is even more elaborate than the 1962 resolution. Thus, it declares the right of each state to ‘regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies’.24

Not surprisingly, the newly independent states, when freed from European colonial powers, perceived sovereignty as a shield against European and American dominance and power, and a means to preserve their independence and self-determination, but also as a means to promote economic and social development and fair distribution of wealth.25 This mind-set was evident in the context of the New International Economic Order (NIEO),26 proclaimed by developing countries at that time. It is reflected in international human rights treaties, such as the UN covenants on civil and political rights as well as economic, social and cultural rights,27 and in numerous international environmental agreements, policy documents and decisions of normative weight, adopted since the 1970s.28 Thus proclaims the 1992 UN Declaration on Environment and Development (Rio Declaration):

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.29

When analysing its impact on transboundary pursuits for justice, we need, again, to distinguish between situations of transboundary effects and cases where transnational corporations are involved without any apparent transboundary effects on the environment. As far as transboundary effects on health and the environment are concerned, it follows from the quoted principle that a state is not immune from claims or interference by other states when its policies or use of natural resources may harm the persons or the environment outside its territory. Yet, even taking the interests

24 UNGA Resolution 3281 (XXIX), Charter of Economic Rights and Duties of States (1974), Art. 2.
25 Rajagopal 2003 at 79–81. 26 See Shelton in Chapter 3 of this volume.
of other affected *states* into account is no guarantee for cosmopolitan justice or for fair consideration of the individuals potentially affected. This would still depend on whether there are institutions in place for the persons concerned to somehow pursue their case – either in the state of the activity or elsewhere.

In cases of transboundary effects, the *territorial connection*, which is the most significant jurisdictional basis, can be invoked by the state of the activity as well as by the state suffering the harm.\(^{30}\) In environmental settings, the ‘territorial principle’ applies for instance when the state of the activity issues a permit or imposes its environmental protection standards or tort law on national and foreign companies operating within its territory. It also applies when a claim for compensation is brought to a court in the state of the harm rather than the state of the activity. Whereas administrative decision-making (permits, requests by supervisory authorities) will largely take place in the state of the activity, a possibility of choosing the forum may arise in private law litigation concerning transboundary effects on health and the environment.\(^{31}\) In theory, either route may promote justice, although the choice of forum will be determined not only by the possibility of a positive outcome, but also by the means of enforcement.

The situation is different when a transnational corporation or its subsidiary is brought by the locals affected to a court outside the state of the harm/activity. In these situations, without transboundary effect, the jurisdictional basis for the court to decide on the corporation’s activity mainly consists in the *personality* or *nationality* of the corporate wrongdoers; and this is compatible even with a rather orthodox reading of sovereignty.\(^{32}\) The ‘nationality principle’ provides a pertinent basis for jurisdiction when transnational corporations operate in states with inadequate legal or institutional structures to effectively handle cases of harm to health or the environment. In such cases, the court of the company’s home country may try claims for compensation and maybe even apply injunctive measures. While the personality link to the home country of the transnational corporation may appear weaker when it operates through local subsidiaries in the state of the activity, there is still a legitimate jurisdictional basis from an international law point of view as the subsidiary operated under *de facto* control of the parent company.

As a jurisdictional basis, the personality link outside the state of the activity (with no adequate environmental laws and institutions) appears weaker if the company in question is owned by several foreign corporations, none of which has the majority of shares. Yet, in these cases, jurisdiction can be established in the home country of the

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\(^{30}\) For general accounts of the territorial principle, see e.g. Lowe 2006 at 342–4; Shaw 2003 at 572; and Malanczuk 1997/2002 at 109.

\(^{31}\) See Case 21/76, *Bier v. Mines de Potasse d’Alsace* [1976] European Court Reports (ECR) 1735. The distinction between public law and private law is admittedly not that clear, and what is seen as a private law remedy in one state may be functionally equivalent to a public law remedy in another state.

\(^{32}\) It is for each state to decide on the criteria for a corporation’s nationality, e.g. registered seat, main business and tax payment.
shareholder with *de facto* control of the subsidiary. If no such owner can be identified, even partial ownership (or simply access to assets) may suffice to establish jurisdiction, although the personality link is weak. This would imply overlapping jurisdictions, still without amounting to universal jurisdiction. Apparently, the weaker the personality link between the accused corporation and the state of the court, the more important becomes the lack of adequate laws and institutions in the state of the harm/activity as a ground for claiming jurisdiction to try a case for compensation for harm to health or the environment.

From the perspective of justice in cases concerning health and the environment, *universal* jurisdiction – i.e. jurisdiction without any particular link at all to the state where the case is tried – may seem appealing as it would, in effect, expand the opportunities for remedies and procedures for those affected. Increasing the possibility for persons affected to claim compensation or ask for injunction or mandamus action could thus promote justice and the protection of health and the environment. However, universal jurisdiction is problematic from a legitimacy as well as from a justice point of view, since it means that some states or regions – without any link to the issue at stake – may impose their laws onto another people. Unless some international normative consensus exists regarding corporate behaviour, universal jurisdiction may be perceived as imposing laws from outside onto a people. There is indeed some international consensus with regard to a limited number of activities, such as the production of CFCs, transboundary shipment of hazardous wastes, and the dumping of such wastes at sea, and it may also be possible to establish some common elements in compensation schemes. Still, universal jurisdiction should be limited to rather severe cases, where the host state fails to ensure even minimum standards of human rights related to health and the environment. Today, universal jurisdiction is generally accepted only for a limited number of serious acts, such as piracy, war crimes and hijacking.

This said, to preclude any such opportunities to bring the claims abroad, by reference to state sovereignty, would in certain cases amount to *dénie de justice*, which is as such incompatible with the notion of a human right to a fair trial. Whereas some gross violations of human rights may even justify interventions on the basis of humanitarian law (when approved by the UN Security Council), our concern is rather if, and when, recourse can be had to remedies abroad in cases of harm to health and the environment. This is the sovereignty versus justice test; and in severe situations pursuits for justice require that the state of the activity cannot claim

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33 See Boyle 2006 at 559, 570–83.
34 I leave aside the more contested bases for jurisdiction, e.g. the ‘protective principle’ (with respect to acts by aliens abroad that threaten the state in question) and the effects doctrine. While in theory they could be useful in the pursuit for justice, a too far-reaching ‘effects doctrine’ would not be compatible with the principle of self-rule. See Åkehurst 1972–3 at 157–9, and Lowe 2006 at 344–5 and 347–8.
35 See Cohen 2005 for a critical account on cosmopolitan justice in cases of violations of humanitarian law.
exclusive jurisdiction even if there is no link of territoriality or personality to any other particular state.

These concerns were not addressed in the 1962 or 1974 UN resolutions. Rather, these resolutions were intended to clarify that foreign ownership does not deprive the host state of its right to regulate or control the activities of foreign companies, and under what circumstances the host state may even nationalise or expropriate foreign investments without violating international law. Both NIEO resolutions focus on the laws and regulations of the host state, but do not expressly tackle the question whether a foreign corporation can – also – be held responsible outside the host state, presumably in its home state, for causing harm to health or the environment in the host state. When proclaiming the sovereign right of states or peoples to pursue their own environmental and developmental policies, the NIEO resolutions, human rights treaties and international environmental instruments (such as the Rio Declaration), presume that there are national environmental laws, regulations and institutions in place in the state of the activity. They do not refer to lawless situations or cases where the state fails to control foreign corporations. In such situations, accepting overlapping jurisdictions, so as to allow some courts outside the state of the harm/activity to decide on compensation or injunctive measures, does not amount to thwarting the economic policy or self-determination of the people in the state of the harm/activity.

5 Choice of law

In most cases of administrative decision-making and adjudication in environmental matters, the choice of law is not really an issue, since the activity, the harm and the forum to decide the case are located within the same jurisdiction. In transboundary contexts, however, the situation is different, and the choice of law becomes an issue.

Possible options for the choice of law, depending on the forum as well as the issue at stake, are the law of the place of the court (lex fori), the law of the place of the activity and/or harm (lex loci delicti), or resort to international or generally accepted standards. In cases involving transboundary effects, the presumption would be to apply the law of the place of the harm/tort. Yet, in such settings the place of the harm may refer to either the place where the harmful activity or the harmful effects occurred; and the court, or the plaintiff, will have to choose between the law of the state of the activity and the law of the state of the harm. In the alternative setting, of a transnational corporation brought to court in its home country, the court, if it accepts jurisdiction, may decide to try the case according to the law of the state of

38 As argued by Briggs 2002 at 176–8, alternative approaches to lex loci delicti have been applied for torts, such as a 'test of the closest connection'.
the activity/harm. As mentioned, applying the environmental law of the state of the
court, rather than the state of the activity/harm, implies imposing foreign standards
on the people affected. Therefore, provided rules on the protection of health and the
environment actually exist in the state of the activity/harm, it may be preferable to
apply this law since it may somehow reflect the values, preferences and principles for
the distribution of burdens and benefits among those concerned. There is no general
principle of international law on the choice of law in cases like this. Determining the
responsibility of transnational corporations may involve yet another choice of law
issue when considering holding the parent company responsible for the activities of
its subsidiaries overseas. While corporate matters are usually determined by the law
under which the corporation was created (*lex incorporationis*), courts may also avoid
entering into such deliberations simply by allocating the responsibility to the parent
company without further ado about piercing the corporate veil.

The choice of law has justice implications, because the distribution of burdens
and benefits as well as the opportunities for participation etc. depend on the values
and priorities reflected in the law to be applied. For instance, different laws weigh in
different ways the interests of the operator of a hazardous activity against the interests
of those who are adversely affected by the activity. This balance of interest may be based
on the application of general principles (e.g. the precautionary principle, the polluter
pays principle and proportionality), but also follow from emission standards, technical
standards (including the standard of best available technology) and ambient standards
intended to protect health and the environment. The principles for compensation for
harm (e.g. strict or fault-based liability) also differ depending on the choice of law to
be applied.

### 6 Premises for pursuits across state borders

#### 6.1 Three constellations

Remaining at a rather abstract level, we can identify three possible groupings of the
harm(s), its cause (i.e. the activity) and the decision-making forum in transnational
contexts. Of course, the complexity of a case depends on the number of causes and
spreading of harms as well as the distance between the cause and the harm(s). Yet,
from a typology point of view, they can be reduced to the following constellations:

1. *Cause and forum* in State A, *harm* in State B.
2. *Cause* in State A, *harm* and *forum* in State B.
3. *Cause* and *harm* in State A, *forum* in State B.

*Harm* refers to harm to the environment as well as harm to health and damage
sustained by persons or property in relation to harm to the environment. It also

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includes possible future harm, i.e. situations of prevention and risk of harm. The *cause* is the activity or installation which entails the nuisance, harm or risk of harm. The cause may be a polluting industry, but also an activity that uses natural resources in a harmful way. Depending on the kind of decision-making, the *forum* may be an administrative authority, which decides on whether to permit the activity, or a court which either reviews the administrative act (or omission) or decides on compensation, enforcement or criminal sanctions. While, in theory, the forum for transboundary claims regarding health and the environment could be an international institution of some sort, such a forum remains yet to be established.\(^{41}\) Therefore, from a justice point of view, it is essential to consider whether recourse can be had to fora – courts, other tribunals, or competent administrative bodies – established under some national law and jurisdiction.

In all cases with some transboundary reach, the question arises not only as to which state(s) can decide and whether there are procedural opportunities across state borders, but also about enforcement and recognition of decisions. To be worthwhile from a justice point of view, a decision concerning environmentally harmful activities must also be enforceable somewhere and somehow.

### 6.2 Case I: pursuing justice in the state of the cause (activity)

The first case refers to situations where the harm occurs outside the state of the cause (activity), but the affected members of the public across the border take part in decision-making or initiate legal actions in the state of the cause.

![Figure 14.1 Case I: pursuing justice in the state of the cause](image)

This is the situation when persons potentially affected by transboundary harm seek to participate in a permit procedure or an environmental impact assessment

\(^{41}\) If the operator causing the harm so accepts, it would be possible to refer a dispute between non-state actors to an *ad hoc* arbitral tribunal, e.g. in accordance with the procedures set out by the Permanent Court of Arbitration. To my knowledge, however, no such transboundary conflict between the non-state actors concerned by environmentally harmful operations and the operator has ever been settled by arbitration. See Hey 2000. The Aarhus Convention Compliance Committee has no power to remedy any harm caused. Rather, it is intended to be forward-looking with regard to the implementation of the Convention, and can only address the issue of non-compliance of a state party to the Convention (although this includes cases where the party failed to control private companies). See Fitzmaurice in Chapter 11 of this volume, and Koester 2005 at 31.
procedure in the state of the activity, or appeal such decisions. Possible claims in such procedures are the denial of a permit or the requirement that certain precautionary measures be taken by the applicant in order to avoid adverse effects. Alternatively, if procedures involve actions in court, the plaintiffs may claim compensation, injunctive measures and enforcement with regard to activities already in place. There is solid jurisdictional support, based on the territorial principle, for the forum in the state of the activity (State A) to deal with either cases. While outside the scope of this chapter, these are situations where the neighbouring state might also initiate diplomatic or legal measures against the state of the activity for violations of international law. Such inter-state proceedings may provide for just outcomes as far as the distributive and corrective aspects are concerned, although what is just for the government of a state in such a dispute is not necessarily just for the affected individuals in that state.

For this particular constellation some development of international law has taken place, in particular by the increasing recognition of non-discrimination and equal access as a legal principle. Non-discrimination and equal access imply that the forum deciding the case must apply no less favourable rules and principles on standing, participation in decision-making and access to justice to subjects outside the territory of the state of the court than to like subjects within that state. As to the examination on the merits, non-discrimination, for example when issuing a permit or trying a claim for compensation, also implies that the interests and concerns on the other side of the border should be treated no less favourably than like interests and concerns in the state of the activity. Thus, criteria for defining the group of persons with standing may well relate to the distance from the installation and possible impact on those concerned, but not to the state borders. If the criterion for standing refers to sufficient interest, the same test should apply across the border. If certain non-governmental organisations have standing in the state of the activity, non-discrimination implies standing also for like organisations in the affected state.

While non-discrimination and equal access have achieved global recognition as a legal principle (although its practical implementation in many countries and regions

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42 On jurisdictional principles and forum non conveniens in general, see McLachlan and Nygh 1996.

43 Indeed, in the 1941 Trail Smelter award, concerning an air pollution dispute between Canada and the US, the tribunal was asked to ‘reach a solution just to all parties concerned’; and it was to this end that the tribunal concluded the principle that ‘no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence’: 3 RIAA 1905, at pp. 1908, 1963–6. Still, such settlements are scarce and they do not necessarily provide for just outcomes for the persons affected by transboundary nuisance. That would in part depend on the claims made by the affected state, and the extent to which it truly represented the persons concerned.

can be questioned), this is not the case with international minimum standards for procedural opportunities. Some minimum standards for public participation and access to justice have been established in international law, but this development is basically limited to Europe, parts of Asia and North America. The most advanced regime for this purpose is the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), which applies to the UNECE region.\(^\text{45}\) Despite the strong endorsement of public participation in environmental decision-making at the 1992 Rio Conference, this has not yet been incorporated in any international agreement of broader geographical coverage. Although human rights instruments, if seriously implemented, would promote procedural justice also in environmental cases, they may not generally ensure procedural opportunities in cases related to health and the environment, and in particular not in transboundary contexts. Thus, with the possible exception of the Aarhus Convention, international law does not provide for procedural justice across state borders. The minimum procedural opportunities in transboundary cases therefore essentially depend on the national law of the state of the cause (activity).

When the case is tried in the state of the cause (activity), the court or administrative body most likely applies the law of that state (possibly influenced by international law). The court may decide to apply foreign law, for example the law of the state of the harm – at least to the extent that it does not lead to less favourable result for the subjects and concerns abroad as to like concerns in the state of the activity.\(^\text{46}\) An alternative approach to the choice of law is found in European Community law, which leaves it to the injured party to choose the law to be applied – either the law of the place of the activity or of the place of the harm.\(^\text{47}\) From a justice point of view, this appears to be a satisfactory solution, and it does not amount to imposing the law from outside the context.

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\(^{45}\) 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 38 ILM (1999) 515. See Ebbesson 1998 and 2007. The Aarhus Convention sets out such minimum requirements for access to information, public participation in decision-making and access to review procedures. However, it does not apply to the US, Canada or Russia. Some such internationally defined minimum requirements also apply to North America, through the 1993 North American Agreement on Environmental Cooperation, 32 ILM (1993) 1480.

\(^{46}\) Cf. the 1974 Nordic Environment Protection Convention, note 44 above, Art. 3, which seems to be drafted on the assumption that \textit{lex loci delicti} is the general principle providing for the choice of law. For that reason, it sets out that, if the law of the state of the harm is less generous to the plaintiff than that of the state of the activity, the latter should apply.

\(^{47}\) See European Community Regulation (EC) No. 864/2007 on the Law Applicable to Non-contractual Obligations (Rome II), [2007] OJ L199/40, Art. 7: ‘The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1) [i.e. the law of the country in which the damage occurs], unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.’
While transboundary procedures in cases of environmental harm will always be complicated, generally speaking bringing them to the state of the cause is the least complicated route of procedure.

6.3 Case II: pursuing justice in the state of the harm

While the state of the activity has a solid support for jurisdiction in just about all cases, and should take the transboundary matters into account on the basis of non-discrimination, this does not preclude overlapping jurisdiction. There are transboundary cases where other routes of procedure appear more promising from the perspective of the persons potentially harmed. The most relevant alternative is to bring the claims to a forum in the state of the harm. The reason for doing so may be that there is no competent forum or adequate remedy available in the state of the cause (activity). This makes the following constellation:

![Figure 14.2 Case II: pursuing justice in the state of the harm](image)

Jurisdiction can clearly be established on the territorial principle also in the state of the harm, and international law does not generally preclude such jurisdiction. Even so, there may be situations where litigation in the state of the harm, depending on the implications of the decisions in/for the state of the cause (activity), is considered to interfere too much with the domestic policies of the latter. While of little interest for this essay, it would, for instance, clearly amount to an unacceptable interference in the domestic of State A if a court or an administrative authority in State B were to grant permits for activities in State A without State A’s approval. The situation is different, though, if members of the public in State B claim compensation for harm or injunctive measures in a court of State B against an activity in State A. For such claims, international law does not preclude jurisdiction also for State B.

In effect, however, the most complicated issue with pursuing justice in the state of the harm (State B) instead of the state of the cause (State A) relates to enforcement rather than jurisdiction. While states may agree through bilateral and multilateral treaties to recognise court decisions in other states, there is no general and consistent practice among states on the recognition of court decisions on compensation, let alone on injunctive measures, made in another state. For that reason, in terms of effective remedies, running the procedure in the state of the cause would often be preferable, because the court decision can easily be enforced against the operator of the activity.
This will have to be balanced against the possible advantages for the plaintiffs to bring the case to the court in State B, where they live, whether from a procedural, distributive or corrective point of view.

Even though international law does not generally block jurisdiction for the state of the harm, national law in that state may do so – with a negative impact from a justice point of view. There is no common position among states on how to decide in cases like these. In some states, courts may dismiss the case on the basis of *forum non conveniens* or other discretionary reasons, even if it has jurisdiction. In other states or regions, jurisdiction in these cases also is mandatory. A promising development from a justice point of view, in line with the notion that state borders should not block pursuits for justice, can be found in the European Union, where the persons affected can choose whether to bring the claim for compensation and injunctive measures to a court in the state of the activity or the state of the harm. This possibility was previously based on an international agreement between the EU member states, but it is now based on European Community law. The states concerned are also obliged to recognise and even enforce court decisions made in the other EU member states. Moreover, the plaintiff can decide on the choice of law regardless of whether the case is brought to a court in the state of the activity or the state of the harm. This is a rather unique development without any parallel on a global scale, so here, too, the effectiveness of bringing the case to court in the state of the harm depends on the national law of the particular state of the harm as well as on the law of the state of the cause; with obvious impact for the pursuit of justice.

6.4 Case III: pursuing justice outside the states of the cause and the harm

The third constellation occurs when a transnational corporation is held accountable outside the state of the activity/harm for harm caused either by itself or its subsidiaries. As mentioned, this situation differs from the previous two by the lack of transboundary effects; while the cause and harm largely remain in the same state, the case is brought to a forum outside that state for a decision regarding the harmful activity.

The concerns for such pursuits for justice are driven by the fact that, if no such opportunities are available, there are situations where transnational corporations may cause severe harm to health and the environment without any possibility to make them accountable. This is particularly the case when transnational corporations operate in countries with inadequate, if any, administrative institutions, laws and participatory opportunities for the persons concerned to prevent or remedy harm to health and the environment. Yet, as mentioned, it may arise also in states with effective laws and

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49 See note 47 above.
institutions if the operator has no assets in that state to compensate for or remedy the harm caused.

**Figure 14.3 Case III: pursuing justice outside the state of the cause and the harm**

Corporations organise themselves in multiple ways when acting across state borders, and this matters for jurisdictional considerations. Most transnational corporations have some national basis, but some companies are active in many countries without a particular link to any particular ‘home country’. Some corporate structures are organised as even more diffused international networks or clusters of firms, sub-units, suppliers and sub-contractors.

Some policy documents and guidelines concerning corporate accountability in transboundary contexts have been adopted by international organisations, such as the UN, the OECD and the ILO. Apart from that, however, there has been only little effort at a global scale to harmonise the laws or secure some minimum degree of responsibility of transnational corporations for harm to health and the environment. While outside the scope of this chapter, certain transboundary initiatives through ‘self-regulation’, corporate codes of conduct, voluntary auditing and management schemes etc., have taken place, and they may influence also administrative decision-making and legal reasoning. Yet, these voluntary or legally non-binding instruments are not themselves enforceable against the corporation in case of a conflict.

The lack of an international legal framework does not mean that international law prevents a state from deciding cases concerning the activities of its nationals in other states, provided that it does not generally thwart the economic policy of that state. Different positions and policies on jurisdiction for corporate activities abroad are employed in different regions and states. One of the few efforts at harmonisation can

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53 See e.g. OECD 2001b.
again be found in the European Union, as it opens the doors to the European courts in cases where European companies are involved outside Europe. Under European Community law, the exclusive forum in international cases concerning civil and commercial matters is the court of the state where the defendant is domiciled, i.e. where the corporation has its statutory seat, central administration or principal place of business.\(^{54}\) In principle, this makes it possible to bring a European company to the court in the company’s home state also in cases when the company operates its harmful activity in a country outside Europe.\(^ {55}\)

If the operation is carried out by a local corporation which is owned and/or controlled by a transnational corporation, the local corporation may, formally speaking, be a separate legal person. Even so, the court in the parent company’s home country should have to look through the corporate veil to determine whether the parent company has maintained *de facto* control of the subsidiary. If not, this corporate divide, however artificial, may be abused in a similar way as national jurisdictions in order to do away with accountability for harms to health and the environment. Corporate structures, including the possibility of piercing the corporate veil, is yet another issue for which there is hardly any international effort of coordination, let alone harmonisation.\(^ {56}\) Due to the different perceptions of corporate structures, the possibility of pursuing these kinds of cases will depend on the national laws of the states involved.\(^ {57}\) Yet, while there is no international framework for harmonising the laws on corporate structures and responsibilities, international law does not preclude national courts from piercing the corporate veil in a case for preventing or remedying harms to health and the environment.\(^ {58}\)

In determining the responsibility of the transnational corporation, the choice of law is all the more important, taking into account the distance between the states concerned – the home state and the host state – and the possibility of differing laws and regulations in these states. While in these cases the presumption should be to apply the law of the state of the harm,\(^ {59}\) provided such laws and institutions exist, this rule could possibly be set aside if the standards in the state of the activity/harm

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\(^{56}\) Ebbesson 2006.

\(^{57}\) A thorough analysis of corporate groups and their legal responsibilities is given by Antunes 1994, in particular pp. 64–80.

\(^{58}\) Even if such opportunities are available, this may not resolve cases where the harmful company is owned by several corporations from different countries, and none of them is particularly dominant. Apparently, international law does not provide much guidance. One possibility would be to bring the case to the state of the most dominant owner, another to accept jurisdiction where any of the major owners has assets. Yet, this is not established in international law.

are obsolete or manifestly unacceptable. Of course, if there is no applicable law in the state of the harm/activity this may not only be a sufficient reason to bring the case out of the country, but also a reason for not applying lex loci delicti.

The almost unlimited jurisdiction of states to legislate and try cases of criminal and tort law on the basis of nationality provides a potentially useful entry for pursuits of justice in transboundary cases, although it has not yet been widely used for this purpose. The legal developments in Europe go in this direction, but there are few signs of such developments in international law at the global scene. While this area of law is developed without coordination through international law, there are some examples, for example in the US and the UK, where pursuits for justice in the home country of the transnational corporation have been acknowledged.60

7 Effective cosmopolitan justice without environmental imperialism

Procedures to remedy violations of performance standards and harm to health and the environment are often most effective, efficient and available for members of the public if they take place near the area of the activity or harm. Too remote procedures, geographically, economically or socially, make it difficult, if not impossible, for many people to participate in, let alone initiate, proceedings. For this reason, if possible, it makes good sense to run the procedure in the state where the activity is carried out, and, if that does not seem appropriate, in the state of the harm. Moreover, the application of local laws and the use of local proceedings ideally implies more of self-rule and self-determination than applying distant laws. This includes establishing principles for the distribution of burdens and benefits. Provided such opportunities exist in the state of the activity, non-discrimination and equal access for those concerned outside that state may add to achieving fair distributive and corrective outcomes also in transboundary contexts.

Still, as I have argued, there are numerous such situations where procedures to deal with environmental or health issues in the state of the activity are inadequate or simply not available – and thus cannot be used by members of the public who are at risk of suffering harm. In these cases, increasing procedural opportunities outside the state of the cause (activity) may be instrumental for justice. Failing international institutions for individuals to prevent or remedy harm to the environment, recourse must be had to national fora in other states. Such an overlapping of jurisdiction – in some cases in the state of the harm, in others in the state to which the corporation

60 Numerous claims have been brought to US courts against corporations with some link to the US for harm caused ‘abroad’ on the basis of the Alien Tort Claims Act (28 USC section 1350 (2000)). While most claims have been dismissed on jurisdictional grounds (including forum non conveniens), there are also cases where the jurisdiction has been acknowledged, resulting in out-of-court settlements; see e.g. Crook 2005. In the UK, the House of Lords decided to try a case concerning claims for injuries from asbestos in South African mining where British corporations were involved; see Muchlinski 2001.
has some link – may promote pursuits for justice, by complicating for corporations engaged in harmful activities to shield behind state borders. While recognising the positive effects of overlapping jurisdiction in these transboundary contexts, some caveats, already mentioned, are in place.

The first regards the effectiveness of proceedings outside the state of the activity. While the jurisdictional basis for such decision-making may be perfectly fine, the decision on, say, compensation or precautionary measures may not be enforceable in the state of the activity. Unless the company has assets in the state of the proceedings or the decision can be formally recognised in the state of the activity, bringing the case outside the state of the activity may have little immediate legal effect (although it may still have a political effect).

The second concern is more principled and refers to justice versus imperialism. The point made – that the rules and principles for procedural opportunities as well as the distribution of burdens and benefits should as far as possible be decided by those concerned – matters for jurisdictional allocation as well as for the choice of law. Overlapping jurisdiction does not imply universal jurisdiction; and for the said reason, while some overlapping may promote pursuits for justice, universal jurisdiction is not optimal even from a justice point of view. Just outcomes would require some common perception of what is accepted or unaccepted behaviour. Once a case is brought out of the country of the activity/harm, some caution is required in terms of jurisdiction as well as the choice of law, in order to avoid a sense of imposing protection standards from one state or region onto another, and of disregarding the moral weight of self-determination and autonomy of the people concerned. Even so, these concerns should be weighed against the lack of remedies – laws and/or institutions – for those harmed by the corporate misdeeds, and against the fact that the case is actually brought abroad by the affected persons themselves. If there is no law or institution for the protection of health or the environment in the host state, then there would be no articulated self-rule to interfere with in the first place, and possibly no means for those affected to articulate it either, unless proceedings could be triggered abroad. What would remain in such a situation is just a lack of decent government. Moreover, in some of these cases, the corporate activity is likely to violate international norms, for example international human rights law, labour law or environmental law standards. If so, values and norms, at least if part of general international law, would not really be imposed from one territory to the other. In construing such principles for allowing pursuits for justice outside the state of the cause, much can be built on already existing notions for jurisdictional claims.

Third and final concern, re-conceptualising the transboundary situations and relaxing the impact of state borders in a formal, legal sense is not in itself sufficient to ensure fair proceedings. Justice, also in these contexts, requires that existing institutions actually make it possible for those concerned to participate in decision-making or to initiate legal proceedings. While, in most states, participating in
environmental decision-making is free of charge,\textsuperscript{61} bringing a case to court, either as a private suit or as an appeal, is costly. Economic constraints may completely block any access to transboundary proceedings even if they are formally open and available. To be fair, procedures for challenging acts and omissions with a bearing on the environment should ‘provide adequate and effective remedies . . . and be fair, equitable, timely and not prohibitively expensive’.\textsuperscript{62} This applies in the national contexts, but is equally important in transnational situations.

**Bibliography**


\textsuperscript{61} See, however, Case C-216/05, *Commission v. Ireland* [2006] ECR I-10787, where the European Court of Justice accepted the Irish system, where the court did not consider the charge of €20 and €45 respectively as constituting an obstacle to the exercise of the rights of participation as set out in European Community law.

\textsuperscript{62} Aarhus Convention, note 19 above, Art. 9(4).


