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Review Article

Transboundary pollution at the intersection of private and public international law

Uglješa Grušić*

This article reviews Guillaume Laganière's *Liability for Transboundary Pollution at the Intersection of Public and Private International Law* (Bloomsbury Publishing, 2022). This book makes a valuable contribution to private international law scholarship by exploring the relationship between public and private international law and the regulatory function of private international law in relation to transboundary pollution. The book's focus on transboundary pollution, however, is narrow. A comprehensive and nuanced regulatory response to contemporary environmental challenges in private international law must also address cases where transnational corporations and global value chains are sued in their home states for environmental damage caused in developing states.

Keywords: private international law; conflict of laws; public international law; regulation; transboundary pollution; environment

A. Introduction

The *Bier* case[1] and Article 7 of the Rome II Regulation[2] are well-known components of EU private international law. They deal with the jurisdiction of EU Member State courts over environmental torts and the applicable law for such torts. These rules have been discussed in the scholarship on private international law's role in global governance,[3] its regulatory function,[4] its contribution to the UN Sustainable Development Goals 2030,[5] and business and human

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[1]Case 21/76 *Handelskwekerij GJ Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 1735.

[2]Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

[3]H Muir Watt, "Private International Law Beyond the Schism" (2011) 2 *Transnational Legal Theory* 347, 425, fn 377.

[4]U Grušić, "International Environmental Litigation in EU Courts: A Regulatory Perspective" (2016) 35 *Yearbook of European Law* 180.

[5]R Michaels, V Ruiz Abou-Nigm and H van Loon (eds), *The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law* (Intersentia, 2021).

rights.[6] The International Law Association and the UN Environment Programme have recommended similar rules as part of regulatory responses to contemporary environmental challenges.[7]

It, therefore, comes as no surprise that Guillaume Laganière, in his book on *Liability for Transboundary Pollution at the Intersection of Public and Private International Law*, published by Bloomsbury Publishing in 2022 (266 pp; RRP £85), also recommends such rules as a global private international law gold standard in relation to transboundary pollution. But Laganière does more than that. He sheds light on the relationship between public and private international law with respect to transboundary pollution, an aspect that the disciplinary and technical specialisation of these legal fields has largely obscured. Additionally, he emphasises the regulatory function of private international law and offers insights into the optimal regulation of transboundary pollution in private international law. Finally, he assesses whether, and to what extent, Canadian private international law rules correspond with the rules that he recommends. Despite its coverage of Canadian law, this book should be of interest to a broader audience. It deals with transboundary pollution, an aspect of a more general topic of environmental protection in public and private international law; its recommended private international law rules can form part of domestic, international, and transnational regulatory responses; and the analytical framework developed to assess Canadian private international law rules can be applied to other legal systems.

However, the book's scope is narrow. It focuses on transboundary pollution and does not address the question whether the private international law rules it recommends are suitable for dealing with cases where transnational corporations and global value chains are sued in their home states for environmental damage caused in developing states, which are increasingly prevalent in international environmental litigation.

[6]European Group of Private International Law (GEDIP), "Recommendation to the European Commission Concerning the Private International Law Aspects of the Future Instrument of the European Union on Corporate Due Diligence and Corporate Accountability of 8 October 2021" https://gedip-egpil.eu/wp-content/uploads/2021/02/Recommandation-GEDIP-Recommendation-EGPIL-final-1.pdf accessed on 20 November 2023; "Recommendation Concerning the Proposal for a Directive of 23 February 2022 on Corporate Sustainability Due Diligence, Following Up on Its Recommendation to the Commission of 8 October 2021" https://gedip-egpil.eu/wp-content/uploads/2022/07/Recommendation-GEDIP2022E.pdf accessed on 20 November 2023.

[7]ILA, "Resolution No 6/2006: Transnational Enforcement of Environmental Law" in ILA, "Report of the Seventy-Second Conference" (Toronto 2006), Rules 4 and 5; UNEP, "Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damage Caused by Activities Dangerous to the Environment" in Governing Council of UNEP, "Proceedings of the Governing Council/Global Ministerial Environment Forum at its Eleventh Special Session (24-26 February 2010)" (2010) UN doc UNEP/GCSS.XI/11, Guideline 13.

The next section provides an overview of the book. Section C discusses its contribution to the scholarship on the relationship between public and private international law and the regulatory function of private international law. Finally, section D evaluates the relevance of its central arguments for three different kinds of international environmental litigation, namely litigation involving transnational pollution, environmental damage caused by transnational corporations and global value chains in developing states, and climate change. Climate change litigation, in particular, is a recent phenomenon. The most important manifestation of this phenomenon for the purposes of private international law are claims, sometimes commenced by overseas victims, based on private law brought against emitters of CO2 for the harm they cause to the climate.

B. Liability for Transboundary Pollution at the Intersection of Public and Private International Law: An Overview

The book starts with a concise introduction that outlines its context, scope, objectives, and structure. Part 1 consists of two chapters exploring liability for transboundary pollution in international environmental law and the role of private international law within this context. These chapters lay the foundation for assessing Canadian private international law rules. Part 2 includes two chapters that evaluate Canadian rules on jurisdiction, foreign judgments, and choice of law. Each chapter provides a detailed description of the relevant public international law framework, followed by an analysis of the corresponding Canadian rules. The book concludes with a brief summary.

The introduction clarifies that the book primarily focuses on the relationship between public and private international law in the field of transboundary pollution. Its main objective is to contribute to the scholarship on private international law and global governance. The book's scope is limited to the civil liability of private parties for transboundary pollution, defined as a polluting "act which occurs in one place and has consequences in another".[8] Consequently, it does not cover damage to the global commons or cases involving transnational corporations and global value chains in their home states for environmental damage caused in developing states.[9] This focus may be attributed to the author's Canadian perspective, as cross-border environmental law debates in North America draw inspiration from the Canada-US context, particularly the "near-mythical *Trail Smelter* arbitration between Canada and the United States over the toxic fumes of a Canadian facility at the border".[10]

[8]Laganière 8.
[9]*Ibid*, 9-10.
[10]*Ibid*, 2, referring to *Trail Smelter (US v Canada)* (1941) 3 RIAA 1905. See also Laganière 13-14.

Chapter 1 addresses a topic not well-understood by many private international lawyers. It argues that states, under public international law, have a duty to ensure the availability of prompt and adequate compensation for victims of transboundary pollution. The chapter distinguishes between state responsibility and liability and explains how states can fulfil their duty by providing civil remedies for victims. With the failure of many civil liability treaties, domestic civil remedies have emerged as the most promising approach for states to fulfil their duty, with private international law playing a crucial role in providing such remedies. The chapter reveals that the duty to ensure prompt and adequate compensation is not part of customary international law, but is arguably considered an "overarching and emerging principle of international environmental law".[11] Nevertheless, this duty, as evidenced by the International Law Commission's 2006 Principles on the Allocation of Loss,[12] can guide the development of private international law rules.

Chapter 2 explores the role of private international law in global governance and its regulatory function,[13] emphasising that it is not an obstacle but a positive force for ensuring prompt and adequate compensation. It discusses key milestones such as the sixth ILC principle on the allocation of loss,[14] the work of the Hague Conference on Private International Law on civil liability for transboundary pollution, the International Law Association's 2006 Toronto Rules on Transnational Enforcement of Environmental Law,[15] and the 2010 UN Environment Programme Guidelines on Liability.[16] These instruments indicate a degree of consensus that supports the idea that private international law has an important role in global governance and performs an important regulatory function in relation to environmental protection.

Chapter 3 focuses on jurisdiction and foreign judgments, presenting three main arguments. First, it demonstrates how the sixth ILC principle on the allocation of loss operationalises and implements the duty of states to ensure prompt and adequate compensation through the principles of non-discrimination and equal access to courts in the state where transboundary pollution originates. These principles require courts in the state of origin to have jurisdiction over transboundary pollution, with the same jurisdictional threshold for all claimants. Jurisdiction in the place of injury is also necessary. Secondly, the chapter reveals that courts in both common-law and civil-law Canada are increasingly willing to

[11] Laganière 60.
[12] Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, annexed to GA Res 61/36 (4 December 2006) UN Doc A/RES/61/36.
[13] Laganière particularly engages with the work of R Wai. See R Wai, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization" (2002) 40 *Columbia Journal of Transnational Law* 209.
[14] *Supra* n 12.
[15] *Supra* n 7.
[16] *Ibid*.

assert jurisdiction over transboundary pollution. Canadian courts have jurisdiction over transboundary pollution originating in Canada or causing injury in Canada. The common-law exclusionary *Moçambique* rule[17] should (and possibly does) not extend to tort claims, at least when title is not at stake. The primary restriction in the common-law provinces is the requirement that foreign polluters could reasonably foresee their operations having an impact in Canada. While foreseeability does not pose significant problems in traditional transboundary pollution cases, it may be an obstacle to climate change litigation. *Forum non conveniens* has been kept in check by legislatures and courts and does not pose a systemic threat in transboundary pollution cases because defendants face a heavy burden in their attempts to have a claim dismissed. Thirdly, the chapter addresses the law of foreign judgments, demonstrating that indirect jurisdiction requirements (except in Quebec and New Brunswick) and the public law and policy exceptions do not hinder the recognition and enforcement of foreign judgments in Canada in this field.

Chapter 4 examines choice-of-law, presenting two main arguments. First, it argues that the sixth ILC principle on the allocation of loss operationalises and implements the duty of states to ensure prompt and adequate compensation through the principles of non-discrimination and equal remedy for victims of transboundary pollution. This translates into a choice-of-law rule based on the ubiquity principle that posits that the *lex loci actus* and the *lex loci damni* can equally apply, without a foreseeability of injury proviso. This approach aligns with section 138 of the Swiss Private International Law Act (pertaining to damaging nuisances originating from real property) and Article 7 of the Rome II Regulation (pertaining to environmental damage in general),[18] as well as recommendations from the Hague Conference, International Law Association, and the UN Environment Programme. Secondly, the chapter argues that current choice-of-law rules for torts in Canada, which are not based on the ubiquity principle, fail to meet the requirements associated with the duty of states to ensure prompt and adequate compensation. The chapter also highlights that Canadian courts do not necessarily apply a choice-of-law analysis to determine the application of Canadian statutory causes of action. The territorial scope of Canadian

[17] *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL).

[18] This approach is also adopted in some non-EU states: Albania, Dominican Republic, Macedonia, Montenegro, Norway (as well as Denmark (which is not bound by Rome II) under the Nordic Convention of 19 February 1974 on the Protection of the Environment), the UK, and the 2012 draft Serbian private international law act: SC Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (OUP, 2014) 62-64; SC Symeonides, "Private International Law: Idealism, Pragmatism, Eclecticism" (2017) 384 *Recueil des Cours* 9, 240-241; T Deskoski, "Macedonia, FYR" in *Encyclopedia of Private International Law* (2017) 2315, 2322; Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834).

statutes primarily depends on constitutional law and statutory interpretation, guided by the presumption against extraterritoriality.

The concluding chapter brings together the arguments presented throughout the preceding chapters. It asserts that the relationship between public and private international law, along with the regulatory function of private international law, legitimise and enable a liability regime that relies on domestic law to hold transboundary polluters accountable. It emphasises the need for a polycentric regulatory approach to the problem of transboundary pollution, acknowledging that there is no one-size-fits-all solution.

C. The Public-private Interface in International Environmental Litigation

The book enhances our understanding of the relationship between public and private international law and the regulatory function of private international law. It provides valuable insights into these topics, although some aspects remain unclear.

1. *Public and private international law at the intersection*

The book contributes to various debates at the intersection of public and private international law. First, it enhances the scholarship on the role of national courts in applying, enforcing, and developing public international law. While existing scholarship has focused on public international law in general[19] or specific fields like international environmental law[20] and international human rights law,[21] it has generally neglected or insufficiently engaged with private international law.

Secondly, the book adds to the scholarship on business and human rights, which examines the protection of the right to a healthy environment from business-related human rights and environmental abuses. Despite initial indifference and scepticism,[22] this scholarship has gradually recognised the significance and regulatory potential of private international law.

[19]Institute of International Law, "The Activities of National Judges and the International Relations of Their State" (Milan 1993) https://www.idi-iil.org/app/uploads/2017/06/1993_mil_01_en.pdf accessed on 20 November 2023; B Conforti, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff Publishers, 1993); A Nollkaemper, *National Courts and the International Rule of Law* (OUP, 2011); A Nollkaemper and others (eds), *International Law in Domestic Courts: A Casebook* (OUP, 2018).

[20]N Sachs, "Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law" (2008) 55 *UCLA Law Review* 837.

[21]D Shelton, *Remedies in International Human Rights Law* (OUP, 3rd edn, 2015) ch 4; E Bagińska (ed), *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* (Springer, 2016).

[22]See the UN Protect, Respect and Remedy Framework and its implementing Guiding Principles on Business and Human Rights, which do not address private international law, conflict of laws, or choice of law: UN Human Rights Office of the High

Thirdly, these developments are reflected in private international law scholarship. Scholars have recently explored the relationship between public and private international law in general[23] and specific fields such as international human rights,[24] business and human rights,[25] and international humanitarian law.[26] Laganière's book aligns with this growing trend.

However, a significant aspect of the relationship between public and private international law that the book does not address is the concept of extraterritoriality, that is the idea that international aspects of state regulatory authority are subject to regulation themselves through public international law. While the book acknowledges that extraterritoriality "looms large in international environmental law"[27] and mentions the presumption against it as a principle of statutory interpretation,[28] it does not explore whether, and to what extent, extraterritoriality can or should influence the design of private international law rules.

A parallel can be drawn with the field of business and human rights, where extensive discussions have taken place regarding the powers and duties of home states to regulate extraterritorially.[29] The private international law rules for business-related human rights abuses proposed in the draft UN Treaty on Business and Human Rights[30] and by the European Parliament Committee on Legal Affairs[31] are largely influenced by debates on extraterritoriality. For

Commissioner, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (UN, 2011).

[23]A Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in International Constitutional Ordering of Private Law* (CUP, 2009); V Ruiz Abou-Nigm, K McCall-Smith and D French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing, 2018).

[24]JJ Fawcett, M Ní Shúilleabháin and S Shah, *Human Rights and Private International Law* (OUP, 2016).

[25]FJ Zamora Cabot, L Heckendorn Urscheler and S De Dycker (eds), *Implementing the UN Guiding Principles on Business and Human Rights: Private International Law Perspectives* (Schulthess, 2017); C Kessedjian and H Cantú Rivera (eds), *Private International Law Aspects of Corporate Social Responsibility* (Springer, 2020); V Rouas, *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries* (IALS, 2022).

[26]MM Karayanni, *Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories* (OUP, 2014); U Grušić, *Torts in UK Foreign Relations* (OUP, 2023).

[27]Laganière 214.

[28]*Ibid*.

[29]D Augenstein and D Kinley, "When Human Rights 'Responsibilities' Become 'Duties': The Extra-territorial Obligations of States that Bind Corporations", in S Deva and D Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP, 2013).

[30]The latest, third revised draft is available at https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc accessed on 20 November 2023.

[31]"Draft Report of 11 September 2020 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL))".

example, Article 11 of the draft UN Treaty proposes a choice-of-law rule allowing victims to choose from the *lex loci actus*, *lex loci damni*, and the law of the perpetrator's domicile. Article 9(2) defines domicile as the place of incorporation or registration, the place of principal assets or operations, the place of central administration or management, and the principal place of business or activity. These connecting factors are clearly derived from permissible grounds for the exercise of extraterritorial state jurisdiction in public international law. The drafters of Article 11 of the draft UN Treaty, as well as those of the equivalent proposal by the European Parliament Committee on Legal Affairs, can be criticised on the basis that they did not sufficiently take the disciplinary knowledge of private international law into account. Their proposed choice-of-law rules may lead to the application of laws without a sufficiently strong connection to the parties involved and their relationship and have, therefore, proved to be impractical.[32]

Laganière's book is important in this respect because it implicitly demonstrates that public international law can inform the development of private international law rules without relying on the controversial concept of extraterritoriality. This has the potential to point to a way forward for the development of private international law provisions in business and human rights instruments. In other words, private international law provisions in business and human rights instruments should give less weight to debates on extraterritoriality, while more weight should be given to the disciplinary knowledge of private international law. However, Article 11 of the draft UN Treaty, as well as the equivalent proposal by the European Parliament Committee on Legal Affairs, show that relying on extraterritoriality can be of some use for designing private international law rules because it can help to create a list of possible connecting factors. It is for this reason that Laganière could have engaged more with extraterritoriality and explored whether, and to what extent, relying on it can inform the design of private international law for transboundary pollution or for international environmental litigation more generally.

[32]B Grama and others, "Third Revised Draft Treaty on Business and Human Rights: Comments and Recommendations" (TMC Asser Institute Centre for International & European Law, Policy Brief 2021-01, October 2021). EU bodies have rejected the European Parliament Committee on Legal Affairs proposal: European Parliament, "Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL))" [2021] OJ C474/11; European Commission, "Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937" COM (2022) 71 final; European Parliament amendments of 1 June 2023 on the Commission's proposed directive P9_TA(2023)0209.

2. *Private international law as a regulatory tool for environmental protection*

The book effectively explains the regulatory function of a jurisdictional rule that allows claimants to initiate proceedings in either the state where transboundary pollution originates or the place of injury, as well as of a choice-of-law rule based on the ubiquity principle.

However, a related issue that the book does not sufficiently discuss is whether the operation of private international law rules based on the connecting factor of the place of injury should be tampered in some way. The discussion in Chapter 3 is a good example. The jurisdictional rule advocated for in this chapter does not include a foreseeability of injury proviso, and there is no discussion regarding whether such a proviso or any other limitation should be introduced. Nevertheless, Laganière positively assesses the Canadian law of jurisdiction, even though jurisdiction at the place of injury in the common-law provinces depends on the foreseeability of the injury. But this is a discussion that we must have if we aim for a jurisdictional rule based on the connecting factor of the place of injury to be part of a global regulatory response because such a rule, if left unqualified, may not gain universal acceptance.[33]

The book also implicitly addresses other aspects of the regulatory function of private international law. As discussed by Lehmann in this journal,[34] private international law should consider opening up its methodology to the new reality of increased regulation by overcoming the "public law taboo", more liberally applying foreign public law and foreign overriding mandatory rules, developing multilateral choice-of-law rules for areas permeated by regulation, recognising foreign administrative decisions, and developing global public policy. Laganière's book convincingly argues that the "public law taboo" and the public law and policy exceptions do not impede the recognition and enforcement of foreign judgments or the application of foreign law in Canada. Chapter 4 explores a multilateral choice-of-law rule based on the ubiquity principle. The book also touches on the relevance of administrative authorisations for cross-border liability. Chapter 3 argues that an administrative authorisation issued under Canadian law does not suffice to prevent the enforcement of a foreign judgment on public policy grounds.[35] Chapter 4 suggests that an administrative authorisation issued in the place of acting cannot exempt polluters from liability under the law of the place of injury but may be taken into

[33]For example, the rule of special jurisdiction at the place of damage is unconstitutional in the US if the defendant does not have minimum contacts with the forum: *World-Wide Volkswagen Corp v Woodson* 444 U.S. 286 (1980); *Asahi Metal Industry Co v Superior Court* 480 U.S. 102 (1987); *J McIntyre Machinery Ltd v Nicastro* 564 U.S. 873 (2011).
[34]M Lehmann, "Regulation, Global Governance and Private International Law: Squaring the Triangle" (2020) 16 *Journal of Private International Law* 1.
[35]Laganière 149.

account for other purposes, such as assessing damages. It also suggests that certain conditions need to be met first:

> "(1) the operation of the facility complies with public international law; (2) the conditions of issuance of the foreign licence match the ones found in local law; and (3) plaintiffs had a chance to take part in the foreign proceedings leading to the attribution of the licence".[36]

It is well-known that "the conflict of laws does not do statutes well".[37] While the book reveals that Canadian courts do not necessarily apply a choice-of-law analysis to determine the application of Canadian statutory causes of action, it does not discuss foreign overriding mandatory rules or whether the duty of states to ensure prompt and adequate compensation affects this issue. Perhaps the acceptance of a choice-of-law rule based on the ubiquity principle eliminates the need to address foreign overriding mandatory rules. Nevertheless, it is unfortunate that this aspect was not thoroughly explored because Canada seems to present an excellent case study. Article 3079 of the Quebec Civil Code allows the application, not just consideration, of mandatory foreign laws when legitimate and manifestly preponderant interests require it. On the other hand, Canadian common law follows strict English rules on foreign illegality,[38] which have also influenced Article 9(3) of the Rome I Regulation.[39]

D. Private International Law and Different Types of Environmental Damage

The book primarily focuses on transboundary pollution, including climate change. However, it does not address cases where transnational corporations and global value chains are sued in their home states for environmental damage caused in developing states. This is unfortunate considering the close connection between these different types of environmental damage.

1. *Traditional transboundary pollution*

Traditional transboundary pollution involves a scenario where a polluter from State A contaminates a natural medium such as air, water, or soil, causing injury in State B. This type of environmental damage, which is exemplified by

[36] *Ibid*, 180-181.
[37] A Briggs, "A Note on the Application of the Statute Law of Singapore within its Private International Law" [2005] *Singapore Journal of Legal Studies* 189, 190.
[38] *Gillespie Management Corp v Terrace Properties* (1989) 62 DLR (4th) 221 (BC CA).
[39] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6. See L Collins and J Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, 16th edn, 2022), paras 32-248-32-250.

the *Bier* case,[40] formed the focal point of the Hague Conference's work on the private international law aspects of civil liability for transboundary pollution,[41] which, in turn, influenced the subsequent endeavours of other international bodies working in this field. It, therefore, is not surprising that Laganière focuses on this kind of environmental damage in his book. However, other types of international environmental litigation have emerged and even became prevalent in recent years.

2. *Cases involving transnational corporations, global value chains, and environmental damage in developing states*

The book explicitly excludes cases where transnational corporations and global value chains are sued in their home states for environmental damage caused in developing states, arguing that such damage "remains local".[42] However, this exclusion is difficult to justify for several reasons.

First, the book aims to reassess "the relevance of early debates on transboundary pollution against the rise of the human rights discourse, the judicial fight against climate change and the attempts at elaborating international liability regimes for some of the greatest environmental challenges of our time".[43] However, as demonstrated by the business and human rights scholarship, cases involving transnational corporations and global value chains are at the forefront of present debates and undeniably relate to contemporary environmental challenges.

Secondly, it will be remembered that the book defines transboundary pollution as a polluting "act which occurs in one place and has consequences in another".[44] Many cases where transnational corporations and global value chains are sued in their home states for environmental damage caused in developing states meet this definition as they involve decisions made or not made in the home state of the parent company or lead member of a global value chain, causing environmental damage in another state.

Thirdly, the book acknowledges that the risk of traditional transboundary pollution depends on the nature of the polluter's operations:

> "The extent of a polluter's ability to shop its regulatory regime … is illusionary if the operations involve the extraction of natural resources located only in a certain

[40] *Supra* n 1.
[41] C Bernasconi, "Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?" (1999) 12 *Hague Yearbook of International Law* 35, focusing on "transfrontier" pollution that assumes that the places of wrongful conduct and injury are in different countries.
[42] Laganière 10.
[43] *Ibid*, 17.
[44] *Ibid*, 8.

> place, but it is likely if they involve human activities which can be done in alternative jurisdictions."[45]

From an environmental protection standpoint, it makes little difference whether an investor decides to build a polluting facility at the border, externalising the costs to a neighbouring country, or if they decide to build such a facility in the neighbouring country, resulting in "local damage" only.

Finally, there are situations that exhibit characteristics of both traditional transboundary pollution and cases where transnational corporations and global value chains are sued in their home states for environmental damage caused in developing states, such as the *Texaco* case in US courts.[46] In this case, an Ecuadorian subsidiary of a US parent company was alleged to have caused environmental damage in Ecuador and Peru.

While traditional transboundary pollution cases and cases where transnational corporations and global value chains are sued in their home states for environmental damage caused in developing states present different regulatory challenges, it is important not to develop regulatory responses for these two types of cases in isolation. In fact, the private international law rules for business-related human rights abuses proposed in the draft UN Treaty on Business and Human Rights are based on the logic underlying the *Bier* case and Article 7 of Rome II. Additionally, the European Group of Private International Law has proposed extending Article 7 to business-related human rights abuses.[47] Laganière's book would have offered a more comprehensive and nuanced regulatory response to contemporary environmental challenges in private international law had it explored whether the private international law rules it recommends are suitable for cases where transnational corporations and global value chains are sued in their home states for environmental damage caused in developing states, and how the scope of those rules can be distinguished from that of the private international law rules proposed in the draft UN Treaty and by GEDIP.

E. Climate Change

Although the book excludes damage to the global commons, it covers climate change cases, recognising that issues of climate change "can be approached not only as a global regulatory challenge, but also as distinct occurrences of transboundary damage calling for private remedies in certain circumstances".[48] The inclusion of climate change cases is welcome. However, it emphasises the exclusion of cases where transnational corporations and global value chains are sued in

[45] *Ibid*, 164.
[46] *Aguinda v Texaco Inc* 303 F 3d 470 (2d Cir 2002); *Jota v Texaco Inc* 157 F 3d 153 (2d Cir 1998).
[47] *Supra* n 6.
[48] Laganière 9.

their home states for environmental damage caused in developing states, as both types of cases present specific regulatory challenges.[49]

A crucial question arises concerning the weight to be given to the connecting factor of the place of injury in climate change cases. A polluter contributing to climate change becomes part of a causal chain that produces adverse impacts worldwide. Jurisdictional rules based on the place of injury and choice-of-law rules based on the ubiquity principle without additional conditions would grant jurisdiction to the courts or lead to the application of the law of any country where the claimant suffers injury.

There is an ongoing debate in private international law whether rules that allow victims to choose between the state of origin and the place of injury should be limited in some way in climate change cases. Van Loon advocates for the inclusion of a foreseeability of injury proviso in rules that allow victims to choose between the state of origin and the place of injury as key building blocks of his proposed global legal framework for transnational civil litigation in environmental matters.[50] Lehmann and Eichel further advocate for limiting the application of the *lex loci damni* in climate change litigation where "an authorization [by the state of emission] does not exist, was obviously invalid, obtained by fraud or where such authorization has been consciously transgressed".[51] Laganière's position on the inclusion of a foreseeability of injury proviso or other limitations is ambiguous. While positively assessing the Canadian law of jurisdiction, even though jurisdiction at the place of injury in the common-law provinces depends on the foreseeability of the injury, Laganière admits that this may be an obstacle to climate change litigation.[52] On the other hand, he rejects the inclusion of a foreseeability of injury proviso in choice-of-law rules for climate change cases, arguing that a choice-of-law rule based on the ubiquity principle without additional conditions better aligns with the goal of environmental protection.[53] He does not consider such a choice-of-law rule as problematic as long as "it limits the array of potentially applicable laws in other ways", such as through the requirement of directness of damage.[54]

However, the directness of damage requirement is not a satisfactory solution. Climate change can cause damage to property, persons, and the environment

[49] *Ibid*, 12.
[50] H van Loon, "Principles and Building Blocks for a Global Legal Framework for Transnational Civil Litigation in Environmental Matters" (2018) 23 *Uniform Law Review* 298, 316. Similarly, Y Nishitani, "Localisation of Damage in Private International Law and Challenges of Climate Change Litigation" (2022) 6 *International Business Law Journal* 707, 716–717.
[51] M Lehmann and F Eichel, "Globaler Klimawandel und Internationales Privatrecht: Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden" (2019) 83 *RabelZ* 77, 110.
[52] Laganière 132.
[53] *Ibid*, 178-179.
[54] *Ibid*, 179.

globally. It is unclear when such damage should be considered direct or indirect. Consider the *Lliuya v RWE AG* case, where a Peruvian farmer sued a major energy company in Germany, arguing that the company was partly responsible for the adverse impacts of climate change on his family, land, and region.[55] If the claimant in this case is considered to suffer damage directly caused by the defendant's activities, the directness of damage requirement adds little, if anything, to the analysis. On the other hand, if the defendant's activities are considered to directly damage the climate only, which subsequently results in indirect damage affecting victims' property, persons, and livelihoods, the directness of damage requirement becomes so restrictive that it negates the place of injury as a connecting factor and is arguably contrary to the logic underlying the *Bier* case. More thought is needed about the suitability of private international law rules to address climate change.

F. Conclusion

Liability for Transboundary Pollution at the Intersection of Public and Private International Law makes a valuable contribution to private international law scholarship by exploring the relationship between public and private international law and the regulatory function of private international law in relation to transboundary pollution. However, its focus on transboundary pollution is narrow. Although traditional transboundary pollution cases present different regulatory challenges from cases where transnational corporations and global value chains are sued in their home states for environmental damage caused in developing states and climate change cases, it is important to develop a comprehensive private international law framework that addresses all cases of environmental damage. Nevertheless, the book offers useful insights. It highlights that public international law can inform the development of private international law rules for international environmental litigation without relying on the controversial concept of extraterritoriality. Moreover, it emphasises the need for a more comprehensive and nuanced regulatory response that goes beyond a simple extension of existing rules designed for traditional transboundary pollution cases. Further work is required to formulate such a response in this field of private international law.

Disclosure statement

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[55](7 February 2018, Higher Regional Court Hamm).