

# International Environmental Litigation in EU Courts: A Regulatory Perspective

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## Abstract

*This article argues that the rules of European private international law, which frame international litigation in the courts of the Member States of the EU, fail in their pursuit of the cosmopolitan goals of EU environmental policy. The practical operation of these rules is limited to the following two types of case: 1) the case of victims suing an operator whose actions in one country directly cause environmental damage elsewhere, and 2) the case of victims suing a European-based multinational corporation operating in an extraction or chemical industry whose overseas subsidiary, typically in a developing country, causes environmental damage. By arguably not accommodating claims by public authorities against foreign operators, including from other Member States, which are crucial in cases of pure environmental damage, and the cases of the second type in industries other than extraction and chemical, European private international law fails to achieve fully its regulatory potential. Furthermore, the rules of European private international law have the effect of raising the level of environmental protection solely within the EU and at its borders in the first type of case and shielding European multinational corporations from liability for the environmentally detrimental and degrading effects of their overseas operations in the second type of case. These rules are therefore an inadequate tool of global governance. Avenues for improving the law are mentioned.*

Keywords: environment; litigation; European Union; private international law; conflict of laws; jurisdiction; choice of law

## Introduction

In the early 1990s the Movement for the Survival of the Ogoni People protested in Nigeria against the environmental damage allegedly caused by Royal Dutch Shell's oil operations in Ogoniland, in the Niger Delta. Several protesters were arrested by the Nigerian armed forces, charged with questionable crimes and executed. Amongst them was Dr Barinem Kiobel, whose widow, after obtaining asylum in the United States, together with a number of other former Ogoniland residents, brought a class action suit under the 1789 Alien Tort Claims Act ('ATCA').<sup>1</sup> The Act provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. The claimants argued that the Anglo-Dutch corporation and its Nigerian subsidiary were complicit in the Nigerian government's violations of the law of nations, including extrajudicial killing, torture, rape, arbitrary arrest and detention, theft and destruction of property.

In April 2013, after a protracted legal battle, the US Supreme Court decided unanimously in favour of the defendants.<sup>2</sup> The majority noted a strong presumption against the extraterritorial application of US law, and held that the Act did not cover overseas conduct of multinational corporations. According to Roberts CJ, who delivered the opinion of the Court, the presumption will be displaced 'where the claims touch and concern the territory of the United States...with sufficient force... [I]t would reach too far to say that mere corporate presence suffices.'<sup>3</sup> Alito J went further in his concurring opinion, in which Thomas J joined, by holding that an ATCA claim would fail, 'unless the *domestic* conduct is sufficient to violate

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<sup>1</sup> 28 U.S.C. §1350.

<sup>2</sup> *Kiobel v Royal Dutch Petroleum Co*, 113 S. Ct. 1659 (2013).

<sup>3</sup> *ibid* 1669.

an international law norm that satisfies *Sosa*'s requirements of definitiveness and acceptance among civilised nations',<sup>4</sup> a very high threshold indeed. Although the exact impact of *Kiobel* is unclear,<sup>5</sup> it is evident that in the Supreme Court's interpretation the Act has a very narrow reach.

A reference to a US case concerning international human rights litigation may seem like a strange way to open an article dealing with international *environmental* litigation in the courts of the Member States of the *European Union*. But *Kiobel* is an important piece of the context in which international environmental litigation now takes place in Europe. It also illustrates two important characteristics of this type of litigation. First, environmental litigation is often not just about who ultimately bears the risk of environmentally detrimental and degrading economic activities. It is often also, sometimes primarily, about the victims' human rights, usually the right to life, private and family life and home,<sup>6</sup> health, property and the like, sometimes even about human rights not typically perceived as closely related to the protection of the environment (e.g. the right to a fair trial). Second, international environmental litigation typically involves claimants from a developing country who suffer damage as a result of local activities of a multinational corporation and its local subsidiary.<sup>7</sup> In the past few decades,

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<sup>4</sup> *ibid* 1670 (emphasis added). *Sosa* is a reference to the US Supreme Court case of *Sosa v Alvarez-Machain*, 524 U.S. 692 (2004).

<sup>5</sup> The literature on *Kiobel* is immense. See e.g. 'Agora: Reflections on *Kiobel*' (2013) 107 *American Journal of International Law* 829-863, contributions to symposiums 'Human Rights Litigation in State Courts and Under State Law', published in (2013) 3 *UC Irvine Law Review* 1-149 and 'Extraterritoriality Post-*Kiobel*: International & Comparative Legal Perspectives', published in (2013) 28 *Maryland Journal of International Law* 1-274, and the SCOTUS and Opinio Juris blogs: <http://www.scotusblog.com/category/special-features/kiobel-symposium/>; <http://opiniojuris.org/page/3/?s=Kiobel+Insta-Symposium>.

<sup>6</sup> See e.g. *Lopez Ostra v Spain* (1995) 20 EHRR 277; *Guerra v Italy* (1998) 26 EHRR 357 (European Court of Human Rights).

<sup>7</sup> The term 'multinational corporation' is used in this article rather than 'multinational enterprise' or other similar terms to reflect the fact that it is incorporated business entities forming corporate groups based on parent-subsidary relations, not modern, open and flexible forms of corporate organisation or business networks, that typically appear as defendants in international environmental litigation. For reasons see text to nn 71-76 below. For problems of definition see P. Muchlinski, *Multinational Enterprises and the Law* (Oxford: OUP, 2<sup>nd</sup> ed, 2007) 5-8.

numerous cases with these characteristics have been brought in US courts under the ATCA.<sup>8</sup> The Act has had a positive impact in the form of increased public awareness of the relevant issues, settlement of disputes and the resulting compensation of victims and even environmental remediation, and multinational corporations taking human rights and the protection of the environment more seriously. Now that the US Supreme Court has interpreted very narrowly the Act's reach, seemingly in effect barring victims of gross violations of human rights and the environment outside the US by multinational corporations from bringing ATCA claims, such victims will have to turn to other forums for the vindication of their rights.<sup>9</sup> European countries, where many multinational corporations originate, and particularly England, are promising alternative venues.

This article explores whether and how the rules of private international law of EU law, which frame international litigation in the Member State courts, contribute to the regulation of the environment. Looked at from another perspective, this article examines whether international environmental litigation in Europe, and thereby the relevant rules of European private international law, are an adequate tool of global governance. Given the close connection between environmental and human rights litigation, the discussion in this article is also relevant for the debate concerning the role of international litigation for the protection of human rights.

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<sup>8</sup> The literature on environmental litigation under the ATCA is immense. See e.g. N. Bridgeman, 'Human Rights Litigation under the ATCA as a Proxy for Environmental Claims' (2003) 6 *Yale Human Rights and Development Law Journal* 1; R.L. Herz, 'Litigating Environmental Abuses under the Alien Tort Claims Act: A Practical Assessment' (2000) 30 *Virginia Journal of International Law* 575; A. Rosenkranz and R. Campbell, 'Foreign Environmental Harm and Human Rights Suits Against US Corporations in US Courts' (1999) 18 *Stanford Environmental Law Journal* 145. For ATCA claims in general see S. Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart, 2004) Ch 2.

<sup>9</sup> J.A. Kirschner, 'Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe: Extraterritoriality, Sovereignty, and the Alien Tort Statute' (2012) 30 *Berkeley Journal of International Law* 259; M.S. Quintanilla and C.A. Whytock, 'The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law' (2011) 18 *Southwestern Journal of International Law* 31, 32-35 (presenting evidence that suggest that at the same time that US courts are decreasingly open to international litigation, the courts of other countries are increasingly attracting it).

In the EU, transnational environmental cases have been brought primarily in England, and to a significantly lesser extent in a few other Member States, most notably the Netherlands and Sweden. Since many relevant issues have been discussed and decided by the English courts, this article will focus on international environmental litigation in this country. There are two additional reasons for such focus. First, the recent decision of the Court of Appeal in *Chandler v Cape Plc*,<sup>10</sup> in which a duty of care was imposed on the defendant parent company for the health and safety of the employees of its dissolved subsidiary, might encourage overseas victims to bring claims in England against English-based multinational corporations for damage caused by their overseas subsidiaries to local workers and general population. Second, the English legal system is said to offer claimants a number of procedural advantages, not all of which are available in other Member States: a system of conditional fees coupled with litigation insurance against the risk of having to pay the other party's legal costs; efficient, skilled and impartial judges; availability of group actions; rules on disclosure and the preservation and taking of evidence; potentially high damages etc.<sup>11</sup> A disproportionate number of transnational environmental cases is therefore likely to continue to be litigated in England in comparison with other Member States.

The relevant rules of European private international law are contained in two EU law instruments. The first is the Recast of the Brussels I Regulation,<sup>12</sup> which replaced as of 10 January 2015 the Brussels I Regulation.<sup>13</sup> It allocates adjudicatory jurisdiction among the Member State courts and enables the free movement of judgments within Europe in civil and

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<sup>10</sup> [2012] EWCA Civ 525, [2012] 1 WLR 3111.

<sup>11</sup> T. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge: CUP, 2009) 310.

<sup>12</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 ('Brussels I Recast').

<sup>13</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L16/1. The rules of the Brussels I Regulation and the Brussels I Recast concerning the environment are largely identical.

commercial matters. The second is the Rome II Regulation,<sup>14</sup> which lays down choice-of-law rules for non-contractual obligations. Rome II contains special rules for environmental damage in Article 7, which are largely inspired by the case law of the Court of Justice of the European Union ('CJEU') on jurisdiction for environmental torts under the Brussels jurisdictional regime.<sup>15</sup> In a nutshell, the law applicable to environmental damage is by default the law of the country of the damage, but the person seeking compensation can choose the law of the country of the event giving rise to the damage. Similarly, the claimant can commence proceedings, in addition to the Member State of the defendant's domicile, in either the Member State of the damage or the Member State of the event.

Recital 25 in the Preamble to Rome II states expressly that the special choice-of-law rules are justified by Article 191 of the Treaty on the Functioning of the European Union,<sup>16</sup> which concerns EU environmental policy. These special choice-of-law rules also implement Article 3(3) and (5) of the Treaty on European Union,<sup>17</sup> which sets the achievement of 'sustainable development' and 'a high level of protection and improvement of the quality of the environment' as core objectives of the EU. EU environmental policy includes the apparently *cosmopolitan* goals of 'preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change'.<sup>18</sup> The term 'cosmopolitan' is used here to denote a normative standpoint that considers and accommodates the interests and values of individuals and communities not just within but also outside the EU.<sup>19</sup> In the same vein, EU

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<sup>14</sup> 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 ('Rome II').

<sup>15</sup> Case 21-76 *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 1735 ('*Bier*').

<sup>16</sup> Treaty on the Functioning of the European Union (consolidated version) [2012] OJ C326/1 ('TFEU').

<sup>17</sup> Treaty on European Union (consolidated version) [2012] OJ C326/1.

<sup>18</sup> TFEU, Article 191(1).

<sup>19</sup> 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, 231-232.

environmental policy aims ‘at a high level of protection’ and is based on the following universally accepted principles of environmental law: ‘precautionary principle and...the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay’.<sup>20</sup> Since many environmental problems are transnational, even global, in nature, it is logical that the relevant rules of European private international law, which may assist in their solution, should take a cosmopolitan approach. Indeed, many influential private international law scholars are of the opinion that Article 7 of Rome II pursues, and in an adequate manner, the cosmopolitan goals of EU environmental policy.<sup>21</sup> This rule has also been endorsed by the Hague Conference on Private International Law and the International Law Association.<sup>22</sup>

Contrary to the majority opinion, this article argues that the relevant rules of European private international law fail to take a cosmopolitan approach. They are therefore an inadequate

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<sup>20</sup> TFEU, Article 191(2).

<sup>21</sup> See G. Betlem and C. Bernasconi, ‘European Private International Law, the Environment and Obstacles for Public Authorities’ (2006) 122 *Law Quarterly Review* 124, 141 (‘the principle favouring the injured party (*favor laesi*) has thus a completely desirable and welcome corollary: favouring nature (*favor naturae*)’) and 142 (‘The effect of this rule is a general “levelling-up”...and can be seen as an application of the environmental integration principle in the field of private international law’ (footnote omitted)); O. Boskovic, ‘The Law Applicable to Violation of the Environment – Regulatory Strategies’ in F. Cafaggi and H. Muir Watt (eds), *The Regulatory Function of European Private Law* (Cheltenham: Edward Elgar, 2009) 188, 196 (‘This option granted to the injured party seems satisfactory both in the light of the importance of the protection of the environment and of the extent of damage, even ordinary damage, resulting from its violations.’); L.F.H. Enneking, ‘The Common Denominator of the *Trafigura* Case, Foreign Direct Liability Cases and the Rome II Regulation’ (2008) 16 *European Review of Private Law* 283, 310 (‘The Regulation’s specific rule on environmental damage is progressive and will have a limited conducive effect on the feasibility of regulating the transboundary activities of multinational corporations through tort law’) and 312 (‘the specific rule on environmental damage may prove to be the first step towards a more prominent role of tort law in deterring harmful activities of Europe-based multinational corporations in host countries’); H. Muir Watt, ‘Private International Law Beyond the Schism’ (2011) 2 *Transnational Legal Theory* 347, fn 377 (‘Article 7 integrates a private attorney general mechanism into the conflict of laws rule so as to ensure that private interest (in obtaining higher damages) coincides with the interests of the global commons (ensuring the highest available level of protection of the environment)’); J. von Hein, ‘Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution’ (2008) 82 *Tulane Law Review* 1663, 1703 (‘as the preference for a high level of environmental protection (expressed in Article 7)...show[s], the European legislature made judgments on the value of different rules and policies that may be characterized as liberal, progressive, and open-minded’).

<sup>22</sup> ‘Should the Hague Conference Revisit the Scope and Nature of Possible Work in the Field of Civil Liability for Environmental Damage?’ (Permanent Bureau of the Hague Conference Preliminary Document No 12, February 2010), available at <http://www.hcch.net/upload/wop/genaff2010pd12e.pdf>, [5]-[7]; International Law Association, ‘Transnational Enforcement of Environmental Law’ (Final Conference Resolution Toronto 2006), available at <http://www.ila-hq.org/download.cfm/docid/794784AC-08FE-4DA9-A02948C51E5C4E0E>, Rules 4 and 5.



tool of global governance. There is a strong argument that the Brussels I Recast and Rome II exclude from their scope claims by public authorities against foreign operators and the resulting judgments, thus potentially hindering an important type of international environmental litigation, which is crucial in cases of pure environmental damage, from taking place in Europe. The two Regulations address relatively adequately the type of case where the claim is brought by victims against an operator whose actions in one country directly cause environmental damage elsewhere. But the cases of this type that are brought in EU courts will almost always concern actions committed in the EU and/or environmental damage suffered in the EU. The rules of the Brussels I Recast and Rome II concerning this type of case therefore help to raise the level of environmental protection within the EU and at its borders, but not elsewhere. Crucially, it is argued that European private international law fails to deal with the globally more important and frequent cases of the same type as *Kiobel*. It effectively shields European multinational corporations from liability for the environmentally detrimental and degrading effects of their overseas operations. For these reasons, the relevant rules of European private international law overall fail in their pursuit of the cosmopolitan goals of EU environmental policy. This conclusion raises the question how European private international law could more fully achieve its regulatory potential.

This article is divided into seven sections. Following this introduction, the second section outlines the regulatory potential of private international law with regard to the protection of the environment. The third section divides the relevant CJEU and English and other domestic cases into different types. It demonstrates that whatever regulatory potential European private international law may have, its practical operation is limited to only two types of case, namely the case of victims suing an operator whose actions in one country directly cause environmental damage elsewhere and the cases of the same type as *Kiobel*, but the latter only with regard to extraction and chemical industries. The reasons for the relatively limited

practical operation of the relevant rules of European private international law are provided. The subsequent three sections explore how the rules of jurisdiction of the Brussels I Recast and the special choice-of-law rules for environmental damage of Rome II apply to the two types of case identified in the third section. Shortcomings in the current rules are identified. The seventh section concludes and examines the avenues for improvement.

### **Private international law and the regulation of the environment**

It is nowadays widely understood that private law can be used as a regulatory tool that supplements or even replaces the ‘command and control’ and other types of regulation. Private international law, a field of law of particular relevance for international environmental litigation, is no exception.<sup>23</sup> This section presents the regulatory challenges posed by transnational environmental cases and various regulatory responses to them.<sup>24</sup> The aim is to disclose the regulatory potential of private international law in this context.

International environmental litigation concerns cases of environmental damage that are connected with more than one country. In some cases, an operator’s actions in country A directly cause environmental damage in country B. The main challenge in this type of case is that, since environmental standards<sup>25</sup> of countries differ, the operator will be subject to the exclusive application of the laxer standards of country A, even if the negative externalities of

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<sup>23</sup> For the regulatory function of private international law see R. Michaels, ‘New European Choice-of-Law Revolution’ (2008) 82 *Tulane Law Review* 1607; H. Muir Watt, ‘Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy’ (2003) 9 *Columbia Journal of European Law* 383; H. Muir Watt, ‘European Integration, Legal Diversity and the Conflict of Laws’ (2005) 9 *Edinburgh Law Review* 6; Muir Watt, above, n 21; Wai, above, n 19. For the regulatory function of private law in general see C. Parker and others (eds), *Regulating Law* (Oxford: OUP, 2004).

<sup>24</sup> For environmental regulation in general see N. Gunningham and P. Grabosky with D. Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon, 1998). For the EU context see J. de Cendra de Larragán, ‘Regulatory Dilemmas in EC Environmental Law: The Ongoing Conflicts Between Competitiveness and the Environment’ in Cafaggi and Muir Watt (eds), above, n 21, 91.

<sup>25</sup> The term ‘environmental standards’ is used here in a broad sense and includes both ‘public law’ standards such as ‘command and control’ type of regulation and ‘private law’ standards of tort law.

its activities are suffered in country B. In other cases, as illustrated by *Kiobel*, a parent company from country A has a subsidiary in country B that causes environmental damage in the latter country. In this type of case, regulatory challenges are created by the fact that a multinational corporation, composed of the parent and its subsidiaries, operates its many parts in more than one country ‘with the coherence of intent and implementation that resembles a single entity’.<sup>26</sup> Of course, the constituent parts of a multinational corporation can be connected into a single economic entity not just through bonds of ownership but also through contractual relations or even informal alliances.<sup>27</sup> The constituent parts, however, remain separate legal persons, falling under distinct and independent regulatory systems of the countries in which they are established and operate. Consequently, each legal person forming part of a multinational corporation is accountable, in principle, only to its local authorities and liable only to its own creditors. The main challenge in this type of case is that, through smart corporate organisation, the multinational corporation, as a single economic entity, may reap the profits generated by its constituent parts and simultaneously shift the risk of negative externalities of their activities on third parties by taking advantage of the constituent parts’ separate legal personality, their limited liability, the territorial jurisdiction of local authorities, and regulatory failures in host countries. These failures consist in the inability or unwillingness of local authorities to regulate and oversee the multinational corporation’s local activities because of the host country’s socio-economic underdevelopment, low administrative capacity and technical expertise, information asymmetry, fear of driving away foreign investors, corruption, collusion with the corporation and the like.<sup>28</sup> These failures are often caused or exacerbated by a great disparity in economic

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<sup>26</sup> M. Anderson, ‘Transnational Corporations and Environmental Damage: Is Tort Law the Answer?’ (2002) 41 *Washburn Law Journal* 399, 402.

<sup>27</sup> See G. Teubner, *Networks as Connected Contracts* (Oxford: Hart, 2011), edited with an introduction by H. Collins, in particular 133-139.

<sup>28</sup> J. Stiglitz, ‘Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities’ (2008) 23 *American University International Law Review* 451, 474-481.

power between the multinational corporation and its home country, on the one hand, and the host country, on the other.<sup>29</sup> Under-regulation may therefore occur in both types of case, leading to a globally suboptimal allocation of resources.

In setting, monitoring and enforcing environmental standards, countries are typically guided by the interests and values of local individuals and communities, without considering and accommodating the interests and values of outsiders. This results in two additional regulatory challenges.<sup>30</sup> First, countries may turn the problem of under-regulation into an opportunity, and compete to attract foreign direct investment and try to increase the competitiveness of domestic businesses by lowering their environmental standards, especially when the negative externalities of local activities are suffered across the border. This ‘regulatory competition’ may, in turn, lead to a ‘race to the bottom’. An extreme example of this is Papua New Guinea where lax environmental standards were coupled with legislation making it a criminal offence to sue multinational mining corporations operating and causing damage in that country.<sup>31</sup> Yet another challenge is that countries typically regulate activities taking place in, or affecting, their territory without regard to the regulation in other countries. Consequently, operators may be subject to environmental standards of more than one country, which may result in over-regulation. Both scenarios lead to a globally inefficient resources allocation.

These regulatory challenges would not exist if there were a global standard-setting, monitoring and enforcing authority or an effective global system of cooperation of national

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<sup>29</sup> *ibid.*

<sup>30</sup> Muchlinski, above, n 8, 114-117; Muir Watt, ‘Choice of Law in Integrated and Interconnected Markets’, above, n 23, 387-388, 399-401; Muir Watt, ‘European Integration, Legal Diversity and the Conflict of Laws’, above, n 23, 17; A. Nicita and M.M. Winkler, ‘The Cost of Transnational Accidents: Lessons from *Bhopal* and *Amoco*’ (2009) 43 *Journal of World Trade* 683, 689-692; Wai, above, n 19, 250-258.

<sup>31</sup> A. Imhof, ‘The Big, Ugly Australian Goes to Ok Tedi’, (1996) 17(3) *Multinational Monitor*, available at <http://multinationalmonitor.org/mm2002/02jan-feb/jan-feb02front.html> (describing how corporations participated in the drafting of the Papua New Guinea legislation).

authorities with regard to the protection of the environment. But there is no such authority or system. Environmental treaties are patchy<sup>32</sup> because of a genuine disagreement over the content and method of monitoring and enforcement of international environmental standards, and because of the free-riding by countries that see the advantage of not respecting such standards when other countries do.<sup>33</sup> Furthermore, the existing treaties usually do not impose obligations directly upon multinational corporations and other operators. Some scholars have advanced the idea that the home country of a multinational corporation should be responsible under international law, at least in some cases, for the environmental damage caused by the corporation's constituent parts.<sup>34</sup> This idea, however, remains purely theoretical. There are many 'soft law' instruments regulating the activities of multinational corporations. Particularly prominent are the following codes of conduct: the United Nations Guiding Principles on Business and Human Rights,<sup>35</sup> Global Compact,<sup>36</sup> Agenda 21,<sup>37</sup> the International Labour Organisation Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,<sup>38</sup> the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises,<sup>39</sup> and the ISO 26000 Guidance Standard on Social Responsibility.<sup>40</sup> In addition, there is consumer pressure through eco-labelling, investor pressure through

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<sup>32</sup> C. Bernasconi, 'Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference' (Permanent Bureau of the Hague Conference on Private International Law Preliminary Document No 8, April 2000), available at [http://www.hcch.net/upload/wop/gen\\_pd8e.pdf](http://www.hcch.net/upload/wop/gen_pd8e.pdf), 4-15 (concluding that 'a worldwide private international law Convention would come to fill a yawning gap'). See International Law Commission, Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities) (UN Doc A/CN.4/543, 24 June 2004), available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_543.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_543.pdf).

<sup>33</sup> Wai, above, n 19, 250-252. See also N. Sachs, 'Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law' (2008) 55 *UCLA Law Review* 837 (identifying three roadblocks for the conclusion of environmental civil liability treaties: interest conflicts between developed and developing countries; high transaction costs and low expected payoffs; incorporation of treaty provisions that are too onerous for countries to accept).

<sup>34</sup> For an overview see E. Morgera, *Corporate Accountability in International Environmental Law* (Oxford: OUP, 2009) 34-38.

<sup>35</sup> <http://business-humanrights.org/en/un-guiding-principles>.

<sup>36</sup> <http://www.unglobalcompact.org/>.

<sup>37</sup> <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=52&ArticleID=49>.

<sup>38</sup> [http://www.ilo.org/empent/Publications/WCMS\\_094386/lang--en/index.htm](http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm).

<sup>39</sup> <http://www.oecd.org/daf/inv/mne/>.

<sup>40</sup> <http://www.iso.org/iso/home/standards/iso26000.htm>.

environment-friendly investment practices, general public and civil society pressure, and corporate self-regulation. But since these regulatory responses typically do not result in the imposition of legal obligations on multinational corporations and other operators, their regulatory potential is limited.

Another response to the regulatory challenges posed by transnational environmental cases lies in international environmental litigation. In purely domestic settings, tort law is used as a regulatory tool for the protection of the environment, usually as a supplement to ‘command and control’ and other types of regulation.<sup>41</sup> It pursues the objective of compensating victims of environmental damage for the harm they suffer as a consequence of the tortfeasor’s actions, possibly also making funds available for environmental remediation, in particular if environmental NGOs are given standing to commence environmental litigation. The compensatory function of tort law is usually supported by liability insurance or environmental damage insurance. Furthermore, by forcing actual or potential tortfeasors to internalise the negative externalities of their activities, tort law also performs a specific and general deterring function. The tortfeasor is in a better position to bear the risk of its activities than those who are affected by them. For instance, it can improve its environmental performance by investing in its technologies and practices and take out insurance. On the other hand, it is highly unlikely that many victims of the tortfeasor’s activities will have known of, insured themselves against or in other way managed the risk of those activities. By shifting the risk to the best cost-avoider, tort law contributes to the achievement of the optimal allocation of resources. Where

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<sup>41</sup> K. Abraham, ‘The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview’ (2002) 41 *Washburn Law Journal* 379; Anderson, above, n 26, 408-409; M.G. Faure, ‘Regulatory Strategies in Environmental Liability’ in Cafaggi and Muir Watt (eds), above, n 21, 129; Gunningham and Grabosky, above, n 24, 78-79, 86-87; D. Howarth, ‘Muddying the Waters: Tort Law and the Environment from an English Perspective’ (2002) 41 *Washburn Law Journal* 469; K.N. Hylton, ‘When Should We Prefer Tort Law to Environmental Regulation?’ (2002) 41 *Washburn Law Journal* 515. For a critical account of the regulatory function of tort law see P. Cane, ‘Tort Law as Regulation’ (2002) 31 *Common Law World Review* 305; P. Cane, ‘Using Tort Law to Enforce Environmental Regulations?’ (2002) 41 *Washburn Law Journal* 427; J. Stapleton, ‘Regulating Torts’ in C. Parker and other (eds), above, n 23, 122.

environmental damage is caused by a member of a corporate group, the fulfilment of tort law's regulatory function also depends on whether, and to what extent, company law ascribes liability to the parent company for the environmental damage caused by its subsidiary. In transnational cases, the applicable tort law and company law depend on the applicable choice-of-law rules, which, in turn, depend on where the litigation takes place. By allowing the victim to commence proceedings in a certain jurisdiction and by leading to the application of a certain law, private international law also performs compensatory and deterring functions. International environmental litigation has other characteristics which support its regulatory function: it generates pressure on private actors and governments; it constitutes, sustains and energises transnational networks of civil society; it provides information and policy opinions to interested parties, transnational networks and broader publics; it encourages settlement.<sup>42</sup> The fact that international environmental litigation relies on private parties to bring claims with a regulatory impact contributes to the effectiveness of this regulatory response. In some countries, conditional or contingent fees are available. There, the victim may be able to obtain the services of top litigation lawyers who will also have an interest in the outcome of the litigation.

International environmental litigation, however, comes with a number of disadvantages. It can be slow, expensive, and operates on an *ex post* and case-by-case, and therefore selective and unsystematic, basis. There may be factual and legal problems arising out of the long latency of harm, the indeterminate nature of claimants and defendants, and the intersection of public law and civil liability.<sup>43</sup> In criticising the use of tort law as a regulatory tool, Cane notes that courts are neither expert in relevant areas of regulated activity nor politically responsive, that they rely more or less exclusively on litigants for information about

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<sup>42</sup> R. Wai, 'Transnational Private Litigation and Transnational Governance' in M. Lederer and P.S. Mueller (eds), *Criticising Global Governance* (New York, NY: Palgrave Macmillan, 2005) 243, 248-250.

<sup>43</sup> Abraham, above, n 41, 380-383. See also C. van Dam, 'Tort Law and Human Rights: Brothers in Arms. On the Role of Tort Law in the Area of Business and Human Rights' (2011) *Journal of European Tort Law* 221, 228-229 ('Perhaps the most fundamental problem...is fact-finding')

regulated activities, and that court procedures in tort cases largely exclude participation of third parties who might be affected by the regulated activity.<sup>44</sup> In addition, tort litigation sometimes exhibits the following negative features: ‘inexperienced and under-funded lawyers representing poor and vulnerable clients against wealthy and aggressively defensive corporations; the difficulty courts have in dealing with scientific uncertainty; and the negative effects of delay and inequality of bargaining power on settlement negotiations’.<sup>45</sup> Some of these disadvantages can be mitigated to a large extent by improving civil procedure rules or introducing specialised environmental courts and tribunals.<sup>46</sup> On the other hand, political irresponsiveness of the judiciary, seen by Cane as a disadvantage in purely domestic settings, can actually represent an advantage in transnational environmental cases. In cases like *Kiobel*, for example, overseas victims of the activities of a multinational corporation resort to litigation in the home country of the multinational’s parent company because they are unable to obtain justice in their own country. Since such victims are outsiders in the forum country, their interests will be unrepresented in the legislative and administrative bodies of that country. International environmental litigation, however, provides for a more open and effective point of access for such victims.<sup>47</sup> Since judges are independent of the directly accountable legislatures and executives and hold permanent positions, they are less likely to succumb to the pressure to resolve transnational environmental cases exclusively in the interest of local individuals and communities.

Given the lack of comprehensive and effective international environmental standards and a global system of cooperation, and the limitations of alternative regulatory responses,

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<sup>44</sup> Cane, ‘Tort Law as Regulation’, above, n 41, 313.

<sup>45</sup> *ibid* 322-323.

<sup>46</sup> G.R. Pring and C.K. Pring, ‘The Future of Environmental Dispute Resolution’ (2012) 40 *Denver Journal of International Law & Policy* 482 (examining the major problems with courts of general jurisdiction and the key characteristics of specialised environmental courts and tribunals).

<sup>47</sup> R. Michaels, ‘Global Problems in Domestic Courts’ in S. Muller and others (eds), *The Law of the Future and the Future of the Law* (FICHL Publication Series No 11, 2011) 165, 174-175; Wai, above, n 42, 251-252.



international environmental litigation is a promising way of addressing the regulatory challenges posed by transnational environmental cases despite all its disadvantages.<sup>48</sup> In order to achieve fully its regulatory potential, private international law should lead to outcomes that avoid both under- and over-regulation. Private international law can attain this goal only if the rules of adjudicatory jurisdiction and choice of law result in a coordinated allocation of adjudicatory and regulatory authority.<sup>49</sup> Such coordination inevitably requires the rules of private international law to take a cosmopolitan approach. But a crucial question then arises. If comprehensive and effective international environmental standards and a global system of cooperation cannot be achieved because countries are typically guided by the interests and values of local individuals and communities, why would any country adopt private international law rules that take into account and accommodate the interests and values of outsiders?

The rules of private international law concerning the environment in general, and particularly those of EU law, should take a cosmopolitan approach for the following reasons. Since environmental problems are transnational, even global, in nature, they require cosmopolitan solutions.<sup>50</sup> The fact that truly global solutions are precluded because of genuine disagreement among countries and the problem of free-riding shows that the objective of environmental protection can more adequately be pursued at a sub-global level, for example through rules of private international law in conjunction with the applicable tort and company laws. The EU is particularly well suited for providing cosmopolitan private international law rules.<sup>51</sup> The EU pursues objectives that transcend the interests and values of individual

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<sup>48</sup> Also Muir Watt, 'Choice of Law in Integrated and Interconnected Markets', above, n 23, 388-389; O. Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Oxford: Hart, 2004) 191-192; Wai *ibid* 245.

<sup>49</sup> Muir Watt *ibid* 386-389, 399-408; Wai, above, n 19, 253-254. See also A.T. Guzman, 'Choice of Law: New Foundations' (2002) 90 *Georgetown Law Journal* 883.

<sup>50</sup> Michaels, above, n 47, 165; Muir Watt *ibid* 402-404.

<sup>51</sup> See J. Bomhoff, 'The Constitution of the Conflict of Laws' (LSE Law, Society and Economy Working Papers 4/2014), available at [http://www.lse.ac.uk/collections/law/wps/WPS2014-04\\_Bomhoff.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2014-04_Bomhoff.pdf), 17-18 (emphasising

Member States and, furthermore, prides itself with the highest standards in many policy areas. It is therefore not surprising that EU environmental policy expressly pursues cosmopolitan goals.<sup>52</sup> Europe is a home to many multinational corporations and other operators engaged in environmentally detrimental and degrading activities. The EU therefore has the power to affect the way such activities are conducted and thereby neutralise the effects of the measures adopted by host countries that lead to a ‘race to the bottom’, thus raising the global level of environmental protection. As a beneficiary of such activities, the EU should be responsible for their regulation, especially where there are regulatory failures in host countries.<sup>53</sup> This is indeed demanded by many EU citizens, who act as consumers and small investors. Requiring multinational corporations established in the EU to respect high environmental standards also makes long-term economic sense.<sup>54</sup> For example, in order to reduce their compliance costs, those corporations will have to invest in research and development. Since there is a global trend of raising environmental standards, such investment may pay off in the long term. Those corporations may be able to export advanced environmental technologies and practices, on the one hand, and enjoy greater productivity levels in comparison with their foreign competitors, on the other.<sup>55</sup> The argument that home state regulation represents an imperialist infringement

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the constitutional function of private international law ‘in the allocation of regulatory authority and responsibility, and the formation of political and cultural identity’ which reinforces this field of law ‘as a site of contestation and deliberation over questions of authority, responsibility and identity’).

<sup>52</sup> TFEU, Article 191.

<sup>53</sup> P.I. Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’ (2001) 24 *Hastings International and Comparative Law Review* 297; O. De Schutter, ‘The Accountability of Multinationals for Human Rights Violations in European Law’ (Center for Human Rights and Global Justice, New York University School of Law, Working paper No. 1, 2004), available at <http://chrjg.org/wp-content/uploads/2012/07/s04deschutter.pdf>; Morgera, above, n 34, 30-31; Muchlinski, above, n 7, 84; Muir Watt, above, n 21, 386, 425-427.

<sup>54</sup> This idea is behind the concept of corporate social responsibility, as advocated by the European Commission: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility, 25 October 2011, COM(2011) 681 final, 3.

<sup>55</sup> Gunningham and Grabosky mention in *Smart Regulation*, above, n 24, at p 43, Germany as an example of a country where high environmental standards have been credited with not only improving the productivity of existing firms through technological and managerial improvements, but also the creation of entire new pollution control industries. These firms are in a competitive position to export their products and services as others catch up.

of the sovereignty of disempowered host states is not persuasive where the interests at stake, i.e. the protection of the environment, are truly global.<sup>56</sup>

If its rules do take a cosmopolitan approach, private international law will have gone a long way towards adopting a ‘planetary perspective’<sup>57</sup> and fulfilling its ‘social mission’.<sup>58</sup> The examination of whether, and to what extent, European private international law achieves its regulatory potential starts with the exploration of the types of transnational environmental cases it is able to accommodate.

### **Types of transnational environmental cases and international environmental litigation in EU courts**

International environmental litigation is not a new phenomenon in Europe. Two relevant cases have thus far been decided by the CJEU. The English courts have been particularly busy with this kind of litigation. Very important cases have recently been brought in the Dutch and Swedish courts. By focusing on the two CJEU cases and the experience of the English, Dutch and Swedish courts in the past two decades, this section aims to identify the types of transnational environmental case that are litigated in Europe, and to explain why some types of case do not appear in EU courts.

#### **(1) Types of case litigated in EU courts**

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<sup>56</sup> See S.L. Seck, ‘Home State Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance’ (2013) 13 *German Law Journal* 1364.

<sup>57</sup> Muir Watt, above, n 21.

<sup>58</sup> U. Baxi, ‘Mass Torts, Multinational Enterprise Liability and Private International Law’ (1999) 276 *Recueil des Cours* 305.

The two cases decided by the CJEU are *Bier*<sup>59</sup> and *Land Oberösterreich v ČEZ*.<sup>60</sup> In *Bier*, a Dutch horticulturalist and the Reinwater Foundation, a non-governmental environmental organisation that aims to improve the quality of the water in the Rhine basin, brought an action in the Netherlands against a French potash mining company. The defendant had polluted the waters of the Rhine by discharging in it saline waste from its operations. The first claimant suffered damage as a result of using the polluted water for irrigation. The issue before the Court was whether the Dutch courts had jurisdiction under the Brussels Convention,<sup>61</sup> the predecessor of the Brussels I Regulation and the Brussels I Recast. In *Land Oberösterreich v ČEZ*, Land Oberösterreich, an Austrian local authority, and some private persons commenced proceedings in nuisance against ČEZ, a Czech public utility company, seeking injunctive relief. The defendant operates a nuclear power plant in Temelin, a place in the Czech Republic near the Austrian border. The claimants alleged that the power plant emitted ionising radiation, which affected their agricultural land located in Austria. The issue was whether EU law obliged the claimants to tolerate the activities of the defendant which had been authorised by the Czech authorities in the situation where an equivalent authorisation by the Austrian authorities to an operator of a nuclear power plant in Austria would have precluded claims for injunctive relief.

Cases of international environmental litigation in the English courts are fairly numerous. They concerned the pollution of water, land and air, and typically personal injury, property damage and economic loss caused by such pollution. The best known are the two cases that reached the House of Lords: *Lubbe v Cape*<sup>62</sup> and *Connelly v RTZ*.<sup>63</sup> In *Lubbe v Cape*, several thousand claimants either worked at or lived close to asbestos mines and processing

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<sup>59</sup> [1976] ECR 1735.

<sup>60</sup> Case C-115/08 *Land Oberösterreich v ČEZ as*. [2009] ECR I-10265.

<sup>61</sup> Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Brussels on 27 September 1968 [1972] OJ L299/32.

<sup>62</sup> *Lubbe v Cape Plc* [2000] 1 WLR 1545.

<sup>63</sup> *Connelly v RTZ Corp Plc (No 2)* [1998] AC 854.

plants situated in South Africa, which were owned by local subsidiaries of an English-based corporation. The claimants commenced proceedings in England against the parent company arguing that they had contracted asbestiosis as a result of the defendant's negligence to protect them from the exposure to asbestos. In addition, claims were brought by four Italian claimants for the harm suffered while working at or living close to a factory owned by an Italian subsidiary of the English-based corporation. The second case concerned a claim brought by Mr Connelly, a Scotsman. He worked for four years in Namibia at a uranium mine owned by a local subsidiary of an English-based corporation. After returning to Scotland, he was diagnosed with suffering from cancer of the throat. He then commenced proceedings in England against the parent company and one of its English subsidiaries claiming damages in negligence for the defendants' failure to protect him from the effect of uranium ore dust on the mining site. The issue in both cases was whether the English proceedings should be stayed on the basis of the *forum non conveniens* doctrine in the situation where adequate legal representation was unavailable in the natural forum because of the lack of legal aid and adequate conditional fee arrangements.

The vast majority of other cases brought in England follow the same pattern.<sup>64</sup> An English-based corporation operating in an extraction or chemical industry carries on its activities abroad, typically in a developing country, though a local subsidiary. The workers of

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<sup>64</sup> *Ngcobo v Thor Chemicals Holdings Ltd* [1995] TLR 579 (CA); *Sithole v Thor Chemicals Holdings Ltd* [1999] TLR 110 (CA) (claims by workers of the defendant's South African subsidiary engaged in the production of mercury-based chemicals); *Durham v T&N Plc*, Court of Appeal, 01 May 1996, unreported (claim by a worker of the defendant's Canadian subsidiary engaged in asbestos mining); *Guerrero v Monterrico Metals Plc* [2009] EWHC 2475 (QB) and [2010] EWHC 3228 (QB) (claims by Peruvian environmental protesters for false imprisonment, torture and mistreatment by the police at a copper mine owned by the defendant's local subsidiary); the Ocesa Pipeline litigation (claims by Columbian farmers against British Petroleum for damage to their land, crops and animals caused by the construction of an oil pipeline in Columbia): *Arroyo v Equion Energia Ltd (Formerly BP Exploration Co (Colombia) Ltd)* [2013] EWHC 3150 (TCC) and [2013] EWHC 3173 (TCC) and an unreported judgment from 6 May 2010, Case No HQ08X00328; *Bodo Community v Shell* (claims by Nigerian fishermen for damage caused by oil spills from Shell's Trans-Niger Pipeline): <http://www.leighday.co.uk/News/2012/March-2012/11,000-Nigerians-sue-Shell-in-London-Courts> and <http://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills>; *Vava v Anglo American South Africa Ltd* [2013] EWHC 2131 (QB), [2013] Bus LR D65 (silicosis claims against the defendant's South African subsidiary engaged in gold mining).

the subsidiary or people living in the area of its operations suffer personal injury, property damage or economic loss as a result of the exposure to a dangerous substance through the medium of water, land or air. One case involved the persecution of environmental protesters. Victims typically face a number of obstacles to commence proceedings in their own country: inability to obtain adequate representation because of the lack of funding or local firms that can handle complex cases; inefficient and inexperienced judges and procedures; corruption; collusion with the multinational corporation; lower damages; withdrawal of the multinational corporation from the host country etc. For these reasons, victims commence proceedings against the parent company in the English courts. This pattern is confirmed by a recent case brought in the Dutch courts<sup>65</sup> and is also visible in ATCA litigations in the US courts, as exemplified by *Kiobel*. Two cases that do not entirely fit this pattern are *Trafigura*<sup>66</sup> and the Swedish case *Arica Victims KB v Boliden Mineral AB*.<sup>67</sup> *Trafigura* is a Dutch incorporated oil trading company, with its operations base in London. In 2006 it chartered a ship which illegally fly-tipped toxic waste at locations around Abidjan in Ivory Coast, after permission to offload the waste had been denied in several other countries. Some 30,000 claimants commenced a group action against *Trafigura* in England. A criminal trial was also conducted in the Netherlands and France. *Boden Mineral AB* is one of the largest Swedish mining companies, which during 1984–1985 exported some highly toxic mining waste (sludge) from Sweden to an area known as Polygono in Arica, Chile. The claim was brought by *Arica Victims KB*, an association representing a number of people from this area who suffered from serious illnesses

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<sup>65</sup> In *Akpan and others v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria, Ltd* (2013) LJM BY9854 (Netherlands), Friends of the Earth Netherlands (Milieudefensie) have, together with a number of Nigerian farmers and fishermen, commenced proceedings against Royal Dutch Shell and its Nigerian subsidiary for environmental damage caused in Nigeria: C. Ryngaert, 'Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the *Akpan v Shell* Litigation in the Netherlands' (2013) 8 *McGill International Journal of Sustainable Development Law and Policy* 245.

<sup>66</sup> The case was settled before trial. See 'How the *Trafigura* Story unfolded', *The Guardian*, 13 October 2009. See also *Motto v Trafigura Ltd* [2011] EWCA Civ 1150, [2012] 1 WLR 657 (on costs).

<sup>67</sup> (2013) T. 1021–13; R.K. Larsen, 'Foreign Direct Liability Claims in Sweden: Learning from *Arica Victims KB v Boliden Mineral AB*?' (2014) 83 *Nordic Journal of International Law* 404.

related to excessive levels of, among other, arsenic in their blood. These two cases are unusual in that no overseas subsidiaries were involved in the poisoning of the claimants, although the defendants in both cases argued that the waste had been dumped by local independent contractors, which had been appointed in good faith. Interestingly, claimants in all the English cases, as well as in *Chandler v Cape*,<sup>68</sup> were represented by the same firm of London lawyers, Leigh Day.<sup>69</sup>

Cases of international environmental litigation can be divided into several types by using the following criteria: the (de)localised nature of the actual or potential tort; the defendant's corporate organisation; the defendant's industry; the nature of the claimant (see table 1). Sometimes, as in *Bier* and *Land Oberösterreich v ČEZ*, the tort is delocalised, in the sense that the defendant's actions and/or damage are not confined to one country. But, as the English, Dutch and Swedish experience shows, cases where the elements of the tort are localised, i.e. confined to one country only, are more common. Depending on the defendant's corporate organisation, cases of international environmental litigation also fall into two types. In some cases, it is the defendant's acts or omissions that directly cause the damage, as in *Bier* and *Land Oberösterreich v ČEZ*. In others, a foreign subsidiary of the defendant is also involved. Since the foreign subsidiary often lacks funds or even ceases to exist before the claim is brought, claimants typically look for ways to ascribe liability to the parent company for the actions of the subsidiary. An option is to rely on the 'piercing of the corporate veil', 'enterprise liability', agency and related doctrines. Another option, regularly pursued in the English and recently in the Dutch and Swedish courts, is to argue that the defendant has breached a duty of care that it owes directly to the victims. Such cases are frequently referred to as 'foreign direct

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<sup>68</sup> [2012] EWCA Civ 525, [2012] 1 WLR 3111.

<sup>69</sup> <http://www.leighday.co.uk/Illness-and-injury/International-and-group-claims>.

liability' cases.<sup>70</sup> Most cases concern extraction industries. The minority of cases concern other industries such as the production of chemicals (*Thor Chemicals*), the production and distribution of nuclear energy (*Land Oberösterreich v ČEZ*) and oil trading (*Trafigura*). Finally, cases can in theory be divided into those where the claim is pursued by a private party or a public authority. However, all of the mentioned cases involved private claimants. Even in *Land Oberösterreich v ČEZ*, the claimant, an Austrian local authority, acted in a private capacity as a landowner. The majority of claimants were victims of environmental damage. A non-governmental environmental organisation appeared as claimant in *Bier*, in the Dutch case of *Akpan v Shell* and in the Swedish case of *Arica Victims KB v Boliden Mineral AB*.

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<sup>70</sup> L.F.H. Enneking, *Foreign Direct Liability and Beyond – Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (The Hague: Eleven International Publishing, 2012); Morgera, above, n 34, 31; H. Ward, 'Governing Multinationals: The Role of Foreign Direct Liability' (The Royal Institute for International Affairs, Briefing Paper, New Series No. 18 February 2001), available at <http://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/roleoffdl.pdf>.



Table 1: classification of transnational environmental cases litigated in EU courts				
Case	Nature of the tort	Defendant's corporate organisation	Defendant's industry	Nature of the claimant
<i>Bier</i> (CJEU, the Netherlands)	Delocalised	No subsidiary	Potash mining	Private
<i>Land Oberösterreich v ČEZ</i> (CJEU, Austria)	Delocalised	No subsidiary	Nuclear energy production and distribution	Private
<i>Lubbe v Cape</i> (England)	Localised	Involvement of a subsidiary	Asbestos mining	Private
<i>Connelly v RTZ</i> (England)	Localised	Involvement of a subsidiary	Asbestos mining	Private
<i>Thor Chemicals</i> (England)	Localised	Involvement of a subsidiary	Production of mercury-based chemicals	Private
<i>Durham v T&amp;N Plc</i> (England)	Localised	Involvement of a subsidiary	Asbestos mining	Private
<i>Guerrero v Monterrico Metals Plc</i> (England)	Localised	Involvement of a subsidiary	Copper mining	Private

Ocensa Pipeline litigation (England)	Localised	Involvement of a subsidiary	Oil exploration and exploitation	Private
<i>Bodo Community v Shell</i> (England)	Localised	Involvement of a subsidiary	Oil exploration and exploitation	Private
<i>Vava v Anglo American South Africa Ltd</i> (England)	Localised	Involvement of a subsidiary	Gold mining	Private
<i>Akpan v Shell</i> (the Netherlands)	Localised	Involvement of a subsidiary	Oil exploration and exploitation	Private
<i>Trafigura</i> (civil proceedings in England; criminal trial in the Netherlands and France)	Localised	No subsidiary; use of independent contractor	Oil trading	Private
<i>Arica Victims KB v Boliden Mineral AB</i> (Sweden)	Localised	No subsidiary; use of independent contractor	Copper, zinc, lead, gold and silver mining	Private

## **(2) Why some types of case are not litigated in EU courts**

The classification in Table 1 reveals two intriguing facts. First, all cases where a defendant's foreign subsidiary was involved concerned only extraction and chemical industries. Although transnational corporate groups also exist in other industries that have the potential to harm the environment, such as clothing, manufacturing and IT, no claims have thus far been brought against parents companies in such corporate groups. Second, all cases involved private claimants. Why has international environmental litigation against the parents of corporate groups involved only extraction and chemical industries? Why have transnational environmental cases not been brought by public authorities? Is international environmental litigation, for whatever reason, unsuitable for these types of case? If so, the regulatory potential of European private international law is significantly curtailed. The following text aims to answer these questions.

With regard to the first question, an explanation lies in the fact that extraction and chemical industries are by their characteristics and location more likely to encounter environmental and human rights related problems. Furthermore, as Muchlinski observes,<sup>71</sup> the corporate organisation of Cape (but also of the defendants in other cases of the same type) was 'that of a hierarchical parent-subsidary group, typical of early [multinational enterprises] operating in high-risk, capital-intensive extraction industries where economies of scale are important.' These defendants 'appear to fit into the theoretical model of the closely controlled, managerially centralised, MNE'.<sup>72</sup> Modern forms of business organisation, however, involve subsidiaries or affiliates with substantially more autonomy. The bonds of ownership are often replaced by purely contractual relations or even informal alliances.<sup>73</sup> Modern forms of

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<sup>71</sup> P. Muchlinski, 'Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review' (2002) 23 *The Company Lawyer* 168, 170.

<sup>72</sup> *ibid.*

<sup>73</sup> Teubner, above, n 27.

corporate organisation and business networks relate primarily to newer high technology industries such as information technology or advanced product manufacture.<sup>74</sup> Given the looser connections between the members of modern forms of corporate organisation and business networks, it is considerably more difficult to pierce the corporate veil or establish a direct duty of care on the part of the parent company in such an organisation or of the controlling enterprise(s), if any, in a network.<sup>75</sup> Since the odds of winning the case are correspondingly reduced, the possibility for the workers of subsidiaries in such an organisation or of cooperating enterprises in a network and for the affected members of the general public of finding a law firm to represent them a 'no win no fee' basis is very remote.<sup>76</sup>

Looking at the cases from the past two decades, it is surprising that no international environmental litigation in Europe has been brought by a public authority.<sup>77</sup> After all, some transnational environmental cases concern pure environmental damage where no individual suffers actionable personal injury, property damage or economic loss or where such harm is thinly spread among a number of victims. In such cases, it is usually up to public authorities to seek injunctive relief or clean up the pollution and seek recovery of the clean-up costs from the operator. Indeed, the most important piece of EU environmental legislation, the

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<sup>74</sup> Muchlinski, above, n 71, 171. See 'Partners in Wealth', part of the special report on 'The New Organisation', *The Economist*, 21 January 2006: 'companies today cohabit with a vast number of joint-ventures and strategic alliances, some more and some less connected. The line between what is inside and what is outside the corporation, once so clear, has become blurred... Firms such as Nike have stretched this idea to such an extent that some of them now make nothing: all Nike's shoes, for instance, are manufactured by subcontractors'.

<sup>75</sup> See Muchlinski, above, n 7, 316-317.

<sup>76</sup> According to Richard Meeran, a partner in Leigh Day: 'In considering the potential for legal action in MNC home courts, the relevance of financial resources, constraints and incentives for claimants' lawyers cannot be overstated. The fact of the matter is that, apart from a few exceptions, claimants' lawyers in MNC home states have shown a distinct lack of enthusiasm for undertaking such cases.': R. Meeran, 'Tort Litigation against Multinationals ("MNCs") for Violation of Human Rights: an Overview of the Position outside the US' (March 2011), available at <http://www.businesshumanrights.org/media/documents/richard-meeran-tort-litigation-against-mncs-7-mar-2011.pdf>.

<sup>77</sup> Compare *In Re Amoco Cadiz*, No 78 M.D.L. 376, 1984 AMC 2123 (N.D. III. 1984), a case concerning an oil spill off the French coast, where France and various municipalities claimed pollution damages and clean-up costs in the US courts: see N. Eskenazi, 'Forum non Conveniens and Choice of Law in *Re Amoco Cadiz*' (1993) 24 *Journal of Maritime Law and Commerce* 371.

Environmental Liability Directive,<sup>78</sup> is concerned only with claims by public authorities against operators for the enforcement of environmental standards and recovery of clean-up costs. Although the Directive acknowledges potential actions by public authorities against foreign operators,<sup>79</sup> it does not provide for any special procedures for the bringing of such actions. One would therefore expect to find cases under the Brussels regime of public authorities from one Member State initiating proceedings abroad against foreign operators or of public authorities from one Member State seeking enforcement abroad of judgments rendered under the Directive.

A reason for the lack of such cases may lie in the fact that there is a strong argument that claims by public authorities under the Environmental Liability Directive concern public law in the sense defined by the CJEU for the purposes of the Brussels regime. Given that the Brussels regime applies only to ‘civil and commercial matters’,<sup>80</sup> claims brought by public authorities abroad and judgments rendered under the Directive arguably fall outside its scope. A leading case on the concept of ‘civil and commercial matters’ is *Rüffer*.<sup>81</sup> This case concerned a claim by the Netherlands for the recovery of the costs involved in the removal of a wreck in a public waterway over which the Netherlands exercised river-police functions under a Dutch-German treaty. The CJEU held that the claim did not arise in a civil or commercial matter, since the treaty conferred on the claimant the status of a public authority and the claimant exercised its public authority powers in removing the wreck.<sup>82</sup> By analogy, it is arguable that the Directive confers on the competent authorities of Member States public authority powers which they exercise when enforcing environmental standards and claiming

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<sup>78</sup> Directive 2004/35/EC of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.

<sup>79</sup> *ibid* Article 15(3).

<sup>80</sup> Brussels I Recast, Article 1(1); Brussels I, Article 1(1); Brussels Convention, Article 1(1).

<sup>81</sup> Case 814/79 *Netherlands State v Reinhold Rüffer* [1980] ECR 3807.

<sup>82</sup> *ibid* [7]-[15].

clean-up costs against operators. If so, it would not mean that international environmental litigation by public authorities is completely precluded. It would mean that this type of litigation has to take place under the Member States' traditional rules of jurisdiction and recognition and enforcement of foreign judgments and, if any, environmental treaties. Given that the Member States' traditional laws also contain public law exceptions<sup>83</sup> and the dearth of civil liability environmental treaties,<sup>84</sup> the prospect of international environmental litigation by public authorities in Europe is poor.

Admittedly, it is not certain that claims by public authorities under the Environmental Liability Directive concern public law. According to some scholars, these claims arise in a civil or commercial matter,<sup>85</sup> and thus fall under the scope of the Brussels regime. These scholars doubt the correctness of *Rüffer* in the light of subsequent cases, and advocate a systemic and 'green' interpretation of EU law concerning the protection of the environment.

The *Rüffer* approach to 'civil and commercial matters' has been criticised as being inconsistent with the CJEU decisions in *Sonntag*<sup>86</sup> and *Baten*.<sup>87</sup> *Sonntag* concerned a claim for damages against a German state-school teacher for the accidental death of a pupil in his care on a school trip. The CJEU held that the fact that the defendant had the status of a civil servant under German law and acted in that capacity at the relevant time was irrelevant.<sup>88</sup> So was the fact that the case was covered by a scheme of social insurance under German public law that

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<sup>83</sup> For English traditional conflict of laws see L. Collins and others (eds), *Dicey, Morris & Collins on the Conflict of Laws* (London: Sweet & Maxwell, 15<sup>th</sup> ed, 2012) Ch 5.

<sup>84</sup> See n 33 above.

<sup>85</sup> Betlem and Bernasconi, above, n 21; T. Kadner Graziano, 'The Law Applicable to Cross-Border Damage to the Environment: A Commentary on Article 7 of the Rome II Regulation' (2007) 9 *Yearbook of Private International Law* 71; R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (London: Sweet & Maxwell, 3<sup>rd</sup> ed, 2009). See also A. Briggs, *Private International Law in English Courts* (Oxford: OUP, 2014).

<sup>86</sup> Case C-172/91 *Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann* [1993] ECR I-1963.

<sup>87</sup> Case C-271/00 *Gemeente Steenberg v Luc Baten* [2002] ECR I-10489.

<sup>88</sup> *Sonntag* [1993] ECR I-1963, [21].

excluded a direct claim against the defendant.<sup>89</sup> The Court found that the functions of the public authority should be analysed to determine whether its conduct constitutes the exercise of public powers going beyond those existing under the rules applicable to relationship between private individuals.<sup>90</sup> Since a teacher in a state school assumes the same functions in relation to their pupils as a teacher in a private school, the conduct of the former does not constitute the exercise of public powers.<sup>91</sup> *Baten* concerned a claim by a Dutch local authority for the recovery of sums of money paid as social assistance to support the defendant's child after the defendant had been divorced from the child's mother. The CJEU held that it was necessary to examine the basis and the detailed rules governing the bringing of the claim to determine whether it concerned a civil or commercial matter.<sup>92</sup> Since the Dutch legislation allows recovery of the costs of social assistance up to the limit of the maintenance obligation under the Dutch Civil Code, it was the rules of civil law nature that determined the conditions under which the public authority might bring an action for the recovery of sums of money paid.<sup>93</sup> The claimant's legal situation was, therefore, comparable to that of a person who, having paid another's debt, is subrogated to the rights of the original creditor and to that of a person who, having suffered damage from a third party, seeks compensation from that party.<sup>94</sup> The CJEU also stated that the conclusion would be different if the local authority had the power to disregard a maintenance agreement entered into between the defendant and his ex-wife.<sup>95</sup>

Similarly, Betlem, Bernasconi, Kadner Graziano, Plender and Wilderspin<sup>96</sup> argue that the fact that public authorities enforcing environmental standards or claiming clean-up costs

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<sup>89</sup> *ibid* [28].

<sup>90</sup> *ibid* [22].

<sup>91</sup> *ibid* [23].

<sup>92</sup> *Baten* [2002] ECR I-10489, [31].

<sup>93</sup> *ibid* [32].

<sup>94</sup> *ibid* [34].

<sup>95</sup> *ibid* [35]-[36].

<sup>96</sup> Betlem and Bernasconi, above, n 21, 133-135; Kadner Graziano, above, n 24, 81-85; Plender and Wilderspin, above, n 85, [21-021].

under the Environmental Liability Directive act in their public capacity is irrelevant. The real question is whether their conduct constitutes the exercise of any powers going beyond those existing under the rules applicable to relations between private individuals. Since claims for the enforcement of environmental standards and recovery of clean-up costs against foreign operators typically arise in tort and, moreover, in some Member States can be made not just by public authorities but also by non-governmental environmental organisations,<sup>97</sup> such claims concern ‘civil and commercial matters’, irrespective of the nature of the claimant.

Furthermore, according to the mentioned scholars, the systemic interpretation of the Brussels regime leads to the conclusion that claims by public authorities under the Environmental Liability Directive fall within its scope. The Directive acknowledges potential actions by public authorities against foreign operators but provides no special procedures. According to Kadner Graziano, Plender and Wilderspin, such actions must fall within the scope of the Brussels regime in order to be truly enforceable.<sup>98</sup> Similarly, the special choice-of-law rules for environmental damage of Article 7 of Rome II, whose scope must be interpreted consistently with that of the Brussels regime,<sup>99</sup> apply to cases of environmental damage irrespective of any harm to life, health property or financial wellbeing of individuals. In cases of pure environmental damage, only public authorities, acting under the Directive, can commence proceedings for the enforcement of environmental standards and recovery of clean-up costs. Since Article 7 of Rome II applies to cases of pure environmental damage, Kadner Graziano argues that claims by public authorities concerning such damage under the Directive must fall within the scope of Rome II and therefore also the Brussels regime.<sup>100</sup> Betlem,

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<sup>97</sup> See e.g. *Bier* [1976] ECR 1735, where a claimant was the Reinwater Foundation, *Akpan v Shell* (2013) LJN BY9854 (the Netherlands), where a claimant was Friends of the Earth Netherlands (Milieudefensie) and *Arica Victims KB v Boliden Mineral AB* (2013) T. 1021–13 (Sweden), where the claimant was Arica Victims KB, an association representing a number of people from Arica, Chile.

<sup>98</sup> Kadner Graziano, above, n 85, 83-84; Plender and Wilderspin, above, n 85, [21-021].

<sup>99</sup> Rome II, Recital 7.

<sup>100</sup> Kadner Graziano, above, n 85, 85-86.



Bernasconi, Plender and Wilderspin further rely on the *Henkel* case,<sup>101</sup> where the CJEU held that a claim by a consumer protection organisation for an injunction to prevent a trader using allegedly unfair terms in its consumer contracts fell within the scope of the Brussels jurisdictional regime in general and the rule of jurisdiction in tort in particular (now contained in Article 7(2) of the Brussels I Recast) on the basis that this interpretation was the only one consistent with the Unfair Contract Terms Directive.<sup>102</sup> Finally, according to Betlem and Bernasconi,<sup>103</sup> the conclusion that claims by public authorities under the Directive concern ‘civil and commercial matters’ is supported by the ‘green’ interpretation of EU law concerning the protection of the environment. Since the application of the Brussels regime to claims by public authorities increases the chances of the operators’ liability, thus supporting the polluter-pays principle, such interpretation is to be preferred.

The majority of scholars (including the editors of *Dicey, Morris & Collins*), however, are of the opinion that claims by public authorities under the Environmental Liability Directive do not concern ‘civil and commercial matters’, and thus fall outside the scope of the Brussels regime.<sup>104</sup> They all rely on *Rüffer* for this conclusion. Indeed, *Rüffer* seems a stronger authority than *Sonntag*, *Henkel* and *Baten*.<sup>105</sup> In *Sonntag*, a crucial point in the CJEU analysis was that a teacher in a state school and a teacher in a private school assume the same functions in relation to their pupils. With regard to claims by public authorities under the Directive, such a private

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<sup>101</sup> Case C-167/00 *Verein für Konsumenteninformation v Henkel* [2002] ECR I-8111. See Betlem and Bernasconi, above, n 21, 136; Plender and Wilderspin, above, n 85, [21-021].

<sup>102</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [2003] OJ L95/29 (‘Unfair Contract Terms Directive’).

<sup>103</sup> Betlem and Bernasconi, above, n 21, 135-137.

<sup>104</sup> M. Bogdan, ‘The Treatment of Environmental Damage in Regulation Rome II’ in J. Ahern and W. Binchy, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (Leiden: M. Nijhoff, 2009) 219, 224-225; *Dicey, Morris & Collins*, above, n 83, [35-066]; A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Regulations* (Oxford: OUP, 2008) [7.03]-[7.06]; A. Fuchs, ‘Environmental Damage’ in P. Huber, *Rome II Regulation: Pocket Commentary* (Munich: Sellier, 2011) 202, [13]-[18].

<sup>105</sup> Interestingly, Plender and Wilderspin, who are of the opinion that claims by public authorities under the Directive are within the scope of the Brussels regime, state that Betlem and Bernasconi’s attempt to distinguish *Rüffer* is ‘not particularly convincing’: Plender and Wilderspin, above, n 85, [21-020], fn 36.

comparator is absent. The role of non-governmental environmental organisations under the Directive is limited to submitting any observations concerning environmental damage to public authorities, requesting action from public authorities, and commencing review proceedings of public authorities' decisions in response to the request.<sup>106</sup> It is also for this reason that *Henkel* is distinguishable.<sup>107</sup> Here, the claim was brought under the Austrian implementation of the Unfair Contract Terms Directive, which expressly envisages court and administrative actions by persons or organisations having a legitimate interest in protecting consumers for the enforcement of its terms.<sup>108</sup> It was the claimant's status as a non-governmental consumer organisation, and not the fact that it was pursuing an action to enforce EU law, that brought the claim within the concept of 'civil and commercial matters'. The Environmental Liability Directive, on the other hand, achieves its objectives by conferring enforcement powers on the Member State public authorities. In *Baten*, it was the rules of the Dutch Civil Code that determined the conditions under which the public authority might bring an action for the recovery of sums of money paid.<sup>109</sup> The recovery of clean-up costs under the Directive is independent of the rules of civil law nature. Indeed, there seems to be an agreement in the literature that the Directive takes an administrative approach that is strongly influenced by the situation in the US, where at the federal level environmental clean-up is in the hands of the Environmental Protection Agency.<sup>110</sup>

Furthermore, Dickinson and Fuchs provide counter-arguments to the systemic interpretation of the scope of the Brussels regime advanced by Kadner Graziano, Plender and

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<sup>106</sup> Environmental Liability Directive, Articles 12 and 13.

<sup>107</sup> Also Dickinson, above, n 104, [7.05].

<sup>108</sup> Unfair Contract Terms Directive, Article 7(2).

<sup>109</sup> Similarly, Case C-433/01 *Freistaat Bayern v Blijdenstein* [2004] ECR I-981. See also Case C-49/12 *HMRC v Sunico ApS* EU:C:2013:545, [2014] QB 391 (proceedings brought by a tax authority for damages for conspiracy to defraud, where the fraud was the unlawful evasion of tax and the amount of damages claimed was equal to the evaded tax, were civil and commercial as they were founded on ordinary private law of tort).

<sup>110</sup> G. Winter and others, 'Weighing up the EC Environmental Liability Directive' (2008) 20 *Journal of Environmental Law* 163, 163-165.

Wilderspin.<sup>111</sup> The cross-border enforcement of environmental standards and recovery of clean-up costs by public authorities involve mutual assistance, which is the subject of an EU measure under Article 192 TFEU, not private international law instruments adopted under Articles 67 and 81 TFEU.<sup>112</sup> It is counterintuitive and contrary to the CJEU approach under the Brussels regime to determine its scope by relying on the content of a choice-of-law rule of Rome II.<sup>113</sup>

In conclusion, arguments on whether claims of public authorities under the Environmental Liability Directive fall within the scope of the Brussels I Recast are finely balanced. Assuming that the majority view is correct, the narrow scope of this instrument seems to prevent an important type of international environmental litigation from taking place in Europe.<sup>114</sup> In any event, the legal uncertainty surrounding this issue may serve in itself as a deterrent to public authorities bringing transnational claims under the Directive. Coupled with the fact that international environmental litigation against the parents of corporate groups seems to be effectively confined to extraction and chemical industries, this finding leads to the conclusion that the field in which European private international law can have a regulatory impact on the protection of the environment is relatively narrow. This regulatory field is in effect limited to two types of case, namely the case of private claimants suing an operator whose actions in one country directly cause environmental damage elsewhere and the *Lubbe v Cape* type, but the latter exclusively with regard to extraction and chemical industries, given

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<sup>111</sup> See text to nn 98-102 above.

<sup>112</sup> Dickinson, above, n 104, [7.06].

<sup>113</sup> A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations Updating Supplement* (Oxford: OUP, 2010) [7.05A]; Fuchs, above, n 104, [18].

<sup>114</sup> Compare *United States v Ivey* (1995) 139 DLR 674, 689 (Ont. Gen. Div), affirmed (1996) 139 DLR 570 (Ont. CA) (Can), where an Ontario court gave summary judgment to enforce judgments obtained pursuant to US environmental agency clean-up legislation, the Comprehensive Environmental Response, Compensation and Liability Act 1980), 42 USC § 9670(a). In its discussion of the rule concerning penal, revenue, or other public laws, the lower courts carefully examined the US judgment, characterising it as primarily a cost recovery measure, and the degree to which the 'public law' prohibition applied to hybrid regulatory regimes that included civil liability: *ibid* 684-689.

the adherence of these industries to old-fashioned forms of corporate organisation. The following sections analyse how, within the scope of their practical operation, the rules of European private international law apply to these two types of case in order to examine whether, and to what extent, this field of law is achieving its regulatory potential. The analysis starts with the rules of jurisdiction.

### **Adjudicatory jurisdiction and environmental damage**

The Brussels I Recast allocates adjudicatory jurisdiction in civil and commercial matters among the Member State courts. Its jurisdictional rules apply, in principle, to defendants domiciled in a Member State.<sup>115</sup> The main rule is that the courts of the Member State of the defendant's domicile have general jurisdiction over the defendant.<sup>116</sup> There are also rules of special jurisdiction which confer jurisdiction, with regard to specific matters, on the courts of other Member States. Since international environmental litigation typically concerns tortious claims, the rules of jurisdiction in tort are of particular relevance. International environmental litigation in EU courts sometimes involves defendants not domiciled in a Member State. In such cases, the Brussels I Recast delegates jurisdictional issues to the Member States' traditional laws. It will now be examined how these jurisdictional rules apply to the two types of case in which European private international law can have a regulatory impact that have been identified in the previous section.

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<sup>115</sup> Brussels I Recast, Articles 4-6. Domicile of legal persons is defined autonomously in Article 63. See *Vava v Anglo American South Africa Ltd* [2013] EWHC 2131 (QB), [2013] Bus LR D65 (a company's central administration amounted to its centre of management or operational centre; it depended on where the company itself carried out its functions). According to Article 62, domicile of individuals is to be determined by reference to the Member States' traditional laws.

<sup>116</sup> *ibid* Article 4(1).

Claims against an operator domiciled in a Member State whose actions in one country directly cause environmental damage elsewhere can be brought in the courts of the operator's domicile<sup>117</sup> or in the courts for the place where the harmful event occurred or may occur.<sup>118</sup> The leading case on the determination of the place of the harmful event in delocalised torts is *Bier*.<sup>119</sup> It will be remembered that this case concerned a French mining company that had polluted the Rhine by discharging in it in France saline waste from its operations. A Dutch horticulturalist suffered damage as a result. The CJEU held that the claimant had an option to commence proceedings 'either at the place where the damage occurred or the place of the event giving rise to it.'<sup>120</sup> The CJEU case law on jurisdiction in delocalised torts also deals with claims for indirect damage (i.e. damage suffered by the victim as a consequence of the direct damage) and claims brought by indirect victims. The case law demonstrates that the jurisdictionally relevant places are only the place where the direct victim suffers direct damage and the place of the event giving rise to it.<sup>121</sup> Claims against an operator domiciled in a Member State that acts in one Member State and directly causes environmental damage in another can therefore be brought either in the courts for the place where the direct victim suffers direct damage or at the source of the pollution.

The *Lubbe v Cape* type of case involving a European-based parent company operating in an extraction or chemical industry that carries on its activities in a developing country through a local subsidiary falls within the scope of the Brussels I Recast. The courts of the Member State of the defendant's domicile have general jurisdiction.<sup>122</sup> This type of case has

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<sup>117</sup> *ibid.*

<sup>118</sup> *ibid* Article 7(2).

<sup>119</sup> [1976] ECR 1735.

<sup>120</sup> *ibid* [19].

<sup>121</sup> See Case C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and others* [1990] ECR I-49 ('*Dumez*'); Case C-364/93 *Antonio Marinari v Lloyd's Bank Plc and Zubaidi Trading Company* [1995] ECR I-2719 ('*Marinari*').

<sup>122</sup> Brussels I Recast, Article 4(1).

been frequently brought in the English and recently in the Dutch courts, and typically concerns direct liability in negligence of the European-based parent.

An issue litigated in the past in England in this type of case was whether the English courts should refuse to exercise their jurisdiction and stay their proceedings under the traditional English doctrine of *forum non conveniens* in favour of the courts of the developing country where the harmful event occurred.<sup>123</sup> The CJEU held that the *forum non conveniens* doctrine had no role to play in cases falling within the scope of the Brussels Convention and the Brussels I Regulation.<sup>124</sup> The Brussels I Recast superseded the Brussels I Regulation on 10 January 2015. The Recast introduces one important change that has the potential to undermine international environmental litigation in EU courts. Unlike the Brussels I Regulation, the Recast gives an amount of discretion to all Member State courts to stay their proceedings when parallel or related proceedings are already pending in a third country. According to Articles 33(1) and 34(1) of the Recast, where the jurisdiction of a Member State court is based on certain jurisdictional rules of the Recast, including all the rules relevant for international environmental litigation, and where at the time when the Member State court is seised with the dispute parallel or related proceedings are pending in a third country, the Member State court may stay its proceedings under two conditions. The first is that it is expected that the court of the third country will give a judgment capable of recognition and, where applicable, of enforcement in the Member State concerned. The second is that the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. Recital 24 clarifies the second condition:

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<sup>123</sup> The leading case on the doctrine of *forum non conveniens* is *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (HL).

<sup>124</sup> Case C-281/02 *Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn' and Others* [2005] ECR I-1383.

‘When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.’

Articles 33(1) and 34(1) could lead to a ‘race to the court’, with the European-based parent company and its overseas subsidiary commencing preventive proceedings in the developing country where the harmful event occurred. In such cases, the Member State court seised with the claim against the parent may refuse to hear and decide the dispute under what comes close to the *forum non conveniens* doctrine.

English cases such as *Lubbe v Cape*<sup>125</sup> and *Connelly v RTZ*<sup>126</sup> dealing with *forum non conveniens* in the context of international environmental litigation have therefore regained relevance. These cases confirm that the fundamental principle in *forum non conveniens* cases is to identify the most appropriate forum in which the case may be tried suitably for the interests of all the parties and the ends of justice. The English courts are instructed to look not just for the ‘natural forum’, i.e. the forum with which the action has its most real and substantial connection, but also to examine, if the natural forum is abroad, whether there are special circumstances by reason of which justice requires that litigation should nevertheless take place in England. In both *Lubbe v Cape* and *Connelly v RTZ* the natural forum was abroad, in South Africa and Namibia, respectively. Both cases therefore revolved around the issue of whether the claimants would obtain justice in the natural forum. In both cases the House of Lords found

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<sup>125</sup> [2000] 1 WLR 1545.

<sup>126</sup> [1998] AC 854.

that the claimants would not be able to obtain legal representation in the natural forum, and consequently refused to stay the proceeding under the *forum non conveniens* doctrine.

The *Lubbe v Cape* type of case may concern a claim brought in one Member State against a parent company domiciled in another. The court seised with the claim will not have general jurisdiction over such parent. Article 7(2) of the Brussels I Recast will be inapplicable, since the harmful event will have occurred in a third country. The only other rule of special jurisdiction of the Recast that the claimants could rely on is Article 7(3) which gives jurisdiction to a court seised with criminal proceedings over a civil claim for damages or restitution which is based on the criminal act giving rise to such proceedings. This rule of jurisdiction is of potential relevance for Member States that deal with transnational environmental cases primarily through criminal law.<sup>127</sup>

In cases of international environmental litigation in which the defendant is domiciled in a third country, the Brussels I Recast delegates jurisdictional issues to the Member States' traditional laws. If the proceedings are commenced in England, for example, the English courts will have jurisdiction over the defendant that is properly served with the claim form whilst present in England.<sup>128</sup> The English courts, however, may decide not to exercise their jurisdiction and stay their proceedings under the *forum non conveniens* doctrine. Corporate defendants domiciled in third countries, however, are seldom present in England for jurisdictional purposes. The majority of cases brought in England against non-EU defendant thus revolve around the issue of whether the English courts should grant the claimant

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<sup>127</sup> E.g. France: see D. Papadopoulou, 'The Role of French Environmental Associations in Civil Liability for Environmental Harm: Courtesy of *Erika*' (2009) 21 *Journal of Environmental Law* 87, discussing the judgment of the Paris *Tribunal Correctionnel* of 16 January 2008, No 99-34-895010, concerning the *Erika* oil spill. The criminal court awarded 192 million euros in private law damages against the defendants (an Italian shipping classification society, the ship owner, the manager and the charterer) in favour of certain French environmental associations and local administrative authorities.

<sup>128</sup> The leading cases on the presence of companies in England for jurisdictional purposes are *Dunlop Pneumatic Tyre Co. Ltd v A.G. Cudell & Co* [1902] 1 KB 342 (CA) and *Adams v Cape Industries* [1990] 2 WLR 657 (CA). See also *Maharane of Baroda v Wildenstein* [1972] 2 QB 283 (CA).



permission to serve the claim form on an absent defendant out of the jurisdiction.<sup>129</sup> Permission depends on the claimant being able to satisfy three requirements. First, the claimant must have a reasonable prospect of success on the merits.<sup>130</sup> Second, the claimant must have a good arguable case that the claim falls within a head of jurisdiction listed in Civil Procedure Rules, Practice Direction 6B.<sup>131</sup> Since international environmental litigation typically concerns tortious claims, para 3.1(9) of the Practice Direction 6B is of particular relevance. Under this provision, the English courts may assume jurisdiction if damage was sustained within the jurisdiction or the damage resulted from an act committed within the jurisdiction. Unlike Article 7(2) of the Brussels I Recast, the case law demonstrates that para 3.1(9) of the Practice Direction 6B applies not just when the direct victim suffers direct damage in England or when the place of the event giving rise to it is in England but also when either the direct victim suffers indirect damage or when the indirect victim suffers damage in England.<sup>132</sup> Third, England must be *forum conveniens*.<sup>133</sup>

International environmental litigation of the *Lubbe v Cape* type sometimes involves not just a claim against a European-based parent company but also a claim against its subsidiary domiciled in or outside the EU. Claimants can rely on Article 8(1) of the Brussels I Recast concerning jurisdiction over co-defendants to establish jurisdiction over subsidiaries domiciled in the EU. With regard to non-EU subsidiaries, claimants will have to invoke the Member States' traditional rules of jurisdiction. If the proceedings against a non-EU subsidiary are commenced in England, for example, the claimants can rely on para 3.1(3) of the Practice Direction 6B concerning jurisdiction over necessary or proper parties. The other two

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<sup>129</sup> Civil Procedure Rules, rules 6.36 and 6.37; Civil Procedure Rules Practice Direction 6B, para 3.1.

<sup>130</sup> Civil Procedure Rules, rule 6.37(1)(b); *Seaconsar Far East Ltd v Bank Markaze Jomhuri Islami Iran* [1994] 1 AC 438 (HL).

<sup>131</sup> Civil Procedure Rules, rule 6.37(1)(a); *Seaconsar Far East Ltd v Bank Markaze Jomhuri Islami* *ibid*.

<sup>132</sup> *Cooley v Ramsey* [2008] EWHC 129 (QB), [2008] IL Pr 27; *Booth v Phillips* [2004] EWHC 1437 (Comm), [2004] 1 WLR 3292.

<sup>133</sup> See *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460; *Lubbe v Cape* [2000] 1 WLR 1545; *Connelly v RTZ* [1998] AC 854.

requirements for service out of the jurisdiction, namely a reasonable prospect of success on the merits and *forum conveniens*, will also have to be satisfied. Given that the English courts are loath to split up proceedings involving co-defendants,<sup>134</sup> it seems that claimants will easily satisfy these requirements.<sup>135</sup>

In conclusion, the rules of jurisdiction of the Brussels I Recast deal satisfactorily with the type of international environmental litigation in which the claim is brought against an EU domiciliary acting in one Member State and directly causing environmental damage in another. In such cases, victims may access several forums, most importantly the courts for the place of the direct damage suffered by direct victims. This place usually coincides with the habitual residence of direct victims and the place where the damaged property is located. If a claim for a delocalised tort is brought against a non-EU domiciliary, the jurisdiction of the Member State court seised with the claim depends on the traditional law of that Member State. The English traditional jurisdictional rules applicable in this type of case, for example, seem to be somewhat wider than the analogous jurisdictional rules of the Brussels I Recast. These rules therefore also put victims in this type of case in a good litigational position.

With regard to the *Lubbe v Cape* type of case, the jurisdictional rules of the Brussels I Recast are also favourable for victims as they may commence proceedings against a parent company domiciled in the EU in the courts of its domicile, and those courts must hear and decide the case. The Recast, however, represents a setback for this type of case as it introduces a discretion that comes close to the *forum non conveniens* doctrine. Although *Lubbe v Cape*<sup>136</sup>

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<sup>134</sup> See *Owusu v Jackson* [2002] EWCA Civ 877, [2002] IL Pr 45, [19]-[21].

<sup>135</sup> The claimants in the Dutch case of *Akpan v Shell* seem to have also easily satisfied the requirements of the traditional Dutch rule of jurisdiction over co-defendants (which is very similar to Article 8(1) of the Brussels I Recast): see the interim decision of the District Court of Amsterdam of 24 February 2010 LJM BM1469 and the decision of the District Court of The Hague (*Rechtbank 's-Gravenhage*) of 30 January 2013 LJM BY9854, confirmed on appeal: <http://www.theguardian.com/global-development/2015/dec/18/dutch-appeals-court-shell-oil-spills-nigeria>.

<sup>136</sup> [2000] 1 WLR 1545.

and *Connelly v RTZ*<sup>137</sup> show that the English courts have been reluctant to use this doctrine in the context of international environmental litigation, there is no guarantee that the attitude of the CJEU, which is the ultimate interpreter of the Recast, will be the same.<sup>138</sup> The *Lubbe v Cape* type of case also sometimes concerns a claim against a subsidiary domiciled either in or outside the EU. Both the Brussels I Recast and the English traditional rules of jurisdiction provide for this scenario. In theory, the *Lubbe v Cape* type of case could also concern a claim against a non-EU parent. Such cases, however, do not arise in practice, possibly because it would be hard to obtain jurisdiction of the Member State courts in such cases.

The following text continues the examination of the regulation of the environment in European private international law by exploring how the special choice-of-law rules for environmental damage of Rome II apply to the two types of case in which European private international law can have a regulatory impact.

### **Choice of law and the *Bier* type of case**

Article 7 of Rome II contains special choice-of-law rules for environmental damage:

‘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), 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.’

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<sup>137</sup> [1998] AC 854.

<sup>138</sup> Similarly, W. van den Eeckhout, ‘Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of Private International Law in Implementing Human Rights in Civil Proceedings in Europe: A Facilitative Role for PIL or PIL as a Complicating Factor?’ (2012) 4 *Contemporary Readings in Law and Social Justice* 178, 186-187.

Article 4(1), in turn, provides:

‘...the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.’

For the purposes of these rules, ‘environmental damage’ is defined as an ‘adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.’<sup>139</sup> Also relevant are Articles 14 (‘Freedom of choice’), 16 (‘Overriding mandatory rules’), 17 (‘Rules of safety and conduct’) and 26 (‘Public policy’).

The scope of Article 7 is wide, although there is some uncertainty in this respect. It clearly covers personal injury, property damage, economic loss and pure environmental damage. It is also clear that nuclear damage is excluded.<sup>140</sup> According to some scholars, Article 7 is wide enough to cover cases brought under the English law of negligence, trespass, nuisance, *Rylands v Fletcher*<sup>141</sup> and breach of statutory duty.<sup>142</sup> Others, however, interpret the scope of Article 7 more narrowly.<sup>143</sup>

The special choice-of-law rules for environmental damage are based on the principles of ubiquity, favouring the victim and, to a limited extent, party autonomy. Article 7 provides

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<sup>139</sup> Rome II, Recital 24. Compare the definition of ‘environmental damage’ in Article 2 of the Environmental Liability Directive.

<sup>140</sup> *ibid* Article 1(2)(f). Nuclear damage is left to the existing treaties in this field.

<sup>141</sup> (1866) LR 1 Ex 265, affirmed (1868) LR 3 HL 330.

<sup>142</sup> Dickinson, above, n 104, [7.14]; J.J. Fawcett and J.M. Carruthers, *Cheshire, North & Fawcett’s Private International Law* (Oxford: OUP, 2008) 813. According to Fuchs, above, n 104, [21] and Plender and Wilderspin, above, n 105, [21-010]-[21-012], the application of Article 7 is limited to cases of damage caused by an economic activity. Nuisance caused by excessive noise is not covered: Fuchs *ibid* [20]; Plender and Wilderspin *ibid* [21-015].

<sup>143</sup> C.M.V. Clarkson and J. Hill, *The Conflict of Laws* (Oxford: OUP, 4<sup>th</sup> ed, 2011) 275 (not covering nuisance and the rule in *Rylands v Fletcher*); J. Hill and A. Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Oxford: Hart, 4<sup>th</sup> ed, 2010) [15.1.65] (not covering nuisance).

that the law applicable to environmental damage is by default the law of the country of the damage (*lex loci damni*), but the victim can choose the law of the country of the event giving rise to the damage (*lex loci actus*). There is no rule allowing the courts to apply the law of the parties' common habitual residence or the law that is manifestly more closely connected with the tort. The question when the victim can make the choice is one of procedure, governed by the law of the forum.<sup>144</sup> If the *lex loci damni* applies, Article 17 becomes relevant. It provides that, in assessing the conduct of the person claimed to be liable, account should be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct in force at the place and time of the event giving rise to the damage. This provision allows the court, when determining liability, to take into account the fact that the defendant, who is sued for damage suffered in one country and under the law of that country, has complied with the public law rules concerning safety and conduct of the *lex loci actus*. Article 14 allows the parties to agree on the applicable law either after the event giving rise to the damage occurred or, where all the parties are pursuing a commercial activity, even by an agreement freely negotiated before the event giving rise to the damage occurred. Article 16 allows the court to apply the overriding mandatory provisions of the law of the forum. Article 26 allows the court to disregard a provision of the foreign applicable law whose application is manifestly incompatible with the public policy of the forum.

Some of the ideas that motivated the CJEU decisions in *Bier*<sup>145</sup> and other jurisdictional cases on delocalised torts<sup>146</sup> underlie Article 7 of Rome II. Just as a claimant whose claim falls within the scope of the Brussels I Recast may commence proceedings either in the country where the direct victim suffers direct damage or in the country of the event giving rise to it, so can the victim of environmental damage advance their claim under the law of either country

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<sup>144</sup> Rome II, Recital 25.

<sup>145</sup> [1976] ECR 1735.

<sup>146</sup> See *Dumez* [1990] ECR I-49; *Marinari* [1995] ECR I-2719.

under Rome II. The scopes of the Recast and Rome II, however, differ in an important respect. Whilst the jurisdictional rules of the Recast apply in civil and commercial matters and, in principle, to defendants domiciled in a Member State,<sup>147</sup> Rome II is of universal application. It applies, in all situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters regardless of whether the applicable law is the law of a Member State.<sup>148</sup> In other words, whilst the Brussels I Recast regime is concerned only with torts connected with the EU, Rome II, at least in theory, applies to all delocalised torts regardless of the place of the environmental damage or the defendant's actions.

Universal application of Rome II, coupled with the superiority of the principles of ubiquity and favouring the victim and the limited acceptance of party autonomy on which its special choice-of-law rules for environmental damage are based, are the main grounds on which the supporters of these rules base their conclusion that Rome II adequately pursues the cosmopolitan objectives of EU environmental policy.<sup>149</sup> Comparative overviews of choice-of-law rules for environmental damage disclose a diversity of connecting factors.<sup>150</sup> For example, some point exclusively to the *lex loci damni*, others exclusively to the *lex loci actus*. In some countries, the applicable law is determined pursuant to the principle of the closest connection. Some countries allow party autonomy. Some do not. But all of these connecting factors on their own and the unlimited acceptance of party autonomy have certain drawbacks when compared with the special choice-of-law rules of Rome II.

The connecting factor of the place of the damage is said to be protective of the victim's interests as it often coincides with their habitual residence and the place where the damaged

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<sup>147</sup> Brussels I Recast, Articles 1, 4-6.

<sup>148</sup> Rome II, Articles 1, 3.

<sup>149</sup> See n 21 above.

<sup>150</sup> Betlem and Bernasconi, above, n 21, 137-150; Bernasconi, above, n 32, 29-38; K. Fach Gomez, 'The Law Applicable to Cross-Border Environmental Damage: From the European National Systems to Rome II' (2004) 6 *Yearbook of Private International Law* 291, 296-303; C. von Bar, 'Environmental Damage in Private International Law' (1997) 268 *Recueil des Cours* 291, 363-377.

property is located.<sup>151</sup> It is further justified by the fact that the main objective of tort law is compensation for the harm suffered, often under the system of strict liability, not vengeance or retribution.<sup>152</sup> In the words of the European Commission: ‘The basic connection to the law of the place where the damage was sustained is in conformity with recent objectives of environmental protection policy, which tends to support strict liability.’<sup>153</sup> The downside of this connecting factor is that the victim cannot invoke the potentially higher environmental standards of the country of the tortious action.<sup>154</sup> According to the European Commission: ‘Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country’s laxer rules.’<sup>155</sup> Furthermore, since environmental damage can be suffered in more than one country, claims of victims of the same tortious action may fall under different applicable laws containing different environmental standards.<sup>156</sup> This is a serious downside for a rule called to deal with mass torts where ideally all victims should be treated equally.<sup>157</sup>

The connecting factor of the place of the event giving rise to the damage avoids the potential application of different laws to claims of victims of the same tortious action. It is also often justified with the tortfeasor’s interests in mind – the tortfeasor can be expected to know and comply with the law of the country of the event but not with the potentially multiple laws of the countries of the damage.<sup>158</sup> The downside of this connecting factor is that it gives

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<sup>151</sup> Betlem and Bernasconi *ibid* 144.

<sup>152</sup> Betlem and Bernasconi *ibid*; von Bar, above, n 150, 370.

<sup>153</sup> European Commission, Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (‘Rome II’), 22 July 2003, COM(2003) 427 final, 19. See also Rome II, Recital 16 justifying the *lex loci damni* as the default general connecting factor in Rome II.

<sup>154</sup> European Commission *ibid* 19; Betlem and Bernasconi, above, n 21, 140-141, 144.

<sup>155</sup> European Commission *ibid* 19-20.

<sup>156</sup> Betlem and Bernasconi, above, n 21, 144.

<sup>157</sup> Von Bar, above, n 150, 364.

<sup>158</sup> R. Michaels, ‘Two Economists, Three Opinions? Economic Models for Private International Law – Cross-Border Torts as Example’ in J. Basedow and T. Kono (eds), *An Economic Analysis of Private International Law* (Tübingen: Mohr Siebeck, 2006) 143, 151.

countries that already host polluting industries an incentive to decrease their environmental standards where the environmentally detrimental and degrading effects of those industries are exclusively or primarily felt across the border.<sup>159</sup> It also increases the incentives of operators moving to the country with the laxest standards and could lead to a ‘race to the bottom’.<sup>160</sup> The *lex loci actus* can be a law unconnected and unfamiliar to the victim, whose application they do not expect.<sup>161</sup> In international environmental litigation there is no justification for favouring the interests of polluters over those of victims.

The principle of the closest connection is also not an optimal solution. The most closely connected country will ordinarily be either the country of the damage or the country of the event giving rise to the damage. The downsides of these two connecting factors are therefore attributable to the principle of the closest connection.

With regard to party autonomy, there is a concern that the operator, typically a big corporation, might abuse its typically superior bargaining power and impose upon the potential victims of environmental damage the application of the law favourable for it. That is why Rome II does not allow *ex ante* choice-of-law agreements, assuming they are practically possible in the context of international environmental litigation.<sup>162</sup> *Ex post* choice-of-law agreements, on the other hand, are considered useful and appropriate as they enable the operator and all the victims to agree on the application of only one law, thus facilitating the settlement of disputes.<sup>163</sup> *Ex post* choice-of-law agreements do not raise concerns of the abuse

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<sup>159</sup> Betlem and Bernasconi, above, n 21, 140, 144; Nicita and Winkler, above, n 30, 690; von Bar, above, n 150, 370.

<sup>160</sup> European Commission, above, n 153, 19; Betlem and Bernasconi *ibid*.

<sup>161</sup> Von Bar, above, n 150, 370.

<sup>162</sup> In practice, the cost of *ex ante* choice-of-law agreements is prohibitive. Potential victims of an action might be numerous and difficult to determine in advance. The operator might therefore have to negotiate with a large number of potential victims. Such individual negotiations would seldom lead to identical outcomes. Some potential victims might refuse to negotiate. All of this leads to prohibitive cost of negotiation: Nicita and Winkler, above, n 30, 697.

<sup>163</sup> Betlem and Bernasconi, above, n 21, 146; Nicita and Winkler *ibid* 698. According to von Hein, above, n 21, 1699: ‘There may be legitimate procedural reasons to opt for the *lex fori*, even if it is less stringent than the law of another country, in order to have recourse to the highest civil court in countries such as Germany, where the



of the operator's typically superior bargaining power, since the victim, after the risk materialises, is in a position to assess the pros and cons of the application of different laws. They will not easily give up their rights under the law(s) applicable by default, and will agree to the application of another law only if they consider that to be in their interest. A further concern is that party autonomy should not be used to undermine the rights and obligations of third parties.

The special choice-of-law rules for environmental damage of Rome II are considered superior to choice-of-law rules based on the connecting factors considered above. By opting for the alternative application of the *lex loci damni* and the *lex loci actus*, Article 7 combines the positive characteristics of the two connecting factors, whilst avoiding most of their downsides. In particular, it reduces the problem of potential application of different laws to claims of victims of the same tortious action. It neither gives operators an incentive to establish their facilities at the border so as to enjoy the application of the neighbouring country's laxer environmental standards nor leads to a 'race to the bottom'. It provides for the default application of the *lex loci damni*. The default rule seems to be based on the assumption that the victim will typically commence proceedings in the country of their habitual residence where they suffer personal injury, property damage and economic loss, thus leading to the application of the local law.<sup>164</sup> But the victim can choose the *lex loci actus* if it is more favourable for them, i.e. if it contains higher standards. Furthermore, Article 7 is justifiable in terms of legitimate expectations, fairness and state interests.<sup>165</sup> Operators should expect the application of the law of the country of the tortious action and, to a certain extent, of the country of the damage. Victims, on the other hand, typically expect the application of the law of the country

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Federal Court of Justice may not review the application of foreign law.' Similarly, von Bar would allow only the choice of the *lex fori*: von Bar, above, n 150, 377.

<sup>164</sup> Fach Gomez, above, n 150, 300.

<sup>165</sup> Betlem and Bernasconi, above, n 21, 141; S.C. Symeonides, 'Rome II and Tort Conflicts: a Missed Opportunity' (2008) 56 *American Journal of Comparative Law* 173, 210-211; von Bar, above, n 150, 370-373.

where their injured interests are situated, but also have an interest in the application of the higher standards of the *lex loci actus*. The state of the tortious action has an interest in ensuring compliance with its standards, whereas the state of the damage has an interest in protecting its environment. In addition, the latter country has no interest in displacing higher standards of the former country as doing so would lead to a higher risk of environmental damage in the latter country. It is for all these reasons that Article 7 is said to pursue the cosmopolitan objective of raising the general level of environmental protection on the basis of the universally accepted principles of environmental law.<sup>166</sup>

But this conclusion does not sufficiently take into account the context in which international environmental litigation takes place. In some cases, as *Bier*<sup>167</sup> and *Land Oberösterreich v ČEZ*<sup>168</sup> demonstrate, the environmental damage and the tortious action occur in different countries. Indeed, Article 7 produces beneficial effects in this type of case. But both *Bier* and *Land Oberösterreich v ČEZ*, and presumably the vast majority of cases of this type that end up in EU courts concern intra-EU delocalised environmental torts. Presumably, the minority of cases concern delocalised environmental torts where one of the elements of the tort occurs within and the other outside the EU. It is unlikely that the Member State courts will be seised with a claim concerning the *Bier* type of case where both elements of the tort occur entirely outside the EU. The exception is where a delocalised environmental tort is committed by an overseas subsidiary of a European parent company. But this is the *Lubbe v Cape* type of case, to which this article now turns. In conclusion, the effect of Article 7 in the *Bier* type of case is to raise the level of environmental protection within the EU and at its borders, which in itself falls short of the proclaimed cosmopolitan objectives.

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<sup>166</sup> European Commission, above, n 153, 19-20; Rome II, Recital 25.

<sup>167</sup> [1976] ECR 1735.

<sup>168</sup> [2009] ECR I-10265.

### Choice of law and the *Lubbe v Cape* type of case

In the *Lubbe v Cape* type of case, environmental damage is typically suffered in a developing country as a result of the local activities of a multinational corporation carried on through a local subsidiary. Victims typically commence proceedings against the parent company in its home country for breaching a duty of care that it allegedly owes them directly. Sometimes victims argue that the parent should be liable for the actions of the subsidiary on the basis of the piercing of the corporate veil, enterprise liability, agency and similar doctrines.

A recent development in English substantive law, the Court of Appeal decision in *Chandler v Cape*,<sup>169</sup> might encourage overseas victims to bring ‘foreign direct liability’ cases in the English courts. This case resembles *Lubbe v Cape*,<sup>170</sup> the main difference being that it had no international elements. In a nutshell, Mr Chandler was employed by a defendant’s subsidiary. Asbestos was produced on the site where he worked. Some fifty years later Mr Chandler contracted asbestosis. As his former employer had been dissolved, he commenced proceedings against the parent company. The trial judge found in favour of the claimant. The Court of Appeal confirmed that a duty of care should be imposed on the defendant for the health and safety of its subsidiary’s employees because (i) the businesses of the two companies were in a relevant respect the same, and the parent (ii) had, or ought to have had, superior knowledge on some relevant aspect of health and safety in the particular industry, (iii) knew, or ought to have known, that the subsidiary’s system of work was unsafe, and (iv) knew, or ought to have foreseen, that the subsidiary or its employees would rely on its using that superior

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<sup>169</sup> [2012] EWCA Civ 525, [2012] 1 WLR 3111. For a general comparative law analysis with a European focus of whether a parent owes a duty of care to the employees of its overseas subsidiary and the people living in the vicinity of its operations see van Dam, above, n 43, in particular 246-251.

<sup>170</sup> [2000] 1 WLR 1545.

knowledge for the employees' protection.<sup>171</sup> It seems that a duty of care can be imposed on the same grounds on a parent company for the health and safety of people living in the area of its subsidiary's operations. If an international environmental litigation is brought in England under *Chandler*, the main question will be whether English law applies to the issue of the parent's liability because only then can a duty of care be imposed on a parent domiciled in England for the environmental damage caused by its overseas subsidiary under the principles laid down in *Chandler*.

The answer to this question will largely depend on the classification of the relevant issue. In *Chandler*, Arden LJ 'emphatically reject[ed] any suggestion that this court [was] in any way concerned with what is usually referred to as piercing the corporate veil'<sup>172</sup> and clarified that '[t]he question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees.'<sup>173</sup> The tortious classification of the relevant issue in English substantive law, however, is not determinative for the purposes of Rome II. This instrument applies 'in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.'<sup>174</sup> Some civil and commercial matters are expressly excluded from the scope of Rome II, most importantly for the present discussion

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<sup>171</sup> [2012] EWCA Civ 525, [2012] 1 WLR 3111, [80]. For an application of the *Chandler* precedent, where the victim's claim was unsuccessful, see *David Thompson v The Renwick Group plc* [2014] EWCA Civ 635, [2014] PIQR P18, noted by U. Grušić in (2015) 74 *Cambridge Law Journal* 30. In *Thompson*, the Court of Appeal noted, at [29], that the facts in *Chandler* were 'far removed from those which are under consideration in this appeal'. See also the decision of the District Court of The Hague in *Akpan v Shell* of 30 January 2013 LJM BY9854, holding that Royal Dutch Shell did not owe a direct duty of care to the Nigerian claimants under Nigerian law and the *Chandler* case, which was considered to form part of Nigerian law. The court distinguished *Chandler* on the ground, inter alia, that the special relationship of proximity between a parent company and the employees of its subsidiary operating in the same country cannot be equated with the bond between the parent of an international oil multinational corporation and individuals living near the oil installations of its subsidiaries in foreign nations. The District Court of The Hague also found that the other defendant in *Akpan v Shell*, the Royal Dutch Shell's Nigerian subsidiary, owed and breached a duty of care to one of the claimants. But a Dutch appeals court ruled on 18 December 2015 that Royal Dutch Shell could be held liable for oil spills at its Nigerian subsidiary and ordered the disclosure of documents that might shed light on the cause of the oil spills and whether leading managers were aware of them. See Ryngaert, above, n 65; <http://www.theguardian.com/global-development/2015/dec/18/dutch-appeals-court-shell-oil-spills-nigeria>. It should also be mentioned that *Akpan v Shell* is a pre-Rome II Regulation case.

<sup>172</sup> *ibid* [69].

<sup>173</sup> *ibid* [70].

<sup>174</sup> Rome II, Article 1(1).

‘non-contractual obligations arising out of the law of companies...such as...the personal liability of...members as such for the obligations of the company.’<sup>175</sup> Whether an issue is a matter of company law is determined by autonomous interpretation.<sup>176</sup> If the issue of whether a parent company is liable under the *Chandler* principles is a company law matter for the purposes of Rome II, then the traditional choice-of-law rules will determine whether English law applies. If not, the choice-of-law rules of Rome II will provide the answer.

### **(1) ‘Foreign direct liability’: a matter of tort law or company law?**

Separate legal personality of the company and its shareholders and their limited liability are two of the oldest doctrines in company law.<sup>177</sup> They are a product of the early Industrial Revolution. Capital needed by the companies of the first half of the nineteenth century to exploit the emerging technology and conduct major infrastructure projects was raised from the public through sale of shares. The resulting separation between investors and managers required the limitation of liability of the former to the amount of their investment. Moreover, any potential liability of subsequent purchasers of shares beyond the amount of their investment would have reduced the marketability of shares and affected the functioning of stock exchanges.<sup>178</sup> Limited liability also encourages entrepreneurial activity and reduces monitoring costs for investors, thus further promoting the marketability of shares and the diversification of investors’ share portfolios.

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<sup>175</sup> *ibid* Article 1(2)(d).

<sup>176</sup> *ibid* Recital 7; Case 29/76 *LTU v Eurocontrol* [1976] ECR 1541.

<sup>177</sup> Blumberg, above, n 53, 300-303; P. Muchlinski, ‘Limited Liability and Multinational Enterprises: A Case for Reform?’ (2010) 34 *Cambridge Journal of Economics* 915, 916-918. See *Salomon v Salomon* [1897] AC 22 (HL); *Adams v Cape Industries* [1990] 2 WLR 657.

<sup>178</sup> H. Hansmann and R. Kraakman, ‘Toward Unlimited Shareholder Liability for Corporate Torts’ (1991) 100 *Yale Law Journal* 1879; A. Lowenfeld, *International Litigation and the Quest for Reasonableness* (Oxford: Clarendon 1996) 84.

Limited liability arose at a time when, except by a special act of the legislature, a company could not own shares in another company.<sup>179</sup> In England this occurred in 1855 through the passing of the Limited Liability Act. Corporate groups became possible only later. The key feature of the latter development was the extension of limited liability to parent companies within corporate groups. However, as Blumberg notes, no court has ever examined, in a case involving the liability of a parent for the actions of its subsidiary, whether the doctrine of limited liability should protect the parent to the same extent that it protects shareholders/investors from corporate debts.<sup>180</sup> Unlike investors in a company who are detached from its management, a parent and its subsidiary form part of a single economic entity under the control of the former. When applied to involuntary creditors of a group, e.g. the victims of environmental damage caused by a subsidiary, the extension of limited liability shifts the risk of liability onto them.<sup>181</sup> But this shifting of risk is hard to justify. Unlike voluntary creditors of the group who knowingly and willingly assume the risks associated with the parent's limited liability, typically in return for consideration, involuntary creditors are in a fundamentally different position. The parent can externalise the risk without having to compensate them. Although it may be argued that limited liability is needed to ensure that the group will take on the enterprise risk, such argument is inapplicable where creating a subsidiary is done purely for business organisation purposes.<sup>182</sup> Even where a subsidiary is established as a vehicle for new and risky investments, the shifting of the risk of liability onto involuntary creditors is hard to justify in the light of the fact that they are typically uninsured and in a much worse position than the group to obtain insurance.<sup>183</sup> Furthermore, the risk of moral hazard

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<sup>179</sup> Blumberg, above, n 53, 302; Muchlinski, above, n 177, 918.

<sup>180</sup> Blumberg *ibid* 302-303.

<sup>181</sup> P. Davies and S. Worthington, *Gower and Davies' Principles of Modern Company Law* (London: Sweet & Maxwell, 9th ed, 2012) [8-7], fn 38; Hansmann and Kraakman, above, n 178, 1920-1921; E. McGaughey, 'Donoghue v Salomon in the High Court' (2011) 4 *Journal of Personal Injury Law* 249, 252-254 and 257; Muchlinski, above, n 177, 918-919.

<sup>182</sup> P. Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the UK Asbestos Cases' (2001) 50 *International and Comparative Law Quarterly* 1, 16.

<sup>183</sup> Hansmann and Kraakman, above, n 178, 1888; Muchlinski *ibid*.

speaks against the parent's limited liability in such situations.<sup>184</sup> The courts have never inquired whether this radical development required a reconsideration of the doctrine of limited liability. Although there have been calls for shifting the focus from the liability of individual members of a group to enterprise liability<sup>185</sup> such calls remain largely theoretical.

Limited liability, of course, is not absolute. In English company law, for example, exceptions include the piercing of the corporate veil and the common-law concepts of agency law. But these exceptions fail to provide an adequate solution in most cases. According to Blumberg, '[t]his is one of the most unsatisfactory areas of the law', '[w]ith hundreds of irreconcilable decisions and shifting rationales', that functions 'in an almost inscrutable manner behind conclusory metaphors such as "mere instrumentality", "sham", "adjunct", "agent", "alter ego", "puppet", or dozens of similarly murky terms'.<sup>186</sup> It is therefore not surprising that claimants in many cases of the *Lubbe v Cape* type attempt to avoid the piercing of the corporate veil and agency doctrines, and instead proceed on the basis of the parent company's direct tortious liability. Meeran, a partner in Leigh Day who was involved in many of the English cases described above, draws an interesting analogy between cases of this type and product liability cases:

'Save that one is dealing with "processes" rather than "products" an analogous duty to that owed by a manufacturer to consumers should be imposed ("process" liability).

Indeed here it is arguable that the proximity of a [transnational corporation] to overseas

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<sup>184</sup> Muchlinski *ibid.*

<sup>185</sup> C. Bright-Staath and B. Wray, 'Corporations and Social Environmental Justice: The Role of Private International Law' (European University Institute Law Working Paper No 2012/02), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2207317](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207317), 21-22; M. Dearborn, 'Enterprise Liability: Renewing and Revitalising Liability for Corporate Groups' (2009) 97 *California Law Review* 195; De Schutter, above, n 53, 42-46; Muchlinski, above, n 177; Stiglitz, above, n 28, 536-540. See also the US case of *In Re Amoco Cadiz*, No 78 M.D.L. 376, 1984 AMC 2123 (N.D. III. 1984).

<sup>186</sup> Blumberg, above, n 53, 307.

employees of its subsidiaries [and the people in its vicinity] is closer than that of a manufacturer to consumers of its products.’<sup>187</sup>

*Chandler*<sup>188</sup> is the first, and so far the only, English case where a parent was held directly liable towards the victims of its subsidiary’s operations.

The question whether the issue of a parent company’s liability under the *Chandler* principles falls under the company law exclusion from the scope of Rome II is determined by autonomous interpretation. Guidance can be found in the CJEU case law on the definition of the concept of ‘civil and commercial matters’ for the purposes of the Brussels jurisdictional regime. It will be remembered that in *Baten*<sup>189</sup> the CJEU held that it was necessary to examine the basis and the detailed rules governing the bringing of a claim to determine whether it concerned a civil or commercial matter.

Much has been written about the nature of the *Chandler* type of liability in English law. Almost all scholars agree with Arden LJ that the case was in no way concerned with the piercing of the corporate veil.<sup>190</sup> In essence, a duty of care was imposed on the parent company because control represented an assumption of responsibility, which, in turn, satisfied the requirements of proximity and justice demanded by the duty of care analysis in the English law of torts. *Chandler* has been criticised for conflating the four elements of control, assumption

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<sup>187</sup> R. Meeran, ‘The Unveiling of Transnational Corporations: A Direct Approach’ in M. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer, 1999) 161, 170.

<sup>188</sup> [2012] EWCA Civ 525, [2012] 1 WLR 3111.

<sup>189</sup> [2002] ECR I-10489.

<sup>190</sup> D. Brodie, ‘Employer’s Liability and Parent Companies’ [2011] 101(Aug) *Reparation Bulletin* 5, 5-6; Davies and Worthington, *Gower and Davies’ Principles of Modern Company Law*, [8-7], fn 38; J. Fulbrook, ‘*Chandler v Cape Plc*: Personal Injury: Liability: Negligence’ [2012] 3 *Journal of Personal Injury Law* C135; D. Gibbs, ‘*Chandler v Cape Plc*’ (2013) 24 *International Company and Commercial Law Review* N-8; M.A. Jones and others (eds), *Clerk & Lindsell on Tort, Second Supplement to the 20<sup>th</sup> Edition* (London, Sweet & Maxwell, 2012) [13-04]; D. Kershaw, *Company Law in Context: Text and Materials* (Oxford: OUP, 2<sup>nd</sup> ed, 2012) 147; M. Petrin, ‘Assumption of Responsibility in Corporate Groups: *Chandler v Cape Plc*’ (2013) 76 *Modern Law Review* 603; A. Sanger, ‘Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary’ (2012) 71 *Cambridge Law Journal* 478, 480. *Contra*: P. Yeoh, ‘A Parent Company’s Liability for a Subsidiary’s Action’ (2012) 33 *Business Law Review* 206.



of responsibility, proximity and fairness into one ‘pragmatic’ inquiry into circumstances in which a duty of care might exist, and introducing a degree of uncertainty with regard to each of them.<sup>191</sup> Nevertheless, one thing is clear. Control was the key factor for imposing a duty of care. The nature of the relevant control is therefore crucial for determining whether the *Chandler* type of liability concerns tort law or company law for the purposes of Rome II. As Joseph explains, the control test in direct liability cases is different than in piercing cases:

‘The issue is *not* control by the parent over the subsidiary. Rather, the relevant control is that exercised by the parent over the conduct which gave rise to the tort at issue. Thus, the relevant “control test” focuses on the extent to which a parent is somehow in control of the causes of the tort, which will be linked to, but will not be the same as, the issue of a parent’s control over its subsidiary.

Similarly, a parent corporation may attract direct liability if it undertakes to perform services for a subsidiary... For example, employees of subsidiaries have successfully sued parent companies on the basis that the parent undertook but failed to provide a safe working place on behalf of the subsidiary.<sup>192</sup>

Indeed, some of the relevant features of *Chandler* are that the parent had employed group medical and safety officers who had overseen the health and safety of employees across the group, that the contemporaneous documents, such as board minutes, showed that the parent had taken a direct interest in the working practices of the subsidiary that had employed the claimant, and that the parent and the subsidiary had shared directors who had been fully aware of what had been happening on the ground.<sup>193</sup> Looking from this perspective, the *Chandler*

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<sup>191</sup> Petrin *ibid.*

<sup>192</sup> Joseph, above, n 8, 136 (footnotes omitted).

<sup>193</sup> But see Muchlinski, above, n 7, 313 (‘where decision-making is so centralised, that major policies could not have been formulated or put into operation without the direct involvement of the parent company, the parent ought to be answerable. In these circumstances the parent is likely to be aware, or ought to be aware, of the risk to potential claimants of such group actions, and to be sufficiently proximate to hold a duty of care towards them.’);

type of liability is a matter of tort law for the purposes of Rome II. Consequently, the *Chandler* principles apply only if English law is the law governing the tort pursuant to the choice-of-law rules of Rome II.

*Chandler* is at the borderline of tort law and company law, and it is not inconceivable that the CJEU might classify the relevant issue as one of company law for choice-of-law purposes. Indeed, at least one scholar commenting on *Chandler* has adopted such a view.<sup>194</sup> Assuming that the relevant issue is classified as one of company law, would English law, including the *Chandler* principles, apply in a case of the *Lubbe v Cape* type brought in England against an English-based parent company? Such a classification would take the relevant issue outside the scope of Rome II, and the law governing that issue would be determined pursuant to the traditional English choice-of-law rules. The content of those rules, however, is unclear.<sup>195</sup> The choice seems to lie between the law of the forum, the law governing the parent, the law governing the subsidiary, the law governing the tort or any of those that is most favourable to the claimant. Scholarly opinions are divided. According to the authors of *Dicey, Morris & Collins*, all matters concerning the constitution of a corporation are governed by the law of its place of incorporation.<sup>196</sup> Similarly, Nygh favours the law governing the subsidiary on the basis that the relationship between a company and its shareholders should be determined by the law governing the company.<sup>197</sup> Some are in favour of the law governing the tort, especially when the tort is committed in the forum.<sup>198</sup> Lowenfeld proposes a unique solution

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Petrin, above, n 190, 613 ('a parent company's involvement in areas unrelated to health and safety, such as financial planning or purely operational matters, may be enough to find reliance in assumption of responsibility cases in which the underlying claim alleges personal injury. This approach means that a parent company could be liable even where there is no nexus between the parent's involvement and the harm that a claimant suffered.' (footnote omitted)).

<sup>194</sup> McGaughey, above, n 181, 261-262.

<sup>195</sup> C.H. Tham, 'Piercing the Corporate Veil: Searching for Appropriate Choice of Law Rules' [2007] *Lloyd's Maritime and Commercial Law Quarterly* 22.

<sup>196</sup> *Dicey, Morris & Collins*, above, n 83, Rule 175(2), [30-028].

<sup>197</sup> P. Nygh, 'The Liability of Multinational Corporations for the Torts of Their Subsidiaries' (2002) 3 *European Business Organization Law Review* 51, 74-75.

<sup>198</sup> Hansmann and Kraakman, above, n 178, 1921-1923.

that favours the claimant:<sup>199</sup> if the forum is where the parent is established and its law imposes a liability on it in respect of the actions of its foreign subsidiary, then that law should be applied; if, on the other hand, the law of the country of the injury imposes enterprise liability but the law of the parent does not, then the former law should be applied.

In conclusion, it seems that the issue of whether a duty of care should be imposed on a parent company under the *Chandler* principles is to be classified as tortious for choice-of-law purposes, thus triggering the application of the choice-of-law rules of Rome II. In the unlikely case that this issue is classified as pertaining to company law, the English traditional choice-of-law rules will determine the governing law. Although not free from doubt, it seems that the law applicable to this issue under the traditional rules would be the law of the subsidiary. If so, English law, including the *Chandler* principles, would not apply in the *Lubbe v Cape* type of case brought in the English courts against an English-based parent company, but typically the law of a developing country. This law will typically contain laxer environmental and compensation standards in comparison with the law of the parent company's home country.

## **(2) Choice of law in tort**

If the issue of whether a parent company is liable under the *Chandler* principles is classified as a tort law matter for the purposes of Rome II, the choice-of-law rules of that instrument will determine whether English law applies.

In the *Lubbe v Cape* type of case, important decisions concerning the operations of the subsidiary are typically taken by the parent company in its home country. Decisions vary from those concerning general issues of policy to those concerning day-to-day operations. The

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<sup>199</sup> Lowenfeld, above, n 178, 88-89.

notorious *Bhopal* litigation<sup>200</sup> represents one end of the scale, where the documents seem to have shown that the decision to shut off the refrigeration unit on the tank of methyl-isocyanate in Bhopal, India, which led to the warming up and explosion of the gas, was taken in the parent's US headquarters, and communicated by letter to the management of the Indian subsidiary. Typically, however, claimants allege that the parent's superior knowledge of the health and safety issues and knowledge of the subsidiary's unsafe system of work, coupled with its inaction, are the grounds for holding the parent liable. According to Article 7 of Rome II, the law applicable to environmental damage is by the default the *lex loci damni*, but the victim can choose the *lex loci actus*. In the *Lubbe v Cape* type of case, it is clear that the country of the damage is the country of the subsidiary. The key question is therefore whether the decisions concerning the operations of the subsidiary taken by the parent in its home country that start the chain of events resulting in environmental damage are to be considered as the relevant event for the purposes of Article 7.

Opinions are divided. Some scholars argue that the decisions taken by the parent company constitute the relevant event,<sup>201</sup> others that the relevant event is the tortious action of the subsidiary directly causing the environmental damage.<sup>202</sup> To answer the question, one

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<sup>200</sup> *In re Union Carbide Corp Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842 (S.D.N.Y. 1986).

<sup>201</sup> Anderson, above, n 26, 416-417; Bright-Staath and Wray, above, n 185, 14-19; De Schutter, above, n 53, 32; van den Eeckhout, above, n 138, 191; Enneking, above, n 70, 164, 216-218; N.M.C.P. Jägers and M-J. van der Heijden, 'Corporate Human Rights Violations: the Feasibility of Civil Recourse in the Netherlands' (2008) 33 *Brooklyn Journal of International Law* 833, 846, 853; C. Otero Garcia-Castrillon, 'International Litigation Trends in Environmental Liability: A European Union – United States Comparative Perspective' (2011) 7 *Journal of Private International Law* 551, 570-572; Ryngeart, above, n 65, 256. See also International Law Association, 'Transnational Enforcement of Environmental Law' (Conference Report Berlin 2004), available at <http://www.ila-hq.org/download.cfm/docid/DDDBD783-4062-4227-96F2BAA582F1524A> ('If the duty is one of exercising supervision over a subsidiary to prevent it from, inter alia, causing environmental harm it can be said that that duty must be exercised in the boardroom of the parent. If, on the other hand, it is framed as a duty to warn, then that duty is breached at the last place where that warning could have been given, usually the place where the harm occurs').

<sup>202</sup> Boskovic, above, n 21, 202; A.G. Castermans and J.A. van der Weide, 'The Legal Liability of Dutch Parent Companies for Subsidiaries' Involvement in Violations of Fundamental, Internationally Recognised Rights' (Report Offered to the Dutch House of Representatives, 15 December 2009), available at <https://openaccess.leidenuniv.nl/handle/1887/15699>, 53; Nygh, above, n 197, 80; von Bar, above, n 150, 365-366; D. Augenstein and other, 'Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union. Submitted by the University of Edinburgh' (June

should look closely at the choice-of-law rules of Rome II and at the case law on Article 7(2) of the Brussels I Recast. Article 7 of Rome II states that the law applicable to environmental damage is ‘the law determined pursuant to Article 4(1)’, or, if the victim so chooses, the law of the country of the event giving rise to the damage. According to Article 4(1), the applicable law for torts in general is the law of the country where the direct damage occurs regardless of where the indirect damage occurs. The focus on the direct damage is said to be required by the principles of legal certainty and foreseeability and by the need to ‘ensure a fair balance between the interests of the person claimed to be liable and the person sustaining the damage’.<sup>203</sup> The parent company’s decisions in its home country that start the chain of events resulting in environmental damage can be regarded as an ‘indirect event’ in the sense that it precedes the subsidiary’s tortious action causing the damage directly. Should the distinction between direct and indirect damage for the purposes of Article 4(1) be applied by analogy to the question of the nature of the event giving rise to the damage for the purposes of Article 7, this ‘indirect event’ would be disregarded for choice-of-law purposes.

There are no CJEU cases directly on this point. The case law on Article 4(1) of Rome II and Article 7(2) of the Brussels I Recast is potentially relevant. It will be remembered that the CJEU cases dealing with the jurisdictional treatment of indirect damage and indirect victims demonstrate that only the place where the direct victim suffers direct damage is of jurisdictional relevance.<sup>204</sup> The only CJEU case on the interpretation of Article 4(1) of Rome II, *Florin Lazar v Allianz SpA*,<sup>205</sup> follows this line of cases and confirms that it is only the place where the direct victim suffers direct damage that is relevant for the purposes of Article 4(1) of Rome II. Should this distinction be applied by analogy to the question of the nature of the event giving rise to

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2010), available at [http://en.frankbold.org/sites/default/files/tema/101025\\_ec\\_study\\_final\\_report\\_en\\_0.pdf](http://en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf), [222] (unclear, but seems to reject a wide interpretation of Article 7). See also Dickinson, above, n 113, [7.22A].

<sup>203</sup> Rome II, Recitals 15-17.

<sup>204</sup> *Dumez* [1990] ECR I-49; *Marinari* [1995] ECR I-2719.

<sup>205</sup> Case C-350/14 EU:C:2015:802.

the damage for the purposes of Article 7 of Rome II, both the ‘indirect event’ (i.e. the parent company’s decisions in its home country that start the chain of events resulting in environmental damage) and the actions of the ‘indirect tortfeasor’ (i.e. the parent whose decisions concern the operations of the subsidiary) would be disregarded for choice-of-law purposes. This logic seems to be supported by a recent CJEU decision in *Melzer v MF Global UK Ltd*.<sup>206</sup> Here, a German private investor brought a tortious claim in Germany against an English broker trading in futures on the basis that he had been solicited as a client in Germany by a German company. The defendant seems to have been sued both for its own alleged wrongdoing in England and for assisting the German company’s alleged wrongdoing in Germany.<sup>207</sup> Furthermore, it seems to have been conceded that the only viable jurisdictional basis was with respect to the German company’s alleged wrongdoing in Germany, which the defendant had allegedly assisted.<sup>208</sup> As Dickinson explains, this case ‘appears to be an attempt to turn the tort upside down – to treat a tort committed in London with facilitation from Germany, as one committed in Germany with facilitation from London’.<sup>209</sup> The CJEU interpreted Article 5(3) of the Brussels I Regulation, the predecessor of Article 7(2) of the Brussels I Recast, strictly and refused to allow the German courts to assume jurisdiction over the English co-perpetrator. Similarly, in the *Lubbe v Cape* type of case victims attempt to treat a tort committed in a developing country with facilitation from a developed country as a tort committed in a developed country. Should *Melzer* be applied by analogy to Article 7 of Rome II, this argument is bound to fail.

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<sup>206</sup> Case C-228/11 EU:C:2013:305, [2013] QB 1112.

<sup>207</sup> *ibid* [14].

<sup>208</sup> *ibid* [16].

<sup>209</sup> A. Dickinson, comment to G. Cuniberti, ‘ECJ Refuses to Extend the Scope of Article 5(3) Brussels I to Coperpetrator’ (June 2013), available at <http://conflictoflaws.net/2013/ecj-refuses-to-extend-the-scope-of-article-5-3-brussels-i-regulation-to-coperpetrator/>.

Two cases that are arguably to the point are the English High Court cases of *Anton Durbeck GmbH v Den Norske Bank ASA*<sup>210</sup> and *Vava v Anglo American South Africa Ltd.*<sup>211</sup> In the first case the defendants were alleged to have unlawfully interfered with the claimant's contracts for the carriage of goods by arresting the vessel in Panama. The decision to arrest the vessel was taken by the defendant's London branch. According to the court:

‘In one sense the decision of the branch of the Defendants in London can be said to have given rise to and to be the origin of the damage because the arrest is executed pursuant to that decision. However, it can also be said that the arrest is the event which gives rise to the damage and is the origin of the damage because without the arrest there would be no interference with the contracts of carriage.’<sup>212</sup>

The court held that the event giving rise to the damage for the purposes of Article 5(3) of the Brussels I Regulation occurred in Panama. In *Vava v Anglo American South Africa Ltd.*,<sup>213</sup> the court was concerned with the question whether the defendant, a South African subsidiary of an English-based parent company, was domiciled in England for jurisdictional purposes. The claimants argued that the defendant's central administration was in England because the management entrepreneurial decisions relating to its business had been taken in England at the headquarters of the parent. The court, however, held that a company's central administration was not where such decisions were taken, regardless of whether they were taken by the company, its parent or anyone else. An important reason was that accepting the claimants' argument would mean that if such decisions were determined predominantly by the wishes of a bank or other institution on which it relied for its financial survival, then the defendant would have its central administration where the bank or institution took its decisions. These two cases

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<sup>210</sup> [2002] EWHC 1173 (Comm), not appealed on this point.

<sup>211</sup> [2013] EWHC 2131 (QB), [2013] Bus LR D65.

<sup>212</sup> *Anton Durbeck GmbH v Den Norske Bank ASA* [2002] EWHC 1173 (Comm), [15].

<sup>213</sup> [2013] EWHC 2131 (QB), [2013] Bus LR D65.

show that the English courts interpret restrictively the relevant jurisdictional connecting factors in cases in which there are joint tortfeasors. If these cases are applied by analogy to the choice-of-law context in the *Lubbe v Cape* type of case, the tortious action of the subsidiary directly causing environmental damage will be considered as the relevant event for the purposes of Article 7 of Rome II.

It is also important to look at the High Court decision in *RTZ v Connelly*<sup>214</sup> and the second Court of Appeal decision in *Lubbe v Cape*.<sup>215</sup> Wright J, when dealing with the case after the decision of the House of Lords in *RTZ v Connelly*,<sup>216</sup> was clear that the cause of action had arisen in Namibia for the purposes of the common law choice-of-law rules. It was not the making of decisions in England that was crucial, but the concrete results that this produced in Namibia.<sup>217</sup> His Lordship also referred to a decision of the Court of Appeal to similar effect in *Durham v T&N Plc*.<sup>218</sup> In *Lubbe v Cape*, the second Court of Appeal<sup>219</sup> departed from the decision of the first Court of Appeal<sup>220</sup> that, for the purposes of the common law choice-of-law rules, the breach of the parent's duty of care had occurred in their boardroom in England and held that the obligations of the parent towards the employees of the subsidiary and the people in the vicinity were to be determined under South African law. Although not made under Rome II, these decisions illustrate the likely answer to the question whether the decisions concerning the operations of the subsidiary taken by the parent in its home country are to be considered as the relevant event for the purposes of Article 7.

Instead of framing their claims in terms of environmental damage, victims may claim for the alleged violation of their human rights. Rome II does not have special choice-of-law

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<sup>214</sup> [1999] CLC 533, 545.

<sup>215</sup> [2000] 1 Lloyd's Rep 139.

<sup>216</sup> [1998] AC 854.

<sup>217</sup> [1999] CLC 533, 545-546.

<sup>218</sup> 1 May 1996, unreported.

<sup>219</sup> [2000] 1 Lloyd's Rep 139, 161, *per* Pill LJ.

<sup>220</sup> [1999] ILPr 113, [55], *per* Evans LJ.



rules for human rights claims. The general choice-of-law rules of Article 4 would apply and point to the application of the law of the country of the direct damage. Since the direct damage in the *Lubbe v Cape* type of case occurs in the subsidiary's country, the law of that country will govern. It is highly unlikely that that law will be displaced in favour of the law of the parent company's home country under the escape clause of Article 4(3).

In conclusion, regardless of how a claim for environmental damage in the *Lubbe v Cape* type of case is framed, the applicable law is almost certain to be the law of the country of the subsidiary, typically a developing country. This law will typically contain relatively lax environmental and compensation standards in comparison with the law of the parent company's home country. Consequently, even though victims of environmental damage are able to obtain the jurisdiction of the English courts over the parent established in that country, they will struggle to find lawyers willing to take on their case on a 'no win no fee' basis.

## **Conclusion**

This article examines whether, and to what extent, the rules of European private international law, which frame international litigation in the Member State courts, contribute to the regulation of the environment. Contrary to the majority opinion, this article argues that these rules fail in their pursuit of the cosmopolitan goals of EU environmental policy. They are therefore an inadequate tool of global governance.

After outlining the regulatory potential of private international law with regard to the protection of the environment, this article observes that international environmental litigation in EU courts is effectively confined to two types of case. In the first type private claimants sue an operator whose actions in one country directly cause environmental damage elsewhere. In

the second type of case the claim is brought by victims against a European-based corporation operating in an extraction or chemical industry whose overseas subsidiary, typically in a developing country, causes environmental damage. Proceedings are commenced by private claimants only, arguably because European private international law excludes from its scope claims by public authorities against foreign operators. Claims by public authorities, however, are crucial in cases of pure environmental damage where no individual suffers actionable personal injury, property damage or economic loss or where such harm is thinly spread among a number of victims, as recognised by the Environmental Liability Directive. The second type of case is limited to extraction and chemical industries not just because of their characteristics and location but also because such industries tend to be run by hierarchical parent-subsidiary corporate groups. Other industries tend to be run by corporate groups with more open and flexible forms of corporate organisation or business networks, where the chances of ascribing liability to the parent company/the controlling enterprise(s) are so low that arguably no lawyer will take on a case on a 'no win no fee' basis.

The rules of European private international law also have the following regulatory effects. By allowing the victim of environmental damage to choose both the forum and the applicable law between the courts/law of the country of the damage and the courts/law of the country of the event giving rise to the damage, the Brussels I Recast and Rome II address relatively adequately the first type of case. But the cases of this type that are brought in EU courts will almost always concern actions committed in the EU and/or environmental damage suffered in the EU. By guaranteeing the victim in this type of case the choice of the law of an EU Member State, Rome II helps to raise the level of environmental protection within the EU and at its borders. Crucially, European private international law fails to deal with the globally more important and frequent cases of the second type. The Brussels I Recast allows the claimants in this type of case to commence proceedings in the EU against a parent company

domiciled here, although it gives an amount of discretion to the Member State courts to stay their proceedings when parallel or related proceedings are already pending in a third country. The choice-of-law rules of Rome II, however, arguably lead to the application of the law of the country of the subsidiary, typically a developing country. This law will typically contain laxer environmental and compensation standards in comparison with the law of the parent's home country, which will make it hard for victims to obtain representation on a 'no win no fee' basis. Importantly, claimants in this type of case in the English courts will be unable to invoke the type of liability recently established in the English law of torts in *Chandler v Cape*.<sup>221</sup> European private international law therefore effectively shields European multinational corporations from liability for the environmentally detrimental and degrading effects of their overseas operations.

For these reasons, the rules of European private international law overall fail in their pursuit of the cosmopolitan goals of EU environmental policy. In fact, they often lead to outcomes that are contrary to the universally accepted environmental law principles on which EU environmental policy is based such as the principles that environmental damage should as a priority be rectified at source and that the polluter pays.

It is worrying to see similar developments occurring elsewhere. In April 2013, for example, the US Supreme Court effectively barred victims of gross violations of human rights and the environment outside the US by foreign corporations from bringing ATCA claims. A year earlier UK Parliament passed a bill overhauling the system of conditional fees to the detriment of claimants in international environmental litigations. Under the new rules, the claimants' lawyers can recover from the losing defendant only 'proportionate' (as opposed to 'necessary') legal costs and no success fees and litigation insurance premiums.<sup>222</sup> Coupled

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<sup>221</sup> [2012] EWCA Civ 525, [2012] 1 WLR 3111.

<sup>222</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss 44, 46.

with the fact that, after the entry into force of Rome II, the assessment of damages is a matter for the law governing the tort,<sup>223</sup> often the law of a developing country, it is likely that these developments will have a chilling effect on international environmental litigation in England.<sup>224</sup> It should not be forgotten that the House of Lords in *Lubbe v Cape*<sup>225</sup> and *Connelly v RTZ*<sup>226</sup> regarded the shortcomings of the Namibian and South African legal systems which had a similar effect on international environmental and human rights litigation in these countries as leading to a denial of justice. It is likely that the future of international environmental litigation in England will depend on the willingness and ability of non-governmental environmental organisations to bring and sustain this type of litigation, as is the case now in the Netherlands and Sweden.<sup>227</sup> The costs of such litigation, however, may turn out to be prohibitive.

In order to achieve fully its regulatory potential, the rules of European private international should be improved. The Brussels I Recast and Rome II should include within their scope claims by public authorities against foreign operators. The rules of the Recast that allow the courts to stay their proceeding when parallel or related proceedings are already pending in a third country should be applied restrictively. The victims of environmental damage in the second type of case should be allowed to choose the law of the country of the parent company. Admittedly, there are scholars who believe that the rules of European private international are already along those lines. After a detailed examination of these rules,

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<sup>223</sup> Rome II, Article 15(c).

<sup>224</sup> 'Legal Aid Cuts will Stop Cases like Trafigura, UN Official Warns', *The Guardian*, 16 June 2011.

<sup>225</sup> [2000] 1 WLR 1545.

<sup>226</sup> [1998] AC 854.

<sup>227</sup> In *Bier* [1976] ECR 1735, *Akpan v Shell* (2013) LJN BY9854 (the Netherlands) and *Arica Victims KB v Boliden Mineral AB* (2013) T. 1021–13 (Sweden), three NGOs, the Reinwater Foundation, Friends of the Earth Netherlands (Milieudefensie) and Arica Victims KB, respectively, played a key role in the proceedings. Transnational environmental cases have been brought in the Netherlands despite the following features of Dutch civil procedure: the 'loser pays' rule, the lack of a system of conditional or contingency fees, of legal aid for foreign claimants, of punitive damages, of class actions, restrictive rules on disclosure: Castermans and van der Weide, above, n 202, 61-69; Jägers and van der Heijden, above, n 201, 860-862; Ryngaert, above, n 65.

however, this article concludes that the restrictive, non-environmental-friendly interpretation is more likely. It is for this reason that the Brussels I Recast and Rome II should be amended to expressly include within their scope claims by public authorities against foreign operators<sup>228</sup> and to expressly allow the victim to choose the law of the parent's country. On their own, however, these improvements will not be enough. They should be complemented with adequate rules on the funding of international environmental litigation and liability of parent companies in corporate groups and dominant enterprise(s) in business networks for environmental damage caused by their subsidiaries, affiliates and cooperating enterprises. At one point, it seemed that English law would move in this direction. However, the proposed Corporate Responsibility Bill 2003 introduced in the House of Commons never made it through to the second reading.<sup>229</sup> The time is ripe for these issues to be taken up by the EU legislator.

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<sup>228</sup> See International Law Association, 'Transnational Enforcement of Environmental Law' (Final Conference Resolution Toronto 2006), Rule 4(2).

<sup>229</sup> Bill 129. For similar unsuccessful initiatives in other countries see the 2000 and 2006 US Bills for a Corporate Code of Conduct Act, H.R. 4596 (106<sup>th</sup>) and 5377 (109<sup>th</sup>), available at <https://www.govtrack.us/congress/bills/109/hr5377>, and the Australian 2000 Corporate Code of Conduct Bill, available at [http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s259\\_first/toc\\_pdf/0016320.pdf;fileType=application%2Fpdf#search=%22legislation/bills/s259\\_first/0000%22](http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s259_first/toc_pdf/0016320.pdf;fileType=application%2Fpdf#search=%22legislation/bills/s259_first/0000%22).