Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters

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Abstract

Increasing awareness of industrial and commercial activity's impact on the natural environment and the planet's climate is giving rise to a new global normative order that poses challenges to business. The United Nations (UN) 2030 Agenda: Transforming Our World, combined with the Ruggie Principles, the Organisation for Economic Co-operation and Development guidelines, the UN Global Compact, and other recent instruments all contribute to reinforcing corporate responsibility for sustainable development. At stake is companies' responsibility not just for their own operations but also for those of their subsidiaries abroad. While environmental law treaties generally establish (long-term) courses of action for States, they usually do not directly address the conduct of private actors. Yet the role of business is crucial. Against this background, civil litigation in national courts is of critical importance to define and enforce transnational corporate responsibility. Initially, litigating in the United States of America (USA) seemed to be a promising route, but recent Supreme Court of the United States decisions have raised considerably the jurisdictional threshold for such proceedings; the application of *forum non conveniens* (*FNC*) poses additional hurdles. By contrast, in Europe, the Brussels I (recast) Regulation offers the company's domicile as a general ground of jurisdiction in tort-based environmental actions, excluding *FNC*. Although the Regulation leaves it to national law to determine whether a parent company based in the European Union (EU) may be sued as an anchor defendant for claims for environmental damage caused by its subsidiary based outside the EU, recent court decisions in the United Kingdom and the Netherlands suggest that the EU may become a more promising arena for such joint proceedings against parent and subsidiary than the USA.

These developments highlight the need, and offer principles and building blocks, for renewed efforts to establish a global framework for civil litigation in the environmental realm, including climate change matters with common rules on jurisdiction, applicable law, enforcement of decisions, and judicial and administrative cooperation. The article

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concludes by suggesting starting points for such an initiative, which, as a complement to top-down approaches, should facilitate essential bottom-up ways of enforcing environmental and climate protection standards.

I. Introduction

1. The publication in 1987 of *Our Common Future*,[1] prepared by the United Nations World Commission on Environment and Development, put environmental issues firmly on the political agenda for the first time. The report introduced the term 'sustainable development', which it defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[2] It stressed that economy and ecology 'are becoming ever more interwoven—locally, regionally, nationally and globally' and warned against the increasing adverse effects of global warming.[3] It laid the groundwork for a series of global initiatives, starting with the 1992 Earth Summit, which adopted the Rio Declaration on Environment and Development and which continue, recently culminating in the 2015 Paris Agreement.[4]

2. *Our Common Future* highlighted the role of civil society, including industry: 'Industry is on the leading edge between people and the environment. It is perhaps the main instrument of change that affects the environmental resource bases of development, both positively and negatively.'[5] Indeed, over the past decades, the ecological effects of industrial and commercial activity have become an ever-increasing challenge to business: on the one hand, to innovate and develop products, services, and business models more adapted to sustainable growth and, on the other, to face new forms of responsibility, accountability, and, indeed, liability. This twofold challenge arises from a wider, ongoing paradigm shift—initiated by the Brundtland report—that leads towards a global economy that is no longer primarily dependent on fossil energy—a shift that is nourished by an ever-growing, globally shared concern over the state of the natural environment, including global warming.

3. A paradigm shift of such impact will inevitably meet resistance from the existing dominant (political and business) culture. So, it will not take place without contestation. Contestation may take different forms:

- social protest—for example, the 1999 Seattle World Trade Organization protests that opened the minds of many to a new way of thinking about

[1] *Our Common Future*, known as 'the Brundtland Report' after its Chair, Gro Harlem Brundtland; Oxford University Press, 1987.

[2] 'It contains within it two key concepts: the concept of "needs", in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs' (n 1) 43. These two key concepts reappear in the image of the 'donought', with its 'social foundation' and 'ecological ceiling', in Kate Raworth, *Donought Economics* (Oxford, 2017).

[3] *Our Common Future* (n 1) in particular Ch 7 II Fossil Fuels: The Continuing Dilemma.

[4] Adopted on 12 December 2015, first signed on 22 April 2016, entered into force on 4 November 2016, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&lang=en (accessed 14 February 2018).

[5] *Our Common Future* (n 1) 329.

globalization and the effects of corporations' operations on people and the environment in a globalized economy and, following the financial crisis, the Occupy movement;
- political activism—for example, by green parties that now exist in most countries with a democratic system, campaigning on an environmental platform; and
- litigation through the judicial system, which is often in the form of public interest litigation.

Ideally, such contestation should occur in a non-violent way, through available institutional channels. Therefore, enabling non-violent contestation, including litigation, is an inherent—indeed, fundamental—function of the law, both public and private.[6]

4. In a globalizing world economy, transnational court litigation is of particular importance. Not only to the normal course of business but also especially in situations where transnational industrial and commercial activity impacts negatively on people and the environment. The political and legal remedies to address such adverse cross-border and, indeed, global externalities remain primarily bound to the nation-state, as the international legal order offers only very limited means of addressing them. Through transnational private litigation in national courts, plaintiffs, including public interest groups, seek to prevent or stop harmful conduct and/or to obtain compensation for harm already done. Such litigation often also has a strategic component, where it contests the general conduct of private actors, such as the commercial policies of multinational corporations and, indeed, the conduct of States. Indeed, the mere availability of transnational litigation in national courts may offer a background for negotiation and regulation.

5. This contribution will first recapture some of the parameters of what may be seen as an emerging new normative order for business in our world in the years ahead (section II).

It will then turn to recent developments in transnational private litigation in environmental matters based on human rights and civil liability (tort) law; as we will see, the two are often linked (section III).

Finally, building on the principles identified and lessons drawn from transnational private litigation, it will suggest some 'building blocks' for a possible global legal framework for civil litigation in environmental matters (section IV).[7]

[6] On contestation as a form of legitimate 'private ordering' – 'using private power to control private power' – see Robert Wai, 'Private v Private: Transnational Private Law and Contestation in Global Economic Governance', in Horatia Muir Watt and Diego Fernández Arroyo, *Private International Law and Global Governance* (2014), 34, at 42 *et seq.*

[7] Parts of this contribution build and draw on the author's 'The Global Horizon of Private International Law', in *Recueil des Cours de l'Académie de Droit International* 2015 (2016; Vol. 380) 9-108.

II. The emerging normative order for business relating to the environment

6. There is no dearth of global principles and rules concerning environmental protection, sustainable development, and climate change. But the available international instruments generally establish responsibilities—often long-term responsibilities—for States rather than for private actors. Yet, there is increasing awareness that, as *Our Common Future* points out, without a collective effort involving the private sector, global goals will not be achieved. Thus, the 2030 UN Agenda for Sustainable Development, *Transforming Our World*,[8] with its 17 Sustainable Development Goals (SDGs) seeks to bring together governments, the UN system, as well as the private sector and civil society to meet the 'immense challenges to sustainable development ... climate change being one of the greatest'.

7. Regarding the role of business, the UN Guiding Principles, or 'Ruggie Principles', must be mentioned.[9] The Guiding Principles specifically address corporate social responsibility in relation to human rights. While the primary responsibility to protect human rights lies with States, companies everywhere, large and small, have a responsibility to respect human rights—to avoid having negative impacts on these rights and to address such impacts where they do occur—and they also have a certain responsibility to provide remedies when things have gone wrong.

8. According to the Ruggie Principles, corporate social responsibility applies to companies' own operations as well as to all of their business relationships, including those throughout their value chain. In a world of global production chains and markets, responsibility for human rights does not stop with companies' own operations and employees and the activities they directly control. Nor is it just about first tier or strategic suppliers. It includes impacts that may be much more remote in their value chain and caused by third parties over which they have limited influence.

9. John Ruggie argues that there is currently at the global level a:

> fundamental institutional misalignment ... between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed.[10]

[8] Adopted by the General Assembly of the United Nations on 25 September 2015, 'effective 1 January 2016'.

[9] *Guiding Principles for the Implementation of the 2008 United Nations 'Protect, Respect and Remedy' Framework for Business and Human Rights*, endorsed by the UN Human Rights Council in 2011.

[10] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (2007; UNGA doc. A/HRC/4/35) 3.

Where the host State of the activities of a (transnational) company is a developing country, it often lacks strict regulations for its protection and/or the power to enforce them. In extreme cases, the 'institutional misalignment' may get out of hand and lead to industrial environmental catastrophes, sometimes in circumstances where the foreign company is accused of complicity ('aiding and abetting') in human rights violations committed by the host government against its own citizens or foreigners on its territory.[11]

10. The Ruggie Principles are not binding, and they do not specifically address the natural environment. Nonetheless, they have become the dominant paradigm for discussing corporate social responsibility. Moreover, abuses of human rights often go hand in hand with a lack of care for the environment. Indeed, nearly a third of the human rights cases investigated by Ruggie alleged environmental harms that had impacts on human rights. And the very concept of sustainable development—the essence of the SDGs—first recognized in *Our Common Future*, implies the integrated and interdependent protection of human rights and the environment.[12]

11. The SDGs and the Ruggie Principles combined support an emerging integrated corporate responsibility for sustainable development that applies to companies' own operations and to all of their business relationships, including those throughout their value chain.

12. More detailed indicators for such an environmental corporate responsibility can be found in various soft law and self-regulation tools, including:

- the 2011 Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises, which contain Chapter 6 on the Environment;[13]
- the UN Global Compact initiative,[14] to which almost 10,000 companies and 4,000 non-businesses have subscribed and which includes environmental principles along the lines of those of the OECD guidelines; meanwhile, the Global Compact also embraces the SDGs;
- the International Organization for Standardization's 26000 Guidance on Social Responsibility,[15] building on the 14001 standards for companies and

[11] See below, Nos. 14, 21, 35–39.

[12] See Katinka Jesse and Erik Koppe, 'Business Enterprises and the Environment', 4 (December 2013) *The Dovenschmidt Quarterly*, 176-89, arguing that the Ruggie Principles provide a model to address State duties and business responsibilities to care for the environment.

[13] http://www.oecd.org/daf/inv/mne/48004323.pdf (accessed 14 February 2018). Commentary 71 encourages enterprises to work to raise the level of environmental performance in all parts of their operations, even where this may not be formally required by existing practice in the countries in which they operate. In this regard, enterprises should take due account of their social and economic effects on developing countries. An important feature of the Guidelines is that, although non-binding, they require adhering countries to set up National Contact Points, with reporting obligations to the OECD Investment Committee, to further their effectiveness.

[14] https://www.unglobalcompact.org/ (accessed 14 February 2018).

[15] https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en (accessed 14 February 2018).

organizations of all kinds looking to manage their environmental responsibilities.[16]

For our purposes, there is no need to go into detail with respect to the legal status of these and other texts.[17] Clearly, they remain soft law and comprise self-regulating tools. But, together, they offer broad support for a new global normativity that forms a background for ongoing and future developments in transnational private litigation in environmental matters.[18]

III. Recent developments in transnational private environmental litigation

13. As noted, environmental law treaties generally establish (long-term) courses of action for States rather than concrete binding obligations from which rights and obligations of citizens derive. In this regard, they differ from global and regional human rights instruments as well as uniform private law and private international law instruments, which are generally cast in language such that they can be directly invoked by those affected and applied by national courts and other authorities. Thus, both human rights law and private (international) law, often in combination, play a significant role in advancing and enforcing environmental law.

1. Human rights litigation

14. Some recent human rights instruments, such as the African Charter of Human and Peoples Rights, make express provision for a right to a sound environment. In *SERAP v Nigeria*, a public interest case, the Court of Justice of the Economic Community of West African States found that Nigeria had violated its obligations, under Article 24 of the Charter,[19] towards a Nigerian non-governmental organization by not doing enough to protect the Niger delta from oil pollution by Royal Dutch Shell (RDS).[20] This judgment is also interesting in light of the

[16] Cf. Martje Theuws and Mariette van Huijstee, *Corporate Responsibility Instruments: A Comparison of the OECD Guidelines, ISO 26000 & the UN Global Compact*, http://www.somo.nl/wp-content/uploads/2013/12/Corporate-Responsibility-Instruments.pdf (accessed 14 February 2018).

[17] For an *Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility* see https://www.oecd.org/corporate/mne/40889288.pdf (accessed 14 February 2018).

[18] A further step, regarding obligations of companies regarding climate change in light of the Paris Agreement's aims of '[h]olding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C', has recently been made by the publication by the Expert Group on Climate Obligations of Enterprises of the Amsterdam *Principles of Climate Obligations of Enterprises*, see https://climateprinciplesforenterprises.files.wordpress.com/2017/12/enterprisesprincipleswebpdf.pdf (accessed 14 February 2018), and the contribution by Jaap Spier to this volume.

[19] Art. 24: 'All peoples shall have the right to a general satisfactory environment favorable to their development'.

[20] Court of Justice ECOWAS, 14 December 2012, *SERAP v Federal Republic of Nigeria*. The court ordered the Nigerian government to ensure restoration of the Niger Delta damaged by oil exploitation, prevent further damage, and hold accountable the responsible actors, http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf (accessed 14 February 2018). This case was preceded by a similar (*ex parte*) decision of the African Commission on Human Rights under the African Charter in a public interest case

ongoing proceedings in the United Kingdom (UK) and the Netherlands against RDS, to which we will return, as it highlights the host countries' own responsibilities in dealing with environmental issues.[21]

15. In addition, provisions of global and regional human rights treaties that do not specifically address the environment have been successfully invoked before human rights bodies and courts in support of procedural and substantive State obligations in relation to environmental harm:

- procedural obligations have been found to include the duty to provide persons with access to environmental information and enable them to assess in advance any harm to the environment, to participate in decisions concerning their environment, and to have access to legal remedies;[22]
- substantive obligations include the State's duty to adopt and implement a legal framework to strike a fair balance between the protection of the environment and other interests and the protection of persons, including vulnerable groups such as children, women, or indigenous peoples, against environmental harm by private actors, including in transboundary cases.[23]

16. With respect to the European Convention of Human Rights (ECHR), the European Court of Human Rights (ECtHR) has derived such obligations both from Article 2 (right to life) and Article 8 (right to private and family life).[24] The Inter-American Court of Human Rights, in a further step, has interpreted the Inter-American Convention on Human Rights in ways that strengthen the public interest dimension of environmental issues.[25]

concerning damage allegedly caused by oil exploitation of the Niger Delta, lodged by a Nigerian and a New York based NGO against Nigeria. The Commission found violations of Art. 24 and a number of other provisions of the African Charter, *Communication 155/96*, communicated to the parties on 6 June 2001, at http://www1.umn.edu/humanrts/africa/comcases/155-96b.html (accessed 14 February 2018).

[21] See below, Nos. 21, 35–39.

[22] Support for procedural rights in environmental matters comes from Principle 10 of the aforementioned 1992 *Rio Declaration on Environment and Development*, *A/Conf.151.151/26* (Vol.1) 13 June 1992, 31 ILM 874, which in turn has inspired the UNECE 1998 Aarhus Convention on Access to Information, Public Participation, in Decision-making and Access to Justice in Environmental matters (see Section IV below).

[23] See John Knox, *Mapping Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (December 2013; A/HCR/25/53), http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx (accessed 14 February 2018).

[24] See, e.g., ECtHR 9 December 1994, application 16798/90, *Lopez Ostra v Spain*; 30 November 2004, application 48939/99, *Öneryildiz v Turkey*; 10 November 2004, application 46117/99, *Taşkın and Others v. Turkey*; and recently 24 July 2014, applications 60908/11, 62110/11, 62129/11, 62312/11, and 62338/11, *Brincat and others v Malta.*

[25] E.g., IACtHR 28 November 2007, *Saramka v Suriname*, and 27 June 2012, *Kichwa Indigenous People of Sarayaka v Ecuador*, in which the Court supports the *collective* rights of indigenous peoples in environmental matters. Cf. Riccardo Pavoni, 'Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights', in Ben Boer, *Environmental Law Dimensions of Human Rights* (Oxford, 2015), 69 *et seq.* In its recent Advisory Opinion OC-23/17 of 15 November 2017, the Court gave a broad interpretation of the concept of jurisdiction of Art. 1 of the Interamerican Convention on Human Rights and found that for transboundary environmental damage the exercise of jurisdiction over a person

Human right norms may, in turn, inform civil law norms and form a basis for private litigation against governments—for example, regarding climate change.[26]

2. *Transnational civil litigation*

17. Civil lawsuits through which citizens seek relief to obtain damages for, or injunctions to halt or reduce environmental harm, may extend beyond national borders either because the environmental harm and the event causing it are located in different States—that is, because of the cross-border effects of the harm—or because legal action is taken against a transnational company in the courts of its home State—or a third State in which it does business, which typically has been the USA—over environmental harm allegedly caused by that company, its subsidiary, or contractors, in the host State where they are operating. In the latter case, the cross border element is not the effect of the harm but, rather, the corporate legal structure or the economic organization of the company.[27]

18. Private international law often plays a key role in such lawsuits. Choice-of-law rules will designate the applicable law, which will determine if, and to what extent, economic actors can be held accountable and liable for their activities at home or abroad. Rules on adjudicatory jurisdiction will determine if and where they are amenable to suit and, in the case of transnational companies, whether such actions may include their subsidiaries or contractors for their activities in the host State.

19. Until not so long ago, the USA was the preferred country for transnational civil litigation, including in environmental cases. But recent developments in both the USA and the European Union (EU) suggest that the USA is no longer the quasi-automatic choice. In fact, we already see a shift in litigation strategies—particularly, for transnational environmental corporate liability—with respect to EU-based (parent) companies active in developing countries.

20. The core issue that has given rise to important case law developments is adjudicatory jurisdiction. Jurisdiction is a threshold question; if the court lacks jurisdiction, victims may have no (other) forum to go to. Moreover, the court's jurisdiction has important procedural implications, such as whether or not other defendants may be added to the lawsuit, the availability and modalities of class actions and public interest litigation, admissibility and methods of obtaining

arises when the State of origin exercises *effective control over the activities* carried out that caused the harm and consequent violation of human rights under the Convention.

[26] See e.g., the landmark judgment of the district court of The Hague, 24 June 2015, *Stichting Urgenda v State of the Netherlands*, ECLI:NL:RBDHA:2015:7196 (official English translation) (appeal pending). See the contribution by Marc Loth to this volume. Cf. also Lahore High Court 4/14 September 2015, *Ashgar Leghari v Pakistan*, https://elaw.org/PK_AsgharLeghari_v_Pakistan_2015 (accessed 14 February 2018).

[27] Jonas Ebbesson, 'Transboundary Corporate Responsibility in Environmental Matters: Fragments and Foundations for a Future Framework', in Gerd Winter (ed.), *Multilevel Governance of Global Environmental change* (Cambridge, CUP, 2006), pp. 200 *et seq. Id.*, 'Piercing the State Veil in Pursuit of Environmental Justice', in Jonas Ebbesson and Phoebe Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge, CUP, 2009), pp. 270 *et seq.*

evidence including discovery rules, the availability of provisional orders, punitive or only compensatory damages, costs, and the right to a jury trial in civil cases. And, of course, jurisdiction may have implications for the applicable law, which determines the basis and extent of liability, the kinds of damage for which compensation may be due, the burden of proof, and so on.

A. USA

21. On both sides of the Atlantic, environmental actions have been framed as civil tort claims. But, in the USA, for more than a decade, claimants from abroad could rely on an old statute, the Alien Tort Act (or Alien Tort Statute [ATS]), for claims against both US and foreign companies. And they were often successful and got settlements for high amounts of damage. But, in 2013, the US Supreme Court in *Kiobel v Shell* drastically limited the potential use of this Act.[28] The case was about complicity, aiding, and abetting by Royal Dutch Shell (RDS) in violations by the Nigerian government of the rights of the Nigerian Ogoni people.[29] The US Supreme Court ruled that the Act was subject to the presumption that it had no extraterritorial effect. The claim against a company based outside the USA did not 'touch and concern the territory of the US with sufficient force' to displace that presumption. The 'mere corporate presence' of RDS in the USA was considered insufficient.[30]

Kiobel has most likely eliminated most ATS-based human rights and environmental actions for conduct outside the USA against foreign companies commercially active in, but based outside, the USA. Since *Kiobel*, the US Supreme Court has further narrowed personal jurisdiction under its interpretation of the US Constitution.

22. The year following *Kiobel*—2014—the US Supreme Court, in *Daimler v Bauman*, looked into the question of whether US courts had general jurisdiction—*ratione personae*—concerning severe human rights violations allegedly committed by Daimler's subsidiary in Argentina over foreign parent company Daimler, which had been sued in the USA, predicated on the activities of its US subsidiary in California (but which was incorporated in Delaware with its principal place of business in New Jersey). The Court denied such general jurisdiction

[28] In an earlier decision, *Sosa v Alvarez-Machain*, 542 US 692 (2004), the Supreme Court had ruled already that the ATS only covers the most serious violations of '*specific, universal and obligatory*' human rights norms, thus narrowing ATS-based jurisdiction in actions against both US based and foreign based (multinational) companies.

[29] Cf. the *SERAP* case, above, No. 14.

[30] US Supreme Court, 17 April 2013, *Kiobel et al. v Royal Dutch Petroleum Co et al.*, 569 US (2013). Justices Breyer, Ginsburg, Sotomayor, and Kagan concurred, but rejected the reasoning that the presumption against extraterritoriality applies to the ATS. In their view, ATS jurisdiction was given when the tort occurs on American soil, the defendant is an American national, or when 'the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind'.

because neither Daimler nor its subsidiary was incorporated, or had its principal place of business, in California.[31]

The USA has often been criticized for its expansive view of general jurisdiction based on minimum contacts beyond the simple domicile of the defendant, including during the negotiations on a global convention on jurisdiction and the enforcement of judgments in the framework of the Hague Conference on Private International Law in the 1990s, and *Daimler* may be seen as a response to these criticisms.[32] *Daimler* reduces the exposure to unforeseeable general jurisdiction of non-US defendants. As such, the judgment is to be welcomed; it contributes to a more balanced allocation of jurisdiction among States around the world. However, this should not lead to a denial of justice in those cases where proceedings in another State are not possible or cannot reasonably be required, leaving victims of serious illegal conduct, including human rights violations abroad, without relief.[33] While, in Europe, the limitations of general jurisdiction are complemented by rules of special jurisdiction, including for tort matters and multiple defendants cases, which may reflect social values and may protect the plaintiff, the recent case law of the US Supreme Court, on the contrary, tends to leave victims unprotected, especially against the activity of foreign companies.[34]

23. In *Walden v Fiore*,[35] which took place a month after *Daimler*, the US Supreme Court underscored that even specific, case-linked jurisdiction—for example, relating to injury suffered in a jurisdiction—is fundamentally defendant oriented: '[T]he proper question is whether defendant's conduct connects him to the forum in a meaningful way ... [A]n injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum.' This decision followed a divided ruling in *McIntyre v Nicastro* in 2011,[36] in which a British company that had sold machines in New Jersey causing serious injury to a victim in New Jersey could not be sued as a matter of specific jurisdiction in the USA.[37]

[31] *Daimler AG v Bauman, et al.*, 134 S. Ct. 746 (2014). In *Kiobel*, lack of personal jurisdiction was not an issue before the Supreme Court since it was not raised by the defendants as a ground for dismissal of the case. By contrast, *Daimler* turned on the question of personal jurisdiction, and the Supreme Court did not (need to) consider the ATS, although this Act had also been invoked.

[32] The Court referred (at 23) to the Solicitor General's brief, according to which 'foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments', an indirect reference to the Hague negotiations on a 'mixed' convention on jurisdiction and enforcement of judgments.

[33] Cf. the minority concurring view in *Kiobel* above, No. 21.

[34] The US Supreme Court's recent decision in *BNSF Ry. Co. v Tyrrell*, 137 S.Ct. 1549 (U.S. 2017), seems to constrict general jurisdiction even further, to such an extent that, as Justice Sotomayor notes in her partly dissenting opinion, '*Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States*'.

[35] *Walden v. Fiore et al.*, 25, 134 S.Ct. 1115 (2014).

[36] *J. McIntyre Machinery, Ltd v Nicastro*, 131 S.Ct. 2780 (2011).

[37] A recent judgment of the Supreme Court would seem to restrict specific jurisdiction in tort cases even further, see *Bristol-Myers Squibb Co. v Superior Court of California*, 137 S.Ct. 1773 (U.S. 2017). It led Justice Sotomayor to comment in her dissent that this decision will '*make it impossible to*

24. As Symeon Symeonides notes,[38] the result of these recent US Supreme Court cases is: (i) that while reform regarding general jurisdiction was necessary, and 'the "doing business" basis of general jurisdiction was the right place from which to begin', the Court seems to have 'overcorrected what needed correcting', while (ii) the reform of general jurisdiction should have led the Court to 'take another, more lenient look at specific jurisdiction' because 'cases like McIntyre ... cry out for reform', granted that, in the context of the US system, 'objective foreseeability is a necessary safeguard that looks at jurisdiction from the perspective of the defendant's due process rights'. But the US Supreme Court is currently taking another direction, and it looks like the pendulum has swung from one extreme to another—from overly broad to overly narrow bases of adjudicatory jurisdiction.

25. In the light of these restrictive rulings, it seems doubtful—quite apart from the substantive law hurdles that must be overcome—that US courts will assume jurisdiction with respect to foreign-based companies, such as RDS or British Petroleum, in the climate change lawsuits that a number of municipalities both on the west and east coasts of the USA have recently launched against the world's leading oil companies.[39]

26. From another recent US Supreme Court case, *Goodyear v Brown*,[40] it follows that in order to establish general jurisdiction over a foreign subsidiary of a US parent company in regard to tort claims unrelated to any activity of the subsidiary in the USA, the foreign subsidiary's contacts with the forum State must be 'so continuous and systematic as to render [it] essentially at home in the forum State'.[41] Thus, the corporate link with the parent company is in itself not sufficient to establish jurisdiction over the subsidiary. Clearly, this judgment reduces the possibility of finding a court in the USA to bring suit against the subsidiary for environmental harm committed abroad.

bring certain mass actions at all', such as 'a nationwide mass action against two or more defendants headquartered and incorporated in different States', or one brought 'against a defendant not headquartered or incorporated in the United States'.

[38] Symeon Symeonides, 'Choice of Law in the American Courts in 2017: Thirty-First Annual Survey (December 29, 2017)', 66/1 (2018) *American Journal of Comparative Law*, available at https://ssrn.com/abstract=3093709 (accessed 14 February 2018).

[39] In the summer of 2017 the counties of Marin and San Mateo, along with the City of Imperial Beach, followed in December by the City of Santa Cruz and Santa Cruz County, filed lawsuits against 37 fossil fuel companies over the impacts of climate change. They were followed by separate suits from the cities of San Francisco and Oakland, which, however, were based on narrower grounds and targeted only five of the largest companies, including BP and RDS. The complaints in both cases were filed in California Superior Court and defendants then removed them to federal court in the Northern District of California, to which plaintiffs responded by having them remanded to state court. In January 2018 the City of New York filed lawsuits against the same five largest companies in U.S. District Court for the Southern District of New York. The overall complaint in these cases is that the companies are liable because they knew but hid that climate change was happening, that fossil fuel production and use was causing it, and that continued fossil fuel production and use would only make it worse. See http://blogs.law.columbia.edu/climate-change/ (accessed 14 February 2018) and https://www.nytimes.com/2018/01/10/nyregion/new-york-city-fossil-fuel-divestment.html (accessed 14 February 2018).

[40] *Goodyear Dunlop Tires Operations S.A. v Brown*, 131 S Ct 2846 (2011).

[41] *Ibid.*, at 10.

27. But even where a court finds that it could properly exercise jurisdiction over a parent company and/or its subsidiary 'at home' in the forum, it may nevertheless keep its doors closed if it is persuaded that it is *forum non conveniens* (*FNC*) and that it should not exercise its jurisdiction because another court is a more appropriate forum. *FNC* has frequently been invoked, with success, by transnational companies in class actions over environmental harm and related human rights violations committed abroad. The result is that in the USA transnational companies have generally been insulated from responsibility for their actions abroad, and foreign plaintiffs have been barred from recovering damages.

28. One of the most well-known cases in which the *FNC* doctrine was applied, and its use widely criticized, is the *Bhopal* case. The Bhopal tragedy in 1984 killed thousands and caused injuries to several hundred thousand people. It was caused by a gas leak from a chemical plant in Bhopal, India, operated by a subsidiary of the US-based company Union Carbide, now Dow Chemical. The Indian plaintiffs filed suit against Union Carbide and its Indian subsidiary in the USA, but the US courts refused to take the case because they considered that India was a more convenient and appropriate forum to hear the suit, despite the telling fact that the government of India initially supported the US lawsuit, admitting that the Indian court system at the time was unable to handle the cases.[42] The *FNC* analysis in this case absorbed the primary question of whether the US courts had personal jurisdiction over the parent company (and, thereby, the question of the applicable law). After the case was dismissed from the US courts, a settlement was brokered, but this was widely considered to be insufficient.

29. The use of *FNC* led to a plainly bizarre outcome in the *Chevron* case. Here 55,000 plaintiffs from indigenous communities in Ecuador and Peru sued the American company Chevron, successor to Texaco, and its subsidiary in Ecuador, in the US courts for environmental injuries due to Texaco's oil operations in Ecuador and Peru. Chevron raised the *FNC* defence, the Court agreed, and ruled that the case should be tried in Ecuador. Normally, the resulting judgment of the Court in Ecuador, if it found for the plaintiffs, would have been enforceable in the USA. But, not in this case; Chevron successfully argued that the procedure in Ecuador—on which it had itself initially insisted—was fraught with corruption. Chevron even obtained an injunction from the US courts prohibiting enforcement of this judgment, not only in the USA but also worldwide.[43] This result is clearly unsatisfactory. After all, Chevron had initially been sued before the Court of its domicile, a globally accepted ground of jurisdiction; if Chevron had a good case, it might well have won in its own Court, and this legal ping-pong game could have been avoided.

[42] US Court of Appeals, 2nd Circuit, 14 January 1987, *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India in December 1984*, 809 F.2s 195.

[43] The case involved also other fora, including the Permanent Court of Arbitration, cf. Horatia Muir Watt, 'Chevron, l'enchevêtrement des fors, un combat sans issue?', 100 (2011) *RCDIP*, 339.

B. EU

30. In contrast to the situation in the USA, in the Brussels I Regulation (recast), the domicile of the company offers a general ground of jurisdiction (Article 4(1), read in conjunction with Article 63(1)),[44] which may therefore be used in tort-based actions against such a company, including for environmental harm committed abroad. If the tort occurs in the EU, the company may also be sued—in contrast to the USA—on the special jurisdiction ground of Article 7(2), 'either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage'.[45] But, if both of these places are outside the EU, then the court of the domicile is in principle the only court available under the Regulation. Still, this forum is a firm one because, as decided in *Owusu v Jackson*, *FNC* has no place in the Regulation.[46] Therefore, it is possible in principle to sue a Europe-based company in its EU home State, even by plaintiffs from outside the EU,[47] with a prospect of a final decision by the courts of that State. This also applies in the UK, where the courts otherwise would be inclined to declare themselves *FNC*.[48] This makes the situation in Europe crucially different from that in the USA.[49]

31. With regard to choice of law, according to Article 4(1) of the Rome II Regulation on the law applicable to non-contractual obligations, the applicable law in transnational tort matters generally is 'the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred.' However, in relation to environmental torts, Article 7 provides: '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.'[50] The choice is open to the plaintiffs, both from within or outside the EU, with respect to environmental torts occurring both within and outside the EU.

[44] Art. 4(1): Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State; Art. 63(1): For the purposes of this Regulation, a company . . . is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business.

[45] CJEU 30 November 1976, C-21/76 *Handelskwekerij Bier v Mines de Potasse.*

[46] CJEU 1 March 2005, C-281/02 *Andrew Owusu v N. B. Jackson.*

[47] CJEU, 13 July 2000, C-412/98 *UGIC v Group Josi.*

[48] Cf, e.g., correctly, EWCA, 13 October 2017, [2017] ECWA Civ 1528 *Lungowe et al. v Vedanta and Konkola Copper Mines*, (*Vedanta*), para. 28–38.

[49] The rules of the Lugano Convention of 30 October 2007, which in addition to the EU binds Norway, Switzerland, and Iceland, are largely similar to those of the Brussels I Regulation.

[50] This choice of law rule explicitly serves EU environmental policy: Recital (25) of the Regulation justifies the rule by referring to the Treaty on the Functioning of the European Union, Art. 191, which states the objectives of Union policy on the environment, and its basic principles, including that the polluter should pay.

32. These provisions of Brussels I and Rome II may also become relevant in transnational climate change cases. A recent example is the case of *Lliuya v RWE AG*,[51] which is now pending before the Court of Appeal (Oberlandesgericht) in Hamm, in which a Peruvian farmer has sued the German company RWE, alleging that RWE, having knowingly contributed to climate change by emitting substantial volumes of greenhouse gases, is, in part, liable for the melting of mountain glaciers near Lliuya's town of Huaraz, which has given rise to an acute threat of flooding in the town.[52] Under the Brussels I Regulation, there is no doubt that the German court of the domicile has jurisdiction. Under the Rome II Regulation, the plaintiff will be able to opt either for the law of the State of the damage (Peru) or for that of the State in which the event giving rise to the damage occurred (Germany).

33. Is it possible to jointly sue a subsidiary based outside the EU, or perhaps a contractor, with the parent company, if that subsidiary or contractor is allegedly directly responsible for environmental harm? As noted earlier in this article, in the USA, *Goodyear v Brown* seems to exclude this possibility.[53] In Europe, Article 8 of the Brussels I Regulation (recast) deals with the question of connected claims, but only with respect to defendants domiciled in a Member State.[54] Whether a subsidiary domiciled outside the EU may be sued in the courts for the place in the EU where the parent is domiciled is a question left to national law.

34. Recent English and Dutch case law show different approaches to this issue.[55] While accepting that Article 4(1) of the Brussels I Regulation (recast) establishes a mandatory rule, English courts have developed a rather complicated test, which hinges on the question whether there is 'a real issue' between the claimant and the 'anchor defendant'—the parent company—so as to avoid that the claim against the parent is used as an 'illegitimate hook' to bring the subsidiary before the English courts. The difficulty with this approach is that, in the initial stage of deciding if the court has jurisdiction regarding both parent and subsidiary, a full examination of the substance of the claims—in particular, the critically important claim against the parent—is not possible, and the courts readily admit this.[56]

[51] See https://germanwatch.org/de/download/20811.pdf (accessed 14 February 2018); first instance: https://germanwatch.org/de/download/19023.pdf (accessed 14 February 2018).

[52] Acknowledging that RWE is only a contributor to the emissions responsible for climate change and thus for the lake's growth, Lliuya claims reimbursement by RWE for a portion of the costs he and his town have incurred to establish flood protections. That portion was 0.47% of the total cost—the same percentage as Lliuya's estimate of RWE's annual contribution to global greenhouse gas emissions. See also http://blogs.law.columbia.edu/climatechange/2017/12/07/the-huaraz-case-lluiya-v-rwe-german-court-opens-recourse-to-climate-law-suit-against-big-co2-emitter/#_ftn1 (accessed 14 February 2018), which however wrongly states that the Brussels I Regulation does not apply.

[53] See above, No. 26.

[54] Art 8(1): A person domiciled in a Member State may also be sued: where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

[55] For an in-depth discussion see the contribution by Matthias Weller and Alexia Pato in this volume.

[56] See e.g. *Vedanta*, para. 85-9.

Nonetheless, they tend to examine in varying degrees various issues of substance in order to determine whether they have, or do not have, jurisdiction with respect to the anchor defendant. The guiding case here is *Chandler v Cape*,[57] in which the Court of Appeal, carefully distinguishing its reasoning from 'piercing the corporate veil', accepted a separate duty of care of the parent, which, based on criteria of foreseeability, proximity, and reasonableness defined by the House of Lords in *Caparo*,[58] depending on the circumstances of the case, could lead to the conclusion that there was such 'a real issue'.

35. In the *Vedanta* case, the Court of Appeal, assuming that the applicable Zambian law followed English law, concluded, 'without deciding whether the claim was strong or weak', that Vedanta, arguably owed a duty of care to the persons affected by its subsidiary's operations.[59] This test would still seem to be compatible with the system of the Brussels I Regulation since there can be no doubt that under the Regulation a manifest abuse of rights is unacceptable.[60] In another recent case, *Okpabi*, on the other hand, Justice Fraser delved considerably more deeply into the 'real issue' question.[61] He took the view not only that 'neither the [Brussels] Recast Regulation, nor the case of *Owusu v. Jackson* removes' the need to examine this question but also that only if there was a real issue, the question of an abuse of EU law could arise.[62] The reasoning seems to imply that the abuse test is different from that concerning the 'real issue'—the issue that the judge examined in great detail to conclude that there was none. It would seem that the line between what belongs to the field of jurisdiction and what belongs to matters of substance has been overstepped here.

36. The position under Dutch law is different and more focused on the proper administration of the procedure; the Dutch Code of Civil Procedure deals with the issue of connection of claims in its Article 7(1), which has been aligned to Article 8(1) of the Brussels I Regulation. In *Akpan et al v Shell*, a case currently pending before the Court of Appeal at The Hague (now on the merits), the courts accepted jurisdiction over both the parent company, Shell, and its subsidiary in Nigeria in view of the close connection between the two claims.[63] The Court did

[57] *Chandler v Cape Plc* [2012] EWCA Civ 525 [2012] 1 WLE 3111.

[58] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

[59] In the appeal proceedings Vedanta had argued that allowing cases against English multinationals in their home State was not in the public interest. That argument might well succeed in the US, but the Court refrained from considering it.

[60] The court of appeal recalls the mandatory character of Art. 4(1) (para. 34), and states that 'the claim against Vedanta would in any event continue in England' (para. 117).

[61] *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC). Appeal dismissed, Court of Appeal (Civil Division—Justice Sales dissenting), 14 February 2018 [2018] EWCA Civ 191.

[62] Para. 69.

[63] See, most recently, Court of Appeal The Hague, 18 December 2015, ECLI:NL:GHDHA:2015:3587, *Akpan et al. v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD* (interlocutory appeal judgment, proceedings continue). Appeal from District Court The Hague 30 January 2013, ECLI:NL:RBDHA:2013:BY9854, unofficial English translation at https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/view (accessed 14 February 2018). See also the parallel cases ECLI:NL:GHDHA:2015:3586,

not exclude the possibility of an abuse of procedure under the Brussels I Regulation but concluded that no such abuse had occurred. The Court also found that it was sufficient that there was a real dispute between the plaintiffs and the parent at the beginning of the proceedings, notwithstanding that the first instance court found at the end that the parent was not liable.

37. Worth mentioning in terms of access to information is the Dutch Court of Appeal's decision—contrary to the district court's ruling—that the parent company should disclose a certain number of documents to the original plaintiffs that might be relevant to the question of whether the parent company knew about the leakage and the condition of the leaking pipeline.[64]

38. These cases continue, and, at this point, it is not certain that the appeal courts' confirmation of jurisdiction in *Vedanta* and *Akpan* will be upheld in the end. But, in light of the trend towards 'foreign direct liability', which was noted by the appeal court in *Akpan*, it would seem increasingly difficult for transnational companies based in the EU and their overseas subsidiaries to argue successfully in the court of the parent's domicile that they cannot be sued together in that court for serious environmental damage caused overseas by the subsidiaries' activities. This is in the spirit of the Guiding Principles on Business and Human Rights. In *Akpan*, the Court of Appeal subtly notes that 'Shell sets itself goals and aspirations, including in environmental matters, and has formulated group policy to achieve those goals and ambitions in a coordinated and unified manner'.

39. So it looks like the EU may become a more promising arena for litigants from developing countries seeking relief for environmental damage allegedly caused by the conduct of (subsidiaries of) transnational companies based in the EU than the USA, where adjudicatory jurisdiction has now been drastically narrowed with respect to both foreign-based and USA-based transnational companies.

IV. Building blocks for a global legal framework for civil litigation in environmental matters

40. The recent developments in cross-border civil litigation in environmental matters, in light of the emerging normative paradigm shift that is going on, may well be just the beginning of a growing volume of such lawsuits, both in respect to localized damage and to climate change issues.[65] While the primary responsibility to respect the environment and fight climate change rests with States, both the civil society and the private sector, as the UN 2030 Agenda

Dooh et al. v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD et al.; and ECLI:NL:GHDHA:2015:3588, *Oguru and Efanga et al. v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD et al.* (interlocutory appeal judgments; proceedings ongoing). Appeals from District Court, The Hague 30 January 2013, ECLI:NL:RBDHA:2013:BY9845, and ECLI:NL:RBDHA:2013:BY9850, respectively.

[64] Para. 5.1-10.

[65] See Section I. Introduction.

recognizes, are essential to move things forward, preferably in an orderly fashion through legal channels.

41. The role of civil society in reminding public authorities of their duties in this regard has been recognized, for example, in the 1993 North American Agreement on Environmental Cooperation, which entered into force in Canada, Mexico, and the USA in 1994, providing minimum rules on (advance) publicity of environmental laws and regulations, governmental enforcement action, access to both civil and administrative remedies, and procedural guarantees, and in the 1998 UN Economic Commission of Europe's (UNECE) Convention on Access to Information, Public Participation and Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), which is now in force for 47 States.

42. Efforts to establish legal channels for civil litigation, involving the private sector, in transnational environmental cases have also been made, but so far with less success. The technical feasibility of a global instrument on adjudicatory jurisdiction, applicable law, and recognition and enforcement of judgments, supported by a system of institutional cooperation has been the subject of extensive research and discussion, including in the context of the Hague Conference on the Hague Conference on Private International Law. But this has not led to a decision to embark on negotiations on a global instrument in that forum.[66] At the regional level, the Council of Europe adopted a convention in 1993 thus far providing substantive rules on civil liability, access to information, and procedural matters, combined with rules on the jurisdiction of the courts and recognition and enforcement of judgments,[67] and, in 2003, a comparable instrument, limited to damage caused by industrial accidents on transboundary waters, was adopted by the UNECE.[68] But neither instrument has entered into force.

43. This state of affairs is unsatisfactory. Now, the current negotiations in the framework of the Hague Conference on Private International Law on a global convention on the recognition and enforcement of judgments in civil and commercial matters could potentially be a step forward in this regard by paying special attention to environmental litigation, as it has already done with respect to certain other matters (for example, consumer cases). The latest November 2017 draft

[66] The Permanent Bureau prepared several studies on the topic, in particular, 'Note on the law applicable to civil liability for environmental damage' (Adair Dyer), May 1992, *A&D XVIIth Session, Tome I, Miscellaneous Matters*, pp. 187 *et seq*; 'Note on the law applicable and on questions arising from conflicts of jurisdiction in respect of civil liability for environmental damage' (Adair Dyer), April 1995, *A&D XVIIIth Session, Tome I Miscellaneous Matters*, pp. 72 *et seq*, and 'Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?' (Christophe Bernasconi), April 2000, *A&D XIXth Session, Tome I Miscellaneous Matters*, pp. 320 *et seq*. In April 1994, the University of Osnabrück, in cooperation with the Hague Conference, organized a scientific colloquium, the proceedings of which—mostly in English, some in French—may be found in Christian von Bar (ed.), *Internationales Umwelthaftungsrecht I* (Köln etc., C. Heymanns Verlag, 1995).

[67] 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

[68] 2003 Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

provides in its Article 5 (bases for recognition and enforcement) under paragraph (1)(j) that a foreign judgment may be recognized and enforced if it 'ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred'.[69] Thus, this draft provision, in its present form, does not provide for the recognition and enforcement of judgments rendered at the place of the harmful event, even if limited to local damages.

44. Under the current draft, in order to benefit from the Convention's provisions on recognition and enforcement, plaintiffs essentially have the choice only of bringing their original claims at the defendant's home (Article 5(1)(a)) or at the place where 'the act of omission directly causing [the] harm occurred' (Article 5(1)(j)). And, even in those cases, the courts in some countries may, according to their national jurisdictional rules, refuse to take jurisdiction on the basis of *FNC*, which will limit the future instrument's effectiveness in cross-border environmental cases even further.[70] This rule is a departure from Article 7(2) of the Brussels I Regulation recast, as interpreted by the Court of Justice of the European Union and more in line with the narrow defendant-oriented case law of the US Supreme Court in *McIntyre* and *Walden*. But, even under the *Walden* test, the court of the place of the harmful event may have jurisdiction if the 'defendant's conduct connects him to the forum in a meaningful way'. The final text of the Hague Convention should at the very least make room for recognition and enforcement of judgments emanating from the court of the place of the harmful event where, as Symeonides has suggested, the defendant could reasonably foresee that its conduct would give rise to the harm in that State.[71]

45. Even so, however, the future Convention will only deal with one aspect of civil litigation—namely, recognition and enforcement of judgments. But we have seen how critically important the issue of jurisdiction of the original court is.[72] And so is the question of the applicable law.[73] Moreover, civil litigation would be

[69] Accessible at https://assets.hcch.net/docs/2f0e08f1-c498-4d15-9dd4-b902ec3902fc.pdf (accessed 14 February 2018).

[70] Cf. Andrea Bonomi, 'Courage or Caution? A Critical Overview of the Hague Preliminary Draft on Judgments', in 17 (2015/2016) *Yearbook of Private International Law*, 1–31, at 25–6 (commenting on the text of the 2016 preliminary draft Convention, which contained a provision identical to Art. 5(1)(j) of the November 2017 draft).

[71] The 1999 Preliminary draft Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters provided (Art. 10): 'A plaintiff may bring an action in tort or delict in the courts of the State a) in which the act or omission that caused injury occurred, or b) in in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.' Para. b) was supposed to be also acceptable from a US point of view, admittedly, before *McIntyre* and *Walden*.

[72] See above, Nos. 20–39.

[73] See above, Nos. 31–32.

greatly assisted by a system of cross-border judicial and administrative cooperation.

46. In light of the developments sketched in the previous sections and building on the 'patterns' emerging from existing global and regional instruments,[74] it should be possible to agree on a number of basic structural components—building blocks—for a global legal framework, including:

47. Jurisdiction:
- broad definition of domicile or (habitual) residence of an entity or person other than a physical person[75] (the Hague Convention on Choice of Court Agreements offers an example);[76]
- exclusion of *FNC* regarding jurisdiction of the courts of the State of the defendant's domicile; as we saw, while this is standard practice under the Brussels I Regulation system, in common law countries, including the USA, *FNC* is alive and well.[77] Here again, however, the Hague Convention on Choice of Court Agreements could serve as an example: it excludes *FNC* for exclusive choice-of-court agreements falling within its scope. It should be possible to exclude *FNC* for the purposes of cross-border litigation in environmental matters;
- close connection between claims as a ground of jurisdiction over multiple defendants in case the court has jurisdiction based on the domicile of one of them (Article 8(1) of the Brussels I Regulation (recast) serves as an example)[78];
- the plaintiff should be able to sue the defendant in a non-contractual action either in the court in the State in which the damage occurs or may occur, provided the damage was reasonably foreseeable by the defendant, or where the event giving rise to the damage occurred.[79] The formula follows the model of the 1999 preliminary draft Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters.

48. Applicable law
- application of the law of the law of the State in which the damage occurs, with an option for the person seeking relief to base his or her claim on the law of the State in which the event giving rise to the damage occurred, provided the occurrence of the damage was reasonably foreseeable by the defendant. The first part should not be controversial. The option is

[74] Ebbesson (2006) (n 27) 203.

[75] See above, Nos. 26–30.

[76] According to Art. 4(1) such an entity or non-physical person '*shall be considered to be resident in the State – a) where it has its statutory seat; b) under whose law it was incorporated or formed; c) where it has its central administration; or d) where it has its principal place of business.*' Cf. also International Law Association, Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights, Arts 2.1, 2.5, *ILA Report of the 75th Conference held in Sofia* (2012) 321.

[77] See above, Nos. 27–30, 34

[78] Cf. above, Nos. 26, 33–36.

[79] See above, Nos. 23–24, 30.

inspired by Article 7 of the EU Rome II Regulation on the law applicable to non-contractual obligations, but qualified in a way similar to the alternative jurisdiction ground.

49. Recognition and enforcement
- recognition and enforcement of a judgment based on the jurisdictional grounds under (i) could follow the model of Chapter III on the Recognition and Enforcement of the Hague Convention on Choice of Court Agreements, including its Article 11 (punitive damages). No reciprocity should be required.

50. Judicial and administrative communication and cooperation
- it would be important to establish a mechanism for direct transnational communication between courts, respectful of the parties' rights to be heard, with a view to avoiding the duplication of proceedings concerning questions of jurisdiction and evidence;[80]
- in addition, it would be helpful to provide basic machinery for direct transnational cooperation between national administrative focal points ('Central Authorities') with a view to facilitating the cross-border service of documents, the taking of evidence, and the transmission of applications for legal aid where such legal aid is available in the requested State;[81] authenticating the legal position of an organization or of plaintiffs under a class action;[82] providing information to foreign nationals and residents concerning decision-making processes on the environment in which they are allowed to participate;[83] and, generally, exchanging information on environmental matters with other focal points.[84]

51. These are just starting points, aimed to stimulate renewed efforts to work on a global framework for cross-border civil litigation in environmental, including climate change, matters. As a bottom-up way of enforcing environmental standards, civil tort litigation forms an essential, effective complement to top-down governmental enforcement, particularly in the transnational context. States, and their citizens, would have an interest in globally strengthening citizens' rights of access to information and justice and participation in decision-making in the

[80] Sofia Guidelines (n 76) Art. 4.

[81] Cf. 1965 Hague Service, 1970 Hague Evidence, and 1980 Hague Access to Justice Conventions, on which David McClean, 'Procedural Matters', in Von Bar (n 66) pp. 195 *et seq.* (pp. 202–3); 1993 North American Agreement on Environmental Cooperation (No 41) Art. 6; 1998 UNECE Aarhus Convention, Art. 9.

[82] McClean (n 81) 204.

[83] North American Agreement on Environmental Cooperation, Art. 4.; UNECE Aarhus Convention, Arts. 6–8.

[84] This could—perhaps going beyond *civil* aspects—include exchange of information on progress made in implementing global agreements concerning the environment, including the 2015 Paris Agreement, which although it requires States parties to enhance public participation and public access to information (Art. 12)—contrary to the non-binding OECD Guidelines (see No 12 above)—does not establish a system of national focal points communicating and cooperating with each other across borders.

context of administrative law, for which the 1998 Aarhus Convention provides a model.[85] At least as urgent is a basic global framework to facilitate transnational civil litigation. This is an area where unified private international law rules would make a significant contribution to a global legal architecture adapted to the emerging normative order for business relating to the environment, including climate change.

[85] 'Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities ... [T]he Convention [has] the potential to serve as a global framework for strengthening citizens' environmental rights.' Kofi Annan, Foreword to UNECE, *The Aarhus Convention: An Implementation Guide*, 1st ed., v.