Actualités en matière de la responsabilité (et du devoir de vigilance) des entreprises pour violation des droits humains et atteintes à l'environnement

Katowice, 13-15 September 2019

1. Introduction

1.1. Previous GEDIP work touching on corporate social responsibility (CSR):

1.1.1. ***Draft rules on the law applicable to companies and other bodies***, adopted in Milan in 2016, art. 1 (3)

> "*This Regulation does not prejudice the fulfilment of the obligations deriving from social responsibility of companies (corporate social responsibility) as defined by national, European or international norms*".

The matter was discussed in detail, some members found the notion too vague and were against mentioning it. Some wanted to add environmental responsibility, but that was not accepted. Some wondered why the question of the corporate structure of groups of companies was not raised, but no adequate conflict rule for that problem could be found. Note that labour relationships and employees rights, including rights of participation in the organs of the company, are excluded from the regulation, art. 1 (2) (e).

The rule is far from precise. Presumably:

- to the extent that CSR forms part of the applicable *lex societatis*, that law applies, subject to overriding mandatory rules not just of the forum but also "of another country in which the company has its central administration or is carrying on activities" (art 10 (3)), as well as to the public policy of the forum (art. 11).

- to the extent that CSR does *not* form part of the applicable law, CSR provisions (mandatory or not (?)) of the law applicable under the conflict of law rules of the forum apply.

1.1.2. In fact, we might have had a discussion relating to CSR on an earlier occasion, not in the conflict of laws context but in that of conflict of jurisdictions, i.e. when we discussed the possible **extension of the Brussels I regulation in the relations to third States.**

At its meetings in Bergen and Copenhagen the GEDIP discussed the issues of *lis pendens* and connected claims together. Whilst we did adopt a proposal for the extension of the *lis pendens* (now art. 30 Brussels I recast) to relations with third States, we did not regarding connected claims, art. 8 (1).

Art. 8 (1) provides: *A person domiciled in a Member State may also be sued: (1) 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 is tis expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*

So Art. 8(1) only applies to persons domiciled in a MS, not when they are domiciled in a third State. In that case, national law applies. Why did we not propose an extension of art. 8 (1) to situations involving third States? Some members felt that the article needed more precision, to avoid its use as an exorbitant forum, not just in relations with third States but also in relations between MSs. The

sous-groupe concluded "*Il n'apparaît… pas que la question soit propre aux relations externes et une amélioration éventuelle du texte actuel devrait faire l'objet d'un examen complémentaire* [1]… which so far we did not undertake.

However, art. 8 (1) now plays a crucial role in human rights and environmental litigation involving corporate group structures, with an anchor defendant in an EU State and daughters in a non-EU State. See **8**. and **9.** below.

1.2. The contours of CSR

Corporate social responsibility or business and human rights (here used interchangeably)[2], refers to a company's responsibility for its economic, social and environmental impact on people and planet, not just based on its strictly legal obligations. As our Milan 2016 text suggests, a broad range of definitions exist not just in academic literature but also in legislative texts at the national, regional and global level [3].In its widest sense, CSR both recognizes the positive role that corporations have in protecting and promoting human rights and the environment through voluntary measures in the field of sustainability, and requires corporations to prevent, account for, and remediate the adverse effects of their activities on individuals, and communities, and the environment, including the global climate. More or less precise definitions can be found in the international soft law instruments mentioned below, and, often based on these, national law.

1.3. Four major (clusters of) CSR issues[4]

1.3.1. Corporations and international law

A major general issue regarding CSR, related to the variety of (levels of) definitions, consists, first, in the definition of the **legal obligations** it entails. Traditionally, corporations have not been subjects of international law, so the primary focus in determining responsibility for the protection of human rights has been on States. Likewise, the primary aim of international trade and investment regimes has been to protect corporations and their interests, often without concern for the impact of their activities upon human rights and the environment. See below, **3.-6.,** however, for new developments.

1.3.2. Weak or failed States

While States have primary responsibility for the protection of human rights, they may be in fact co-perpetrators with corporations in violating human rights or damaging the environment, or fail to act against such corporations. This is a recurring theme in (PIL) litigation, such as *Kiobel v Shell* (US, now the Netherlands), *Akpan v. Shell* (Netherlands), *Okpabi v. Shell* (UK), *Lungowe v.Vedanta* (UK) and

[1] M. Fallon, P Kinsch, C. Kohler (eds.) *Le droit international privé européen en construction – Vingt ans de travaux de GEDIP/Building European Privat International Law – Twenty Years'Work by GEDIP*, p. 718,

[2] On a possible differentiation between CSR and BHR, see Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14(2) IJHR 237, 238 (2015)).

[3] For a detailed discussion see C. Kessedjian, *Académie Internationale de Droit comparé*
Fukuoka conference 2018, General Report, *Questions de droit international privé de la responsabilité sociétale des entreprises/ Private international law for Corporate Social Responsibility* (« CK Report »)

[4] We follow here D. Bilchitz, "Introduction, 1.1 The Tragic Story of Bougainville and Four Legal Problems", in S. Deva and D. Bilchitz (eds.) *Building a Treaty on Business and Human Rights – Context and Contours*, CUP, 2017 xxii+517, pp. 1-4.

others[5]. It is also a factor behind current efforts to draft Arbitration Rules on Business and Human Rights, see **5.** below

1.3.3. The corporate (group) structure

The **corporation structure**, with its limited responsibility for shareholders, while encouraging entrepreneurship, innovation and risk-taking, involves the risk of irresponsible economic, social and environmental conduct. That risk, long-time ignored [6], is now gradually being recognised as part of CSR [7].
Group structures across international borders may enhance that risk, as they increase the distance between shareholders (and CEO's) and stakeholders. PIL currently provides partial answers at best.

1.3.4. Access to remedies

The lack of clarity of CSR obligations, weak State structures and complex corporate structures contribute to the **problem of access to remedies**. Regarding adjudicatory **jurisdiction**, the forum non conveniens (FNC) doctrine may aggravate the problem; conversely, the exclusion of FNC by Brussels I open up possibilities for litigation on adverse conduct by **subsidiaries abroad** against such subsidiaries and the (anchor) parent based in the EU. There is a whole range of issues here, including legal standing and resources in collective and public interest litigation.

2. Soft law sources[8]

2.1. International

Intergovernmental organisations

2.1.1. UN

- 2000 ***UN Global Compact*** (framework of 10 principles on human rights, labour, environment, since 2004 also anti-corruption) .https://www.unglobalcompact.org/about. 13.000 corporate participants and other stakeholders, including cities through the Cities Program https://citiesprogramme.org/. Participation voluntary but mandatory disclosure framework: business participants are required to communicate their progress to their own stakeholders on an annual basis and to post a copy on the UN Global Compact's website."*The UN Global Compact is committed to be a leading catalyst of that (2030 Agenda) transformation*", see below.

[5] See our "Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters" in *Rev. dr. unif.* Vol. 23, 2018, 298-318, circulated to GEDIP members on 6 September 2018, Nos. 17-39.
[6] Cf. Milton Friedman, Capitalism (1962), "*There is one and only one social responsibility of business -- to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud*.", thereby providing the leading doctrine of (US) corporate governance
[7] On 19 August 2019, the most influential lobbying body for U.S. business interests, the Business Roundtable (Amazon, Apple, IBM, JPMorgan Chase, Walmart etc.), that had thus far endorsed the Friedman doctrine, issued a new statement endorsed by 181 of its 193 members which focuses on stakeholders rather than shareholders. The Roundtable lists customer, employee, supplier, and community responsibility above shareholder responsibility.
[8] See, in more detail, CK Report, Chapter 1.

- 2007 John Ruggie publishes his Report of the Special Representative of the Secretary General on the Issue of Human Rights and transnational Corporations and other Business Enterprises: 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*'(UNGA doc. A/HRC/4/35),

- 2011 **UN Guiding Principles on Business and Human Rights**[9], proposed by John Ruggie, endorsed by UN Human Rights Council (HRC) , https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. It rests on three pillars (I) Primary responsibility to *protect* human rights lies with *States*; (II) *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 (III) access by victims to *effective remedies* against human rights abuses; not only States but also corporations have a certain responsibility to *provide remedies* when things have gone wrong.

- 2012 The Human Rights Council appoints John Knox as (expert, then) *Special Rapporteur on human rights and the environment*, to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and promote best practices relating to the use of human rights in environmental policymaking. 2018: Knox succeeded by David Boyd.

- 2013 The UN Working Group on Business and Human Rights/UNWG), mandated by the HRC to promote the effective and comprehensive implementation of the UN Guiding Principles calls upon States to develop a **National Action Plan on Business and Human Rights** (A/HRC/23/32, p. 21), see **3.3.**

- 2015 General Assembly adopts **2030 United Nations Agenda for Sustainable Development, *Transforming the World*,** with its **17 Sustainable Development Goals (SDG's).** The Agenda 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*'. https://sustainabledevelopment.un.org/?menu=1300

2.1.2. ILO

1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration –fifth edition 2017).

This is the ILO instrument providing direct guidance to enterprises on social policy and inclusive, responsible and sustainable workplace practices. Adopted by governments, employers and workers from around the world. Its principles are addressed to multinational and national enterprises, governments of home and host countries, and employers' and workers' organizations providing guidance in such areas as employment, training,

[9] According to the Guding Principles, CSR applies to companies' own operations as well as all 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.

conditions of work and life, industrial relations as well as general policies. The guidance is founded substantially on principles contained in international *labour standards*.

2.1.3. OECD

2011 (OECD) Guidelines for Multinational Enterprises, http://www.oecd.org/corporate/mne/

Recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. "*The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting*".
Unique feature: National Contact Points (NCPs), agencies established by adhering governments to promote and implement the *Guidelines*. The NCPs assist enterprises and their stakeholders to take appropriate measures to further the implementation of the *Guidelines*. They also provide a mediation and conciliation platform for resolving practical issues that may arise.

NGO's

2.1.4. International Organization for Standardisation (federation of national standards bodies) ISO

2010. Adoption ISO Standard 26000 on Social Responsibility https://asq.org/quality-resources/iso-26000 . ISO Encourages business and other organizations to practice social responsibility to improve their impacts on their workers, natural environments and communities (human rights, labour, environment, anti-corruption and fair operating practices, consumer protection). Special standards for environmental management systems: ISO 14.000 "standards family", in particular ISO 14001 https://www.iso.org/iso-14001-environmental-management.html .

2.2. Soft law sources – European Union

2011 European Commission publishes *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility*, https://publications.europa.eu/en/publication-detail/-/publication/ae5ada03-0dc3-48f8-9a32-0460e65ba7ed/language-en. This was followed in April 2019 by a document *Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights. - Overview of Progress* https://ec.europa.eu/docsroom/documents/34963. More specifically,

- **Human rights**

- 2012 Strategic Framework on Human Rights and Democracy, accompanied by action plan, adopted by Council. First action plan up to 31 December 2014. New action plan for 2015-2019 https://www.consilium.europa.eu/en/documents-publications/publications/eu-action-plan-on-human-rights-democracy/ . Instructions for EU representatives around the world concerning Action against the death penalty; rights of the child; anti-torture, protecting human rights defenders, complying with humanitarian law, combatting violence against women and children, etc. Bilateral trade agreements between EU and third countries or regional organisations include a human rights clause defining respect for human rights as an 'essential element'. Measures such as reducing or suspending cooperation can be used to address cases of non-compliance. A strong conditionality mechanism has been established for the enlargement countries.

- **Environment**

- 2001 *Regulation (EEC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS),* as amended, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al28022#AMENDINGACT. Although a regulation, it is binding only for organisations which voluntarily decide to implement the scheme. It includes the environmental management system requirements of ISO-14001 and additional requirements for EMAS registered organisations such as employee engagement, ensuring legal compliance or the publication of an environmental statement, hence, the "premium instrument for environmental management".

  More generally, the EU is committed to 'high level of protection and improvement of the quality of the environment' (Art. 3 TEU). Environment policy is based on Articles 11 and 191-193 of the TFEU. Under Art. 191, combating climate change is an explicit objective of EU environmental policy, implemented by various directives addressed to MSs[10].

3. Emerging hard law

There is no indication (yet) that CSR would be recognised as customary international law or a general principle of international law. Yet there *are* indications of an emerging hardening of soft law principles

3.1. UN

Following its endorsement of the *UN Guiding Principles on Business and Human Rights* in 2011, the UN Human Rights Council established an Intergovernmental Working Group to elaborate an international legally binding *instrument on Transnational Corporations and Other Business Enterprises with respect to human rights*. For the latest draft, published 16 July 2019, see https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf .

The draft (1) explicitly recognises that legally binding CSR obligations would be directly imposed on corporations (in addition to those indirectly imposed via the State as per *Ruggie*); (2) applies to *all* businesses and corporate operations, transnational or not; (3) recognises that businesses do have the capacity to violate human rights; and (4) relating to investments, recognises "the primacy of human rights obligations over trade and investment agreements, and confirms the duty of States to prepare human rights impact assessments prior to the conclusion of trade and investment agreements". The draft contains provisions on "adjudicative jurisdiction" (art. 7) and applicable law (art. 9)[11].

[10] E.g. *Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe; Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora* (based on these three directives the Commission on 25 July 2019 referred Bulgaria, Spain, Sweden, and Greece to the CJEU)

[11] For a collection of essays calling for an international treaty to elaborate the human rights obligations fo transnational corporations and other business enterprises, see S. Deva and D. Bilchitz (eds.) *Building a Treaty on Business and Human Rights – Context and Contours*, CUP, 2017 xxii+517.

3.2. Investment treaties

Only a few bilateral investment treaties include CSR obligations in their operative provisions[12]

3.3. Domestic legislation

To date 22 States (including 15 EU MSs) have adopted a National Action Plan on Business and Human Rights, while 23 (including 3 EU MSs) are in the process of doing so[13]. They address the three pillars of the Guiding Principles (States, Corporations, Remedies). In 2015 the UK adopted the Modern Slavery Act (2015) http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf , which aims to achieve increased transparency by requiring companies to set out what measures they have taken to ensure that no human rights violations occur throughout their global supply chain[14]. In 2017, France adopted the *Loi sur le devoir de vigilance* (2017) https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id [15]. France thereby became the first country to adopt binding legislation on the respect of human rights and the environment by multinationals (i.e. companies with more than 5000 employees in France or 10 000 worldwide). They have a legal obligation to identify and prevent human rights and environmental abuses that result not only from their own activities, but also from those of their subsidiaries, subcontractors and suppliers with whom they multinationals have an established commercial relationship in France and around the world[16].

4. Hardening soft law though contract

In the absence of, or by way of implementing, binding legal norms, private market leaders may through contracting impose CSR obligations. In the project finance industry the *Equator Principles* (2003) have been adopted by 97 financial institutions in 37 countries https://equator-principles.com/. They apply to all industry sectors, and to project finance, project finance advisory services; project-related corporate loans; and bridge loans, and may include both public and private actors (e.g. 1999 Caspian Sea Pipeline Project). Via the mandatory international arbitration (ICSID) clause, a CSR based claim could be brought before the arbitral tribunal.

Other examples: *Bangladesh Accord on Fire and Building Safety in Bangladesh* (2013, a five years' scheme, which however, was not extended by Bangladesh Government) https://en.wikipedia.org/wiki/Accord_on_Fire_and_Building_Safety_in_Bangladesh, which led to PCA arbitration, followed by settlements, and the *Dutch Agreement on Sustainable Garments and Textile* (2016) which seeks to implement the *UN Guiding Principles*, *OECD Guidelines* and *1989 ILO Declaration on Fundamental Principles and Rights at Work*, https://www.imvoconvenanten.nl/garmentstextile/agreement?sc_lang=en . This Agreement has a wide range of objectives: fight discrimination, child labour and forced labour; support a living wage, health and safety standards for workers, and the right of independent trade unions to negotiate;

[12] See E. Vidak-Goljevic, Cherrie Blair, M-A Meudic Role, "The Medium is the Message: Establishing a System of Business and Human Rights Through Contract Law and Arbitration", *J of Int.l Arbitration* 35, no. 4 (2018): 379–412, "Cherie Blair"

[13] See https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx

[14] Modern Slavery Act 2015, 2015 Chapter 30, 26th March 2015. The 2015 only applies to England and Wales. In Scotland there is the Human Trafficking and Exploitation (Scotland) Act 2015. In Northern Ireland there is the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015. ».

[15] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°0074 du 28 mars 2017, texte n°1

[16] See in more detail, CK Report, Chapter 1.

reduce the negative impact of their activities on the environment, prevent animal abuse, reduce the amount of water, energy and chemicals that they use, and produce less chemical waste and waste water. Aim 50% of the Dutch garment and textile sector to support the agreement by 2018, and 80% by 2020[17].

5. Hardening soft law through arbitration[18]

International arbitration, as a tool to enforce CSR obligations, may, through its jurisprudence, also contribute to enhance the substance of those obligations. International arbitration may avoid some of the pitfalls of ordinary court proceedings. A drafting team chaired by Bruno Simma is preparing draft Arbitration Rules on Business and Human Rights, to be applied by existing arbitration courts and institutions, in order to increase transparency of proceedings and awards, open up the possibility of class actions, and promote specialist arbitration, see the latest draft (June 2019): https://gallery.mailchimp.com/75b5b7bea1017e7a4246ddd63/files/081025f4-43f0-4e9c-8e0b-ec323ef6029b/20190619_Draft_BHR_Rules_Final_version_for_SB_consultation.pdf.

Meanwhile, a landmark award was rendered in ICSID Case No. ARB/07/26 of 8 December 2016 (under the chairmanship of our honourary member Andreas Bucher), *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, https://www.italaw.com/cases/1144. The tribunal rejected the investor company's thesis that the asymmetrical nature of the (indeed: any) BIT barred the Argentine Government from bringing a counterclaim (par 1143-1155); found that there was a sufficient connection between the investor's claim and the Government's counterclaim (par. 1151), and admitted the counterclaim that the investor had breached its obligation to guarantee the access to water, and thus to "comply with a fundamental human right":

1194. *A principle may be invoked in this regard according to which corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law. While such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals. A simple look at the MFN Clause of Article VII of the BIT shows that the Contracting States accepted at least one hypothesis where investors are entitled to invoke rights resulting from international law (in addition to the rights resulting from Article X). If the BIT therefore is not based on a corporation's incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations.*

1195. *… international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation.[reference to the Ruggie Principles]. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.*

The tribunal then distinguishes between the obligation "not to engage in activities aimed at destroying certain human rights" (par. 1199), which extends to both the State and the investor, and the obligation "to perform" (par.1207). However, "*none of the provisions of the BIT has the effect of extending or transferring to the Concessionaire an obligation to perform services complying with the residents'*

[17] See also CK Report Chapter 3, and Cherie Blair (fn. 12).
[18] See Cherie Blair (fn.12)

human right to access to water and sewage services… For such an obligation to exist and to become relevant in the framework of the BIT, it should either be part of another treaty(not applicable here) or it should represent a general principle of international law", which is not the case either (ibid.)[19]. The counterclaim, therefore, failed.

6. Hardening soft law through tort law

Given its much wider reach than the *lex contractus* and the *lex societatis*, tort law has become of eminent importance in CSR litigation, as appears, in recent case law concerning the concept of *duty of care* in English law. On 10 April 2019 the Supreme Court of the United Kingdom rendered its much awaited judgment in *Vedanta Resources PLC and another v. Lungowe and others* [2019] UKSC 20 It took its distance from earlier English case law (Court of appeal [2017] EWCA Civ 1528, and *Chandler v Cape plc* (2012)) and, in fact, widened the circumstances in which a parent can be said to owe a direct duty of care to persons affected by a subsidiary:

"53. Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, … the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken."

This is in line with the *UN Guiding Principles* and it forces parent companies to define their commitments very carefully, and also to ensure that what they preach is in accordance with what they actually do. Thus tort law may also have the effect of hardening international soft law.

7. PIL aspects: applicable law[20]

The common law principle according to which a question which is governed by foreign law is presumed to be the same as that of the forum unless proven otherwise increases the potential effect of the broad interpretation of the direct duty of care to third parties, e.g. in the case of *Okpabi v. Shell*, which the UK Supreme Court has accepted to hear[21] This principle was also followed by the Dutch Court of Appeal in Akpan v. Shell.

8. PIL aspects: jurisdiction[22]

The same UK Supreme Court judgment which took the Chandler "straitjacket" off claims against parent companies in respect of their duty of care towards third parties, introduces, on the other hand, a potential restriction regarding jurisdiction. Having held that (i) the jurisdiction of the English courts was given by art. 4 (1) Brussels I, (ii) *Owusu v Jackson* set aside FNC, (iii) there was no abuse of art. 4 (1), (iv) the claims disclosed a real triable issue against Vedanta, and (v) the requirement that

[19] "*Indeed, the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States…. In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law* "(par.1210).

[20] For a detailed discussion of the applicable law aspects of CSR see CK Report, Chapters 2 et seq.

[21] https://www.business-humanrights.org/en/nigeria-uk-supreme-court-grants-permission-to-nigerian-communities-in-their-fight-against-shell-over-oil-spills-in-niger-delta

[22] See also CK Report, Chapter 4.

"The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is the proper place in which to bring the claim." had been met regarding the Zambian subsidiary, the Supreme Court, nevertheless, concluded that, to avoid irreconcilable judgments, the claimants must "*demonstrate that England is the proper place for the trial of their claims against these defendants, having regard to the interests of the parties and the ends of justice*" (par 87). Since Vedanta had accepted the jurisdiction of the Zambian courts, the case should in principle be brought before the courts of Zambia.

While this is not exactly the same as reintroducing FNC through the backdoor, it enables the parent company to avoid being judged by the courts of its domicile, and to submit to the courts for the place of the subsidiary. That reintroduces the problem of weak or failed States (**1.3.2.** above). To mitigate this problem, the Supreme Court makes an access to justice exception: "*the court may nonetheless permit (or refuse to set aside) service of English proceedings on the foreign defendant if satisfied, by cogent evidence, that there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction*" (par. 88) .

9. What's next?

It would seem that, from a PIL perspective, some useful work can be done, in particular regarding jurisdiction. The GEDIP might pick up the question of the possible extension of art. 8(1) Brussels I recast in the relations with third States where we left it in 2010 (**1.1.2.** above) . It might also look into other access to justice issues, such as public interest and class actions in matters of CSR.

Regarding applicable law, the Group might look into a possible extension of the rule of art. 7 Rome II to damage as a result of violation of certain CSR obligations (in addition to environmental damage). More generally, one might perhaps question whether the rules on overriding mandatory provisions and *ordre public* , in particular in Rome I and Rome II, would need to be further articulated in order to call the attention to mandatory international, regional or national CSR provisions[23].

It has been suggested to apply the nationality link to regulate the economic power of corporations. Is that a viable route?[24] Conceivably the Group might wish to give input for the UN efforts to draw up a legally binding *instrument on CSR* (**3.1**. above), in particular regarding draft arts. 7 and 9. In any event, there may be some interesting and useful work ahead of us!

Hans van Loon, 12 September 2019

[23] See also our suggestion regarding the Hague Choice of Law Principles, *Recueil des cours,,* 380, 2015, pp. 56-57.

[24] See L. d'Avout, l'Entreprise et les conflits internationaux des lois, *Recueil des cours*, 397, 2018, pp.382 et seq.