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

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Overview

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 do so regarding connected claims, now art. 8 (1):

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 it is 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, nevertheless, 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 subsidiaries in a non-EU State. See **8**. *Infra*.

1.2. The contours of CSR

Corporate social responsibility (CSR – EU and ILO terminology) or Business and Human Rights (BHR - UN terminology), or Responsible Business Conduct (RBC – OECD terminology) (here used interchangeably)[2], refer 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 (1) *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 (2) *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 CSR problem areas[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* (first in the US, now in the Netherlands), *Akpan v. Shell* (Netherlands), *Okpabi v. Shell* (UK), *Lungowe v. Vedanta*

[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, 'Questions de droit international privé de la responsabilité sociétale des entreprises : Rapport général', in C. Kessedjian et H. Cantú Rivera (eds.), *Private International Law Aspects of Corporate Social Responsibility*, Springer (2020), (« 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.

(UK) and others[5]. It is also a factor behind the efforts which resulted in the *Hague Rules on Business and Human Rights Arbitration*, see **5.** *infra*, as well as the UN ongoing efforts to draw up a *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises*, see **3.2.** *infra.*

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. Several recent, including ongoing, court cases are concerned with this issue, see **7.-9.** *infra*.

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 opens 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. See **7.-9.** *Infra*.

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, and since 2015 also in support of achieving the UN Sustainable Development Goals by 2030 – in particular SDG's 1, 2, 5, 13, 16 and 17, see below) https://www.unglobalcompact.org/about. 15.000 corporate participants and other stakeholders, including cities through the Cities Program https://citiesprogramme.org/. Participation voluntary but mandatory disclosure framework: business participants are

[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, see https://opportunity.businessroundtable.org/ourcommitment/ .
[8] See also CK Report, Chapter 1.

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.

- 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, see also his final report A/HC/17/31 https://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx).

- 2011 – **UN Guiding Principles on Business and Human Rights** (**UNGPs**), proposed by John Ruggie, endorsed by UN Human Rights Council (HRC) by its resolution 17/4 of 16 June 2011 , https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. The UNGPs rest on three pillars:

    - (I) Primary responsibility to ***protect*** human rights lies with ***States***;

    - (II) ***Companies***, everywhere, large and small, irrespective of positive law, must ***respect*** the core internationally recognised human rights and ILO workers' 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.

  The UNGPs apply 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.

  To implement their responsibility businesses should carry out human rights ***due diligence***: assessing human rights impacts, integrating and acting upon the findings and communicating externally how impacts are addressed.

  Regarding pillar (III) – access by victims to effective remedies – the HRC published in 2016 the *Guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse*[9].

- 2012 – The HRC 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

[9] https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf

use of human rights in environmental policymaking. 2018: Knox succeeded by David Boyd, see https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx .

- 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 **3.5** *infra.*

- 2015 – The 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://sdgs.un.org/goals[10] [11].

2.1.2. ILO

1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration – fifth edition 2017) https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm**.**

The MNE Declaration provides 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 (1) multinational and national enterprises, (2) governments of home and host countries, and (3) employers' and workers' organizations providing guidance in such areas as employment, training, conditions of work and life, industrial relations as well as general policies. The guidance is founded substantially on principles contained in international *labour standards*, and builds on the basic **ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up - 1998** https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

2.1.3. OECD

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

[10] On linking PIL Unification to the UN Agenda 2030, see our 'The present and prospective contribution of global private international law unification to global legal ordering', in particular Ch. 3.3., in F. Ferrari and D.P. Fernández Arroyo (eds.) *Private International Law – Contemporary Challenges and Continuing Relevance*, 214-234 (at 228-234). Note also the forthcoming conference at MPI, Hamburg, 9-11 September 2021 on "The private side of transforming our world", https://conflictoflaws.net/2019/the-private-side-of-transforming-the-world-un-sustainable-development-goals-2030-and-the-role-of-private-international-law/.

[11] Note also the *Financial Initiative of the United Nations Environmental Programme* (UNEP FI), a partnership between UNEP and the global financial sector to mobilize private sector finance for sustainable development. The UNEP FI frameworks include: Principles for Responsible Banking (PRB) launched with more than 130 banks collectively holding USD 47 trillion in assets, or one third of the global banking sector, on 22 September 2019, Principles for Sustainable Insurance (PSI) (2012), and Principles for Responsible Investment (PRI) (2006).

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.

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*. Their powers and activities vary, e.g. some provide a mediation and conciliation platform for resolving practical issues that may arise.

- ***Non-governmental international organisations***

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 standard 14001** https://www.iso.org/iso-14001-environmental-management.html .

2.2. Regional – European Union

2011: European Commission publishes the *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. Public authorities' purchasing power represents 14% of EU GDP
and can serve as a powerful driver of the demand for sustainable products. To tap into this potential, the Commission will propose **minimum mandatory green public procurement (GPP) criteria and targets in sectoral legislation** and phase in **compulsory reporting to monitor the uptake of Green Public Procurement** (GPP)
See also the January 2020 *Communication from the Commission*: *A strong social Europe for just transitions* https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52020DC0014, in particular point 5 'Promoting European values in the world'.

Further EU action includes**:**

- **Human rights**

- 2012 Strategic Framework on Human Rights and Democracy, accompanied by action plan, adopted by the Council https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf . 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[12] (art. 7 Rome II also seeks to implement art. 191, see also **7.** *Infra*). See also *2030 Climate and Energy Framework*, https://ec.europa.eu/clima/policies/strategies/2030_en,
  (2014) with key targets for 2030 (renewables and energy revised upwards in 2018):

  - At least 40% cuts in **greenhouse gas emissions** (from 1990 levels)
  - At least 32% share for **renewable energy**
  - At least 32.5% improvement in **energy efficiency.**

  In view of the importance of *public procurement* (public authorities' purchasing power now represents 14 % of EU GDP), note also the Commission's intention to propose, as part of the Circular Economy Action Plan *minimum mandatory green public procurement (GPP) criteria* and targets in sectoral legislation and phase in compulsory reporting to monitor the uptake of GPP, see https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf.

3. Emerging hard law

3.1. Customary international law

Is CSR to be recognised as **customary international law** or a general principle of international law? Recently, the Supreme Court of Canada rendered a landmark preliminary decision in *Nevsun Resources*

[12] 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)

Ltd. v. Araya, on the issue*:* can a private, non-state actor be held liable in Canada for its alleged breaches of international law abroad?[13].

Three Eritrean workers, now refugees in Canada, claimed that they were indefinitely conscripted through Eritrea's military service into a forced labour regime where they were required to work at a mine in Eritrea, and subjected to violent, cruel, inhuman and degrading treatment. The mine is owned by a Canadian company, Nevsun Resources Ltd. The Eritrean workers started proceedings in British Columbia against Nevsun and sought damages for breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity. Nevsun responded that the claims based on customary international law should be struck because they have no reasonable prospect of success. The majority (5-4) found it an open question whether these peremptory norms bind corporations and can lead to a common law remedy of damages in a civil proceeding.

The Canadian Supreme Court allowed the claims to proceed at the trial level:

"[113]..*it is not "plain and obvious" that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of "obligatory, definable, and universal norms of international law", or indirect liability for their involvement in …"complicity offenses"… . However, because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such a character. If they are, the question for the court will be whether the common law should evolve so as to extend the scope of those norms to bind corporations"*.

This judgment may be contrasted with the recent US Supreme Court Judgment *Jesner v. Arab Bank*[14] of 24 April 2018, where the S Ct held that while international law obligations also extend to individual physical persons, it does not follow that international law extends civil liability to corporations. SCOTUS ruled that under the ATS (Alien Tort Statute) no common law action is available against foreign corporations under US federal law. See also under arbitration, **5.** *Infra*.

3.2. UN draft legally binding instrument on CSR

Following its endorsement of the *UNGPs* in 2011, the HCR established an Intergovernmental Working Group to elaborate an international *Legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights (now: Legally binding instrument to regulate, in international human rights law, the activities of transnational corporation and other business entities)* .

The draft obliges State parties to adopt and improve their domestic laws in order to hold business actors to account; it does not impose direct human rights obligations of businesses; it applies to *all* businesses and corporate operations, transnational or not, wherever they operate, and throughout their supply chains; and recognises that businesses do have the capacity to violate human rights. The draft contains provisions on "adjudicative jurisdiction" (art. 9, see also art. 7)). applicable law (art. 11), mutual legal assistance, and recognition and enforcement of judgments (art. 12)[15]. See for the latest draft, published 8 August 2020: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_ChairRapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf .

[13] Supreme Court of Canada, 28 February 2020, *Nevsun Resources Ltd. v. Araya,* 2020 SCC 5. See also the dissents
[14] https://www.supremecourt.gov/opinions/17pdf/16-499_1a7d.pdf . See also the dissent written by Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan.
[15] For a collection of essays calling for an international treaty to elaborate the human rights obligations for transnational corporations and other business enterprises, see S. Deva and D. Bilchitz, fn.4 *supra*.

3.3. Investment treaties

Traditionally bilateral investment agreements did not impose obligations on the investor[16]. More recently, (model) treaties have started to include direct or indirect human rights obligations on investors[17].

3.4. European Union

The EU has not only produced soft law (see **2.2.** *supra*), but also some hard law measures, in close cooperation with the OECD, and geared to the work of the UN: what emerges, therefore, is a sort of three layer framework, UNGPs -> OECD Guidelines -> EU regulations and directives.

- The **Non-Financial reporting Directive** (NFRD), Directive 2014/95/EU, requires the 6000 largest companies in the EU to report annually on how they realize due diligence in the field of society and the environment. The directive is accompanied by the non-binding *Guidelines on non-financial reporting* (methodology for reporting non-financial information) (2017/C 215/01) and the recent *Supplement on reporting climate-related information* (2019/C 209/01). In February 2020 the Commission launched a public consultation on the review of the NFRD. Stakeholders were to submit their views about potential revisions of the NFRD provisions by 11 June 2020.
- The **Timber Regulation**, Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R0995) prohibits the sale of illegally produced hardwood.
- The **Conflict Minerals Regulation**, Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0821) sets due diligence requirements for the trade in certain minerals from war zones and risk areas. This regulation will take effect in 2021.

- In January 2020 the Commission published the extensive *Study on due diligence requirements throughout the supply chain*, carried out by the BIICL together with Civic Consulting and LSE Consulting[18]. The BIICL Study presents 4 options for action to be taken by the EU: no change (Option 1), new voluntary guidelines (Option 2), new reporting requirements (Option 3) and mandatory due diligence as a legal standard of care (Option 4). Option 4 would 'entail a new mandatory due diligence requirement at EU level which would require companies to carry out

[16] See E. Vidak-Goljevic, Cherie 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".

[17] E.g. Southern African Development Community, Model Bilateral investment Treaty Template with Commentary, 2012 https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf, and more recently, the Netherlands model investment agreement, https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden

[18] See https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en (BIICL Study).

due diligence to identify, prevent, mitigate and account for actual or potential human rights and environmental impacts in their own operations and supply or value chain, as a legal duty or standard of care. It would allow for a company to demonstrate, in its defence, that it has met this standard by undertaking the level of due diligence *required in the particular circumstances,* i.e. this would be a context-specific risk-based approach'[19]. Option 4 includes sub-options limited to sector and company size, and enforcement through state-based oversight or judicial / non-judicial remedies.

In line with option 4 of the BIICL Study, EU Commissioner for Justice, Didier Reynders, on 19 April 2019 committed to a legislative initiative on **mandatory human rights and environmental due diligence obligations** for EU companies in early **2021**, which will include liability and enforcement mechanisms and access to remedy provisions for victims of corporate abuse, see https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/[20]. The EP had insisted on this, and the EP's Due Diligence working group proposes that the scheme applies to all companies, small and large, with a due diligence obligation throughout the value chain, to prevent human rights violations and environmental degradation, with remedies and sanctions.

3.5. Domestic regulatory frameworks[21]

To date 23 States (including 16 EU MSs) have adopted a **National Action Plan on Business and Human Rights** (see UN **2.1.1.** *supra*), while 24 (including 3 EU MSs) are in the process of doing so[22]. They address the three pillars of the UNGPs, but they are for the most part non-binding.

Moreover, several countries have adopted *legislation* to enforce RBC. These legislations differ, however, in respect of, in particular, areas of law covered and scope, legal duty imposed, and enforcement, monitoring and remedies:

- *Areas and scope*: some are focused on a specific sector, such as the Dutch *Child Labour Due Diligence Act 2019*[23] ; others cover the whole economy, such as the Swiss initiative[24]. Some focus on one specific risk, such as the UK Modern Slavery Act[25]; others covers all OECD risks

[19] *Ibid.* p. 20.
[20] On the possible legal bases for such an initiative, *ibid.* pp. 231, 232.
[21] For a detailed overview for 20 countries, see c. Kessedjian et H. Cantú Rivera (fn.3), Chapter II.
[22] See https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx
[23] *Wet Zorgplicht Kinderarbeid,* entry into force expected by 2022. The law requires companies to submit a statement to regulatory authorities declaring that they have carried out due diligence related to child labour in their global supply chains. If there are indications that a company's products or services were produced with child labour, individuals and organizations can file a complaint with the regulator. The law provides for substantial enforcement measures including fines and even imprisonment of company directors. See https://www.business-humanrights.org/en/going-dutch-four-things-you-should-know-about-the-netherlands%E2%80%99-new-law-to-eliminate-child-labour
[24] The initiative *Entreprises responsables – pour protéger l'être humain et l'environnement* https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20170060 aims to oblige companies located in Switzerland to regularly examine the consequences of their activity on human rights and the environment, also abroad both up- and downstream along a supply chain. Companies in breach of this duty of care should be held accountable for damages caused, including by companies they control without directly participating in the activities complained of. The popular vote on this initiative will take place on 29 November 2020.
[25] http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf/. The Act aims to achieve increased transparency by requiring companies to set out what measures they have taken to ensure that no

such as the French *Loi sur le devoir de vigilance*[26] . 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). Such multinationals 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[27].

- *Legal duty*: the legal duty on companies is expressed in a variety of ways: as a duty to respect, a duty to prevent, a duty to meet a certain standard, a duty to implement process, a duty to report and a duty of care. Moreover, even within one legal order, the standards may vary, e.g. in German law depending on the type of risk to be addressed, the likelihood and severity of the impact or damage to be expected, and the economic costs involved in minimising or excluding the risk[28] [29].
- *Enforcement, monitoring and remedies:* again, no uniformity. The French *Loi sur le devoir de vigilance* provides for civil liability under tort law where the company breaches *its own* vigilance obligations (there is no separate civil liability for the parent company based on the fault of other entities in their supply chains and there is no criminal liability). By contrast, the proposed German *Legislation on Corporate Human Rights and Environmental Due Diligence in Global Value Chains*[30] has a range of fines against companies, with the additional penalty of possible exclusion of the company from public procurement until such time as the company has proved its reliability, a penalty also found in Spanish law.

4. Hardening soft law though contract

human rights violations occur throughout their global supply chain. The Act 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

[26] https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id 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

[27] A first case based on the *Loi sur le devoir de vigilance* was launched by the French NGO *Les Amis de la Terre France et Survie* and others againt the French multinational company *Total* concerning its oil fields in Uganda. The Tribunal de grande instance de Nanterre declared, on 30 January 2020, that is was not competent to hear the claim because it should have been instituted before the Tribunal de commerce. The decision was appealed to the Cour d'appel de Versailles in March 2020; the hearing is scheduled for October 2020., see www.totalautribunal.org.

[28] See BIICL Study (fn. 18).

[29] A Study carried out by PriceWaterhouseCoopers (Dec. 2018) commanded by the Dutch Ministry of Foreign Affairs, https://zoek.officielebekendmakingen.nl/blg-874902.pdf, which examined thirteen domestic instruments and strategies for CSR found that stakeholders tended to interpret the instruments and strategies, and in particular the notion and process of due diligence, in different ways, "*companies still often treat initiatives as a reporting requirement (focusing on only one component of the due diligence cycle: track and communicate). Stakeholders … indicated that a number of companies focus on* ***producing public statements/public reports in order to 'check the compliance box' with a given instrument, rather than spending time and resources on identifying, prioritizing and managing risks. In other words, companies seem to be acting in line with the 'letter' of the law rather than acting in the 'spirit' of the law and incorporating due diligence in all aspects of business***."

[30] Cf. https://sustainability.freshfields.com/post/102gbky/germany-takes-a-step-closer-to-mandatory-human-rights-supply-chain-due-diligence

In the absence of, or by way of implementing, binding legal norms, private market leaders may through contracting impose CSR obligations[31]. In the project finance industry the *Equator Principles* (2003) have been adopted by 108 financial institutions in 38 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 *UNGPs, OECD Guidelines* and *1989 ILO MNE declarion*, 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; 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[32].

5. Hardening soft law through arbitration[33]

International arbitration, as a tool to enforce RBC 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 prepared the *Hague Rules on Business and Human Rights Arbitration* (2019)[34], based on the 2013 UNCITRAL Arbitration Rules, 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.

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":

[31] For a full overview of transnational company agreements, which may include CSR obligations, see the European Commission's Database on transnational agreements, https://ec.europa.eu/social/main.jsp?catId=978&langId=en. On the PIL aspects of such agreements, see the report prepared for the Commission by A. van den Hoek and F. Hendrickx *International private law aspects and dispute settlement related to transnational company agreements (2009),* http://ec.europa.eu/social/BlobServlet?docId=4815&langId=en.

[32] See Cherie Blair (fn. 16).

[33] Ibid.

[34] https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf

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 … 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' 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.)[35]. 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 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."*

[35] "*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).

This is in line with the UNGPs 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[36]

With regard to choice of law in torts, according to art. 4(1) of Rome II, 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 . . .*'. But in relation to **environmental torts** art. 7 provides that, in addition, '*the person seeking compensation for damage [may choose] to base his or her claim on the law of the country in which* ***the event giving rise*** *to the damage occurred*'.[37] The choice is open to plaintiffs both from within or outside of the EU, in respect of environmental torts occurring both within and outside the EU.

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, in *Vedanta v. Lungowe*, of the direct duty of care to third parties e.g. in the case of *Okpabi v. Shell,* in which hearings before the UK Supreme Court took place on 23 June 2020 [38]. This principle was also followed by the Hague Court of Appeal in *Akpan v. Shell,* where the Court found that Nigerian law, as a common law system, is based on English law, and the Nigerian legal system applies the precedents of English courts as the principal source of interpretation of Nigerian law[39].

8. PIL aspects: jurisdiction[40]

8.1. in respect of an EU based parent company

According to the Brussels I Regulation (recast – BIR) the domicile of the company offers a *general* ground of jurisdiction (art. 4(1) read in conjunction with art. 63(1))[41], that may therefore be used in tort based actions against such a company, including for environmental harm committed abroad.

[36] For a detailed discussion of the applicable law aspects of CSR see CK Report, chapter 6.

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

[38] See 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.

[39] See 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. See also the parallel cases ECLI:NL:GHDHA:2015:3586, *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.

[40] See also CK Report, chapter 5.

[41] 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.

If the tort occurred *within* the EU, the company may also be sued – again in contrast to the USA – on the *special* jurisdiction ground of art. 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*'.[42] But if both those 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*,[43] FNC has no place in the Regulation.

Therefore, it is in principle possible to sue a Europe-based company in its EU home-State, even by plaintiffs from outside the EU,[44] 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.[45] This makes the situation in Europe[46] crucially different from that in the USA.

8.2. In respect of a subsidiary based outside of the EU

Is it possible to sue a *subsidiary based outside of the EU*, or perhaps a contractor, jointly with the *parent* company, if that subsidiary or contractor is allegedly directly responsible for environmental harm? In the USA, *Goodyear v. Brown*[47] seems to exclude that. In Europe, art. 8 BIR deals with the question of connected claims, but only in respect of defendants domiciled in a Member State (**1.1.2.** *supra*). 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.

8.2.1. Recent UK Supreme Court case law

The same UK Supreme Court judgment *Vedanta v. Lungowe* 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. The Court 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 "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. Nevertheless, the Supreme Court 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 would enable the parent company (in this case: Vedanta) to avoid being judged by the courts of its domicile, and to submit to the courts for the place of the subsidiary (in this case: Zambia). That reintroduces the problem of weak or failed States (1.3.2. *supra*). To mitigate this problem, the Supreme Court made an

[42] CJEU 30 November 1976, C-21/76 *Handelskwekerij Bier v. Mines de Potasse*.
[43] CJEU 1 March 2005, C-281/02 *Andrew Owusu v N. B. Jackson*.
[44] EUCJ, 13 July 2000, C-412/98 *UGIC v Group Josi.*
[45] Cf, e.g., correctly, EWCA, 13 October 2017, [2017] ECWA Civ 1528 *Lungowe et al. v. Vedanta and Konkola Copper Mines*, ('*Vedanta*'), par. 28-38.
[46] 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.
[47] *Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S Ct 2846 (2011)

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). And in this case that "real risk" had been established, according to the Supreme Court

8.2.2. Recent Dutch case law

The position under Dutch law is different, and more focussed on the proper administration of the procedure: the Dutch Code of Civil Procedure deals with the issue of connection of claims in its art. 7(1), which has been aligned to art. 8(1) of BIR. In *Akpan et al. v. Shell* (**7.** *supra*), currently pending (now on the merits) before the Court of Appeal at The Hague, the courts accepted jurisdiction over both parent company Shell and its subsidiary in Nigeria, in view of the close connection between the two claims. The court did 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.

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 which might be relevant to the question of whether the parent company knew about the leakage and the condition of the leaking pipeline.[48]

9. PIL aspects: Climate change litigation

The aforementioned provisions of the Brussels I Recast and Rome II Regulations may also become relevant in transnational *climate change* cases. A recent example is the case of *Lliuya v. RWE AG* [49], now pending before the court of appeal (*Oberlandesgericht*) in Hamm, in which a Peruvian farmer Saúl Lliuya 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 Huaraz in Peru, giving rise to an acute threat of flooding the town.[50] Under BIR, there is no doubt that the German court of the domicile has jurisdiction. Under Rome II, 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).

In the case of *Milieudefensie v. RDS*, currently pending before the Hague District Court [51], *Milieudefensie* bases the jurisdiction of the court primarily on arts. 1, 4 and 63 of BIR since Shell,

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[48] Par. 5.1-10.

[49] See https://germanwatch.org/de/download/20811.pdf , first instance: https://germanwatch.org/de/download/19023.pdf .

[50] 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 only 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, which however wrongly states (FN. 8) that the Brussels I Regulation does not apply.

[51] See the writ of summons, unofficial English translation http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/?mc_cid=ff847ee323&mc_eid=c70ad85e80 , and the response by RDS https://milieudefensie.nl/actueel/2019-11-12-conclusie-van-antwoord-finale-versie-als-aangeboden-

although having its statutory seat in London, has its principle place of business in The Hague. Moreover, *Milieudefensie* invokes art. 7(2) Brussels I recast, arguing that the main cause of the damage occurs in the Netherlands, since it is there that Shell adopts the group policy that results in the climate damage, and affects people and the environment in the Netherlands, among other countries. In contrast to *Akpan v. Shell*, *Milieudefensie* is only suing the parent company, not also subsidiaries of RDS abroad.

Milieudefensie bases its claim primarily on a civil tort committed by Shell, arguing that Dutch law applies, not on the basis of art. 4 (1) but art. 7 of Rome II. As damage may be suffered everywhere on Earth, Article 4 (1) could lead to the application of a large variety of applicable laws. To avoid that result *Milieudefensie*, opts for the application of Dutch law permitted under art. 7 (1), claiming that Shell determines the group policy that its subsidiaries follow. Shell's response: the event causing damage is not the group policy decision by Shell, which is a mere preparatory act, but the concrete implementation thereof by Shell companies at the local level, as well as the conduct of the end users across the world. So, not art. 7 (1) (nor 4 (2) or (3)), but 4 (1) Rome II is applicable. In any event, even if Dutch law is held to be applicable art. 17 Rome II should be applied[52].

10. Conclusion - Possible work for the sous-groupe *» Entreprises et droits humains/droit de l'environnement – Aspects de droit international privé «*

Corporate Social Reponsibility/Business and Human Rights/Responsible Business Conduct has multiple aspects: the legal obligations it entails; its relation to weak or failed States; the corporate (group structure), access to remedies. There interrelated issues are increasingly under scrutiny of international and regional organisations including the UN (UNGPs), the ILO (Tripartite MNE Declaration), the OECD (OECD Guidelines, with its National Contact Points) as well as the EU, and have led to important normative initiatives, which are, essentially still non-binding principles, guidance etc. However, one can clearly discern a rapid development towards "hardening" this soft law into binding obligations, through customary international law (as interpreted by domestic courts and arbitral tribunals), the ongoing UN attempt to draw up a legally binding instrument on RBC, new (model) investment treaties, domestic legislation, contractual arrangements, arbitration, and last but not least civil tort litigation, with interesting recent developments in the UK and in the Netherlands.

It looks like it is becoming 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 damage caused overseas by the subsidiaries' activities, or that the group policy defined by the parent company is irrelevant when it comes to determining the liability of its subsidiaries abroad. The announcement of the forthcoming EU legislative initiative on **mandatory human rights and environmental due diligence obligations for EU companies** (**3.4** *supra*) will reinforce this development.

It would seem that the *sous-groupe* might undertake some useful work:

voor-indiening-bij-rechtbank.pdf (we did not find an English translation). Hearings have been scheduled for 1, 3, 15 and 17 December 2020.

[52] The question of the applicable law could have been raised in the well-known *Urgenda* climate change case, but it was not. On both *Urgenda* and *Milieudefensie v. RDS* see our 'Strategic Climate Litigation in the Dutch Courts: a source of inspiration for NGO's elsewhere?', in *Acta Universitatis Carolinae Iuridica* 2020 (forthcoming).

First, in respect of **jurisdiction**: pick up on the question of the possible extension of art. 8(1) BIR in the relations with third States where we left it in 2010 (**1.1.2.** *supra*). The *sous-groupe* might also look into related **access to justice** issues, such as public interest actions and class actions in matters of CSR, (with a focus on their cross-border aspects), the regulation of which varies considerably from one jurisdiction to another[53].

Secondly, 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 other than environmental damage[54]. 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 draw attention to mandatory international, regional or national CSR provisions[55].

Thirdly, as soon as the EU publishes its **legislative initiative on mandatory human rights and environmental due diligence obligations for EU companies** (foreseen for early 2021), the *sous-groupe* might well start reflecting on the PIL aspects/consequences of such an autonomous EU substantive due diligence norm, and possibly give input on the draft text (in this regard, it is worth noting that the status of the French *Loi sur le devoir de vigilence* (**3.5.** supra) as *loi de police* (overriding mandatory law) is not undisputed[56]).

Fourthly, the *sous-groupe* might also wish to give input on the UN efforts to draw up a legally binding *instrument on CSR* (**3.1**. above), in particular regarding draft arts. 9 (juncto 7), 11 and 12 – possibly, since this is a global project, in cooperation or jointly with the American Association of Private International Law (ASADIP) .

Other avenues to explore: it has been suggested to apply the nationality link to regulate the economic power of corporations. Is that a viable route?[57]

The Hague, 1 September 2020, Hans van Loon

[53] On which see C. S. Nagy**, '**The Reception of Collective Actions in Europe: Reconstructing the Mental Process of a Legal Transplantation', in *Journal of Dispute Resolution*, Vol. 2020, No. 2, 413-443 (2020). Cf. the announcement by the EU Parliament of New rules allowing EU *consumers* to defend their rights collectively https://www.europarl.europa.eu/news/en/press-room/20200619IPR81613/new-rules-allow-eu-consumers-to-defend-their-rights-collectively 22 June 2020.

[54] In support of such an extension, A. Peters, S. Giess, C. Thomale and M.-P. Weller, 'Business and human rights: making the legally binding instrument work in public, private and criminal law', MPIL Research Paper Series No. 2020-06 ("Weller")

[55] See also our suggestion regarding the Hague Choice of Law Principles, in 'The Global Horizon of Private International Law", *Recueil des cours,,* 380, 2015, pp. 56-57.

[56] Cf. Valérie Pironon in her presentation on the Loi sur le devoir de vigilance at the Comité français de DIP (publication forthcoming). See also Weller (fn. 54), in particular under IV.C..

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