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Environmental Justice “Light”? Transnational Tort Litigation in the Corporate Anthropocene

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Abstract

Corporations are notoriously powerful actors in the current configuration of our globalized economy. Their activities play a key role in shaping a new age of ecological precarity—the Anthropocene. Much of this environmental damage occurs in cross-border settings, hampering victims’ access to legal remedies due to widespread corporate impunity and institutional hurdles in host states. Several transnational lawsuits have recently tested the willingness of European home state judiciaries to adjudicate the extraterritorial conduct of domestic corporations. To contribute to a more nuanced understanding of this novel phenomenon, this article analyzes three legal sagas from a comparative perspective: *Vedanta v. Lungowe* (England & Wales), *Dooh v. Shell* (The Netherlands) and *Lliuya v. RWE* (Germany). It argues that transnational tort suits remain a problematic vehicle for the attainment of procedural and substantial environmental justice. The inherent limitations of tort law, extra-legal hurdles to transnational litigation, and the socio-cultural contingency of legal institutions severely circumscribe the space for legal contestations of the corporate Anthropocene.

Keywords: Transnational law; litigation; tort; environmental justice; extraterritorial

A. Introduction

They [Shell] never think about the poor man. So, there is no hope that things will get better for us. . . . Only with the help of people all over the world might we be able to recover.¹

Who is to blame for the dire state of our ecosystems, large and small? The diffuse responsibility chains underlying much environmental degradation render this question notoriously difficult to answer, both morally and legally. Situated at politico-economic nodes of power, transnational corporations (TNCs) have asserted a key role in shaping our new era of ecological precarity—the

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¹These are the words of Chief Fidelis, one of the claimants in the Dutch lawsuits against Shell, in reference to his hopes for justice through legal action. Cited in Milieudéfense, *The Plaintiffs and Their Villages*, SHELL IN NIGERIA, <https://en.milieudéfense.nl/shell-in-nigeria/the-plaintiffs-and-their-villages>.

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Anthropocene.² There is ample empirical evidence attesting to this fact. One report quantifies the economic damage of global environmental degradation by hands of the largest 3000 public companies at a staggering \$2.2 trillion in 2008 alone.³ The much-cited Carbon Majors Report estimates that “[o]ver half of global industrial emissions since human-induced climate change was officially recognized can be traced to just twenty-five corporate and state producing entities.”⁴ Similarly, a small number of companies in the food and beverage industry contribute the vast majority of plastic litter collected across fifty-one countries.⁵ Despite past decades’ boom in self-regulation under the heading of corporate social responsibility (CSR) and environmental, social, and corporate governance (ESG),⁶ these impacts continue largely unabated, bolstering calls for legally enforceable models of accountability.⁷

Legal responses to the corporate Anthropocene have run into two hurdles. First, much of environmental law remains deeply embedded in an administrative frame that hinges on the environmental responsibility of public institutions.⁸ The rising importance of private actors in the global system in terms of number and power puts the adequacy of such public accountability channels in doubt. Second, the transnationalization of corporate activities makes their regulation exceedingly difficult in a nation state-centered paradigm that consecrates national sovereignty. In the absence of a strong supra-national or international environmental regime, “[e]ffective legal governance in the Anthropocene . . . requires state laws to reach further, extending beyond territorial borders to capture transnational corporate conduct.”⁹

To tackle these conjoined issues, a nascent class of lawsuits is targeting TNCs’ ecological footprint abroad before European and North American courts through the tools of (international) private law.¹⁰ As some commentators suggest, such “selfless” unilateral interventions hold the promise of widening access to environmental justice and increasing the accountability of

²See generally Jorge Viñuales, *The Organisation of the Anthropocene: In Our Hands?*, in BRILL RES. PERSPECT. 1–81 (2018); Martin Perry, *Corporations and the Anthropocene*, in INTERNATIONAL ENCYCLOPEDIA OF GEOGRAPHY 1–7 (2017). The Anthropocene label is not without criticism, among others for its alleged tendency to brush over the role of intraspecies power relations in driving environmental change, Andreas Malm & Alf Hornborg, *The Geology of Mankind? A Critique of the Anthropocene Narrative*, 1 ANTHRO. REV. (2014). As an alternative, some scholars have put forward the word “Capitalocene” to capture the cheapening of nature under capitalistic rule. See Donna Haraway, *Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making Kin*, 6 ENV’T HUMAN. 159–65 (2015) While wholeheartedly embracing these proposals, this article makes use of the term “corporate Anthropocene” to stress the actorness of corporations in processes of environmental change.

³Juliette Jowit, *World’s Top Firms Cause \$2.2tn of Environmental Damage, Report Estimates*, THE GUARDIAN (Feb. 18, 2010), <http://www.theguardian.com/environment/2010/feb/18/worlds-top-firms-environmental-damage>. The number is likely to be significantly higher today, given that both economic output and ecological costs have risen dramatically since.

⁴Paul Griffin, *CDP Carbon Majors Report 2017*, CLIMATE ACCOUNTABILITY INSTITUTE 8 (2017).

⁵Karen McVeigh, *Coca-Cola, Pepsi and Nestlé Named Top Plastic Polluters for Third Year in a Row*, THE GUARDIAN, (Dec. 7, 2020), <http://www.theguardian.com/environment/2020/dec/07/coca-cola-pepsi-and-nestle-named-top-plastic-polluters-for-third-year-in-a-row>.

⁶See ASEEM PRAKASH & MATTHEW POTOSKI, *THE VOLUNTARY ENVIRONMENTALISTS: GREEN CLUBS, ISO 14001, AND VOLUNTARY ENVIRONMENTAL REGULATIONS* 17–25 (2006), for an example of the wealth of voluntary programs or “green clubs.”

⁷Interestingly, even corporations themselves sometimes prefer “hard” regulation over soft or voluntary approaches. See Maria Gjølberg, *Explaining Regulatory Preferences: CSR, Soft Law, or Hard Law? Insights from a Survey of Nordic Pioneers in CSR*, 13 BUS. & POL. 1–31 (2011).

⁸See Natasha Affolder, *Square Pegs and Round Holes? Environmental Rights and the Private Sector*, in ENVIRONMENTAL LAW DIMENSIONS OF HUMAN RIGHTS 11–35 (Ben Boer ed., 2015); Even market mechanisms are often, although not exclusively, employed as regulatory tools of state control. See generally SANJA BOGOJEVIĆ, *EMISSIONS TRADING SCHEMES: MARKETS, STATES AND LAW* (2013).

⁹Sara Seck, *Moving Beyond the E-Word in the Anthropocene*, in THE EXTRATERRITORIALITY OF LAW: HISTORY, THEORY, POLITICS 49–66, 57 (Daniel S. Margolies et al. eds., 2019).

¹⁰On the growing intersection between private international law and environmental law, see Geert van Calster, *Environmental Law and Private International Law*, in THE OXFORD HANDBOOK OF COMPARATIVE ENVIRONMENTAL LAW 1139–59 (Emma Lees & Jorge E. Viñuales eds., 2019).

TNCs.¹¹ Although the debate surrounding the jurisprudential contribution and normative desirability of transnational litigation for environmental protection is far from new,¹² its geographical¹³ and substantive¹⁴ focus have shifted significantly over the past decade.

This article contributes to this debate in two ways. First, I present a comparative doctrinal analysis of three major transnational environmental litigation sagas to highlight common threads and national nuances in the judicial resolution of such cases. Second, I offer a critical reading of these decisions, arguing that they exhibit serious normative drawbacks, both in procedural as well as in distributive terms.¹⁵ Procedurally, the transplantation of local justice needs to European institutions feeds into colonial legacies of epistemic domination through law across the North-South divide. With regards to distributive effects, private cross-border lawsuits normalize an extractive logic that accumulates profits in the North and costs in the South and fail to address the root causes of global environmental injustices. Although home state litigation often remains the only viable option for claimants, it constitutes a heavily circumscribed and unscalable tool of dispute resolution, one that can only ever deliver “light” forms of environmental justice.

B. The Rise of Transnational Environmental Litigation

As a distinct mode of judicial dispute resolution, transnational litigation is generally characterized by “the presence of a transnational element, such as a foreign party or evidence located abroad.”¹⁶ While the phenomenon itself is as old as the legal regulation of cross-border commerce,¹⁷ it has grown and diversified in the wake of globalization processes during the second half of the twentieth century.¹⁸ Today, transnational litigation is commonly subdivided into “public,”¹⁹ “regulatory,”²⁰ and “private”²¹ branches.²² This article is mostly concerned with the latter, private branch, although the boundaries between the three are somewhat fluid.

¹¹See, e.g., CEDRIC RYNGAERT, *SELFLESS INTERVENTION: THE EXERCISE OF JURISDICTION IN THE COMMON INTEREST* 173–90 (2020); Samvel Varvastian & Felicity Kalunga, *Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe*, 9 *TRANSNAT'L ENV'T L.* 323–45 (2020).

¹²See Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer*, 41 *WASHBURN L. J.* 399 (2001) (assessing legal opportunities and obstacles in using the tort law for transnational environmental accountability purposes); Carmen Otero García-Castrillón, *International Litigation Trends in Environmental Liability: A European Union–United States Comparative Perspective*, 7 *J. PRIV. INT'L L.* 551 (2011).

¹³Jodie A. Kirshner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 *BERKELEY J. INT'L L.* 259 (2012).

¹⁴See Elena Merino Blanco & Ben Pontin, *Litigating Extraterritorial Nuisances under English Common Law and UK Statute*, 6 *TRANSNAT'L ENV'T L.* 285–308 (2017) (investigating the merit of UK nuisance claims for transnational litigation); Geetanjali Ganguly, Joana Setzer, & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 *OXFORD J. LEGAL STUD.* 841 (2018) (documenting the shift from public defendants to corporate ones in climate change suits).

¹⁵See Jane Holder & Donald McGillivray, *Bringing Environmental Justice to the Centre of Environmental Law Research: Developing a Collective Case Study Methodology*, in *RESEARCH METHODS IN ENVIRONMENTAL LAW: A HANDBOOK* 184–206 (Andreas Philippopoulos-Mihalopoulos & Victoria Brooks eds., 2017) on the importance of assessing environmental law not only on its own terms, but also in relation to wider considerations of justice.

¹⁶Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 *UNIV. PA. J. INT'L ECON. L.* 1297, 1300 (2004).

¹⁷Simeon L. Guterman, *The First Age of European Law: The Origin and Character of the Conflict of Laws in the Early Middle Ages*, 7 *N. Y. L. F.* 131–166 (1961).

¹⁸Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 *SW. J. INT'L L.* 31 (2011).

¹⁹Harold Hongju Koh, *Transnational Public Law Litigation*, 100 *YALE L. J.* 2347 (1991).

²⁰Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 *VA. J. INT'L L.* 251 (2006).

²¹Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society Symposium: Comparative Visions of Global Public Order (Part I)*, 46 *HARV. INT'L L. J.* 471 (2005).

²²This distinction is carved out by Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 *TUL. L. REV.* 67, 91 (2009).

Private law proceedings spanning multiple jurisdictions have played a formative role in enabling and shaping the current neoliberal configuration of globalized business. Their scope ranges from corporate governance to the paraphernalia of contract and tort law.²³ The indeterminacy of this transnational legal grammar, however, has simultaneously galvanized its subversive deployment in the battle against harmful corporate practices. For instance, there exists a rich tradition of tort-based “foreign direct liability claims” arising from TNCs’ human rights violations,²⁴ particularly so under the auspices of the US Alien Tort Statute.²⁵ Not least because of the ongoing “greening” of human rights law,²⁶ similar litigation has recently begun to mushroom around environmental causes.²⁷

In part, the surge in transnational environmental litigation responds to the failures of TNC regulation at the international level. While there exists a multitude of soft law mechanisms—including, among others, the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, and the UN Agenda 2030—none of these soft instruments and only a handful of multilateral treaties²⁸ empower harmed parties to seek direct judicial redress.²⁹ The adjudicatory enforcement of domestic environmental laws in corporate host states, in turn, is often distorted by vested economic interests and resource constraints.³⁰ Against this backdrop, litigation in TNCs’ home states remains the only pathway available to challenge corporate predation against the environment.

Three species can be distinguished within the genre of transnational environmental tort litigation. The distinction I draw here hinges on the link between the nature of the claims on the one hand and the forum in which they are brought on the other.

First, litigants may challenge a TNC in its domicile for environmental damage it has directly caused abroad, for example, through transboundary pollution originating in the home state but causing damage elsewhere,³¹ or through managerial decisions that have been taken at

²³KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 15–21 (2019). One of the procedural mechanisms enabling the neoliberal transnationalization of business is the doctrine of forum shopping, allowing corporate actors to choose the most favorable sites to pursue legal action. See generally ANDREW S. BELL, *FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION* (2003).

²⁴See generally SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* (2004); Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard Human Rights Litigation in State Courts and Under State Laws*, 3 U.C. IRVINE L. REV. 127 (2013); Daniel Augenstein, *Paradise Lost: Sovereign State Interest, Global Resource Exploitation and the Politics of Human Rights*, 27 EUR. J. INT’L L. 669 (2016).

²⁵See generally MICHAEL KOEBELE, *CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW* (2009).

²⁶For instance, in October 2021 the United Nation Human Rights Council recognized the right to a healthy environment at the international level, after it had already been enshrined in many national jurisdictions. See Human Rights Council Res. 48/13, *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/RES/48/13 (8 October 2021). See also DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* (2011).

²⁷See, e.g., Robert V. Percival, *Global Law and the Environment*, 86 WASH. L. REV. 578, 601–24 (2011); Ralph Kaye, *Transnational Environmental Litigation*, 24 ENV’T PLAN. L. J. 35 (2007); Hari M. Osofsky, *Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT’L L. REV. 335 (1996).

²⁸See Otero García-Castrillón, *supra* note 12, at 555–58 for an enumeration of the treaties concerned, and a more in-depth discussion.

²⁹Hans van Loon, *Principles and Building Blocks for a Global Legal Framework for Transnational Civil Litigation in Environmental Matters*, 23 UNIF. L. REV. 298, 301–03 (2018).

³⁰Nigeria is a fitting example. See Eloamaka Carol Okonkwo, *Assessing the Role of the Courts in Enhancing Access to Environmental Justice in Oil Pollution Matters in Nigeria*, 28 AFR. J. INT’L COMP. L. 195, 214 (2020) (“[T]he court appears to be a barrier to accessing justice rather than helping in that regard.”).

³¹See, e.g., Prisca Listiningrum, *Transboundary Civil Litigation for Victims of Southeast Asian Haze Pollution: Access to Justice and the Non-Discrimination Principle*, 8 TRANSNAT’L ENV’T L. 119 (2019).

the corporate headquarters and directly produce adverse consequences elsewhere.³² In such cases of immediate liability for cross-border damage, issues of causation usually feature center stage.

The second class of cases concerns so-called “anchor jurisdiction,”³³ where a corporate parent is targeted for the acts or omissions of a subsidiary. In such situations, jurisdiction can only be established if two conditions are fulfilled. First, there must be some recognized legal doctrine that would allow for the cases against parent and subsidiary to be jointly heard in the parent’s domicile. Second, the claims lodged against the parent must have some chance of success for there to be a credible case. Usually, this requires that the parent assumed a duty of care over the subsidiary’s operations through the business law tools of ownership and control. In contrast to the substantive focus of the direct liability mode, the corporate group mode imposes considerable burdens on claimants at the procedural stage.³⁴

A third type of litigation is appearing on the horizon, one that does not rest on a relationship within corporate groups, but merely on TNCs’ purchasing power over other actors along their value chains.³⁵ Given that many small and medium-sized enterprises in the Global South manufacture almost exclusively for one customer, that customer does not need to obtain ownership rights to exercise effective control over the upstream company. But what happens if the local manufacturer causes serious environmental damage? Can a supply chain relationship give rise to a duty of care, and can such a case be heard in the forum of the downstream purchaser? These questions are largely uncharted in current case law. Although their exploration lies beyond the scope of this article, the latest legislative developments suggest that cross-border purchasing relationships may well be the next litigation frontier.³⁶

It is worth noting that not all counter-corporate litigation is necessarily transnational, as many national lawsuits against large carbon emitters exemplify.³⁷ Although these climate cases’ ripple effects are inherently global, their legal framing usually remains domestic.³⁸

C. Environmental Corporate Liability in Comparative Perspective

Following several high-profile decisions by the U.S. Supreme Court in 2013, 2018, and 2021, the American legal system is now perceived as a hostile forum for transnational liability claims against TNCs.³⁹ As a result, litigants have increasingly turned to European courts in their quest for civil justice.⁴⁰ Simultaneously, EU law seems to have discovered its own appetite

³²For instance, under the US Alien Tort Statute, a corporation’s U.S.-based conduct can give rise to direct liability, even if the harm materializes elsewhere. See *Licci v. Lebanese Canadian Bank*, 834 F.3d 201, 217 (2d Cir. 2016) (concerning financing of terrorism).

³³Matthias Weller & Alexia Pato, *Local Parents as ‘Anchor Defendants’ in European courts for Claims Against their Foreign Subsidiaries in Human Rights and Environmental Damages Litigation: Recent Case Law and Legislative Trends*, 23 UNIF. L. REV. 397, 398 (2018).

³⁴*Id.*

³⁵For a more in-depth discussion, see Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis & Jane Wright, *Supply Chain Liability: Pushing the Boundaries of the Common Law?* 8 J. EUR. TORT L. 261 (2018).

³⁶I have discussed the greening of global value chains through legal mechanisms elsewhere in more depth. See Daniel Bertram, *Judicializing Environmental Governance? The Case of Transnational Corporate Accountability*, 22 GLOBAL ENV’T POL. 117 (2022); Daniel Bertram, *Green(wash)ing Global Commodity Chains*, VERFASSUNGSBLOG (2022), <https://verfassungsblog.de/greenwashing-global-commodity-chains/>.

³⁷See Ganguly et al., *supra* note 14.

³⁸An illustration of this effect can be found in a recent climate lawsuit against Shell. Although the claimants had argued to represent the interests of a global population, the Court narrowed the class of admissible interests to Dutch residents only. *Rechtbank Den Haag [RB]* [The Hague District Court], 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie v. Shell*), paras. 4.2.3.–4.2.4.

³⁹*Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Jesner v. Arab Bank, Plc*, 138 S. Ct. 1386 (2018); *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021). See also Kirshner, *supra* note 13, at 301.

⁴⁰Weller & Pato, *supra* note 33, at 399.

for extraterritoriality.⁴¹ How have these developments impacted environmental litigation and adjudication? In this section, I juxtapose and compare a selection of three prominent cases:⁴² *Vedanta v. Lungowe* (England & Wales),⁴³ *Dooh v. Shell* (The Netherlands),⁴⁴ and *Lliuya v. RWE* (Germany).⁴⁵ As per the classificatory scheme introduced above, *Vedanta* and *Dooh* concern liability relationships within corporate groups, whereas *Lliuya* deals with direct responsibility for the transboundary effects of corporate greenhouse gas emissions.

The chosen cases are indicative—rather than representative—of the growing transnationalization of environmental litigation in Europe. All three of them have attracted a great deal of scholarly attention because of their innovative use of legal modalities. Whereas most commentaries have homed in on the cases' significance within their respective jurisdictions,⁴⁶ however, I submit that reading them in conjunction allows for new insights into the wider potential and drawbacks of environmental litigation to be gained. The case analysis proceeds in three steps. After setting out the factual backdrops, I expound the procedural challenges engendered by the litigations' transnational character in relation to jurisdiction and applicable law. Lastly, I compare how the courts have tackled the tort issues raised.

I. Three Tales of Environmental Harm

Much transnational environmental damage follows the same factual pattern. It should come as no surprise that the studied cases all target corporate giants operating in the extractive industries, whose very business models sit uneasy with notions of sustainability.⁴⁷ The aggrieved claimants, in turn, are small-scale farmers whose reliance on a healthy environment for economic gain and sustenance makes them particularly vulnerable to ecological deterioration. All three litigations revolve around corporate emissions into the surrounding soil, water, and atmosphere also known as “toxic torts.”⁴⁸ Tired of playing the figurative canary in the coal mine, the communities bearing the brunt of corporate extractivism are increasingly fighting back in court.

Vedanta revolved around the severe toxic pollution caused by the Nchanga copper mine in Zambia, which, at the time of litigation, was the second largest mine of its type in the world.⁴⁹ The case was brought by the British law firm Leigh Day on behalf of 1,826 individuals residing in the mine's surroundings. The claimants belong to materially underprivileged communities, earning well below the national average income and basing most of their livelihoods on subsistence farming. As such, they are critically dependent on the resources provided by nearby

⁴¹See Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87 (2014); Ioanna Hadjiyianni, *The Extraterritorial Reach of EU Environmental Law and Access to Justice by Third Country Actors*, 2 EUR. PAPERS 519 (2017).

⁴²For a similar approach with regards to climate litigation, see Anna-Julia Saiger, *Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach*, 9 TRANSNAT'L ENV'T L. 37 (2020). The merit of comparing civil litigation systems is exemplarily highlighted in Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002).

⁴³*Vedanta Resources Plc v. Lungowe*, [2019] [UKSC] 20 [hereinafter *Vedanta II*].

⁴⁴Gerechshof Den Haag [Hof] [The Hague Court of Appeal], 29 Jan. 2021, ECLI:NL:GHDHA:2021:133 (*Dooh v. Shell*) [hereinafter *Dooh III*].

⁴⁵Oberlandesgericht Hamm [OLG] [Higher Regional Court of Hamm], 30 Nov. 2017, Case No. I-5 U 15/17 (*Lliuya v. RWE*) [hereinafter *Lliuya*].

⁴⁶A notable, although slightly dated, exception is found in Christine Salamanca Mandap, *Jurisdiction of Parent Companies' Home State Courts over Foreign Subsidiaries Abroad: A Comparative Approach between the Netherlands and the United Kingdom*, 11 AMSTERDAM L. F. 40 (2019).

⁴⁷Lyuba Zarsky & Leonardo Stanley, *Can Extractive Industries Promote Sustainable Development? A Net Benefits Framework and a Case Study of the Marlin Mine in Guatemala*, 22 J. ENV'T DEV. 131 (2013).

⁴⁸See, e.g., Bradshaw, *infra* note 78. Whether the label also fits climate harm of the type occurring in *Lliuya* is subject to debate. Eduardo M Peñalver, *Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change*, 38 NAT. RES. J. 563(1998).

⁴⁹*Vedanta II*, *supra* note 43, at para. 2.

waterways. On the other side of the dispute stood Konkola Copper Mines plc (KCM), the Zambian-based owner and operator of the mine, and Vedanta Resources plc, KCM's London-based majority shareholder. The remaining minority stake in KCM was owned by the Zambian government.⁵⁰ The claimants alleged that KCM frequently and knowingly discharged harmful substances arising from the mining operations into local rivers, leading to "personal injury, damage to property, loss of income and loss of amenity and enjoyment of land."⁵¹ Their claims were based in the common law of negligence, nuisance, trespass, and breach of statutory duties as mandated by Zambian law.⁵² In addition, the parent company Vedanta was sued for breaching the duty of care it had assumed in exercising close oversight and control over KCM.⁵³ After the Supreme Court's jurisdictional ruling in 2019, the case was eventually settled for an undisclosed amount in early 2021 without an admission of liability and without having received a ruling on the merits.⁵⁴

The actions before the Dutch Courts were initiated by four Nigerian farmers. Each had been affected by several oil leaks during the 2000s.⁵⁵ In fact, many residents saw themselves forced to leave the highly polluted areas for economic and health reasons. An investigation quickly found that the spills had originated from the nearby oil installations of Shell Petroleum Development Company of Nigeria Ltd (SPDC), the wholly-owned Nigerian subsidiary of Royal Dutch Shell Plc (RDS), the latter being registered in the UK and headquartered in the Netherlands.⁵⁶ Alleging that the defendants had acted negligently in causing, reacting to, and remediating the oil pollution, the claimants sought civil remedies in tort, including compensation for incurred damages as well as injunctions to repair the defective installations and engage in a large-scale clean-up of any remaining oil pollution.⁵⁷ The claims were brought before the Dutch courts in three parallel lawsuits due to considerable differences in the respective fact patterns,⁵⁸ but all three cases engaged similar legal issues. Throughout the proceedings, the Nigerian farmers were supported by the Dutch NGO "Milieudedefensie."⁵⁹ The litigation commenced in 2008 and received a first ruling by the Hague District Court in 2013.⁶⁰ The case was then appealed by both parties to the Court of Appeal, which issued an interlocutory decision in 2015⁶¹ and awarded the final judgment in January 2021.⁶²

At its launch in 2015, the German case *Lliuya* was among the first transnational suits to target an energy giant for its global carbon emissions and attracted much attention,⁶³ not least for its

⁵⁰Lungowe v. Vedanta Resources Plc [2016] [EWHC] (TCC) 975, paras. 9–15 [hereinafter *Vedanta I*].

⁵¹*Id.* at para. 1.

⁵²*Id.* at para. 37. Zambian law was agreed to be roughly equivalent to English law in this regard.

⁵³*Id.* at paras. 31–34.

⁵⁴Leigh Day, *Legal Claim by More than 2,500 Zambian Villagers in a Case against Vedanta Resources Limited*, LEIGH DAY, Jan. 19, 2021, <https://www.leighday.co.uk/latest-updates/news/2021-news/legal-claim-by-more-than-2-500-zambian-villagers-in-a-case-against-vedanta-resources-limited/>.

⁵⁵A portrait of the claimants can be found at Milieudedefensie, *supra* note 1.

⁵⁶Rechtbank Den Haag [RB] [The Hague District Court], 30 Jan. 2013, ECLI:NL:RBDHA:2013:BY9845 [hereinafter *Dooh I*].

⁵⁷*Id.* at para. 3.1.

⁵⁸In addition to *Dooh*, the other cases are: Gerechtshof Den Haag [Hof] [The Hague Court of Appeal], 29 Jan. 2021, ECLI:NL:GHDHA:2021:134 (*Akpan v. Shell*); Gerechtshof Den Haag [Hof] [The Hague Court of Appeal], 29 Jan. 2021, ECLI:NL:GHDHA:2021:132 (*Oguru & Efang v. Shell*). This article focusses on *Dooh*, but the same reasoning applies *mutatis mutandis* to the other two cases.

⁵⁹It is not quite clear how and why these four individuals were selected by Milieudedefensie and if they had any relationship with the organization prior to litigation.

⁶⁰*Dooh I*, *supra* note 56.

⁶¹Gerechtshof Den Haag [Hof] [The Hague Court of Appeal], 18 Dec. 2015, ECLI:NL:GHDHA:2015:3586 (interlocutory appeal judgement) [hereinafter *Dooh II*].

⁶²*Dooh III*, *supra* note 44.

⁶³Lauren Rothman, *A Peruvian Corn Farmer Is Taking on One of the World's Biggest Polluters*, VICE, Mar. 17, 2015, <https://www.vice.com/en/article/ezq9vj/a-peruvian-corn-farmer-is-taking-on-one-of-the-worlds-biggest-polluters>.

appreciable potential to inspire similar developments elsewhere.⁶⁴ The claimant, Saúl Luciano Lliuya, lives with his family in Huaraz in the Andean region of Peru. The city of roughly 112,000 inhabitants is threatened by the nearby Palcacocha Lake, which has grown dangerously in volume as a result of the surrounding glaciers melting rapidly in a warming climate. A glacial avalanche may cause the lake to burst at any time and devastate Mr. Lliuya's home in the resulting flood wave. Similar incidents have occurred in the past, with disastrous consequences. The likelihood of such a flood wave has been described as one of *when* rather than *if*.⁶⁵ Mr. Lliuya seeks to recover a portion of the costs of various adaptation measures required to safeguard his property against future flooding from German energy company RWE AG, Europe's largest emitter of greenhouse gases (GHG). As RWE is estimated to be responsible for roughly 0.47 percent of historical GHG emissions since 1854,⁶⁶ the damages claimed amount to the commensurate percentage of the expected cost of protection measures, a sum of roughly 17,000 EUR.⁶⁷ The case was brought with the institutional support of the NGO "Germanwatch"⁶⁸ under § 1004 of the German Civil Code (*Bürgerliches Gesetzbuch*), which grants injunctive relief in cases of private nuisance, i.e., an interference with another's ownership rights. In the first instance, the District Court of Essen ruled that there was no justiciable causation between the disturber's emissions and the incurred damages.⁶⁹ Undeterred by the setback, the claimant appealed to the Higher Regional Court of Hamm, who accepted the appeal on November 30, 2017.⁷⁰ After the taking of on-site evidence was delayed multiple times by the COVID-19 pandemic, the case is now moving forward with a final decision expected by 2023.⁷¹

II. Jurisdictional Haggles

A first layer of legal complexity emerges from the litigations' transnational character, which gives rise to competing claims of jurisdictional authority. The dominant territorial model of jurisdiction requires courts to dismiss cases that are not sufficiently connected to their own legal system as a matter of deference to other nations' judicial prerogatives. There are exceptions to this general rule, though. Whether a claim can proceed in a given forum has to be assessed on a case-by-case basis with reference to applicable national and international procedural regulations.⁷² Within the

⁶⁴For instance, one study evaluates how such a case could play out under English nuisance law. See Vedantha Kumar & Will Frank, *Holding Private Emitters to Account for the Effects of Climate Change: Could a Case Like Lliuya Succeed under English Nuisance Laws*, 2018 CARBON CLIMATE L. REV. CCLR 110–23 (2018); *Id.* at 112. The authors explicitly encourage other scholars to engage in similar studies for other jurisdictions.

⁶⁵A more detailed description including pictures and maps can be found in Will Frank, Christoph Bals, & Julia Grimm, *The Case of Huaraz: First Climate Lawsuit on Loss and Damage Against an Energy Company Before German Courts*, in LOSS AND DAMAGE FROM CLIMATE CHANGE: CONCEPTS, METHODS AND POLICY OPTIONS 475–482 (Reinhard Mechler, Laurens M. Bouwer, Thomas Schinko, Swenja Surminski, JoAnne Linnerooth-Bayer, eds., 2019). The risk of flooding is reported, among others, in Christian Huggel, Mark Carey, Adam Emmer, Holger Frey, Noah Walker-Crawford, & Ivo Wallimann-Helme, *Anthropogenic Climate Change and Glacier Lake Outburst Flood Risk: Local and Global Drivers and Responsibilities for the Case of Lake Palcacocha, Peru*, 20 NAT. HAZARDS EARTH SYST. SCI. 2175 (2020).

⁶⁶Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIM. CHANGE 229 (2014).

⁶⁷Lliuya, *supra* note 45, at para. I (1).

⁶⁸According to Germanwatch, contact between the NGO and the claimant was established through a third party and a meeting was arranged after the 2014 COP20 climate conference in Lima, where a common decision to bring suit against RWE was reached. *Questions and Answers Regarding the Case of Huaraz*, GERMANWATCH, (Nov. 23, 2017), <https://www.germanwatch.org/en/14783>.

⁶⁹Landgericht Essen [LG] [District Court of Essen], 16 Dec. 2015, Case No. 2 O 285/15.

⁷⁰Lliuya, *supra* note 45.

⁷¹Marlene Becker & Noah Walker-Crawford, *Court Taking Evidence in Peru for RWE Case*, GERMANWATCH, (March 14, 2022), <https://www.germanwatch.org/en/85108>.

⁷²See, e.g., Ekaterina Aristova, *Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction*, 14 UTRECHT L. REV. 6 (2018).

EU, these precepts are codified in the Brussels I Recast Regulation on the exercise of jurisdiction in “civil and commercial matters.”⁷³ The Regulation’s default rule in Article 4 allocates jurisdiction to the courts of the defendant’s domicile (*forum domicilii*). With regard to legal persons, the corporate domicile is defined by the physical location either of a company’s “statutory seat,” its “central administration,” or its “principal place of business.”⁷⁴

Despite this broad interpretation, the complex and opaque structures underlying large corporate groups typically require claimants to show that the EU-domiciled parent company—in other words, not a third-country subsidiary—owed a direct duty of care towards the foreign victims to establish jurisdiction under Article 4. Non-EU defendants generally do not fall within the purview of the Regulation, but if a parent is found to owe a direct duty of care to foreign plaintiffs, a non-EU subsidiary may still be hauled before EU courts where domestic procedural laws allow for it. This idea of “residual jurisdiction” is found in Article 6(1) of the Regulation.⁷⁵ Both *Vedanta* and *Dooh* ultimately revolved around this inconspicuous mechanism.

After the *Vedanta* claimants had won a favorable ruling on jurisdiction in the High Court, the defendants immediately appealed to the Court of Appeal,⁷⁶ and—upon losing there—to the UK Supreme Court.⁷⁷ Four main questions were addressed by the Court in deciding whether the case could proceed in England: (i) Whether there was a real, triable issue against Vedanta, (ii) whether KCM was a proper party to the claim against Vedanta, (iii) what the proper place was for the claim to be heard, and (iv) how substantial justice could be ensured.⁷⁸

Regarding (i), the Court was asked to evaluate whether Vedanta had breached its duty of care and was therefore an appropriate “anchor defendant” to ground jurisdiction in its home state England pursuant to Article 4 of Brussels I Recast—the *forum domicilii* rule. This was answered in the affirmative, for reasons elaborated in subsection IV on toxic torts.

The second question related to the propriety of dragging KCM, the “foreign defendant,” in front of an English court. Here the residual jurisdiction mechanism of the Regulation’s Article 6(1) came into play. In England, Practice Direction 6B of the Civil Procedure Rules allows for jurisdiction to be established if the foreign defendant is a “necessary and proper party” to the dispute.⁷⁹ Ever since the ECJ’s restriction of the *forum non conveniens* doctrine in *Owusu v. Jackson*,⁸⁰ however, courts’ ability to decline jurisdiction over such defendants is severely curtailed. Faced with the likely risk of irreconcilable judgments in Zambia and England, Lord Briggs saw “one hand tied behind [the Court’s] back” and “the other . . . effectively paralyz[ed]” in staying proceedings, so as long as there was “a minimum level of triable issue . . . against an English incorporated parent.”⁸¹ In short, the claims against Vedanta were found to be genuine and tenable in separation from any action against KCM.

Having established jurisdiction over both defendants, the Court proceeded by asking whether England was the proper venue for the case to be heard at all. Lord Briggs stressed that the claimants had a choice as to whether to pursue one claim against both defendants in Zambia or separate cases in Zambia and England. In fact, given the case’s overwhelming connection to Zambia, “it

⁷³Commission Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), 2012 O.J. (L 351), at art. 1.

⁷⁴*Id.* at art. 63.

⁷⁵Mariangela La Manna, *Residual Jurisdiction under the Brussels I bis Regulation: An Unexpected Avenue to Address Extraterritorial Corporate Human Rights Violations*, in UNIVERSAL CIVIL JURISDICTION - WHICH WAY FORWARD? 140–58 (Serena Forlati & Pietro Franzina eds., 2020).

⁷⁶*Lungowe v. Vedanta Resources Plc* [2017] [EWCA] (Civ) 1528.

⁷⁷*Vedanta II*, *supra* note 43.

⁷⁸*Id.* at para. 22; Carrie Bradshaw, *Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court*, 32 J. ENV’T L. 139, 141 (2020).

⁷⁹*Vedanta II*, *supra* note 43, at para. 20.

⁸⁰Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383.

⁸¹*Vedanta II*, *supra* note 43, at para 39.

would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England.”⁸²

In a final analytical step, however, both the High Court and the Court of Appeal recognized the appreciable risk that substantial justice may not be attainable in the Zambian system.⁸³ The principle that proceedings must not be stayed if there is another forum “in which the case may be tried more suitably for the interests of all the parties and *the ends of justice*” was authoritatively established in *Spiliada v. Cansulex*.⁸⁴ In line with the *Spiliada* doctrine, the Supreme Court upheld the lower courts’ analysis of the hurdles to justice faced in Zambia, stressing two particular obstacles. The first barrier concerned the lack of adequate legal funding arrangements in Zambia, where contingency fee agreements are prohibited and legal representation with the capabilities to adequately litigate such a complex case is therefore nearly impossible to come by for the poverty-stricken claimants. The second barrier touched upon the poor track record of similar environmental litigation before Zambian courts, quashing any “confidence that these cases would be appropriately managed and resolved.”⁸⁵ In particular, the Supreme Court reviewed and reinforced the High Court’s detailed analysis of two previous litigation instances which had both failed for a lack of available technical expertise.⁸⁶ Considering this likely denial of justice in Zambia, the Court ruled that the case could proceed to the merits stage in England.

The Dutch courts’ jurisdiction over the claims in *Dooh* proved a similarly contentious issue, which the Court of Appeal addressed in two steps. It first investigated to what extent the claim against the parent company could succeed under the Brussels I Recast Regime. Second, it applied the Dutch Code of Civil Procedure (DCCP) to determine whether jurisdiction over the foreign defendant could be grounded in the Dutch anchor defendant, given the connection between the claims against RDS and SPDC. In doing so, like the *Vedanta* courts, it too relied on the loophole in Article 6(1) of Brussels I Recast.

Establishing jurisdiction over RDS was a relatively straightforward exercise. The company had its headquarters, and thus its domicile, in the Netherlands in accordance with Article 63 Brussels I Recast. This gave the Court full and undisputed jurisdiction over RDS under the *forum domicilii* rule.⁸⁷ In addition, the judges firmly rejected the notion that the claims were bound to fail from the outset and confirmed that the claims “could possibly be awarded” under Nigerian law.⁸⁸ The thrust of the Court’s jurisdictional argument, though, relied on the close connection between the two defendants. Article 7(1) of the DCCP allows the claims against two separate defendants to be joined, “provided the claims against the various defendants are connected to the extent that reasons of efficiency justify a joint hearing.”⁸⁹

Having confirmed its domicile-based jurisdiction over RDS, the Court of Appeal’s analysis then turned to whether such a link between the defendants was present in the case at hand. In upholding the previous rulings, it concluded that there was indeed a sufficiently close connection to join both cases and quoted a number of factors to support this finding, including that (i) the defendants were held both jointly and severally liable; (ii) the claims lodged against both defendants were identical; (iii) the factual pattern was identical and concerned the same oil spill; (iv) the legal question centered around the cause of the spill and potential negligence on the defendants’ part; (v) further investigations are necessary; and (vi) these investigations should be undertaken by one

⁸²*Id.* at para. 87.

⁸³*Id.* at para. 22.

⁸⁴*Spiliada Maritime Corp. v. Cansulex Ltd.* [1986] [UKHL] 10 (emphasis added).

⁸⁵*Vedanta I*, *supra* note 50, at para. 194.

⁸⁶*Vedanta II*, *supra* note 43, at paras. 100–02.

⁸⁷*Dooh II*, *supra* note 61, at para. 3.9; See also Daniel Bertram, *Transnational Experts Wanted: Nigerian Oil Spills before the Dutch Courts*, 33 J. ENV’T L., 423–35, 427 (2021).

⁸⁸*Dooh II*, *supra* note 61, at para. 3.2.

⁸⁹*Id.* at para. 3.1.

court only so as to reduce the risk of divergent results.⁹⁰ Next to expediency concerns, the Court also saw a clear risk of irreconcilable judgements if the action against SPDC was moved to Nigeria.⁹¹ Moreover, the Court of Appeal upheld the District Court's assertion that the connection between the defendants need only be proven at the jurisdictional level and will remain in place throughout the proceedings in disconnection from any substantive findings.⁹² The jurisdictional gateway thus continues to tie the case to the Dutch forum even if the underlying claims later turn out to be unfounded.

In stark contrast to *Vedanta* and *Dooh*, the question of jurisdictional authority has not played a heightened role in *Lliuya*, despite both the claimant and the damage—although not the defendant—being based in Peru. Pursuant to the *forum domicilii* rule, the claimants contended that German courts were the proper forum to hear the case against German-domiciled RWE.⁹³ This line of reasoning was not disputed by the defendant in its written response, and the District Court of Essen tacitly assumed jurisdiction without addressing the issue in more detail, although it appears that Peruvian courts could theoretically seize the dispute under the *forum locus damni* logic.⁹⁴

Beyond the specifics of *Lliuya*, German legal culture tends to be territorially conservative and wary of hauling foreign defendants before its tribunals. The Code of Civil Procedure (*Zivilprozessordnung*) generally lacks provisions dealing with the international competence (*direkte internationale Zuständigkeit*) of German courts, including a national mechanism comparable to the English and Dutch “gateways” that would allow cases between a German-domiciled parent and a foreign subsidiary to be joined under the umbrella of Article 6(1) Brussels I Recast.⁹⁵ This means that only direct claims against German or other EU parties can be brought, largely preempting cases like *Vedanta* and *Dooh* that are fundamentally aimed at subsidiary operations.

III. Applicable Law

Before assessing the claims' substance, the judges were faced with another crucial question: Whose law should apply to the dispute? As with jurisdiction, determinations of applicable law are largely harmonized at the EU level. For non-contractual claims, these rules are predominantly found in the Rome II Regulation,⁹⁶ whose Article 7 grants claimants a choice between the law of the place of damage (*locus damni*) and the law of the place giving rise to the damage (*locus delicti*) in cases of environmental damage. Recital (25) of the Regulation elaborates the rationale behind this rule by reference to the environmental policy of the EU, in particular its commitments to sustaining “a high level of protection,” the precautionary principle, and the “polluter pays” principle.

Because the Regulation only applies to damage arising after its entry into force in 2009, this provision was of little use to the claimants in *Vedanta* and *Dooh*. In both cases, however, the litigious parties agreed that the applicable law should be the *locus damni*—the place of damage—that is, Zambian⁹⁷ and Nigerian⁹⁸ law, respectively. The stakes of this choice are not to be overestimated, though. Both the Zambian and the Nigerian legal system heavily draw on the English

⁹⁰*Id.* at para. 3.4.

⁹¹*Id.* at para. 3.5.

⁹²*Id.* at para. 3.8.

⁹³*Statement of Claim Lliuya*, GERMANWATCH, (2015), <https://germanwatch.org/sites/germanwatch.org/files/announcement/20822.pdf>.

⁹⁴Peruvian courts can seize disputes related to patrimonial rights under Article 47 of the Peruvian Civil Code (Código Procesal Civil) of 8 January 1993 in connection with Article 2058 of the Peruvian Civil Code (Código Civil) of 24 July 1984.

⁹⁵One exception may be found in Article 8(1) of the Brussels I Recast Regulation, which allows for cases against two defendants with different domiciles to be treated jointly where the court has jurisdiction over one defendant. Importantly, both defendants need to be domiciled in the EU, however, which severely restricts the rule's extraterritorial reach.

⁹⁶Commission Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II Regulation), 2007 O.J. (L 199), art. 7.

⁹⁷*Vedanta II*, *supra* note 43, at para. 85.

⁹⁸*Dooh II*, *supra* note 61, at para. 1.3.

common law and widely adhere to English precedents.⁹⁹ In contrast, the default *locus damni* rule would have designated Peruvian law as applicable to the damage in *Lluyya*. Instead, the claimant made use of his right under Article 7 to opt for the application of German law as the *lex locus delicti*.¹⁰⁰

IV. Toxic Torts

Private law offers an attractive toolkit to seek environmental redress.¹⁰¹ If tort constitutes the “*fons et origo*” of environmental rights,¹⁰² the grammar of private law continues to play an important role in remediating environmental damage, as the cases illustrate. Both the extent and the manner in which tort claims have been deployed differ significantly, however.

At face value, *Vedanta* “is all (and only) about jurisdiction.”¹⁰³ The court’s jurisdictional analysis penetrates deep into the substantive merits, though, providing a glimpse of the parameters along which the case could have been resolved. The gist of *Vedanta*’s tort element addresses liability in corporate group structures. Lord Briggs argued that the reach of a parent’s duty of care towards third parties depends on “the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary.”¹⁰⁴ Ownership is therefore merely relevant as a means for the parent to control the operations of the subsidiary, but does not in itself create an assumption or duty to that effect—effective control is the decisive element. The submitted evidence showed that *Vedanta* was responsible for the establishment and implementation of group-wide environmental standards and could therefore be held accountable for the harmful consequences of KCM’s conduct.¹⁰⁵ The same court recently reinforced and developed the *Vedanta* findings in *Okpabi*,¹⁰⁶ where the Supreme Court clarified once more that “control is just a starting point”¹⁰⁷ in considering factors that may generate a duty of care. It thus firmly rejected a restrictive, formalistic reading of a parent’s duty of care in favor of an earnest appreciation of its de facto practices.¹⁰⁸

In contrast to its English counterpart, the Dutch court in *Dooh* elaborated in great detail on the tort claims, which were based on a statutory strict liability rule created by Article 11(5)(c) of the Nigerian Oil Pipelines Act (OPA), in addition to several common law torts.¹⁰⁹ The main dispute centered on Shell’s responsibility for causing the leaks, although Shell’s immediate reaction to the spill and its later clean-up actions were also addressed. The defendants argued that the pipeline had been sabotaged by unknown third parties, whereas the claimants insisted the damage was due

⁹⁹*Vedanta II*, *supra* note 43, at para. 56; *Dooh II*, *supra* note 61, at para. 3.2.

¹⁰⁰Will Frank, *The Huaraz Case (Lluyya v. RWE) – German Court opens Recourse to Climate Law Suit against Big CO2-Emitter*, CLIMATE LAW BLOG (Dec. 7, 2017), <http://blogs.law.columbia.edu/climatechange/2017/12/07/the-huaraz-case-lluyya-v-rwe-german-court-opens-recourse-to-climate-law-suit-against-big-co2-emitter/>.

¹⁰¹See generally Osofsky, *supra* note 27; Katalin Sulyok, *Managing Uncertain Causation in Toxic Exposure Cases: Lessons for the European Court of Human Rights from U.S. Toxic Tort Litigation*, 18 VT. J. ENV’T L. 519 (2016).

¹⁰²CHRISTOPHER MILLER, ENVIRONMENTAL RIGHTS: CRITICAL PERSPECTIVES 9 (1998).

¹⁰³*Vedanta II*, *supra* note 43, at para. 4.

¹⁰⁴*Id.* at para. 49.

¹⁰⁵In a sense, the court was thereby giving legal effect to a voluntarily adopted corporate policy. There is a legitimate concern that companies could retreat from CSR and ESG policies in the future in response to *Vedanta*. See Bradshaw, *supra* note 78, at 146–7.

¹⁰⁶*Okpabi & Ors v. Royal Dutch Shell Plc & Anor* [2021] [UKSC] 3.

¹⁰⁷*Id.* at para. 147.

¹⁰⁸Ekaterina Aristova & Carlos Lopez, *UK Okpabi et al v. Shell: UK Supreme Court Reaffirms Parent Companies May Owe a Duty of Care Towards Communities Impacted by their Subsidiaries in Third Countries*, OPINIO JURIS (2021), <https://opiniojuris.org/2021/02/16/uk-okpabi-et-al-v-shell-uk-supreme-court-reaffirms-parent-companies-may-owe-a-duty-of-care-towards-communities-impacted-by-their-subsidiaries-in-third-countries/>.

¹⁰⁹*Dooh III*, *supra* note 44, at paras. 3.17–3.22.

to a lack of maintenance and security measures. Because of the strict liability provision engaged, however, the onus of proof lay on the defendants. Although the weight of the evidence indicated that sabotage was indeed the likely cause, some reasonable doubt as to this conclusion remained. SPDC was therefore held strictly liable for any ensuing damage. Notably, the Court refused to extend this liability to the Dutch parent company, RDS, because the parent's duty of care fundamentally rested on the subsidiary's negligence. The applicable burden of proof did not suffice to establish such negligence, and thus the parent had not breached its duty of care towards the claimants.

In addition to the tort claims, the Nigerian farmers also invoked a violation of environmental rights against the defendants. These rights were based in Articles 20, 33, and 34 of the Nigerian constitution, and Article 24 of the African Charter on Human and Peoples' Rights, respectively.¹¹⁰ The rights-based claims turned out to be short-lived, however. Even before assessing whether Nigerian law allowed for a horizontal application of constitutional rights through civil liability mechanisms, the Court argued that the defendants' conduct failed to meet the thresholds of severity and attributability required for an infringement to be established under the European Court of Human Rights' jurisprudence in *López Ostra v. Spain*.¹¹¹ Regarding remedies, the exact amount of economic compensation to be paid by SPDC under the OPA stands to be determined at a later point. Moreover, in one of the parallel proceedings, *Oguru and Efanganga*, the Court ordered the defendants to install a leak detection system that would allow for a quicker response to future leaks.¹¹²

Although *Lliuya* has so far only received a four-page indicative order, the judges seized that opportunity to firmly dismiss some of the defendant's legal arguments and to highlight that "[i]t comports with the principles of the legal system that even a party who acts lawfully must be liable for property damage caused by him."¹¹³ The Court thus gave legal credence to the claim that there was a scientifically tenable and legally actionable chain between RWE's GHG emissions and the risk to his property. In rough terms, this chain involved the emission of a clearly identifiable amount of GHGs from the defendant's power plants into the atmosphere, where an increasing concentration of such gases increases the retention of solar radiation, with the consequence of rising temperatures in the Peruvian Andes. As a result of such regional warming, the local glaciers are releasing large amounts of ice and water into the Palcacocha Lake, whose likely outburst would threaten the claimant's property.¹¹⁴ Despite the deferral of a definitive decision to the provision of further evidence on each causal element within the chain, the Court's 2017 order was widely celebrated as a watershed moment for confirming the plausibility of the claimants' legal reasoning.¹¹⁵

D. An Avenue for Environmental Justice?

Vedanta, *Dooh*, and *Lliuya* have evoked strong reactions in the legal community and beyond. Each case lends itself to David-versus-Goliath narratives of afflicted farmers taking up the legal slingshots to rise against powerful corporate overlords.¹¹⁶ One commentator has proposed a "global legal framework" to facilitate similar mobilization in the future.¹¹⁷ Unfortunately, such rosy accounts all too easily overlook the extent to which transnational tort litigation is embedded

¹¹⁰*Id.* at para. 2.1.

¹¹¹*López Osta v. Spain*, App. No. 16798/90 (9 Dec. 1994), <https://hudoc.echr.coe.int/FRE?i=001-57905>.

¹¹²Gerechtshof Den Haag [Hof] [The Hague Court of Appeal], 29 Jan. 2021, ECLI:NL:GHDHA:2021:132 (*Oguru & Efanganga v. Shell*) at para 6.43.

¹¹³*Id.* at para. I(2).

¹¹⁴Frank, Bals, and Grimm, *supra* note 65, at 479.

¹¹⁵*Id.* at 475.

¹¹⁶Elian Peltier & Claire Moses, *A Victory for Farmers in a David-and-Goliath Environmental Case*, THE NEW YORK TIMES (Jan. 29, 2021) <https://www.nytimes.com/2021/01/29/world/europe/shell-nigeria-oil-spills.html>.

¹¹⁷van Loon, *supra* note 29.

in larger structures that constrain its emancipatory potential. In this section, I build on a contextual reading of *Vedanta*, *Dooh*, and *Lliuya* to problematize the notion that cross-border lawsuits offer a meaningful avenue for the attainment of environmental justice.¹¹⁸ The imbalances in access to legal resources, the alienating impact of private international law, and the translation of environmental wrongs into tort law jointly suppress the articulation and operationalization of environmental justice ideals beyond a caricatured, thin conception.

I. Procedural Justice in a Transnational Setting?

Jurisdictional doctrines catalyze transnational tort litigation. Their extraterritorial implications, however, may also give rise to serious legitimacy concerns. As Sara Seck argues, the procedural legitimacy of home state jurisdiction is dependent upon the extent to which it gives a voice to—and respects the voice of—subaltern claimants from the Global South.¹¹⁹ While civil adjudication may nominally provide such a forum, its availability and effectiveness in practice are curtailed by insurmountable extra-legal hurdles. For starters, the inevitable transaction costs of high-stakes litigation prevent claimants without the requisite financial prowess from being able to access European court systems. In addition, foreign claimants are unlikely to possess the knowledge and understanding of European judicial institutions required to bring proceedings.¹²⁰ Even if, and once an action has been initiated, victims' unique and subjective experiences of suffering need to be translated into European legal grammars.¹²¹ This exercise of translation often occurs against the backdrop of what has been called an “epistemological abyss” separating Southern and Northern ways of knowing and experiencing the world.¹²²

To overcome these financial, practical, and epistemic hurdles, victims are crucially dependent on Northern NGOs and law firms who are capable and willing to take their cases. Most of the aggrieved presumably fail to garner adequate legal representation and cannot make their claims heard at all.¹²³ Even where a relationship with legal representatives is successfully established, it is invariably one marked by dependency and stark power imbalances. This dynamic becomes all the more problematic where the interests of both parties diverge—for example, it may be beneficial for claimants to settle a case and receive the cash-out,

¹¹⁸See generally David Schlosberg, *Reconceiving Environmental Justice: Global Movements and Political Theories*, 13 ENV'T POL. 517 (2004); Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 155 (2015); Holder & McGillivray, *supra* note 15.

¹¹⁹This framework is developed in a series of articles. See generally Sara Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RIGHTS DEV. L. J. 177 (2008); Sara Seck, *Transnational Business and Environmental Harm: A TWAAIL Analysis of Home State Obligations*, 3 TRADE L. DEV. 164 (2011); Sara Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?*, 46 OSGOODE HALL L. J. 565 (2008).

¹²⁰This phenomenon was famously described in the US American context by Marc Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974). It seems to me that the discrepancies in financial prowess, institutional knowledge and informal relations is much more severe in across the North-South divide, as in the analyzed cases.

¹²¹The need for translation arises regardless of later rulings on applicable law. For instance, the procedures applicable to these disputes is invariably that of the European forum.

¹²²Among the leading theorists of this rift is sociologist Boaventura de Sousa Santos. See generally Boaventura de Sousa Santos, *Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges*, 30 REV. FERNAND BRAUDEL CENT. 45 (2007); Boaventura de Sousa Santos, *The Resilience of Abyssal Exclusions in Our Societies: Toward a Post-Abyssal Law*, 22 TILBURG L. REV. 237 (2017).

¹²³There is, of course, no quantifiable data on claims that never pass the first stage. The relative novelty and paucity of litigations, and the quantity of protracted corporate environmental injustices as recorded in tools like the Environmental Justice Atlas suggest that only a tiny fraction of disputes wash up in European courts. EJATLAS - GLOBAL ATLAS OF ENVIRONMENTAL JUSTICE, ENVIRONMENTAL JUSTICE ATLAS, <https://ejatlas.org/>.

whereas NGOs or activist lawyers may prefer a substantive judgment that can only be attained at the merits stage—or, indeed, the other way around.¹²⁴

Once a case is brought, it is usually judged upon according to the the *locus damni* default option, i.e., the laws of the place of damage. While this approach is sensible and aligns with claimants' and defendants' expectations, it creates unique problems of legal expertise. Although the application of foreign laws has a long history in private international law, environmental rights and obligations are complex legal creatures that are deeply interlinked with the social context in which they arise.¹²⁵ Whether a foreign, European court can do full justice to this idiosyncrasy may be doubted. The difference between Northern and Southern jurisprudence can be substantial; a fact that European judges all too readily brush over. For instance, the Supreme Court's assessment in *Vedanta* relied exclusively on English materials with no regard for their interaction with other elements of the Zambian legal system. The same holds true for the *Dooh* court, whose assessment of Nigerian law fundamentally rested on its alleged similarity to the English common law.¹²⁶ Considering the complex structure of the Nigerian system, which combines elements of common law with customary practices, this assumed equivalence should be taken with a grain of salt. Such concerns are mitigated where claimants are given a choice as to the applicable law, as seen in *Lliuya*. *Lliuya* constitutes a relative outlier, though. Not only do many cases fall outside the Rome Regulation's choice-of-law provision's temporal scope, the possibility of picking between the *lex locus damni* and the *lex locus delicti* also amounts to a genuine choice only in cases of transboundary harm—in all other circumstances, the place of damage and the place where the tort was committed would indicate the same law.

II. The Poverty of Tort Law

Tort law is sometimes framed as a universal language of civil rights and wrongs.¹²⁷ Not only is this conception empirically untenable,¹²⁸ it also obscures the drawbacks of minting public rights to a healthy environment in the form of private wrongs.¹²⁹ Tort standing doctrines restrict the class of claimants to those who can demonstrate specific and demonstrable harm, reducing actionable environmental damage to individual loss. Given the complex systems of property law in post-colonial societies, affected individuals may not possess a formal title to their land, thereby stymying recourse to property-based torts such as nuisance or trespass. In the *Dooh* litigation, the defendants exploited this feature by continuously casting doubt on the individual affectedness of the claimant's property with a view to delaying the proceedings.¹³⁰

Depending on the system in question, the focus on individual loss may also prevent public interest organizations from acting as claimants and leveraging their legal and environmental expertise. A rights-based approach, although no panacea, is likely to adopt a broader interpretation of standing; after all, environmental rights tend to capture a broader category of factual patterns beyond individual loss, and their public character mandates a more democratic form of legal

¹²⁴Such conflicts are reported, among others, in Angela Lindt, *Transnational Human Rights Litigation: A Means of Obtaining Effective Remedy Abroad?*, 4 J. LEGAL ANTHROPOLOGY 57 (2020).

¹²⁵Both the articulation and interpretation of environmental rights diverge significantly from system to system. For instance, Ecuador has developed an idiosyncratic constitutional jurisprudence that recognizes rights of nature itself. Louis J. Kotzé & Paola Villavicencio Calzadilla, *Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, 6 TRANSNAT'L ENV'T L. 401 (2017).

¹²⁶Bertram, *supra* note 87, at 433.

¹²⁷See James Goudkamp & John Murphy, *The Failure of Universal Theories of Tort Law*, 21 LEGAL THEORY 47 (2015).

¹²⁸Mauro Bussani & Marta Infantino, *Tort Law and Legal Cultures*, 63 AM. J. COMP. L. 77 (2015).

¹²⁹See Jan Klabbers, *Doing the Right Thing? Foreign Tort Law and Human Rights*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 553–66 (Craig Scott ed., 2011) for a similar argument with respect to acts of torture.

¹³⁰*Dooh III*, *supra* note 44, at para. 4.5.

contestation.¹³¹ Whereas notions of stewardship play an important role in current conceptualizations of environmental rights,¹³² they hardly feature in tort discourses.

Another drawback of tort grammar concerns the applicable burden of proof. Apart from a small number of statutory provisions imposing strict liability, the weight of proving defendants' tortious conduct rests on the claimants. Given the informational and power imbalances involved, this is highly problematic. The causal chains underlying environmental damage are often protracted and complex, and underprivileged claimants are likely to lack the knowledge and resources to establish causation beyond reasonable doubt. TNCs, on the other hand, can easily abuse the complexity of environmental damage to cast doubt on their fault, aided by expert evidence and social engineering.¹³³ The difficulty of proving causation is a main factor delaying the proceedings in both *Dooh* and *Lliuya*. In the former case, Shell's liability could only be established because the relevant statutory provision contained a reversal of the burden of proof, a fortunate coincidence that Mr. Lliuya cannot rely upon. Similar problems occur in rights-based litigation, of course, but human rights tribunals have shown more willing to reverse the burden of proof at their discretion to make up for stark information asymmetries.¹³⁴

The trouble with the discovery process runs deeper than the burden of proof, however. Environmental litigation across the North-South divide is just as much about contesting what constitutes valid environmental knowledge as it is about objective "truths."¹³⁵ Although this epistemological battleground is often hidden from sight, its implications for environmental justice outcomes should not be forgotten. As Eric Dooh remarked in relation to Shell's assertion that the local environment had been measurably restored: "How can they say that they cleaned it up when you can still see oil lying all over?"¹³⁶

Even if a verdict in claimants' favor is reached, the remedies available in tort tilt towards economic compensation and injunctive relief, espousing a particular vision of corrective justice.¹³⁷ In each of the cases, monetary compensation alone is a woefully inadequate response to the emotional and physical suffering inflicted, the displacement of entire communities, and the continuing impairment of natural ecosystems. Indeed, an exclusive reliance on monetary and injunctive relief bears the risk that corporate offenders will merely internalize liability risks as yet another cost of doing business.

Against the backdrop of authoritative rulings in the UK and the Netherlands, many defendants will seek to settle the dispute so as to avoid lengthy proceedings, as ultimately seen in *Vedanta* and a number of other high-profile cases.¹³⁸ Such "settlement justice" comes with its own problems. For starters, it negates victims of environmental harm a public recognition of their injury and fails to expose corporations' illegal and predatory practices. Settlements may therefore be perceived as "hush money."¹³⁹ Also here, practical challenges of adequate interest representation and unequal bargaining power are particularly acute in a transnational context. The infamous *Trafigura* litigation surrounding the dumping of toxic disposals by the *Probo Koala* ship in Ivory Coast serves

¹³¹See Mark Wilde, *Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence*, 12 REV. EUR. CMTY. INT'L ENV'T L. 284 (2003).

¹³²EMILY BARRITT, *THE FOUNDATIONS OF THE AARHUS CONVENTION: ENVIRONMENTAL DEMOCRACY, RIGHTS AND STEWARDSHIP* 127–38 (2020).

¹³³See, e.g., Andrea Brock & Alexander Dunlap, *Normalising Corporate Counterinsurgency: Engineering Consent, Managing Resistance and Greening Destruction Around the Hambach Coal Mine and Beyond*, 62 POL. GEOGRAPHY 33 (2018).

¹³⁴Christopher Roberts, *Reversing the Burden of Proof Before Human Rights Bodies*, 25 INT'L J. HUM. RIGHTS 1682 (2021).

¹³⁵See Rebecca Lave, *Neoliberalism and the Production of Environmental Knowledge*, 3 ENV'T SOC'Y 19 (2012); Erin O'Donnell, Anne Poelina, Alessandro Pelizzon & Cristy Clark, *Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature*, 9 TRANSNAT'L ENV'T L. 403 (2020).

¹³⁶See Milieudéfense, *supra* note 1.

¹³⁷Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981).

¹³⁸The Bodo Community & Ors v. The Shell Petroleum Development Company of Nigeria Ltd. [2014] [EWHC] (TCC) 1973.

¹³⁹For an example of this issue arising in practice, see Lindt, *supra* note 124.

as a cautionary tale.¹⁴⁰ In *Trafigura*, the UK law firm Leigh Day—the same firm that represented the *Vedanta* claimants—managed to negotiate a £30 million settlement on behalf of roughly 30,000 claimants. Sadly, due to a chain of misappropriations, thousands of claimants ended up empty-handed, and Leigh Day was eventually found in breach of its contractual obligations and duties of care towards those claimants.¹⁴¹

To be sure, matching environmental harm with adequate remedies is a pervasive challenge plaguing environmental law more generally.¹⁴² But choosing a rights perspective over the tort frame may not only widen the remedial spectrum, it also foregrounds the responsibility of public actors to protect environmental resources against the practices of TNCs.¹⁴³ This seems particularly pertinent in light of the close ties between state and corporate institutions in many environmental injustices.¹⁴⁴ Responses to the corporate Anthropocene must account for the interlinked civil and public wrongs it entails. In this regard, the headline-grabbing stories engrained in court rulings risk crowding out local efforts at political mobilization.¹⁴⁵

E. Conclusion

Twenty years ago, Michael Anderson offered a skeptical view of tort litigation's potential to challenge environmental degradation in cross-national settings:

Coming back to the original question – whether tort law serves as an effective means to enforce environmental standards in a cross-border context – one is forced to admit that it plays an important role in the absence of other means. The considerable growth in transnational environmental tort cases is likely to continue simply because affected communities and environmental activists find this to be the only legal tool at their disposal. . . . That its profile is much higher in the transnational context is simply testimony to the lack of other accountability mechanisms.¹⁴⁶

Although the latest case law suggests that the field has evolved significantly in the past two decades, one is forced to conclude that Anderson's words hold as true today as they did then. This is all the more lamentable when considering the fact that the environmental externalities of corporate activities have virtually exploded in the meantime and have pushed our planet dangerously close to the edge of ecological collapse.¹⁴⁷

The three European transnational litigation sagas studied in this article demonstrate that the legal contestation of big business's environmental footprint is possible—if a long list of hurdles is overcome. But is it even worth the trouble? Although *Vedanta*, *Dooh*, and *Lliuya* read as success stories, they transport a severely impoverished understanding of environmental justice. Their jurisdictional element allows a narrow gateway to European courts for a select few victims of environmental harm, mercifully aided by a foreign NGO or law firm, at the hefty price of submitting the dispute to a foreign forum with foreign judges trained in a foreign legal and cultural tradition.

¹⁴⁰Sarah Dezalay & Simon Archer, *By-passing Sovereignty: Trafigura Lawsuits (re Ivory Coast)*, in *GLOBAL PRIVATE INTERNATIONAL LAW: ADJUDICATION WITHOUT FRONTIERS* 92 (Horatia Muir Watt et al. eds., 2019).

¹⁴¹*Agouman v Leigh Day* [2016] [EWHC] (QB) 1324.

¹⁴²For an exploration of the creative use of judicial environmental remedies, see Ricardo Luis Lorenzetti, *Complex Judicial Remedies in Environmental Litigation: The Argentine Experience*, 29 J. ENV'T L. 1 (2017).

¹⁴³Linda A. Malone & Scott Pasternack, *Exercising Environmental Human Rights and Remedies in the United Nations System*, 27 WM. & MARY ENV'T L. POL'Y REV. 365 (2002).

¹⁴⁴See, e.g., Michael J. Lynch, Averi Fegadel & Michael A. Long, *Green Criminology and State-Corporate Crime: The Ecocide-Genocide Nexus with Examples from Nigeria*, 23 J. GENOCIDE RESEARCH 236 (2021).

¹⁴⁵This effect is described in relation to social protest and mining conflicts in Peru by Lindt, *supra* note 124, at 67–69.

¹⁴⁶Anderson, *supra* note 12, at 424.

¹⁴⁷See generally DAVID WHYTE, *ECOCIDE: KILL THE CORPORATION BEFORE IT KILLS US* (2020).

These foreign institutions may well lack the necessary knowledge to appreciate local legal constructs in their wider social context. Substantively, the grammar of tort law further circumscribes the potential of such cases as opposed to a more inclusive rights frame.¹⁴⁸ Then again, the persuasiveness of my critique is at least partially dependent on claimants' lived experiences in such proceedings. This is an empirical question in urgent need of addressing through anthropological and socio-legal methods.¹⁴⁹ One may also be hopeful that transnational tort litigation can incentivize changes in corporate behavior, which is another empirical question in need of further research.

Admittedly, many commentators are aware of the drawbacks of transnational tort litigation but posit that imperfect justice is better than no justice at all. In my view, this line of argument misses the wealth of more legitimate alternatives for empowering victims of TNCs' environmental impacts. For instance, Northern states may assist in strengthening national and regional adjudication or push for the global proliferation and enforcement of environmental rights through diplomatic means.¹⁵⁰ Perhaps even more urgently, home states should start subjecting TNCs' global operations to stringent due diligence standards to prevent harm from occurring in the first place rather than focusing on *ex post* relief.¹⁵¹

Ultimately, tort litigation's focus on individual actors and particularized harm runs danger of obscuring the structural injustices of the corporate Anthropocene.¹⁵² The roots of these injustices extend to the bloody legacies of extractive industries during the colonial era, when the global South was exploited to sustain the industrialization and wealth accumulation of Northern states. Meaningful redress mechanisms must address the economic, geo-political, and epistemic power imbalances in the global political economy, or they risk reinforcing them.¹⁵³ An earnest acknowledgement of transnational proceedings' limits would mark an important first step towards a revitalized role for law in taming the corporate Anthropocene.

¹⁴⁸However, tort law is not static and can be tweaked to address novel types of environmental harm, particularly in common law jurisdictions. See, e.g., Maria Hook, Ceri Warnock, Barry Allan, & Mihiata Pirini, *Tort to the Environment: A Stretch Too Far or a Simple Step Forward?: Smith v. Fonterra Co-operative Group Ltd. and Others [2020] NZHC 419*, 33 J. ENV'T L. 195 (2021).

¹⁴⁹Natasha Affolder, *Transnational Environmental Law's Missing People*, 8 TRANSNAT'L ENV'T L. 463 (2019). Laudable first steps in that direction have been undertaken. See, e.g., Lindt, *supra* note 124.

¹⁵⁰The Escazú Agreement is an important hallmark in this regard. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Apr. 9, 2018, C.N.195.2018.

¹⁵¹Fortunately, such legislative proposals are underway or in force across Europe, as I have analyzed elsewhere. See Bertram, *supra* note 36.

¹⁵²For a critical view on the merit of legal corporate accountability models more generally, see Grietje Baars, "It's not Me, it's the Corporation": *The Value of Corporate Accountability in the Global Political Economy*, 4 LONDON REV. INT'L L. 127 (2016).

¹⁵³See generally Gonzalez, *supra* note 118; Benjamin J. Richardson, *Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum*, 11 COLO. J. INT'L ENV'T L. POL'Y 1 (2000). Clearly, this conversation must involve voices outside the law, specifically from the fields of philosophy, economics, sociology and political science. For instance, Iris Marion Young proposes a social connection model of responsibility to address structural global injustices. Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, 23 SOC. PHIL. POL'Y 102 (2006).

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