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CROSS-BORDER ENVIRONMENTAL DAMAGE LITIGATION

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Abstract: Environmental protection is essential to sustainable development. However, private enforcement is not a priority in most legal systems; while it is nowadays possible to seek redress for environmental damage, standing to bring collective actions before courts is not usually granted to NGOs and private persons; although it should be in an attempt to enhance the oversight system over potential and actual polluters. This paper discusses the legal basis upon which the said standing could be established, both at domestic and international levels, as well as the role that cross-border collective redress could play in environmental matters. Accordingly, the paper moves to examine to which heads of international jurisdiction could be resorted when it comes to claiming for collective redress, and which would then be the applicable law.

Keywords: environmental damage, civil liability, collective redress, legal standing, international jurisdiction, conflict of laws

Resumen: La protección del ambiente es esencial para el desarrollo sostenible y, sin embargo, los métodos de reclamación privados están infra-desarrollados en la mayoría de los sistemas jurídicos. Tras el reconocimiento del daño ecológico puro como categoría de derecho privado, la exigencia de responsabilidad civil debería canalizarse a través de acciones colectivas que pudieran entablar no sólo los estados perjudicados, sino también organizaciones no gubernamentales y particulares interesados en la defensa del ambiente. Este trabajo analiza las bases jurídicas sobre las que construir dicha legitimación procesal en el plano doméstico y en el internacional, para examinar a continuación el juego de las acciones colectivas en su dimensión transfronteriza. Por ello, el trabajo se cierra con el examen de los foros de competencia judicial internacional para entablar acciones colectivas por daños ambientales, así como qué ley sería la aplicable en su caso.

Palabras clave: daño ecológico puro, responsabilidad civil ambiental, acciones colectivas, legitimación procesal competencia judicial internacional, normas de conflicto

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1. INTRODUCTION

Legal divergence on environmental matters across the world fuels social and ecological dumping, and it is usually intensified by the transfer of businesses to countries with low environmental standards and low production and labour costs. One of the side effects of this migration is the increase in cross-border litigation dealing with gross violations of human rights. Remarkable is the case against the Shell group as a result of extensive pollution allegedly caused by oil perforation in the Delta Niger (Nigeria) and its impact on the people living in the region, with judgments in the United States,[1] the Netherlands,[2] and the United Kingdom.[3] In all these cases the claimants have not brought their case before the courts of the country where the damage occurred, but to courts in countries from which defendants operate, shopping for a jurisdiction able to deal with complex litigation and a law with stricter environmental standards than the country of damage.

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[1] *Kiobel v. Royal Dutch Petroleum Co.* 133 S. CT. 1659 (2013). See among others, MARRULLO, Mª. C., ZAMORA CABOT, F. J., "Transnational Human Rights Litigation. Kiobel's Touch and Concern: a Test under Construction", *Papeles el tiempo de los derechos*, 2016-1, available at https://redtiempodelosderechos.com/publicaciones-2/papeles-el-tiempo-de-los-derechos/; WHYTOCK, C.A., CHILDRESS III, D.E., RAMSEY, M.D., "Forward: After Kiobel - International Human Rights Litigation in State Courts and Under State Law", *UC Irvine Law Review*, Vol. 3, 2013, pp. 1-8.

[2] The Hague District Court accepted international jurisdiction on the grounds of Article 2 of Regulation (EC) 44/2001 on international jurisdiction, recognition and enforcement of judgments in civil and commercial matters, given that the first defendant has its principal place of business in the Netherlands; and on grounds of Article 7 of the Dutch Civil Procedure Code that establishes the basis for claiming the Nigerian subsidiary at the co-defendant's domicile, in this case Royal Dutch Shell. See *Rechtbank 's-Gravenhage*, 24 February 2010, ECLI:NL:RBSGR:2010:BM1470 (*Barizaa Manson Tete Dooh and Vereniging Milieudefensie v. Royal Dutch Shell Plc. and Shell Petroleum Development Company Ltd.*). The Hague District Court concluded in its final judgment that Royal Dutch Shell Netherlands was not responsible for oil spills in Nigeria, but the Nigerian subsidiary was. See judgment of 30 January 2013, ECLI:NL:RBDHA:2013:BY9845, and comments by JÄGERS, N., JESSE, K.D. VERSCHUUREN, J., "The future of corporate liability for extraterritorial human rights abuses: The Dutch case against Shell", *American Journal of International Law*, 2014(1), pp. 36-41. In June 2017 and after the *class action* initiated in the United States had been finally dismissed, Ester Kiobel and the other widowers of the activits killed by the Nigerian Government in 1995 in a case related to their demonstrations against oil pollution brought a lawsuit against Shell in the Netherlands. See *The Guardian*, 29 June 2017, available at https://www.theguardian.com/global-development/2017/jun/29/ogoni-widows-file-civil-writ-accusing-shell-of-complicity-in-nigeria-killings.

[3] See *Bodo Community v Shell Petroleum Development Company (Nigeria) Ltd ("SPDC")* brought before the London High Court, but this court did not pronounce a judgment because a non-judicial settlement was first reached. See *The Guardian*: http://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills. More recently, the London High Court decided on *Okpabi and others v Royal Dutch Shell*, [2017] EWHC 89, (England & Wales, High Court) (http://www.bailii.org/ew/cases/EWHC/TCC/2017/89.html), concluding that it did not have international jurisdiction on the case.

However, these claims are encountering many obstacles, not being the procedural ones the less relevant; access to justice is proving challenging on account of, first, the establishment of legal standing to pursue environmental damage and lack of mechanisms to deal with complex litigation,[4] and second the asserting of international jurisdiction over defendants not resident in the country of the forum. Even when access to justice is granted, conflict rules are submitting the merits of the case to the law of the country where the damage occurred, i.e. to a law that may not be as environmental-friendly as the law of the forum, and thus encouraging a race to the bottom in these matters.

This paper deals with the private enforcement of environmental law in cross-border settings with a focus on cross-border environmental damage litigation. To this end, the issues of international jurisdiction and conflict-of-laws will be addressed. However, it seems essential first to provide some insights as to the significance of establishing "environmental damage" as a private law category and the move towards strict liability in environmental matters. While this trend enhances environmental protection by encouraging prevention instead of compensation, it raises the issue as to who has standing to claim for environmental damage. On account of environmental protection being a collective interest, the role of collective actions in these matters will need to be also addressed in order to provide an answer to the issue of legal standing.

The third section of this paper focuses on the usual private international law issues. Although controversial,[5] the application in these matters of Regulation (EU) Nr. 1215/2012, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Recast),[6] and Regulation (EC) Nr. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II),[7] is apparently settled. Both instruments provide the rules according to which the issues of international jurisdiction and conflict-of-laws will be addressed in this section. Finally, the paper closes with some final remarks on the role that courts are meant to play in enhancing environmental protection.

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[4] Another remarkable case is *Aguinda v Texaco*, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001), the unfortunate judgment from which the Chevron/Ecuador saga arises. Following very serious oil pollution allegedly committed by Aguinda in the Oriente region in Ecuador, Ecuadorians and Peruvians affected initiated a putative class action in the US dismissed by the cited judgment on grounds of *forum non conveniens*. While Peruvians did not find in their country access to justice, Ecuadorians did because of the issuance of *Ley de Gestión Medioambiental* (1999), Law 99/37 by which a collective action mechanism was established in Ecuador. Likewise, Ecuador adhered to the ILO Convention No. 169 concerning indigenous and tribal peoples in independent countries (1989). On this legal basis, litigation was initiated at the Lago Agrio Court against Chevron, the company which took over Aguinda in the United States.

[5] See on this debate GARCÍA ÁLVAREZ, L., *Daños ambientales transnacionales y acceso a la justicia*, Dykinson, Madrid, 2016.

[6] O.J. [2012] L 351/1.

[7] O.J. [2007] L 199/1.

2. ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

2.1. Origins: Principle 10 of the 1992 Río de Janeiro Declaration on Environment and Development

Environmental protection is nowadays placed high on the political and economic agenda for many reasons that were already put forward in the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992. From that moment on, access to justice in these matters has also received a boost on account of one of the Conference's principles, i.e. sustainable development relies on members of the public access to decision-making processes and also to justice.[8] Along these lines, transparency has found its way into trade negotiations, in particular those involving public procurement. Although resistance is significant as can be learnt e.g. from the management of bilateral investment treaties.[9]

Against this backdrop, international instruments such as the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus on the 25th of June 1998 (hereinafter the Aarhus Convention),[10] are essential to implement Principle 10 of the Rio de Janeiro Declaration. The European Union has signed the latter and implemented it by different instruments including Directive on Public Access to Environmental Information,[11] Directive on Public Participation in Decision-Making[12] –both addressed to Member States–, and a

[8] "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." See Principle 10, *Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development*, U.N. Document, June 3-14 1992, available at http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm [hereinafter *Rio Declaration*].

[9] Literature on these matters is extensive, but it is worth visiting the agenda of the working group dealing with the Aarhus Convention where transparency and negotiations with the Transatlantic Association for Commerce and Inversion (ATCI) are placed high. See http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/news/envppaarhusaarhusweek.html.

[10] Aarhus Convention, 2161 UNTS 447, entered into force on 30 October 2001 and has been ratified by 47 states that made up the region UNECE, including countries of Europe, Asia, United States and Canada. As none of the Latin America countries is a party of this convention, it is to welcome the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean, signed in UN Conference on Sustainable Development (Río+20), done in Rio de Janeiro in June 2012. The signatory countries of the latter have agreed on negotiating a similar instrument to the Aarhus Convention. Negotiations are already ongoing and advanced under Chile's leadership and the support of the *Comisión Económica para América Latina y el Caribe* (CEPAL). More information is available at CEPAL http://www.cepal.org/es/temas/principio-10.

[11] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, O.J. [2003] L 41/26.

[12] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the

Regulation on the application of the provisions of the Aarhus Convention to Community institutions and bodies.[13]

However, the European Union has failed to release a directive on access to justice in environmental matters. The European Commission issued a Proposal for a directive in 2003,[14] but no further action has been taken to date. In fact, the European Union's adherence to the Convention was accompanied by a declaration which pointed out that it was impossible to reach a consensus about the implementation of Article 9(3) of the Aarhus Convention.[15] This provision deals with access to justice in environmental protection matters highlighting the obligation to create private enforcement mechanisms against public and private polluters. The main hurdle seems to be reconciling the different perspectives of Member States in regards to *locus standi*, in particular when it comes to granting non-governmental organizations (NGOs) standing. Legal divergence as to this issue is particularly acute across the EU and this seems to be the main cause why a directive on access to justice in environmental matters has not been issued yet.[16] While some Member States accept the principle of *actio popularis*, others restrict access to court through different procedural requirements. Even the Community has been accused of restricting access to the courts in environmental matters in the past.[17] Exacerbating the issue, the application of the already issued directives has been controversial.[18]

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environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, (O.J. [2003] L 156/17.

[13] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, O.J. [2006] L 264/13.

[14] See Proposal of directive on access to justice on environmental matters, Brussels, 24 of October of 2003 [COM(2003) 624 final]

[15] The Community adherence to the Convention was approved on 17th of February 2005 and the declaration states as follows: "[…] the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community [...]. Consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations".

[16] In 2003 a proposal of Directive on access to justice on environmental matters was presented [Brussels, 24.10.2003, COM(2003) 624 final], but it only contained a reminder, that Article 9(3) of Aarhus Convention also applies to private persons, meaning that access to justice in these matters is to be also made available for these persons and not only states. Article 4(1) of this proposal entitles NGOs to suit states such as Article 12(1) of Directive 2004/35/EC now does.

[17] See Case C-321/95, 2.4.1998, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities*, in which Greenpeace was not entitled to appeal the financial decision of funding with FEDER two power stations. See also a critique by JANS, J. H., "The Rule of Law and European Environmental Policy", pp. 301-312; SOMSEN, H., "Current Issues of Implementation, Compliance and Enforcement of EC Environmental Law", pp. 415-428, both in KRÄMER, L. (ed.), *Recht und Um-Welt. Essays in Honour of Prof. Dr. Gerd Winter*, Groningen, Europa Law Publishing, 2003.

[18] Although public participation is mandatory, arguments over Government application are already reaching courts. See MORROW, K., "On Winning the Battle, but Losing the War", *Environmental Law Review*, Vol. 10 (1), 2008, pp. 65-71.

2.2. Environmental Damage in Context

The role of tort law in environmental protection is often questioned in favour of public environmental law. This tension can be traced at the Aarhus Convention to the extent that it takes for granted the complementary, although limited, role that tort law plays in ensuring environmental protection alongside public environmental law. Its usefulness is attested, though, by its ongoing in most judicial systems.[19] However, in order to improve the efficiency of environmental protection actions in the courts, collective actions have to appear on stage. This is because, as shall be seen below, collective actions are the only process able to deal efficiently with environmental damage and, therefore, properly enforce the "polluter pays" principle.

Damage caused by pollution has special characteristics which make it difficult to pursue in the courts. These characteristics include its long period of latency, which makes it difficult to identify possible victims. Often, the damage done to the individual may be less than the expected recovery in the courts. This creates a disincentive to private persons to litigate because, even when it is worth litigating, proof of causation can be too difficult to justify legal action. All of these problems could be better handled in a group action, because grouping individual damage rights in a single proceeding overcomes the economic hurdle, at least better than an individual action does.[20] Whilst litigation costs may still be daunting in a group action, collective actions make claiming more feasible.[21] Despite these positive aspects, group actions warrant specific regulation because of the constitutional problems they pose.[22] These constitutional issues are very interesting, but deal with traditional damages and as such, fall outside the scope of this paper.

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[19] The topic has been addressed by the Hague Conference while considering the convention on civil liability for environmental damage. See "Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?", 5-6 Preliminary Doc. 8 (prepared by Ch. BERNASCONI), available at http://www.hcch.net/upload/wop/gen_pd8e.pdf, pp. 55-65. On the ongoing discussion, see ABRAHAM, K. S., "The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview", *Washburn Law Journal,* Vol. 41, 2002, p. 379; and ANDERSON, M., "Transnational Corporations and Environmental Damage: Is Tort Law the Answer?", *Washburn Law Journal,* Vol. 41, 2002, p. 399.

[20] See CAPPELLETTI, M., "Vindicating the Public Interest through the Courts: A Comparativist's Contribution" in CAPPELLETTI, M., GARTH, B. (eds.), *Access to Justice. Emerging Issues and Perspectives*, Vol. III, Milano, Sijthoff, 1979, pp. 513-564.

[21] Compensation for environmental damage would be better achieved by collective justice and group actions, which could claim for damages suffered by volunteers either whilst preventing further environmental damage or undertaking conservation work. Recently, courts and legislators have acknowleged the costs incurred by environmental organisations whilst undertaking such activities, but have overlooked individual volunteers. For further analysis of this issue, see CARBALLO FIDALGO, M., "Los daños a voluntarios del caso *Prestige*" in GARCÍA RUBIO, Mª. P., ÁLVAREZ GONZÁLEZ, S., (Coords.), *La responsabilidad por los daños causados por el hundimiento del Prestige*, Madrid, Iustel, 2007, pp. 379-398.

[22] Group actions can undermine the due process rights of class members, because individual rights are decided in proceedings not attended by the individual. In order to assure individual due process rights, group actions provide specific guarantees such as opt in/opt out rights, increased judicial

Moreover, a further hurdle that private law encountered with regard to protecting the environment is that its intervention is generally limited to those cases where property has been affected or there is personal injury. In other words, it is still limited in many jurisdictions to those cases where a right to compensation exists because personal injury or property damage is involved, but not to those in which damage has been caused to the environment, in "no man's land". However, this is a limitation which is obsolete in today's society being necessary to come up with a solution that provide access to justice to environmental damage.[23] In this vein, the recognition of environmental damage, also known as pure ecological damage, as a cause of action is a victory in itself. The release of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage,[24] or the Argentinian *Ley General del Ambiente*,[25] reflects this recognition. However, the directive only grants legal standing to states in order to act/claim against operators.[26] Environmental associations and NGOs can claim against a State's (in)activity, but not directly against operators.

2.3. Standing to Claim for Environmental Damage

The establishment of environmental damage as a source of tort law raises the question as to who has standing to claim for it. If it causes harm to a person or private property, standing is not an issue. However, should the damage be pure ecological and thus impairing a collective interest, the establishment of who is entitling to sue for it is more complicated. A first answer is to grant standing to states and public entities. A second answer, more in accordance with Principle 10 of the Rio de Janeiro Declaration, also entitles private persons and NGOs. However, EU has not gone as far as that, and all the attempts made in that direction have failed.

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monitoring, and/or the right to appeal to third parties. See the White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final.

[23] See BRANS, E., *Liability for Damage to Public Natural Resources*, Rotterdam, Erasmus University, 2001; RUDA GONZÁLEZ, A., *El daño ecológico puro*, Navarra, Thomson-Aranzadi, 2008.

[24] Article 2 of Directive 2004/35/EC defines environmental damages as "a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. (…); b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential (…); c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms".

[25] See Article 27 of Law 25.675 of 6 November 2002, defining environmental damage as "toda alteración relevante que modifique negativamente el ambiente, sus recursos, el equilibrio de los ecosistemas, o los bienes o valores colectivos".

[26] See Article 12 of Directive 2004/35/EC restricting NGOs' standing to those cases in which states have not taken measures to prevent or restore environmental damage. Moreover, only NGOs complying with the Directive's requirements are entitled to sue.

The paralysis concerning the interpretation of Article 9(3) led the Compliance Committee of the Aarhus Convention to issue a declaration. This declaration highlights the difference between Article 9(2) and its reference to "members of the public concerned", and Article 9(3) which refers to "members of the public". In this sense, the Committee suggests a broad interpretation of Article 9(3) so as to include environmental organisations. Although the Aarhus Convention does not require the establishment of an *actio popularis* and Article 9(3) indicates that *locus standi* is granted to those meeting "the criteria, if any, laid down in national law", the Committee indicates that "the Parties may not take the clause [...] as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment".[27]

Following this push, the Commission launched a study aimed at a comprehensive overview of the different measures adopted in the Member States to implement Article 9(3) of the Aarhus Convention and related provisions. 28 The study concluded in a very similar way to the suggestions made by the Committee, even proposing the introduction of an *actio popularis*, since it has not been possible to identify noteworthy abuses in those Member States which have adopted that system. Unfortunately, this study has not triggered any further action within the European Union. The ball is thus in the court of Member States.

By definition, collective interests concern members of the public in general. This is a proposition which should lead to the establishment of an *actio popularis*, making it possible for NGOs to claim against public and private polluters, and thus enhancing environmental protection.[29] This approach sounds, though, too liberal to states who are adamant in preserving the *point d'intérêt, point d'action principle*.[30] The legal situation has, nevertheless, evolved along the years and the pressing challenges posed by pollution on local economies. The acknowledgment of the environmental damage concept and that of environmental protection as a collective interest have significantly contributed to this evolution. At the very least, it has end up granting NGOs standing to claim for this type of damage, although only in restricted terms

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[27] Report of the meeting. Findings and Recommendations adopted by the Compliance Committee on the Aarhus Convention on 16 June 2006 (ECE/MP.PP/C.1/2006/4/Add.2, 26.6.2006), para. 35, available at http://www.unece.org/env/documents/2006/pp/ece.mp.pp.c.1.2006.4.add.2.e.pdf.

[28] Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters, commissioned by the EU and the individual country reports, http://ec.europa.eu/environment/aarhus/study_access.htm.

[29] See on citizen suits in the United States, DERNBACH, J.C., "Citizen Suits and Sustainability", *Widener Law Review*, Vol. 10, 2004, pp. 503-526.

[30] This applies to Spain. Article 41 of Law 26/2007 of 23 October on Environmental Liability (BOE 255, 24 October 2007) lays down that only the Spanish Government, *ex oficio* or requested by third parties, is entitled to initiate proceedings to claim for environmental damage. Accordingly, private persons and NGOs can only request the Spanish Government to undertake action, but are not entitled to pursue environmental liability before courts. As said, the latter is reserved to the government.

on grounds of avoiding a potentially paralysing avalanche of lawsuits. With the excuse of procedural abuse, 31 legislators restrict access to court by imposing procedural requirements that require the plaintiff to be representative. [32]

"Representativeness" is a concept that stems from class actions in the United States of America (USA). More specifically, it comes from the American procedural prerequisite regarding the adequacy of representation. [33] This means that the plaintiff's claim has to be similar to that of the absent class members in order to assure his or her motivation to defend the case as well as possible. [34] The European interpretation of this prerequisite is slightly different, since it is stipulated as a formal concept. In Europe, to be representative depends on the procedural requirements laid down by law, what is far from the judicial monitoring in the USA on the adequacy of representation. The consequence in Europe however is that legislators control access to justice in environmental matters on the pretext of identifying an adequate representative plaintiff. [35]

In fact, the opposite to a proliferation of collective actions is more likely to happen. The aforementioned study promoted by the European Commission has already made it clear that the number of lawsuits is low in coun-

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[31] An example frequently used to illustrate procedural abuse is that of of an association set up by lawyers and their employees and wives. However, KOCH, H., "Group and Representative Actions in West German Procedure" in JAYME, E. (ed.), *German National Reports in Civil Law Matters for the XIIIth Congress of Comparative Law in Montréal 1990*, Heidelberg, C. F. Müller, 1990, pp. 27-40, p. 35, points out: "if an association is only established for fee collection purposes by an attorney, this might be a problem of professional ethics but should not be controlled by rules of standing".

[32] This approach can be found in the public consultation "Towards a European coherent approach to collective redress", para. 25. In Spain, the representativeness requirement even applies also to those who are not entitled to initiate a collective proceeding, but to request the Spanish Government to undertake action. See Article 42 of Law 26/2007 of 23 October on Environmental Liability.

[33] See YEAZELL, S. C., "Group Litigation and Social Context: Toward a History of the Class Action", *Columbia Law Review*, Vol. 77, 1977, pp. 866-896, pp. 199-212.

[34] This statement does not imply that legal standing issues are interpreted more broadly than in Europe. For an argument for broadening the concept, see OWENS, J., "Comparative Law and Standing to Sue: A Petition for Redress for the Environment", *Environmental Law*, Vol. 7, 2001, pp. 321-377. Owens makes an analysis of Australian jurisprudence on this matter (pp. 348-353); PARKER, D., "Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining 'Injury in Fact'", *Columbia Journal of Transnational Law*, Vol. 33, 1995, pp. 259-318. A narrower coverage is found in ALBERT, P., "Comment: Citizen Suits under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?", *Boston College Environmental Affairs Law Review*, Vol. 16, 1988, pp. 283-328. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992), has raised many doubts, but the citizen suit is largely brought by associations.

[35] See BUJOSA VADELL, L., *La protección jurisdiccional de los intereses de grupo*, Barcelona, J.M. Bosch, 1995, p. 196; CALAIS-AUBOIS, J., "Les actions en justice des associations de consommateurs", *Recueil Dalloz-Sirey*, 1988, pp. 193-198; GIDI, A., *Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un modelo para países de derecho civil*, México, UNAM, 2004, GHIDINI, G., "L'intérêt des consommateurs come intérêt "diffus", et sa défense", *Rivista del diritto commerciale*, 1978-I, pp. 33-40, p. 37; KOCH, H., "Cross-Border Consumer Complaints and the Public Interest. The German Perspective" in MICKLITZ, H. & REICH, N. (eds.), *Public Interest Litigation before European Courts*, Baden-Baden, Nomos, 1996, pp. 427-436; JESSURUN D'OLIVEIRA, H. U., "Class Actions in relation to Cross-Border Pollution. A Dutch Perspective", European University Institute Working Paper Law No. 91/19, pp. 1-34, pp. 26-27, p. 38; SILGUERO ESTAGNAN, J., "Las acciones colectivas de grupo", *Revista Vasca De Derecho Procesal y Arbitraje* , 2003, pp. 615-640, p. 625.

tries such as Portugal – where an actio popularis in environmental matters is allowed,[36] or Sweden – which has also interpreted legal standing broadly.[37] This is due to a lack of incentives to litigate and because it is very difficult to find an altruistic Don Quixote willing to claim.[38] Although NGOs fill the void somewhat, they also have to fight against a lack of funding and resources.[39] In this vein, a broad approach to the issue of standing ought to be promoted across the European Union.[40] A further reason can be found in avoiding forum shopping if attention is paid to the fact that litigants are bringing their claims to countries that favour a broad approach to this issue, and regulate transversal collective actions such as the Netherlands.

Legal divergence on standing gives rise to the issue of establishing the law determining it in cross-border cases. However, it is unclear whether it is the law applicable to the proceedings, the *lex fori processus*, or that determining the merits of the case, the *lex causae*, an issue which has been linked to the collective actions' characterization. The latter have been characterized as of substantive law and thus subjected to the *lex causae*,[41] to the extent that these actions have been confused with the underlying collective interest and who is

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[36] See the presentation of the Portuguese system on collective proceedings by ANTUNES, H., "Class Actions, Group Litigation & Other Forms of Collective Litigation. Portuguese Report", 2007, available at http://globalclassactions.stanford.edu/PDF/Portugal_National_Report.pdf, pp. 1-32. The Law 83/95, of 31 August, on the right to take part in administrative proceedings and the right to popular action states: "Everyone shall be granted the right of popular action, either personally or via associations that purport to defend the interests in question, including the right of an aggrieved party or parties to apply for the corresponding compensation, in such cases and under such terms as the law may determine, in particular to: a) promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and the cultural heritage; b) safeguard the property of the State, the Autonomous Regions and local authorities."

[37] See further an English translation of the Swedish Group Proceedings Act, and comments by LINDBLOM, P. H., "Group Litigation in Sweden", 2007, available at http://globalclassactions.stanford.edu/PDF/Sweden_National_Report.pdf, pp. 1-43.

[38] For example, the European Union has spent many years discussing whether to regulate collective actions beyond consumer matters, including all collective interests and in particular, environmental protection. The impossibility to reach an agreement has led to the issuance of Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ [2013] L 201 60. See comments by CARBALLO PIÑEIRO, L. in *Revista española de derecho internacional,* Vol. 65, 2013-2, pp. 395-399.

[39] Unlike other class actions, citizen suits do not allow *quota litis* because judgement recovery goes to the State. NGOs find resources because most of the time they settle the case with the defendant, the proceeds are employed either to go on litigating, or to implement environmental projects when it is not possible to restore the environment. See GREVE, M.S., "Private Enforcement of Environmental Law", *Tulane Law Review*, Vol. 65, 1990, pp. 339-394, pp. 351-359.

[40] This approach is already being undertaken by some countries such as Argentina where *Article 30 of the Ley General del Ambiente* entitles public entities and NGOs to pursue environmental damages, but also private persons who may seek injunctions for environmental protection.

[41] See PALAO MORENO, G., *La responsabilidad civil por daños al medio ambiente*, Valencia, Tirant lo Blanch, 1998, pp. 129-131; VON BAR, C., "Environmental Damage in Private International Law", *Recueil des Cours*, Vol. 278, 1997, pp. 291-411. Von Bar at pp. 356-359 agrees with the application of the *lex fori processus* to group actions, but not to injunctive class actions. As far as associations hold an own right not attributable to any individual, *lex causae* must be applied. Ultimately that leads us to the point expressed above.

entitled to bring them before court. Such a characterization does not comply, though, with the fact that collective actions are proceedings and should be submitted to the *lex fori processus*. This approach can be found, for example, in the standing of *Milieudefensie*, a Dutch environmental NGO, to pursue environmental damage in Nigeria as a result of oil pollution in Niger Delta by the Hague District Court.[42] Along these lines, the law governing the foreign public entity or NGO is only relevant in order to apply the principle of equivalence, i.e. in order to establish whether it can be put on the same foot as a local public entity or NGO entitled to claim for environmental damage.

3. ENVIRONMENTAL DAMAGE AND EU PRIVATE INTERNATIONAL LAW

3.1. Scope of Application

The inclusion of environmental damage in the scope of EU Private International Law[43] is controversial on account of being a matter on state's hands and thus of a public interest.[44] As said, the approach has changed, as Directive 2004/35/EC shows by referring to the Brussels I Regulation[45] to determine international jurisdiction in environmental matters.[46] At the time this directive was released, an EU regulation on the law applicable to non-contractual obligations had not been provided yet for which reason there is no specific reference to one. However, the directive remarks that it does not contain conflict rules applicable to environmental damage, and sets out that "[…] where a Member State identifies damage within its borders which has not been caused within them [….] it may seek, in accordance with this Directive, to recover the costs it has incurred in relation to the adoption of preventive or remedial measures".[47] Such costs would typically be recovered from operators who have caused the damage from abroad, or who have their domicile in a foreign country.

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[42] See The Hague *Rechtbank's-Gravenhage*, 24 February 2010, ECLI:NL:RBSGR:2010:BM1470 (*Barizaa Manson Tete Dooh and Vereniging Milieudefensie v. Royal Dutch Shell Plc. and Shell Petroleum Development Company Ltd.*).

[43] This paper does not address specific cases of cross-border environmental liability such as the one caused by oil pollution at sea or nuclear energy. Literature is extensive in these matters, but see in particular GARCÍA ÁLVAREZ, L., *Competencia judicial internacional, daños ambientales y grupos transnacionales de empresas*, Comares, Granada, 2016.

[44] On this debate, see FACH, K, "Environmental Damage", in BASEDOW, J. et al, *European Encyclopedia of Private International Law*, Edgar Elgar, Cheltenham, 2017, pp. 657-668, pp. 661-662; GARCÍA ÁLVAREZ, L., n 4, *passim*. On the significance of the notion 'environmental damage' to establish the connecting points see BOSKOVIC, O., "The law applicable to violations of the environment – regulatory strategies", en CAFAGGI, F., MUIR WATT, H. (eds.), *The Regulatory Function of European Private Law*, Edward Elgar, Cheltenham-Northampton, 2009, pp. 188-204, pp. 192-192, y 197.

[45] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O.J. [2001] L 12/1.

[46] See CJEU Case 814/79 *Netherlands State v Rüffer,* ECLI:EU:C:1980:291, Rec. 10.

[47] Article 15(3) Directive 2004/35/EC.

Accordingly, Directive 2004/35/EC includes in its scope cases of transnational pollution taking the precaution to make it clear that, while it does not prescribe either international jurisdiction or conflict rules, it is compatible with the Brussels I Regulation,[48] implying that environmental damage cases are "civil and commercial matters" and submitted to the latter. The fact that some countries also entitle NGOs to recover the costs incurred while preventing or restoring environmental damage reinforces this conclusion insofar as it weakens the exclusive role granted to the state by the directive, an exclusivity which could give rise to the idea that standing is a public law power.[49]

The Rome II Regulation confirms this conclusion. The conflict rule on environmental damage set up there distinguishes between "environmental damage or damage sustained by persons or property as a result of such damage",[50] where environmental damage "as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms",[51] in combination with Directive 2004/35/EC. As a result, it does not matter that states are the only ones entitled to bring action against operators according to the directive; such claims are "civil and commercial matters" within the scope of the EU Brussels I, now Recast, and Rome II Regulations.[52]

One further issue could be raised on account the close relationship between collective and public interests and whether collective actions fall within the European Regulations' scope of application or not.[53] The EU Court of Justice has already addressed the matter in a positive way in the *Henkel* case.[54] In this vein, Article 7(2) of Brussels I Recast settles the issue by laying down that the claim may be brought before "the courts for the place where the harmful event [...] *may* occur". Moreover, the Rome II Regulation sets out

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[48] Brussels I Regulation has been replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ [2012] L 351/1. Both instruments arise from the 1968 Brussels Convention with the same title, and are compatible with the Lugano Convention of 30 October 2007, also with the same name and which is binding on all EU Member States plus Switzerland, Norway and Island.

[49] As mentioned, the European legislator considered giving standing to NGOs, but the Commission disagreed. Article 3(3) of the Directive makes it clear that private parties have no rights under its scope of application, although the phrase, "without prejudice of national legislation" means that those rights can potentially be granted.

[50] See Article 7 of Rome II Regulation.

[51] See Rome II Regulation, Rec. 24. As to the legislative works leading to this instrument as well as its precedents in European legal systems, see FACH, K, n 44, pp. 659-661.

[52] See Article 8(3)(b) of Law 26/2007 of 23 October on Environmental Liability, dealing with environmental damage and entitling the Spanish government to initiate proceedings to recover the costs incurred by adopting preventive and restorative measures.

[53] See FACH, K., "Acciones preventivas en supuestos de contaminación transfronteriza y aplicabilidad del artículo 5.3 CB", *Zeitschrift für Europarechtliche Studien*, 1999, pp. 590-607.

[54] See CJEU Case C-167/00, *Verein für Konsumenteninformation* y *Karl Heinz Henkel*, ECLI:EU:C:2002:555, rec. 50, with comments by JIMÉNEZ BLANCO, P., "El tratamiento de las acciones colectivas en materia de consumidores en el Convenio de Bruselas", *La Ley*, 2003, pp. 1573-1583.

a general rule to clarify that it applies "also to non-contractual obligations that are likely to arise [Article 2(2)], and to damage that is likely to occur [Article 2(3)(a) and (b)]". Therefore, it does not matter if the claim seeks compensation or injunction, the applicable law is delivered by Article 7 thereof.[55]

3.2. International Jurisdiction Issues

3.2.1. Defendant's Domicile, Related Actions and Party Autonomy

Apart from the defendant's domicile, the Brussels I Recast sets up a forum on "matters relating to tort, delict or quasi-delict" allocating jurisdiction to "the courts for the place where the harmful event occurred or may occur". While the next section will deal with the *forum delicti commissi*, this one focuses on the former and another alternative head of jurisdiction, that of related action. The plaintiff can resort to each of both heads of jurisdiction to seek for either an injunction or damages including costs of environmental restoration.[56] This choice disappears if the plaintiff and the defendant reach an implied or express choice of forum.

Should the defendant be a legal person, the *forum rei* can be found in its seat, central administration or principal place of business.[57] In case of related actions, they can be brought before the courts of the domicile of a co-defendant. Remarkably, the Hague District Court on charge of the Shell case exercised its jurisdiction against Shell Petroleum Nigeria on the basis of this forum, i.e. Royal Dutch Shell has its seat in London, but its principal place of business is located in The Hague; Shell Petroleum Nigerian is, however, in Nigeria, but the *forum connexitatis* made it possible to bring it before the Dutch courts once the court asserted its jurisdiction over Royal Dutch Shell.[58]

The London High Court has been more careful than the Dutch one in the case *Okpabi and others v Royal Dutch Shell*.[59] This court went further to examine whether there was connection between both claims, i.e. whether Royal Dutch Shell could be held responsible for the pollution in Ogoniland on grounds of the qualified relationship between the parent company and the Nigerian subsidiary, and whether the parent company could have influenced

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[55] Regarding the characterisation of injunction relief when it comes to environmental damage originating from immovable property, see KADNER GRAZIANO, T., "The Law Applicable to Cross-Border Damage to the Environment", *Yearbook of Private International Law*, Vol. 9, 2007, pp. 80-86, p. 77. Kadner Graziano agrees with the application of Rome II Regulation.

[56] Those heads of jurisdiction that allow to accumulate the civil action to the criminal one could be also of interest, as those dealing with provisional measures. They are not more thoroughly addressed in view of their lack of specificity in these matters.

[57] See, for example, Article 63 of Regulation Brussels I Recast.

[58] More specifically, Articles 2 of Brussels I Regulation for Royal Dutch Petroleum and 7 of the Dutch Civil Procedure Code for Shell Petroleum Nigeria. See The Hague *Rechtbank 's-Gravenhage*, 30 December 2009, ECLI:NL:RBSGR:2009:BK8616 and 24 February 2010, ECLI:NL:RBSGR:2010:BM147.

[59] See *Okpabi and others v Royal Dutch Shell*, [2017] EWHC 89, (England & Wales, High Court) (http://www.bailii.org/ew/cases/EWHC/TCC/2017/89.html).

the decisions of the Nigerian company. In other words, whether the plaintiffs are bringing truly related actions or not. As this was not sufficiently established, the London High Court dismissed the claim against the parent company and thus, that against the Nigerian company as it could not appreciated such a connection.[60] This judgment is unfortunate in terms of seeking business responsibility for human rights; corporate social liability has significantly evolved since OECD Guidelines for Multinational Enterprises, and it is to highlight that the businesses' duty of care encompasses nowadays all participants in the global supply chain.[61] If the latter covers third parties even more subsidiaries, making the case for accepting jurisdiction in the herein discussed case.

In addition to the *forum rei* and that on related actions, implied and express party autonomy may also play a role in establishing jurisdiction in these matters. However, tacit and express choice of forum require the agreement of all parties to the proceeding, and collective actions work on the basis of representation meaning that not all parties participate in the proceeding. This makes it difficult to resort to party autonomy in establishing jurisdiction, in particular when the claim seeks an injunction. The case may be different if a number of private persons seeks redress for damage infringed to them. For example, the Netherlands has laid down a settlement collective action that only proceeds to sanction a non-judicial agreement on any private law matter before the Court of Appeals of Amsterdam, provided that it is brought by the defendant and a Dutch foundation or association as representative plaintiff.[62] This type of collective action could be used to proceed on cross-border environmental matters, even when the attachment of the case to the Netherlands is minimal, by including a choice-of-forum clause in the settlement.[63] The issue is not settled yet, although the Converium case provides grounds for this approach.[64]

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[60] Canadian businesses in the gas and mining sectors have a global projection, thereby it is interesting to note that Canadian courts have been asked to exercise jurisdiction in a number of cases dealing with cross-border infringements of human rights. See *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39 (Canada) (CanLII), http://canlii.ca/t/gx49k; *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856 (Canada), http://canlii.ca/t/gv11z; *Anvil Mining Ltd. c. Association canadienne contre l'impunité*, 2012 QCCA 117 (CanLII), http://canlii.ca/t/fpr75; *Das v George Weston Limited*, 2017 ONSC 4129 (CanLII), http://canlii.ca/t/h4pcg.

[61] See section 3.3 of this paper and reference to the UN *Global Compact*.

[62] See VAN LITH, H., "The Dutch Collective Settlements Act and Private International Law", 2010,available at http://english.wodc.nl/onderzoeksdatabase/internationaal-privaatrechtelijke-aspecten-van-de-wet-collectieve-afhandeling-massaschade-wcam.aspx?cp=45&cs=6796 and financed by the Dutch Ministerie van Justitiee.

[63] See on this issue VAN LITH, H., n 62, pp. 26-50, spec. pp. 45-47.

[64] The case admitted by the Court of Appeals of Amsterdam on 12 November 2010 (LJN: BO3908, Gerechtshof Amsterdam, 200.070.039/01) settled a case involving only a very minor number of Dutch investors while the other parties where foreign, making the link to the Netherlands a weak one.

3.2.2. *Forum Delicti Commissi*

In addition to the abovementioned heads of jurisdiction, the so-called *forum delicti commissi* pointing to the courts of the country where the event causing harm occurs or may occur, applies. This criterion is, however, far from being crystal-clear; cross-border environmental damage arises from, and gives rise to, different situations, which has made it necessary to interpret the principle of *forum delicti* as established in Article 7(2) of Brussels I Recast.

The first possible scenario, where the location of the event giving rise to damage and damage itself is spread across different countries, was tackled by the CJEU in *Bier en Reinwater v. Mines de Potasse d'Alsace*.[65] The facts of the case are well-known and can be summarized as follows: French mine-owners were supposedly discharging chlorides into the Rhine and, as a result of the river pollution, Bier's horticulture business in the Netherlands sustained damage to its crops. The horticulturalists brought an action against French mine-owners in the court at Rotterdam. The Netherlands court's jurisdiction was objected to by the defendant on the grounds that the Netherlands was not, "the place where the harmful event occurred". The CJEU ruled against the objection providing that, "the expression 'place where the harmful event occurred,' in art. 5(3)… must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it". Thus, the CJEU gave an option to the plaintiff to sue: either in the courts for the place where the damage occurred (in this case the Netherlands) or in the courts in the place where the event which gave rise to the damage occurred (France in this case).

The reasons behind the CJEU's interpretation in *Bier en Reinwater v. Mines de Potasse d'Alsace* are well-known, but it is worth highlighting two of them. The first reason is related to the objectives sought by the Brussels system while establishing the criteria of Article 7, former Article 5. That is, to provide a court close to the subject-matter in terms of proximity, to assist in gathering evidence and so on. When it comes to cross-border pollution, both places –where the event which gives rise to the damage occurs, and where damage occurs– match this objective. In the case of uncertainty as to which one is the best one, the Court lets plaintiffs choose. As such, the CJEU interpretation does not intend to protect the weaker party, but to be efficient. This choice makes room for the second reason, based on political grounds. Namely, that Article 4 and Article 7(2) should not overlap, so that the plaintiff can apply for a court different from the one at the defendant's domicile, which will usually coincide with the *locus actus*.

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[65] CJEU Case 21/76, ECLI:EU:C:1976:166. See further BOUREL, P., *Revue critique de droit international* privé, 1977, pp.563-576; Droz, A., *Recueil Dalloz Sirey*, 1977, pp. 613-615; HUET, A., *Journal droit international*, 1977, pp. 728-734; REST, A., "Plaintiff can choose his court", *Environmental policy and law*, 1977, pp. 41-45; *idem*, "Wahl des zuständigen Gerichtes bei Distanzdelikten nach dem EG-Zuständigkeits und Vollstreckungsübereinkommen-Ein erster Schritt zum Schutz des Geschädigten im international.en Umweltrecht", *Recht der Internationalen Wirtschaft*, 1977, pp. 669-674.

In line with these reasons, the CJEU has put some limits to its own interpretation. The plaintiff who has suffered harm as a consequence of damage suffered by others (and is therefore, not a direct victim) cannot bring proceedings against the wrongdoer in the courts of the place in which he him/herself ascertained the damage to his/her assets.[66] On the contrary, "the place where the harmful event occurred" cannot be interpreted as, "the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State".[67]

The CJEU has also interpreted Article 7(2) in the case whereby damage is suffered in different countries. In this situation, the plaintiff can claim total redress before the court of the jurisdiction where the harmful event occurred. If however the plaintiff chooses the court of the jurisdiction where the damage occurred (a different court), he can then only claim redress for the damage suffered in that country.[68]

The CJEU has not had the chance to decide a case where the harmful event causing environmental damage has taken place in different countries. A non-European ruling in this situation is the well-known *Bhopal* case. After a leak of methylisocyanate gas from a pesticide plant in the Indian city of Bhopal, a class action was brought to courts in the USA against the parent company. The grounds argued were that the parent company made decisions which damaged the environment, and provoked significant human casualties. Eventually, the case was dismissed on grounds of *forum non conveniens*.[69]

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[66] CJEU Case C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*, ECLI:EU:C:1990:8, and comments by FONT SEGURA, A., "La disociación y los daños indirectos en la aplicación del artículo 5.3 del Convenio de 1968 de Bruselas", *Noticias CE*, 1990, pp. 131-136; GAUDEMET-TALLON, H., *Revue critique de droit international* privé, 1990, pp. 363-379; HUET, A. *Journal droit international,* 1990, pp. 498-503. In Australia it is suggested that even incidental or consequential damages are enough for the exercise of jurisdiction. For instance, in *Darrell Lea Chocolate Shops Pty. Ltd v Spanish-Polish Shipping Co*, 25 NSW LR 568 (1990), New South Wales accepted jurisdiction on the basis of loss suffered in Germany where machinery was damaged was reflected in the plaintiff's books kept at the Sydney head office. In *Flaherty v. Girgis*, 4 NSW LR 248 (1985), the plaintiff continued to suffer damage in New South Wales after being injured in Queensland.

[67] CJEU Case C-364/93, *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*, ECLI:EU:C:1995:289. See HOHLOCH, G. "Erfolgsort und Schadenaort- Abgrenzung bei Ansprüchen auf Ersatz von primaren und sonstigen Vermögenschäden", *Praxis des Internationalen Privat- und Verfahrensrechts*, 1997, pp. 312-314.

[68] CJEU Case C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA,* ECLI:EU:C:1995:61; BORRÁS RODRÍGUEZ, A., "Los supuestos de tráfico privado internacional en los medios de comunicación social", *Cursos de Derecho Internacional de Vitoria Gasteiz,* 1985, available at http://www.ehu.es/cursosderechointernacionalvitoria/ponencias/pdf/1985/1985_7.pdf; CRESPO HERNÁNDEZ, A., *REDI,* 1995, pp. 389-393; KREUZER, K., KLÔTGEN, P., "Die Shevill-Entscheidung des EuGH: Abschaffung des Deliktsortsgerichtsstands des art. 5.3 EuGVÜ für ehreverletzende Streudelikte", *Praxis des Internationalen Privat- und Verfahrensrechts,* 1997, pp. 90-96; LAGARDE, P., *Revue critique de droit international* privé, 1996, pp. 487-503; PALAO MORENO, G., "La aplicación de la regla *forum delicti comissi* en supuestos de difamación por prensa", *Noticias de la Unión Europea*, 1996, pp. 75-80.

[69] *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984*, 809 F 2d 195, cert. den. 484 US 871 (1987). See recent commentary by COOPER, D., "Symposium: The Bhopal Disaster Approaches 25: Looking back to Look Forward: Thinking about Justice "Outside the Box": Could Restorative Practices Create Justice for Victims of International Disasters?", *New England Law Revue*, Vol. 42, 2008, pp. 693-700.

Still, the argument for European application remains. The location where the parent company makes decisions, transfers know-how and provides financial and human resources to the society which is materially polluted, can be considered the location where the harmful event occurred as well.[70] This has been accepted by some courts and in some cases. Examples include the USA *Dow Chemical Co. v. Castro Alfaro*, in which the principle of *forum non conveniens* was deemed incompatible with environmental protection. 71 This result is regarded positively by the UNCITRAL Group working on a Guide to Treatment of Enterprise Groups in Insolvency.[72]

Forum non conveniens has also been put aside in the *Owusu* case,[73] in which the CJEU does not leave national courts any room to decide on their jurisdiction as it is determined by the Brussels I Recast. Therefore, at least when the parent company is located in the EU, Article 4 of the Brussels I Recast provides jurisdiction over it, which cannot be ruled out on grounds on *forum non conveniens*.[74] The outcome of *Owusu* supports the demands of lobbyists who argue for the liability of multinational corporate group. A grant of access to court against the parent company helps to stop corporate groups outsourcing environmental risks and, therefore, makes them apply high environmental standards. At any rate, liability finally depends on the law applicable to environmental damage.

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[70] See MUCHLINSKI, P., "The Bhopal case: Controlling ultrahazardous industrial activities undertaken by foreign investors", *The Modern Law Review*, 1997, pp. 545-587; SEWARD III, A. C., "After Bhopal: Implications for parent company liability", *The International Lawyer*, 1987, pp. 695-707; WESTBROOK, J., "Theories of parent company liability and the prospects for an international settlement", *Texas International Law Journal*, 1985, pp. 321-331.

[71] 786 S. W. 2d 674, 679 (Tex. 1990). For further analysis of environmental liability and *forum non conveniens*, see ANDERSON, M., n 19, pp. 410-414; JUENGER, F., "Environmental Damage" in MCLACHLAN, C. & NYGH, P. (eds.), *Transnational Tort Litigation: Jurisdictional Principles*, Oxford, Clarendon Press, 1996, pp. 201-214. WARD, H., "Governing Multinationals: The Role of Foreign Direct Liability", 3 (Feb. 2001), available at http://www.chathamhouse.org.uk/files/3028_roleoffdl.pdf, pp. 1-6, accounts cases brought against corporate companies in the United States, Australia, Canada and the United Kingdom, venturing that the multitude of cases in these countries is due to discovery rules at p. 1.

[72] Working Document available at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V09/860/81/PDF/V0986081.pdf?OpenElement. This document considers examples where the laws foresee consolidation of enterprise groups. In particular, "Misfeasance, where any person, including another group member, can be required to compensate for any loss or damage to an entity arising from fraud, breach of duty or other misfeasance, such as actions causing significant injury or environmental damage" (A/CN.9/WG.V/WP.90, p. 42)

[73] CJEU Case C-281/02, *Owusu c. Jackson*, ECLI:EU:C:2005:120.

[74] The United Kingdom has experienced an increase of lawsuits against corporate companies. The UK Lord Chancellor's department has argued, in a restricted consultation letter, that granting jurisdiction when the claim could be more appropriately conducted abroad could discourage companies from establishing a presence in the UK. See WARD, H. n 71, p. 4. After *Owusu* there is no alternative to accepting jurisdiction as granted by the Brussels I Regulation. If the parent company were not located in the Community, but the subsidiary company or Article 5(3) were, the joining of the former to the proceedings will depend on national *fora connexitatis*, as outlined in the Brussels I Regulation. See further on the issue, BETLEM, G. *Civil Liability for Transfrontier Pollution. Dutch Environmental Tort Law in International Cases in the Light of Community Law*, London, Kluwer Law, 1993, p. 108-112; FACH, K., n 53, p. 583-607.

3.3. Conflict-of Laws Issues

Conflict rules in environmental matters resort to the *locus commissi* as jurisdiction rules do. However, there has been a departure in both fields to the extent that the conflict rule laid down in Rome II Regulation points to the place where the damage occurs, not taking in principle into consideration the place of the harmful event. This trend has reached environmental matters as well. However and for environmental protection sake, the victim may choose between the law of the harmful event and the law of the damage's production.[75] Moreover, parties to the environmental damage may agree on the applicable law. Articles 14, 7 and 4(1) establish the conflict rule on environmental damage. As such: party autonomy is allowed within limits; lacking agreement on the applicable law, environmental damage is submitted to the law of the place where damage occurs, unless the victim chooses the law of the place where the event originated.

Party autonomy is allowed to the extent that choice of law is reached either "by an agreement entered into after the event giving rise to the damage occurred" or, "where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred".[76] A choice of law is not allowed if there are no international elements relevant to the situation at the time when the wrongful act was committed, apart from the choice of a foreign law itself. A similar rule is applied when all the elements relevant to the situation are within the European area of justice, meaning EU environmental law must be applied and its application cannot be avoided by choosing a third country's law. All these limitations arise from the underlying conflicts of interests and in particular on account of the weaker party protection. However, it is reasonable to say that this choice of law will not be used very often, in particular if the victim wants to take advantage of a stricter environmental law than the otherwise applicable.

In case that Article 14 does not apply or a law is chosen, the first part of Article 7 sets out that the "law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage" shall be "the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur".[77] The law of the place where damage occurs has, amongst other virtues, that of treating all victims and

[75] Article 2657 del Código civil argentino establece la ley aplicable a la responsabilidad extracontractual también remitiendo la cuestión a la ley del lugar de manifestación del daño salvo que las partes tengan su residencia habitual común en el mismo Estado. No existe, por tanto, una norma de conflicto específica como la aquí reseñada. En cualquier caso, las consideraciones que se hagan a propósito del lugar de manifestación del daño en este trabajo también debieran servir para interpretar la disposición argentina.

[76] Article 14 Rome II.

[77] Article 4(1) Rome II Regulation.

polluters equally. Victims are compensated according to the law where their interests have been damaged. Polluters are also dealt with equally, no matter where they are acting from.[78] In line with the remarks made as regards to the *forum delicti commissi*, in some instances the indirect consequences of the defendant's actions cannot be taken into account for reasons of predictability. However, a wide interpretation is given to this principle, and the actionable consequences of the defendant's acts do not depend on them being foreseeable by the defendant. This is essential in environmental protection because, as the Chernobyl accident has shown, air-borne particles and emissions can have very far-reaching damaging effects on the environment.[79]

The application of the *lex loci damni* is not always the environmental-friendliest one, as the string of litigation against Shell illustrates. As said, Dutch courts exercised jurisdiction against both the Dutch parent company and the Nigerian subsidiary, but they applied Nigerian law in accordance with the conflict rule herein examined. In the final judgment, the claim against the Nigerian company was partially upheld, but the claim against Royal Dutch Shell dismissed on grounds of not being accountable for its subsidiary's actions according to Nigerian law.[80]

The second part of Article 7 grants an option to "the person seeking compensation for damage", who can, "base his or her claim on the law of the country in which the event giving rise to the damage occurred". This unilateral option aims at improving environmental standards as the plaintiff is likely to submit to the most favourable law to his or her claim, and this will act as a deterrent for those defendants doing business globally.[81] When the defendant is a corporate company, that place could be located in two different countries, the place where the decision was taken and the place where it was implemented and gave rise to environmental damage. There is a full array of arguments to let the plaintiff choose between those laws as well,[82] but here it is enough to remember the collective interest behind the rule: the environmental protection.

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[78] On the policies and values underlying a conflict rule in environmental matters, see for von BAR, C., n 41, *passim*; FACH, K., *La contaminación transfronteriza en Derecho internacional privado*, Bosch, Barcelona, 2002.

[79] See KADNER GRAZIANO, T., n 55, p. 73; SYMENONIDES, S., "Tort Conflicts and Rome II: A View from Across" in MANSEL, H. *et al.* (eds.), *Festschrift für Erik Jayme*, Vol. 1, München, Sellier, 2004, p. 951.

[80] See the three judgments pronounced by the Hague Dictrict Court (*Rechtbank's-Gravenhage*) 30 January 2013, ECLI:NL:RBDHA:2013:BY9845; ECLI:NL:RBDHA:2013:BY9850 (dismissing the claims) and ECLI:NL:RBDHA:2013:BY9854 (granting compensation to be paid by the Nigerian subsidiary). On these judgments, see ENNEKING, L., "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case", *Utrecht Law Review*, Vol 10, 2014, pp. 1, pp. 44-54.

[81] See KADNER GRAZIANO, T., n 55, pp. 74-76, who also quotes German jurisprudence where this option has already been applied and, because of its effectiveness, has been followed by the European legislator.

[82] See further, ANDERSON, M., n 19, pp. 415-425; BETLEM, G., BERNASCONI, C., "European Private International Law, the Environment and Obstacles for Public Authorities", *Law Quarterly Review*, Vol. 122 (JAN), 2006, pp. 128-137.

However, the abovementioned case-law on the *forum delicti commissi* shows the problems behind such an interpretation. The human rights discourse by the hand of corporate social liability may push for this interpretation. The UN Guidelines on Business and Human Rights, as conceived by John Ruggie, are a good start as they highlight businesses' commitment to the human rights culture in any of their actions and activities, including in their interaction with other businesses, by putting in place all the necessary mechanisms to avoid infringement.[83] While corporate social liability is an answer to the globalization processes and the many regulatory gaps that they open, it has to be taken into account while determining the applicable law to injunctions and compensation for social and environmental dumping.[84]

The concept of "the person seeking compensation for damage" is broad enough to cover any type of collective action. This includes actions brought either by public entities or private persons seeking to recover the costs incurred due to the preventive or restorative measures adopted.[85] When it comes to collective actions, this option avoids the problems posed by many laws being applicable in the same proceeding: if environmental damage happens in more than one country, the *locus damni* rule leads to the laws of all the countries affected and collective actions become very difficult to manage. In order to avoid this problem, courts try to submit the case just to one law by changing or broadly interpreting the conflict rule. The question has been addressed by the USA Supreme Court in *Phillips Petroleum vs. Shutts*.[86] This case denied the creation of particular conflict rules. The Supreme Court held that collective actions cannot modify the substantive situation. As such, interests which are taken into account in building the conflict rule remain unchanged.[87] Now the option given by Article 7 of the Rome II Regulation lets the person seeking compensation for environmental damage submit to the *locus actus* and therefore avoids the multiplication of the applicable laws.[88]

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[83] See, in particular, principles 10, 13, 19, 23 and 26.

[84] Principio 25 of the UN Guidelines on Businesses and Human Rights sets out that efficient and adequate non-judicial remedies should be established. Against this backdrop, it is to remind the settlement reached by Shell in the case *Bodo Community v Shell Petroleum Development Company (Nigeria) Ltd ("SPDC")*.

[85] Group actions cast doubts because they deal with compensation rights of class members, most of them absent to the proceeding. That means that the decision relies on the representative plaintiff, but not on the owners of compensation rights. But, once group actions are accepted, it cannot be denied that option to, "the person seeking compensation for damage", even when representative.

[86] 472 U.S. 797 (1985).

[87] In this particular field, it is tempting to think of a particular rule, because if damage occurs in several countries, several laws will be applicable and therefore victims will be treated differently. For instance, within the Hague Conference it is thought it to be a good reason to establish a particular conflict rule. See BERNASCONI, Ch., n 19, p. 38. But such a particular conflict rule will give rise to an unjustified forum shopping, because victims will be able to bring their claim to court either as a complex case or as an ordinary one (not involving damage suffered in other countries) and the conflict rule will be different depending on the procedural means employed.

[88] When the event given rise to damage happens on the internet, e.g. defamation, then it has been proposed to apply the law of the victim's residence, following the *lex loci damni* rule. Following this approach, see Article 10.4 *Preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,* The Hague Conference –http://hcch.e-vision.nl–.

Once the connecting points have been explored, it is clear that this conflict rule does not always point to the most environmental-friendly law in the case at hand. In fact, it can be safely said that this is not the main objective of this conflict rule, but simply to apply the closest law to the case and thus one that is predictable for the alleged polluter. Having said this, it is also true that the choice between the law of the harmful event and that of the damage manifestation given to the victim is grounded on environmental protection. And if the latter is a legal objective, then it is worth trying to go further and amend the current conflict rule to better achieve it. To this end, it has been advocated that the victim's choice ought to be improved by adding up a third connecting point, i.e. the victim should also be able to choose the law applicable at the defendant's residence.[89]

The objections to including the law of the defendant's residence to the victim's choice are clear in particular in the light of the principle of predictability. However, the objections dilute in view of the interests at stake and the fact that that law is the usual defendant's law. Moreover, it can be argued that the conflicts of interests in environmental matters are better solved by resorting to the law of the place where the harmful event occurs that usually coincides with the defendant's residence. The question remains in the event of groups of companies where that place is, i.e. it is to be determined taking into account each of the allegedly responsible company and thus that place may be different.

4. FINAL REMARKS

The combination of legal divergence and globalization processes is seriously undermining collective commons and making political shortcomings in addressing global challenges clear. On the one hand, the global order is clearly underpinned in the principles of sovereignty and non-interference in other states' affairs; on the other hand, states have been joined by other actors at the international stage. While private persons and transnational companies enjoy the benefits of free movement and establishment to choose the legal system that fits better to their interests, the fight for sustainable development has to be also done at court level.

Courts have an important say in environmental matters; while traditional private international law rules may not be the best ones to fight against social and environmental dumping, their judicial application may make them evolve to better protect global interests and values such as the environment and human rights.[90] In this vein, some authors have reminded of the role

[89] See BOSKOVIC, O., n 44, pp. 197-198.

[90] See on these movements from the private international law angle CARBALLO PIÑEIRO, L., KRAMER, X., "The Role of Private International Law in Contemporary Society: Global Governance as a Challengue", *Erasmus Law Review*, 2014-3, pp. 109-112.

that international courts may play in environmental protection,[91] as the European Court of Human Rights' case law illustrates.[92] Either on the side of international courts or domestic ones, judicial and arbitral[93] activism, and judicial cooperation in environmental matters have to be promoted on grounds of their complexity; while specialization and lifelong learning in these matters are essential, it is also important to resort to imagination when it comes to tackle problems that go well beyond the narrow limits of national legislation.[94]

[91] The establishment of an *ad hoc* international court on environmental matters has been proposed. See SPIER, J., "The Urgent Need of Judicial Cooperation to Map Solutions to Come to Grips with the Major Global Challenges", in MANKOWSKI, P., WURMNEST, W., *Festchrift für Ulrich Magnus zum 70.Geburtstag*, Sellier, München, 2014, pp. 105-114, citing MAGNUS, U. (p. 105). The author rejects that ad hoc tribunal, but supports judicia activism. It is also to mention that a special section was already established within the International Court of Justice, but it ended up closing because the states did no bring any cases in.

[92] As in Öneryildiz *v Turkey* (No. ref. 48939/99) and in particular *Tatar v Romania* (No. ref. 67021/01) specifically mentioning the right to a healthy and protected environment in connection with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[93] See on these reasons FACH GÓMEZ, K., "Environmental Protection and International Trade: Greening the Investment Arbitration?", 2009, available at SSRN: http://ssrn.com/abstract=1434376 or http://dx.doi.org/10.2139/ssrn.143437 (last access 14 May 2016); SANDS, Ph., "Litigating environmental disputes: courts, tribunals and progressive development of international law", *Contribution to the Liber Amicorum of Judge Thomas Menash – 2007*, available at www.oecd.org/investment/globalforum/40311090.pdf *(last access, 6 May 2016)*.

[94] DE SOUSA SANTOS, B., "Law: A Map of Misreading. Toward a Postmodern Conception of Law", *Journal of Law and Society*, Vol. 14, 1987, p. 279, p. 281, pointing out that law is not only positivism but "imagination, representation and description of reality".