

Legal Avenues for Holding Multinational Corporations Liable for Environmental Damages in a Globalized World

Vías Legales para Responsabilizar a las Empresas Multinacionales por Daños Ambientales en un Mundo Globalizado

Daniel Iglesias Márquez

*PhD candidate at Tarragona Centre for Environmental Law Studies (CEDAT), Rovira i Virgili University (URV). Certificate in Human Rights, Governance and Peace Studies (University of Castilla-La Mancha). Master Degree in Environmental Law (URV). Bachelor in Law (University of Colima).
E-mail: daniel.iglesias@urv.cat*



ABSTRACT

In an increasingly globalized world, multinational corporations (MNCs) have expanded not only numerically but also financially. Through foreign direct investment (FDI), they relocate their activities worldwide and thus operate in a wide variety of countries, particularly in those that have the most advantageous conditions, such as lower costs (wages and social security) and laxer labor and environmental standards. Accordingly, MNCs can be directly or indirectly (through their business partners) associated with negative impacts on the environment, e.g. greenhouse gas emissions, the production of toxic and hazardous substances and waste, the over-exploitation of natural resources, water pollution, etc. The negative impacts of MNCs on the environment have drawn a great deal of international attention because of increasing instances of massive environmental damage resulting from their operations, particularly in developing countries. The aim of this paper is to analyze the international and national legal avenues for holding MNCs liable for environmental damage in a globalized world. The guiding question is whether these existing legal avenues are able to influence the environmental performance of MNCs and whether they can be effective in providing redress to the victims of damage caused by companies.

KEYWORDS

Globalization – Environment – Multinational corporations – Liability

RESUMEN

En un mundo cada vez más globalizado, las empresas multinacionales (EMNs) han crecido no sólo numéricamente sino también financieramente. A través de la inversión extranjera directa (IED) deslocalizan sus actividades en todo el mundo y operan en una gran variedad de países, particularmente en aquellos que cuentan con las condiciones más ventajosas, como bajos costes (salarios y seguridad social) y estándares laborales y ambientales más laxos. En consecuencia, las EMNs pueden ser, directa o indirectamente (a través de sus socios comerciales), asociados con impactos negativos al medio ambiente; por ejemplo, emisiones de gases de efecto invernadero, producción de sustancias y residuos tóxicos y peligrosos, sobreexplotación de recursos naturales, contaminación del agua, etc. El impacto negativo de las EMNs en el medio ambiente ha llamado la atención de la sociedad internacional debido al aumento de número de casos de degradación ambiental a consecuencia de sus operaciones, especialmente en los países en desarrollo. El objeto de este artículo es analizar las vías legales internacionales y nacionales para responsabilizar a las empresas por los daños ambientales en un mundo globalizado. La pregunta de investigación es si las vías legales existentes son capaces de influenciar en la conducta ambiental de las EMNs y si son efectivas al momento de compensar a las víctimas de los daños causados por las empresas.

PALABRAS CLAVES

Globalización – Medio ambiente – Empresas multinacionales – Responsabilidad

1. Introduction

Today no one can deny that MNCs play a relevant role in the process of globalization (free markets, free trade, foreign direct investment [FDI], privatization and deregulation, etc.). They control the most strategic sectors of the world economy: energy, finance, telecommunications, health, agriculture, infrastructure, water, media, armaments and food. In addition, their presence has reached the most remote places in the world through the relocation of part or all of their industrial activities. However, the controversial ways in which MNCs operate and impact the environment has raised a great deal of debate among various groups across the social and economic spectrum.

Although they are able to contribute positively to environmental protection through their financial, organizational and technological capacities, their activities have resulted in numerous instances of massive damage to natural resources (e.g. water, air and soil pollution, greenhouse gas emissions, the release of dangerous chemicals, the production of toxic and hazardous substances and waste, etc.), which tend to take place in developing host States. These negative impacts interfere with vital planetary systems and generate ecological challenges (e.g. climate change, depletion of the



ozone layer, loss of biodiversity, desertification, drought, depletion of hydrocarbon resources, etc.) that have effects on the global scale.

Accordingly, international society has become aware of the ecological impact of industrial activities worldwide. Several non-governmental organizations (NGOs) have called for more efficient legal avenues for holding MNCs accountable for damages that can influence their future performance and compensate victims for the damages suffered. This paper outlines the current national and international legal avenues available and examines the obstacles that hinder access to justice for victims. The first part of the paper discusses the invisibility of corporations in international environmental law. The second analyzes some of the hurdles for holding MNCs liable for natural resource damages in host States. The third part examines the feasibility of regulating overseas subsidiaries/operations of corporations in home States and the tendency of victims to seek recourse in the courts of the State where companies have their headquarters. Finally, we conclude that the existing legal avenues remain weak and ineffective for holding MNCs liable for environmental damages.



2. MNCs in International Environmental Law

The international legal personality of corporations is a topic of ongoing debate. The question is whether or not they are subjects of international law and thus responsible for breaches of international obligations (PENTIKÄINEN, 2012; KAMMINGA, ZIA-ZARIFI, 2000; BISMUTH, 2010; ALVA-REZ, 2011, TULLY, 2007). However, the current state of international law is perceived as governing relations between States, which are considered the sole and exclusive subjects of international law. Meanwhile, corporations lack international legal personality; therefore, their responsibilities under international law remain a grey area despite the fact that today MNCs play a significant role at the international level¹ and, moreover, companies benefit from a range of international law provisions (WOUTERS, CHANÉ, 2013). International law imposes only indirect responsibilities on corporations. In addition, international courts do not have jurisdiction over MNCs, except

1. In this regard, JOHNS (1994, 893) points out that “[d]espite their profound influence upon international affairs, transnational corporations are more notable in their absence from international discourse than in their presence.”

in arbitration between a State and an MNC in order to settle disputes related to investment protection and international commercial transactions (PIGRAU, *et al.*, 2012).

Since the second half of the twentieth century, the socio-environmental impacts of multinationals, such as human rights abuses and massive environmental damage, have drawn much attention, particularly those that take place in developing countries with low labor and environmental standards, poor enforcement capacities, and high rates of corruption (PIGRAU, *et al.*, 2012). This situation has given rise to the debate about the need for the international regulation and oversight of businesses. Nevertheless, States have shown resistance to the imposition of obligations on corporations in certain areas of international law (AUGENSTEIN, KINLEY, 2014). Thus, international environmental law has been unsuccessful in controlling the environmental misconduct and wrongful acts of MNCs. Most multilateral environmental agreements (MEAs) are addressed primarily at States, and have at most indirect regulatory implications for MNCs (WOUTERS, CHANÉ, 2013). However, international environmental law leads the States themselves to regulate the behavior of corporations in order to prevent harm to the environment. States should implement environmental international standards through enacting legislation and regulations to control multinationals in their territory and under their jurisdiction. Nevertheless, various international treaties have adopted the approach of imposing strict civil liability on individual operators (public or private) involved in certain specific ultra-hazardous activities that are not prohibited by international law, such as the transport of oil and dangerous substances or nuclear energy for peaceful purposes. Unfortunately, some of these are not yet in force, and others probably never will be.

Therefore, all efforts have relied on voluntary initiatives from intergovernmental organizations, and in particular on international and regional codes of conduct that focus on the impact of MNCs in two main areas: social conditions and the environment. These codes of conduct include the 1976 OECD Guidelines for Multinational Enterprises, the 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the 1982 UN Draft Code on Transnational Corporations, the 1999 Global Compact, the 2003 UN Norms on the Responsibilities of Transna-



tional Corporations and other Business Enterprises with Regard to Human Rights, the 2006 IFC Performance Standards on Environmental and Social Sustainability and the Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework adopted by the UN Human Rights Council on 16th June 2011. These instruments are unilateral declarations of a voluntary nature and differ in the stringency and specificity of their requirements and in their enforcement mechanisms. Most codes of conduct refer to sustainable development and include environmental protection standards and mechanisms to encourage more environmentally friendly behavior. However, in June 2014, the UN Human Rights Council adopted a significant resolution to start the process of creating an international legally binding instrument applicable to transnational corporations. The resolution provides for the establishment of an open-ended intergovernmental working group that is mandated with the drafting of an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.²



Undeniably, as FRIEDMANN (1972) states, “although States remain by far the most important – and the only full – subjects of international law they are no longer the only subjects of international law”. Nevertheless, the current international legal framework and the global economy contribute to the impunity of corporate abuses. These factors represent an economic and legal advantage for MNCs because they do not have to respond directly to breaches of international law. In this regard, ZERK (2006, 103) points out that “[i]nternational law does not provide easy solutions to the social and environmental issues posed by multinationals”. In addition, international law does not provide effective remedies for individual victims of MNCs (NWAPI, 2014) and those affected by corporations cannot and will not wait for the debate concerning the international legal personality of MNCs to be resolved.

3. MNCs’ liability for environmental damages in host States

Since MNCs are not subject to binding environmental obligations con-

2. *Vid.* Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, UN Human Rights Council Resolution 26/9 of 26 June 2014, UN Doc. A/HRC/26/L.22/Rev.1.

tained in international treaties, the environmental liability of these agents must be sought within a domestic legal system. In principle, national laws grant MNCs the status of legal persons and impose domestic responsibilities on corporations. Thus, they are subject to national laws and the jurisdiction of the courts of the countries in which they were incorporated. Therefore, host States bear the obligation for the oversight and control of companies within their territory and elsewhere under their jurisdiction. In this regard, MORGERA (2009, 25) suggests that “[t]he most immediate legal system for ensuring the environmentally sound conduct of private enterprises is that of the State in which they operate”. In addition, host States should provide remedy mechanisms to compensate victims of corporate environmental degradation. Hence, the liability of these companies must be claimed through the judicial and administrative remedies available within national legal systems. Accordingly, as PIGRAU *et al.* (2012) state, “[i]n theory [...], the most obvious legal avenue to seek redress in cases of environmental damage and related human rights violations is recourse to the *forum delicti commissi*, i.e. the domestic courts of the State in which harm was inflicted. Laws in each State tend to provide affected individuals and groups standing before the government agencies responsible for authorizing and overseeing the activities causing the damages. Should this first avenue not settle the issue, recourse is possible before administrative, civil, or criminal courts, or even environmental courts, if these do exist”.

However, in a broader view of the issue, empirical evidence shows that the practice of holding MNCs liable for environmental damages in the State where the damages occurred has been minimal or non-existent, especially in so-called developing countries. There are several legal and practical obstacles and barriers to effective judicial remedy. Thus, even though developing host States have established an environmental legal framework (usually within their administrative law regime), their capacity to enforce environmental regulations is poor, which can be an attractive feature for MNCs seeking locations in which to establish operations. The reality of these countries hampers the appropriate enforcement of their environmental law systems. First and foremost, these sorts of countries, to a greater or lesser degree, depend on the presence of MNCs because they represent foreign investment, jobs and technical expertise (WESCHKA, 2006). Thus,



host States are limited in their capacities to change, refine or update their environmental regulations as such action would most likely give rise to several consequences (MORGERA, 2009). For example, it might adversely affect bilateral or multilateral investment treaties and/or the economic interests of developing host States, which can conclude in two scenarios: the payment of compensation by the State to the foreign company due to the breach of the treaties, or the relocation of the company's industrial activities to another more corporate-friendly State (WESCHKA, 2006).

This is what MORIMOTO (2005, 145) calls a lack of incentive. According to him, “[d]eveloping host countries fear that, by undertaking enforcement action against transnational corporations, they might place billions of dollars in jeopardy”. In addition, some developing host States also lack the technical and legal resources required to enforce environmental regulations (RUGGIE, 2008). Therefore, the practice of host States holding MNCs liable for non-compliance with national environmental law seems to be limited due to this conflict of interest.

Faced with a deficient environmental administrative system with which to hold MNCs liable for damage, victims opt for other legal avenues, i.e. civil law or criminal law.³ In fact, there is a long list of compensation lawsuits and criminal proceedings before domestic courts in the States in which the environmental damages – or human rights violations take place (SAGE-MAAß, 2014). Some specific examples include the case of Chevron in which an Ecuadorian court ordered the company to pay US\$ 8,646,160 in compensation for the environmental and health damage caused by the company's oil operations.⁴ Similarly, the operations of Royal Dutch Shell have resulted in several complaints regarding the environmental damage in the Niger-Delta Region. In one case, the Nigerian Supreme Court in April 2006 ruled that Shell had to stop flaring gas in Iwherekan by April 2007.⁵ In another case, the Federal Court of Nigeria sentenced Shell Nigeria to pay 100 million dollars in damages to the Ejama-Ebubu community, and to



3. Criminal laws exist in some States to punish and deter certain forms of egregious corporate behavior, for example, the formulation of crimes such as corporate manslaughter for deaths caused by gross corporate negligence.

4. *Vid.* National Justice Court. Trial Num. 174-2012. Dr. Wilson Andino Reinoso. National Court of Justice. Civil and Merchant Court Room. Quito, 12 November 2013.

5. *Vid.* *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (NgHC 2005).

restore the area to its original condition prior to an oil spill that occurred forty years earlier, in 1970, affecting 250,000 hectares.⁶

However, the effectiveness of these legal avenues (or lack thereof) lies in the institutional strength, capacity and independence of the national judiciaries (PIGRAU, *et al.*, 2012). In many cases, the complexity of such litigation against MNCs reaches beyond the legal and judicial system of the developing host States. Moreover, the States' complicity with corporations' activities contributes to the lack of transparency and legitimacy of judicial authorities, which can hamper judicial processes (BORRÀS, VILASECA, 2014). For example, in the case of Rio Tinto-Papua, where domestic legal proceedings were manifestly impracticable, the complicity of the whole State system with the company was patently obvious. Finally, this situation also affects the physical safety and integrity of victims and environmental defenders or activists. The claims and protests of those affected by or challenging MNCs have very often resulted in persecution and even casualties. For example, Royal Dutch Shell has been accused of facilitating the execution of Nigerian writer Ken Saro-Wiwa.⁷

In sum, the greater economic and political power of MNCs combined with the dependence of developing countries on foreign direct investment and the existence of various legal and practical obstacles in developing host States, in other words the unwillingness or inability of host States, often leave victims without justice or compensation and, moreover, contribute to the impunity of corporations. Therefore, there has been an increasing tendency for victims to seek justice in the courts of the home States of MNCs.



4. MNCs' liability for environmental damages in home States

The parent companies of a large number of MNCs are based in developed countries, particularly in the United States (US), the European Union (EU) and Japan (UNCTAD, 2009). Thus, taking into account the lack of efficacy of developing host States to control the activities of corporations within

6. *Vid.* In the Federal High Court of Nigeria in the Asaba judicial division holden at Asaba, Delta State, 2010, suit No. FHC/ASB/CS/231/2001.

7. *Vid.* *Wiwa v Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000).

their jurisdiction and/or territory and the transboundary nature of environmental problems, one might expect that home States would be able to offset this lack of environmental liability by regulating company operations outside their territories. However, at the international level, the recognition of international legal obligations to regulate and control impacts of corporate nationals abroad remains unclear. They are “not generally required under international law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so...” (AUGENSTEIN, KINLEY, 2014, 176). As a consequence, States have little incentive - and are sometimes unwilling - to adopt “domestic measures with extraterritorial implications”⁸ to protect third-country victims against environmental corporate abuses.

Undoubtedly, these measures are legal tools in order to avoid environmental destruction and the impairment of planet Earth caused by industrial activities (GREENPEACE, CIEL, 2014). Moreover, as several environmental NGOs have claimed, these measures contribute to filling the “enforcement gap” that exists where companies operate through their subsidiaries in States with weak regulatory regimes (ZERK, 2010). Nevertheless, as MORGERA (2009) points out, there are several obstacles in the current international framework. The author identifies the following: (1) Issues concerning respect for the national sovereignty of foreign countries. (2) The application of standards might lead to the paradoxical situation of different multinationals operating in the same industry sector and in the same foreign country being subject to different environmental regulations depending on their country of origin. (3) Logistical, financial, and technical challenges in the monitoring and implementation of home State norms in foreign countries. For these reasons, States are reluctant to regulate the operations of their MNCs abroad and do not seek to regulate environmental issues in other countries.



8. Concerning the environmental regulation, ZERK (2010, 176-177) identifies the following “domestic measures with extraterritorial implications”: 1) obligations to conduct pre-project environmental impact assessments, covering extraterritorial environmental risks as well as territorial ones; 2) obligations to notify authorities in other countries of possible transboundary environmental risks of projects within the territory of the regulating State; 3) obligations to notify authorities in other countries of the risks associated with hazardous exports; 4) measures aimed at limiting the availability of home State support to environmentally harmful projects overseas, and measures that base the availability of support on good environmental performance; 5) measures to control the extraterritorial environmental impacts of ships (i.e. through safety and construction standards); 6) environmental reporting as part of corporate disclosure regimes; and 7) restrictions on imports of products that have been produced or harvested in an environmentally damaging way.

Despite the above mentioned, in the absence of effective remedies in the host States, victims see resorting to the courts of corporations' home States as an alternative legal avenue for holding MNCs liable because doing so provides the possibility of overcoming the existence of legal barriers in the host States (i.e. unwillingness and/or lack of legal infrastructure). In some of the developed countries in which many of the largest MNCs have their headquarters, there are legal avenues available that allow foreign citizens to access extraterritorial judicial procedures in order to hold companies liable for damages committed in foreign countries (EBBESSON, 2009).

Today, civil litigation and criminal prosecutions⁹ alleging violations of human rights and environmental damage by MNCs in developing countries are already taking place in home States, especially in countries such as the United Kingdom (UK), the US, Canada, Australia and the EU Member States (the Netherlands, Germany, France and Sweden). In particular, victims tend to opt for civil liability cases to be heard in the home State in order to address grievances against MNC activities (ANDERSON, 2002). The aim of these sorts of claims is to connect the liability for harm committed by one entity to the parent entity, which has some degree of control over the perpetrator of the harm (PERRY-KESSARIS, 2010).

In the US, litigation against MNCs has been much more significant. There is a long list of legal cases concerning corporate abuses in third countries. Several foreign victims have made claims before US courts under the Alien Tort Claims Act (ATCA)¹⁰ alleging corporate human rights abuses. Initially environmental harm was not considered in the Act, but the 2006 decision of the Ninth Circuit of the US Court of Appeals in *Sarei v. Rio Tinto Plc* allowed residents of Papua New Guinea to bring a claim against the British mining company for dumped mining waste that contaminated internatio-



9. Most of the criminal prosecutions concern human rights violations. For example, in 2010, in Germany, the European Center for Constitutional and Human Rights (ECCHR) filed a criminal complaint against two executive employees of the company Lahmeyer International GmbH, involved in constructing the Merowe dam in Northern Sudan, for flooding of over 30 villages, displacing over 4,700 families, and destroying their livelihood. (Vid. criminal complaint against Lahmeyer). In France, the French Company and its executive managers have been accused of acts of torture for having signed and executed a commercial agreement for the provision of surveillance technology to the Libyan regime in 2007. (Vid. FIDH's Report Amesys case). In Switzerland, a criminal complaint has been filed against the company Nestle for its complicity in the assassination of a Colombian trade unionist in 2005. (Vid. criminal complaint against Nestle).

10. The ATCA has been used by lawyers to bring litigation against corporations for human rights violations; therefore, a significant proportion of the cases have been heard in the US under the aegis of the ATCA, which states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".

nal waters.¹¹ Despite this case, litigation under the auspices of the ATCA for cases that allege violations of international norms of environmental protection¹² remains uncertain because liability under the ATCA has so far been restricted to cases of violation of international legal rules that fall within the concept of *jus cogens*. Under this concept, US courts have refused to accept rules of international environmental law as cognizable principles of customary international law, which would establish their subject matter jurisdiction under the ATCA. Nevertheless, litigation under the ATCA against MNCs is in a state of transition. The decision in *Kiobel v. Royal Dutch Petroleum Co.*¹³ raised the issue of the future applicability of the ATCA to cases of violations of international norms committed abroad because it seems that the restrictive approach of this decision closes the door to ATCA-based foreign direct liability cases (ENNEKING, 2014).

On the other hand, in the EU, a region with a great number of MNCs based within its Member States, there is no judicial instrument similar to ATCA; however, international private law has been harmonized by European regulations.¹⁴ Despite the fact that recourse to courts of State members is an alternative legal avenue for holding European MNCs liable for environmental damages, it has not been used as much as US jurisdiction (ENNEKING, 2009). However, some emblematic cases before European courts can be mentioned, particularly in countries with a common law tradition such as the UK. In that country, the courts have been involved in civil claims filed in relation to the *Trafigura* case connected to illicit waste disposal in the *Probo Koala* incident in Abidjan. In addition, workers at the *Rössing* uranium mine in Namibia, operated by a Rio Tinto subsidiary, filed a claim before the British courts seeking compensation for health-related damages suffered. Although there is a greater tendency for litigation in common law countries, there are also other jurisdictions such as the Netherlands and Sweden where the hurdles are lower and where a full range



11. *Vid. Sarei v Rio Tinto PLC*, 221 F.2d 1116 (C.D.Cal., 2002).

12. However, the status of international environmental law under the ATCA remains uncertain (PERRY-KESSARIS, 2010).

13. *Vid. Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

14. Regulation EC No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), amended by the Regulation (EU) 1215/2012 on jurisdiction, recognition, and enforcement of judgements in civil and commercial matters (Brussels I bis Regulation) and Regulation (EC) No. 864/2007 of the European Parliament and of the Council, of 11 July 2007, regarding the law applicable to extra-contractual obligations (Rome II Regulation).

of legal avenues is available against parent companies. In this regard, Dutch civil courts have ruled on a case concerning the oil spills caused by the operations of the Nigerian subsidiary of Shell in the Niger Delta between 2004 and 2006 (JÄGERS, *et al.*, 2013).¹⁵ Finally, it is worth mentioning the latest attempt to hold an MNC liable in an EU Member State. In September 2013, the association Arica Victims KB, representing 707 people in the Chilean town of Arica, filed a claim in the County Court of Skellefteå (Sweden) against the Swedish company Boliden Mineral AB concerning environmental damage resulting from the exportation 20,000 tons of mining waste from company's facility in Skellefteå to an area known as Polygon in Arica (Chile).¹⁶ These cases show that foreign direct liability claims on environmental damage are indeed possible in European courts (LARSEN, 2014).

However, there are also a number of serious barriers to accessing justice and obtaining remediation for victims in a third country. Some of these barriers include, firstly, the complex structure of MNCs (a network of distinct entities with separate legal personality¹⁷ and limited liability¹⁸), which can be one of the greatest impediments to victims seeking liability in home States. The structure of MNCs shields the parent company from liability for damages committed by their subsidiaries abroad and impacts the assertion of the courts' jurisdiction over businesses that are not domiciled in home States (SKINNER, *et al.*, 2013).

Secondly, another important obstacle is the doctrine of *forum non conveniens*, particularly in common law countries such as the US or UK. This doctrine allows courts to dismiss a case if a defendant can show that an adequate alternative forum exists for the case due to the location of the parties, witnesses or evidence, and even in the event that the local court is more familiar with local law. This means that even when US federal courts would formally have jurisdiction over a particular action brought to them under the auspices of the ATCA, they may dismiss the action if there is an



15. *Vid.* Judgment of the District Court of The Hague 30th January 2013, C/09/337050/ HA ZA 09-1580, *Friday Alfred Akpan & Milieudéfense, c. Royal Dutch Shell plc & Shell Petroleum Development Company of Nigeria*.

16. *Vid.* Skellefteå Tingsrätt, T. 1021-13 Arica Victims KB v. Boliden Mineral AB.

17. The separate legal personality refers to the “nationality” of the companies. It means that the State where a company is incorporated is that whose national law regulates its conduct.

18. The doctrine of limited liability holds that the shareholders in a business may not be held liable for the debts of that business beyond the level of their investment.

alternative forum.¹⁹ In the EU, as laid down in Brussels I Regulation, this is not the case, and European courts have no power to decline to exercise their jurisdiction on the basis of that doctrine.²⁰

Thirdly, once the court's jurisdiction in the home State is asserted over a case for harm done in another jurisdiction, it has to determine which law applies to the case. In a North-South context in which environmental protection standards are often higher in developed home States than in the developing host States where the subsidiaries operate, one would assume that victims would prefer the application of home State law, which tends to be more favorable to their cause (ENNEKING, 2012). However, the applicable law is generally the *lex loci delicti*, or that of the host State where the damage occurred. This can pose obstacles for victims, such as the application of statutes of limitations, the constraint of vicarious or secondary liability, and difficulties in proving the damage (SKINNER, *et al.*, 2013). In the EU, applicable law is determined under the regime of the Roma II Regulation. This instrument, in order to raise the general level of environmental protection, incorporates the "polluter pays" principle and gives the defendants the possibility to choose the applicable law between *lex loci damni* or *lex loci delicti* (Article 7). Therefore, the law of EU Member States can be applicable in cases concerning extraterritorial environmental damage caused by corporations incorporated in those States (JÄGERS, VAN DER HEIJDEN, 2008).

Finally, the cost of bringing actions before home State courts can be incredibly high, especially for victims with limited resources. Transnational litigation in Europe and North America, which is sometimes long term, entails a variety of costs, such as those associated with gathering evidence in a foreign State and the cost of legal and technical experts. This can hinder access to a judicial remedy (SKINNER, *et al.*, 2013).

5. Conclusion

It seems that MNCs aggravate global environmental challenges despite their capacity to be part of the solution or at least to improve their own

19. In the US, the doctrine has played a significant role in cases such as *Bhopal v. Union Carbide Corporation*, *Aguinda v. Texaco, Inc. and Wiwa v. Royal Dutch Petroleum Co. and Shell Transport*.

20. In many cases, the European Court of Justice has rejected the application of the *forum non conveniens* doctrine in the European Union. See, e.g., *Case C-412/98, Group Josi Reinsurance Co. v. Universal Gen. Ins. Co.*, 2000 E.C.R. I-05925.



environmental performance. This means that although they are able to implement higher environmental standards, their current *modus operandi* contributes little to reducing their impact on the environment. These impacts affect not only the environment, but also the population which, in many cases, depends directly on natural resources.

Therefore, the existence of legal avenues to hold MNCs liable and to compensate victims for environmental damages is extremely important. In fact, as we note above, such recourse already exists at the international and national level, but differs in the degree of stringency and enforcement. Together they form a complex labyrinth in which very few victims ultimately reach the end (holding MNCs liable and gaining environmental justice), while most lose their way due to the multiple obstacles they have to face (the lack of international personality, economic interests and the lack of enforcement capacity in developing host countries, and the unwillingness of developed home States to control industrial extraterritorial activities).

Holding MNCs liable for environmental damages and even for human rights abuses in a globalized world seems to be a difficult and complicated task. There is no suitable legal avenue by which to achieve this goal. Moreover, empirical experience shows that every legal avenue has its own complexities and that results can vary from case to case. At the international level, the old-fashioned Westphalian paradigm has been displaced by the process of globalization, which is characterized by the interaction between States and new actors with a greater presence than many States. This situation benefits MNCs since they are more or less immune to incurring responsibility for breaches of international obligations. At the national level, the scenario does not seem to be much better. In developing host States, despite the fact that most of them have established a legal environmental framework, its effectiveness in holding MNCs liable is extremely limited due to a lack of enforcement capacity and the pressure placed by MNCs on the host States. On the other hand, developed home States do not take into account that, to a greater or lesser extent, the environmental damage caused by their companies will affect them sooner or later. Therefore, they are not willing to adopt regulations to control extraterritorial industrial activities in order to minimize environmental impact. In addition, claims for environmental damage brought before their domestic courts is an issue that they are not



yet prepared to resolve. However, all of the cases against MNCs at the international and national level concerning claims for environmental justice shape the public perception of MNCs and the environment at a global level and raise the questions of whether the existence of legal avenues is the best way to hold multinationals accountable; whether they can make restitution to victims for environmental damages; and, finally, whether they are able to modify environmental corporate behavior in a way that will prevent future injury and environmental harm.

References

ALVAREZ, José E. Are Corporations “Subjects” of International Law? *Santa Clara Journal of International Law*. v. 9, n. 1. Santa Clara: 2011. p. 1-36.

ANDERSON, Michael. Transnational Corporations and Environmental Damage: Is Tort law the Answer? *Washburn Law Journal*. v. 41, n. 3. Topeka: 2002. p. 399-425.

AUGENSTEIN, Daniel; KINLEY, David. Beyond the 100 Acre Wood: In which International Human Rights Law Finds New Ways to Tame Global Corporate Power. *Sydney Law School Research Paper* No. 14/90. Sydney: 2014. p. 1-20.

AUGENSTEIN, Daniel; KINLEY, David. When Human Rights ‘Responsibilities’ become ‘Duties’: The Extra-Territorial Obligations of States that Bind Corporations. In DEVA, Surya; BILCHITZ, David. (eds.). *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* Cambridge: Cambridge University Press, 2014. p. 271-294.

BISMUTH, Regis. Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing Between International and Domestic Legal Orders. *Denver Journal of International Law and Policy*. v. 38. n. 2. Denver: 2010. p. 203-226.

BORRÁS PENTINAT, Susana; VILASECA BOIXAREU Isabel. Los conflictos ambientales causados por empresas transnacionales: realidades y retos jurídicos Internacionales. In SOARES STERSI DOS SANTOS, Ricardo; ANNONI, Danielle. (Coord.). *Cooperação e conflitos Internacionais: Globalização, Regionalismo e Atores*. Curitiba: Multideia, 2014. p. 151-152.

EBBESSON, Jonas. Piercing the State Veil in Pursuit of Environmental Justice. In EBBESSON, Jonas; OKOWA, Phoebe. (eds.). *Environmental Law and Justice in Context*. Cambridge: CUP, 2009.

ENNEKING, Liesbeth. Transnational Corporate Responsibility for the 21st Century: Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases. *George Washington International Law Review*. v. 40. n. 4. Washington: 2009. p. 903-938.

ENNEKING, Liesbeth. Foreign direct liability and beyond. *Exploring the role of tort law in promoting international corporate social responsibility and accountability*. Eleven International Publishing: The Hague, 2012.

ENNEKING, Liesbeth. The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case. *Utrecht Law Review*. v. 10. n. 1. Utrecht: 2014. p. 44-54.

FRIEDMANN, Wolfgang. *Law in a Changing Society*. California: UCP, 1972.

GREENPEACE; CIEL. *Extraterritorial Obligations in the Context of Eco-destruction and*



Climate Change. Heidelberg: FIAN International, 2014.

JÄGERS, Nicola; JESSE, Katinka; VERSCHUUREN, Jonathan. The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case against Shell. *American Journal of International Law*. v. 4. n. 197. Washington: 2013. p. e-36-47.

JÄGERS, Nicola; VAN DER HEIJDEN, Marie-José. Corporate Human Rights Violations: The feasibility of Civil Recourse in The Netherlands. *Brooklyn Journal of International Law*. v. 33. n. 3. Brooklyn: 2008. p. 833-870.

JOHNS, Fleur. The invisibility of the Transnational Corporations: An Analysis of International Law and Legal Theory. *Melbourne University Law Review*. v. 19. Melbourne: 1994. p. 893-923.

KAMMINGA, Menno T.; ZIA-ZARIFI, Saman. (eds.). *Liability of Multinational Corporations under International Law*. The Hague-London-Boston: Kluwer Law International, 2000.

LARSEN, Rasmus K. Foreign Direct Liability Claims in Sweden: Learning from Arica Victims KB v. Boliden Mineral AB? *Nordic Journal of International Law*. v. 83. n. 4. 2014. p. 404-438.

MORGERA, Elisa. *Corporate Accountability in International Environmental Law*. Oxford: Oxford University Press, 2009.

MORIMOTO, Tetsuya. Growing industrialization and our damaged planet. The extraterritorial application of developed countries' domestic environmental laws to transnational corporations abroad. *Utrecht Law Review*. v. 1. n. 2. Utrecht: 2005. p. 134-159.

NWAPI, Chilenye. Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor. *Utrecht Journal of International and European Law*. v. 30. n. 78. Utrecht: 2014. p. 24-43.

PERRY-KESSARIS, Amanda. Corporate Liability for Environmental harm. In FITZMAURICE, Malgosia; ONG, David M.; MERKOURIS, Panos. (eds.). *Research Handbook on International Environmental Law*. Glos-Massachusetts: Edward Elgar Publishing Limited, 2010. p. 361.-376.

PENTIKÄINEN, Merja. Changing International 'Subjectivity' and Rights and Obligations under International Law – Status of Corporations. *Utrecht Law Review*. v. 8, n. 1. Utrecht: 2012. p. 145-154.

PIGRAU Antoni; BORRÀS, Susana; JARIA I MANZANO, Jordi; CARDESA-SALZMANN, Antonio. *Legal avenues for EJOs to claim environmental liability*. EJOLT Report No. 4, 2012.

PIGRAU Antoni; BORRÀS, Susana; JARIA I MANZANO, Jordi; CARDESA-SALZMANN, Antonio. The Interplay of National, Transnational and International Litigation for Environmental Justice: Seeking Effective Means of Redress for Grave Environmental Damage. *International Society for Ecological Economics 2012 Conference - Ecological Economics and Rio+20: Challenges and Contributions for a Green Economy*, Rio de Janeiro: 2012.

RUGGIE, John. *Obstacles to justice and redress for victims of corporate human rights abuse*. Oxford: Oxford Pro Bono Publico, 2008.

SAAGE-MAAß, Miriam. *Holding Companies Accountable Lessons from transnational human rights litigation*. Berlin-Aachen: ECCHR-Bröt für die Welt-MISEREOR, 2014.

SKINNER, Gwynne; MCCORQUODALE, Robert; DE SCHUTTER, Olivier. *The Third Pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Business*. Brussels-London: ICAR-CORE-ECCJ, 2013.

TULLY, Stephen. *Corporations and International Lawmaking*. Leiden: Koninklijke Brill, 2007.



UNCTAD. *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development*. New York-Geneva: United Nations, 2009.

WESCHKA, Marion. Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad? *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. n. 66. Heidelberg: 2006. p. 625–661.

WOUTERS, Jan; CHANÉ, Anna-Luise. Multinational corporations in international law. *Working Paper* No. 129 – December 2013. Leuven: 2013. pp. 1-20.

ZERK, Jennifer. *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*. Cambridge: Cambridge University Press, 2006.

ZERK, Jennifer. *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*. Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2010.

Cases

Federal High Court of Nigeria in the Asaba judicial division holden at Asaba, Delta State, 2010, suit No. FHC/ASB/CS/231/2001.

Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (2005) AHRLR 151 (NgHC 2005).

Judgment of the District Court of The Hague 30th January 2013, C/09/337050/ HA ZA 09-1580, Friday Alfred Akpan & Milieudéfense, c. Royal Dutch Shell plc & Shell Petroleum Development Company of Nigeria.

Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013).

National Justice Court. Trial Num. 174-2012. Dr. Wilson Andino Reinoso. National Court of Justice. Civil and Merchant Court Room. Quito, 12 November 2013.

Sarei v Rio Tinto PLC, 221 F. 2d 1116 (C.D.Cal., 2002).

Skellefteå Tingsrätt, T. 1021-13 Arica Victims KB v. Boliden Mineral AB.

Wiwa v Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000).

