Dislocation of Environmental Litigation – New Developments in Corporate Liability for Environmental Harm

Veerle Heyvaert*

Abstract

This paper examines recent developments in the field of the legal responsibility of corporate groups for environmental harm. It focuses on English and Dutch court rulings in *Vedanta*, *Okpabi* and *Four Nigerian Farmers*, as well as ongoing developments in the context of the *SaMarco* litigation, and argues that these cases demonstrate an increased judicial willingness to confront the transnational character of corporate decision making and its impact on the environment. This changed disposition has triggered three dynamics which the paper qualifies as three 'productive dislocations': a legal conceptual dislocation; a dislocation of jurisdiction; and a dislocation of adjudication.

Conceptual dislocation refers to a shift in the judicial conceptualisation of corporate control from a primarily operational to a regulatory notion. The dislocation of jurisdiction and adjudication, in turn, refer to the phenomenon of courts in the Global North becoming a forum for litigation against companies located in the Global South and, relatedly, such courts having to apply foreign law in their adjudication. The paper presents these dislocations as simultaneously productive and disruptive. They are productive because they enable the removal or accommodation of certain obstacles that have long stood in the way of access to environmental justice. They are disruptive because each of the three dislocations raises a set of new challenges and comes with in-built limitations. Conceptual dislocation of corporate control lowers the threshold for parent company liability, but it simultaneously creates boundary problems and its normative coherence is questionable. Jurisdictional dislocation introduces new pathways to access to justice for victims of pollution in the Global South, but the fact that these pathways are literally thousands of miles long, stretching between Lusaka and London, injects a regrettable remoteness in the delivery of justice. Adjudicative dislocation is the logical consequence of joining cases against different actors in corporate groupings, but it inevitably raises questions about the quality of judicial decision making.

In order fully to capitalise on the productive impacts of the three dislocations, the paper argues that it is important not to view them as a new settlement but instead as an invitation towards more radical, transformative change. To this end, the paper opens the discussion on what such transformative change might looks like and how it could be effectuated. In reference to conceptual dislocation, this includes a fundamental review of the normative justifications for corporate liability in an era of transnational corporate interdependence. To overcome dislocations of jurisdiction and adjudication, the paper reflects on the prospects for a transnational environmental court and, alternatively, for enhanced transnational judicial cooperation.

Keywords: Corporate liability, tort, transnational litigation, environmental justice, dislocation, Vedanta, Four Nigerian Farmers, oil pollution, extraterritoriality, Global South

I. Introduction

On 3 December 1984, the world woke up to news of a catastrophe at a Union Carbide plant in Bhopal, India. A technical malfunction had triggered the escape of large volumes of methyl isocyanide, an acute toxin and carcinogen. Estimates released by the Indian government attribute the gas cloud with causing the death of over 3,700 victims and injuring a further

558,000 in its immediate aftermath. By many accounts, these estimates severely underestimate the scale of the impact.[1] Moreover, the toxic legacy of the Bhopal disaster still reverberates, as methyl isocyanide traces persist in the environment. To this day the region struggles with sharply elevated morbidity and mortality rates, and all their attendant misery.[2] Legal vindication and compensation for the victims and their families has been crushingly inadequate: the Union Carbide mothership paid an exceedingly modest settlement of US$ 470 million, which trickled down to a payout of approximately US$250 per victim. Civil and criminal litigation against both the parent company and the Indian subsidiary was launched in the United Kingdom (UK) and the United States (US), but the cases were subsequently dismissed and redirected to India, where finally in 2010 seven local Union Carbide employees were found guilty of causing death by negligence and convicted to two years imprisonment and a fine of US$2,000. All were released on bail before the verdict. An eighth defendant died before judgment was reached.[3]

The Bhopal tragedy is a stark but by no means exceptional illustration of the chasm between law and environmental justice in the sphere of corporate accountability for environmental disasters. Time and again, communities in the Global South have seen their environment ravaged and their livelihoods devastated by local subsidiaries of multinational corporations, the headquarters of which are safely ensconced in New York, London or Amsterdam beyond the reach of legal scrutiny. Effective recourse against the polluting subsidiary, in turn, is easily obstructed by obstacles ranging from the scarcity of experienced legal representation in the Global South and the limitations of local judicial training and expertise to the difficulties victims face in making the responsible subsidiary pay up if, at long last, their claims are vindicated. In many cases, companies will have changed hands many times over or ceased production in the afflicted area long before any judgment is reached.[4]

Across this bleak landscape a thin seam of recent case law offers a glimmer of hope to victims of pollution in the Global South. In the past six years, courts in England and The Netherlands have shown an increased willingness to entertain the prospect of parent company responsibility for the actions of its subsidiaries, and to adjudicate claims against both the parent company and the subsidiary, even if the latter resides outside the court's jurisdiction.

The rulings have invited considerable attention in scholarly circles and beyond. Much of this writing performs the important role of identifying and discussing the changes in legal reasoning which have accommodated the shift in decision making.[5] Overwhelmingly, these

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* I would like to thank Jacco Bomhoff, Floris De Witte, Giulia Gentile, Eva Micheler, William Moon, Emmanuel Voyiakis, Jan Zglinski and the participants of the 2023 UCL - ECGI Biennial Law and Ethics Symposium on The Boundaries of Corporations' Responsibility (10 November 2023) for helpful comments on this paper. I am grateful to Elbert de Jong for welcoming early musings on the subject at a workshop on the Complexity and the Public Role of Civil Courts in Health and Environmental Matters at the University of Utrecht, the Netherlands (22 April 2022).

[1] Kim Fortun, *Advocacy After Bhopal: Environmentalism, Disaster, New Global Orders,* xiii (University of Chicago Press, 2001); Ashok Bargava, *The Bhopal Incident and Union Carbide: Ramifications of an Industrial Accident* 18 Bulletin of Concerned Asian Scholars 2, 3-6 (1986).

[2] Sajal De et al., *Chronic Respiratory Morbidity in the Bhopal Gas Disaster Cohorts: a Time-Trend Analysis of Cross-sectional Data (1986–2016)* 186 Public Health 20 (2020); Danish Siddiqui and Nita Bhalla, *Bhopal's Toxic Legacy Lives On, 30 Years after Industrial Disaster*' (REUTERS News, 28 Nov. 2014), available at: https://www.reuters.com/article/us-india-bhopal-widerimage-idUSKCN0JC0WD20141128.

[3] Usha Ramanathan, *The Bhopal Case: Retrospect and Prospect* in Philippe Cullet and Suhjit Koonan (eds), *Research Handbook on Law, Environment and the Global South*, 138-145 (Edward Elgar, 2019).

[4] Peter Nygh, *The Liability of Multi-national Corporations for the Torts of Their Subsidiaries* 3 European Business Organization Law Review 51, 55 (2002).

[5] See, e.g., Samvel Varvastian and Felicity Kalunga, *Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after* Vedanta *v* Lungowe 9 Transnational

changes have been celebrated as a long overdue correction to the absence of meaningful legal recourse for victims of pollution the in Global South and, more broadly, as an inflection point in judicial disposition when it comes to recognising the systemic and legally facilitated nature of environmental violence. My paper shares this positive assessment, but its main contribution lies elsewhere. My aim is to seize the case law as an opportunity to study how legal concepts, processes and practices are transformed when they operate in a thoroughly transnationalised context. I argue that the court judgments reviewed in this paper are the product of 'dislocations'; of practices which lift legal issues and entities out of their former geographical, jurisdictional and juridical space and place them in a different, decontextualised setting for deliberation and decision making. The paper identifies three such dislocations: a legal conceptual dislocation; a dislocation of jurisdiction; and a dislocation of adjudication. In the analysis, I discuss how dislocation was achieved and reflect on its consequences. My claim is that, while the three dislocation processes have helped to address some of the most persistent frustrations of transnational environmental litigation, they are also disruptive. To achieve sustainable solutions, we need to contemplate a more thorough, more radical reconceptualization of corporate legal accountability in a transnational context. Effectuating such a radical reconceptualization would demand great efforts in advocacy and persuasion, and would undoubtedly encounter resistance by those served by the status quo. However, if successful, it could better equip courts to make lawful and equitable decisions in matters of corporate accountability and help to bridge the gap between law and environmental justice in the field of transnational litigation.

The next section of this paper introduces the English and Dutch case law which forms the backbone of the analysis and clarifies its salience. Section III follows up with a short introduction of 'dislocation' as a framing device for the analysis in the paper, as well as an explanation of the term 'environmental justice' in the context of the discussion. The next sections form the core of the contribution and show how dislocation operates with respect to the concept of corporate control (Section IV), jurisdiction (Section V) and adjudication (Section VI). Each section highlights the positive impact of dislocation on access to environmental justice, but equally identifies new challenges and disruptions. For each of the three dislocations, I ask how disruption could be overcome and whether a new, more sustainable equilibrium could be found.

II. Recent Developments in Corporate Accountability for Environmental Harm

The decisions which constitute the focus of this discussion are, in chronological order, the *Vedanta* ruling of the UK Supreme Court of April 2019[6]; the *Dooh*, *Efanga* and *Akpan* judgments issued by the Dutch appellate court in The Hague in January 2021[7] (collectively

Environmental Law 323 (2020); Cees van Dam, *Breakthrough in Parent Company Liability* 18 European Company and Financial Law Review 714 (2021); Carrie Bradshaw, *Corporate Liability for Toxic Torts Abroad:* Vedanta *v* Lungowe *in the Supreme Court*' 32 Journal of Environmental Law 139 (2020); Steef Bartman and Cornelis De Groot, *The Shell Nigeria Judgments by the Court of Appeal of the Hague, a Breakthrough in the Field of International Environmental Damage? UK Law and Dutch Law on Parental Liability Compared* 18 European Company Law 97 (2021); Daniel Bertram, *Transnational Experts Wanted: Nigerian Oil Spills before the Dutch Courts* 33 Journal of Environmental Law 423 (2021).

[6] *Vedanta Resources PLC and another* v *Lungowe and others* [2019] UKSC 20.

[7] *Dooh* v *RDS plc and Shell Petroleum NV,* 29/01/2021*,* ECLI:NL:GHDHA:2021:133; *Oguru and Efanga* v *Shell Petroleum NV and RDS plc*, 29/01/2021, ECLI:NL:GHDHA:2021:132; and *Vereniging Mileudefensie* v *RDS plc* and *SPDC* v *Akpan*, 29/01/2021, ECLI:NL:GHDHA:2021:134.

referred to as *Four Nigerian Farmers* v *Shell*)[8], and the April 2021 UK Supreme Court judgment in *Okpabi*.[9] Each case concerns major environmental pollution events allegedly caused by subsidiaries of multinational corporations, and in each instance the claimants are a combination of affected members of local communities and environmental non-governmental organisations (NGOs). *Vedanta* concerns pollution caused by copper mining in Zambia, which was (and still is) carried out by Konkola Copper Mines plc (KCM), a subsidiary of Vedanta Resources. The *Four Nigerian Farmers* and *Okpabi* cases, in turn, all relate to oil spills in Nigeria from pipelines run by the Shell Petroleum Development Company of Nigeria (SPDC), a subsidiary of Royal Dutch Shell (RDS),[10] which has corporate seats in both the UK and the Netherlands. In each of the five cases the court decided that it was possible for the parent company (PC) to bear legal responsibility for pollution caused by a subsidiary company (SC), and that the claims against both parent and subsidiary could be adjudicated in the country where the PC was registered. [11]

To appreciate the significance of this development, it should first be acknowledged that a clutch of five cases, decided in two jurisdictions, is a brittle foundation on which to declare a global legal revolution in corporate environmental responsibility. This is all the more so when we consider that only the *Four Nigerian Farmers* cases were decided on the merits – in *Vedanta* and *Okpabi* the UK Supreme Court only ruled on admissibility and affirmed that, *prima facie*, the PCs potentially could be liable for the harm caused by the SC. The *Vedanta* case has since been settled out of court; discussion on the merits in *Okpabi* is pending before the English High Court.[12] Another factor to consider is that, in the UK at least, the legal context is changing in the wake of Brexit. Both *Vedanta* and *Okpabi* were decided with reference to the provisions of EU Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I (recast)),[13] which played a key role in consolidating jurisdiction over the 'anchor' PC and the subsidiary together. Post-Brexit, Brussels I (recast) has ceased to apply in the UK. This may result in the reintroduction of *forum (non) conveniens* reasoning which, although open to permissive interpretation, gives the UK judiciary broader discretion to decline jurisdiction over foreign subsidiaries, even if a case were made against the PC.[14]

Yet it is hard to overlook the momentum building behind transnational environmental litigation, or to ignore the multiplying calls for greater accountability of multinational corporations for their own environmental behaviour, that of subsidiary branches, and of their suppliers. In July 2022, the English Court of Appeal gave permission to a group of approximately 200,000 Brazilian claimants to pursue a class action against the BHP Group for the widespread damage resulting from the collapse of the Fundao Dam near Mariana,

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[8] See Lucas Roorda and Daniel Leader, *Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court* 6 Business and Human Rights Journal 368 (2021).
[9] *Okpabi and others* v *Royal Dutch Shell Plc and another* [2021] UKSC 3.
[10] Now Shell plc.
[11] Jurisdiction over the subsidiary was directly affirmed in *Vedanta* and the *Four Nigerian Farmer*s cases. The *Okpabi* decision only addressed the possibility of PC accountability, as the defendants did not challenge the admissibility of the claims against the SC. Further on 'anchoring' the subsidiary to the PC, see Daniel Bertram, *Environmental Justice "Light"? Transnational Tort Litigation in the Corporate Anthropocene*' 23 German Law Journal 738 (2021).
[12] The case on the merits was launched in late January 2023, see Sandra Laville, *Nearly 14,000 Nigerians take Shell to Court over Devastating Impact of Pollution* (The Guardian, 2 Feb. 2023).
[13] [2012] OJ L351/1.
[14] See generally Trevor Hartley, *International Commercial Litigation,* 226-236 (Cambridge University Press, 2015).

Brazil.[15] The Dam was owned and operated by Samarco Mineração SA, a company in which the BHP Group is a majority stakeholder. Judicial developments in England and The Netherlands are moreover matched by similarly motivated decisions in New Zealand[16] and Canada.[17]

Developments in the case law on PC liability are further buttressed by a rising interest in corporate accountability for environmental harm generally, and climate change impacts in particular.[18] High-profile litigation in countries ranging from Germany,[19] France,[20] The Netherlands,[21] the US[22] and New Zealand[23] to Brazil,[24] Indonesia, and South Korea[25] raises the urgent question whether private companies, which have been central to the entrenchment of our fossil fuel-dependent, high greenhouse gas (GHG) emitting lifestyle, which were arguably best informed about the enormous environmental risks attached to this lifestyle, and which still reap the financial benefits of its perpetuation, should now be held liable for present and future impacts of climate disruption. The focus on corporate responsibility is moreover replicated in recent legislative developments. Newly adopted laws and proposals in France, Germany, Switzerland and the European Union have introduced a 'duty of vigilance', namely, a legal requirement for large companies to monitor and report on the environmental behaviour of their subsidiaries and supply chain partners.[26] The precise scope of this duty and its impact differ between jurisdictions, but they share the premise that the environmental responsibility of large corporate actors does not stop at their own doorstep and instead covers all the hubs in their transnational corporate network.[27] Important steps on the path towards the adoption of binding 'vigilance' legislation were the growing emphasis on ESG (environmental, social and corporate governance) in the field of corporate governance and the proliferation of self-regulatory codes of conduct, such as the United Nations (UN) Global Compact and the due diligence requirements under the UN Guiding Principles on Business and Human Rights.[28] Hence, even in countries where a legal duty of vigilance is not (yet) being considered, corporate network accountability for environmental harm may be promoted via soft law channels.

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[15] *Municipio de Mariana* v *BHP Group* [2022] EWCA Civ 951.
[16] *James Hardie Industries PLC* v *White* [2018] NZCA 580; *James Hardie Industries Plc* v *White* [2019] NZSC 39.
[17] *Newsun Resources Ltd.* v *Araya & Others*, 2020 SCC 5.
[18] Cf Matthias Weller and Alexia Pato, *Local Parents As 'Anchor Defendants' in European Courts for Claims Against Their Foreign Subsidiaries in Human Rights and Environmental Damages Litigation: Recent Case Law and Legislative Trends* 23 Uniform Law Review 397 (2018).
[19] See, e.g., *Saul Luciano Lliuya* v *RWE* (2017) 20171130 Case No-2-O-28515.
[20] See. E.g., *Notre Affaire a Tous and Others* v *BNP Paribas* (2023).
[21] *Vereniging Milieudefensie et al* v *RDS plc*, 25/05/2021, ECLI:NL:RBDHA:2021:5339.
[22] E.g., *City & County of Honolulu* v *Sunoco LP* (2020).
[23] *Smith* v *Fonterra Co-Operative Group Limited* [2020] NZHC 419; [2021] NZCA 552; [2022] NZSC 35..
[24] *Ministry of Environment and Forestry* v *PT Arjuna Utama Sawit*, 20/07/2020, 3220 K/Pdt/2020.
[25] *Kang et al.* v *KSURE and KEXIM* (2022).
[26] See, e.g., Almut Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?* 22 Human Rights Review 109 (2021); Stéphane Brabant et al., *Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)* 15 *Verfassungs* Blog (2022); Sandra Cossart and Mathilde Silvestre, *Four Years Later – The Impact and Potential of the French Law on the Duty of Vigilance* 15 Zeitschrift für Menschenrechte 84 (2021).
[27] Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All* 2 Business and Human Rights Journal 317 (2017); Nicholas Bueno and Claire Bright, *Implementing Human Rights Due Diligence through Corporate Civil Liability* 69 International & Comparative Law Quarterly 789 (2020).
[28] Cf Schilling-Vacaflor, n. 26 above.

III. The Dislocation of Environmental Litigation and Its Role in the Pursuit of Environmental Justice

This paper uses the image of 'dislocation' to represent the dynamic whereby the application of legal doctrines and judicial interpretation results in a question being removed from its original context and assigned to a different space for deliberation and decision making. Dislocation happens when a legal concept which was formerly interpreted with reference to one epistemic context (for example, an economic framing of unreasonable risk) is now interpreted with reference to another (say, a technological understanding of risk). Or, dislocation may refer to the removal of a legal matter from one jurisdictional sphere to another (an English court becomes the forum for a matter which formerly would have been litigated in India), or from one juridical sphere to another (a question which formerly would have been answered with reference to, say, Colombian Law is now assessed through the lenses of Danish law).

Alternative and possibly les visceral terms could have been found to represent the phenomenon under investigation – in a pinch, 'shift' or 'move' might have sufficed – but 'dislocation' effectively captures the disruptive dimension of the process. Dislocation may at times be inevitable, and may even entail a degree of liberation from tightly constraining circumstances, but it is usually painful. Additionally, the term helpfully alludes to a suggested incompleteness of the process; even where it improves upon a prior state of ossification, a dislocation ideally is a temporary state. The imagery invites us to think beyond *ad hoc* fixes to deficiencies in the delivery of environmental justice and develop long-term, sustainable solutions. This, ultimately, is the motivation of the paper: to contribute to the quest for better access to environmental justice. In this discussion, the term 'environmental justice' refers to the goal of fair and equitable distribution of environmental benefits and burdens across society, with a focus on the role of law in its achievement.[29]

IV. The First Dislocation: From an Operational to a Regulatory Conceptualisation of Control

The *Vedanta*, *Okpabi* and *Four Nigerian Farmers* case all raise questions of corporate liability. Two foundational premises of corporate law are limited liability and the principle of separation.[30] It is often asserted that, absent these foundations, companies would not be able to function and markets would collapse.[31] The principle of separation, here, means that PCs and their subsidiaries constitute separate legal entities, with distinctive assets and liabilities.[32] In exceptional circumstances PCs may be held either vicariously liable for the actions of their employees, or may be held legally to account for the actions of a SC if the latter is shown to be an artificial construct erected for the purpose of deflecting liability (piercing the corporate veil), but the basic principle is that as a separate legal entity the PC is only accountable for its own actions.

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[29] *Cf* Brendan Coolsaet (ed.), *Environmental Justice. Key Issues* (2021, Routledge).
[30] Paul Davies et al., *Gower's Principles of Modern Company Law,* 2-001-2-013 Kortext version (11th ed., Sweet & Maxwell, 2021).
[31] For a spirited defence, see Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics* 87 Northwestern University Law Review 148 (1992). See also Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* 40-62 (Harvard University Press, 1991).
[32] *Aron Salomon* v *A. Salomon and Company Ltd* [1897] AC 22.

The principle of separation informs the conditions under which a PC may be implicated in litigation against a SC. In English law, for a claim against the PC to be admissible the latter must be shown to have a self-standing duty of care vis-à-vis the claimant (here, the victim of environmental pollution).[33] Such duty is present if the harm was reasonably foreseeable by the PC; if a relation of proximity exists between the PC and the claimant; and if it is 'fair, just and reasonable' to hold the PC accountable (the so-called *Caparo* test).[34] In corporate groupings, such proximity is now deemed to exist where the PC exercises control over the polluting SC and therefore indirectly determines the conditions to which the claimant is exposed.[35] Hence, whether a PC is liable for its SC's actions depends on what it means to 'control' a subsidiary.

The Meaning of Control in Corporate Groupings

The answer to the question of control is not straightforward. Given the ubiquity of out-of-court settlements in corporate litigation, case law on the issue is sparse.[36] Up to 2019, the most instructive decision in the English context was the *Chandler* judgment, which addressed whether a PC owed a duty of care to the employees of a subsidiary asbestos factory. The conceptualisation of control that emanates from *Chandler* is nuanced. On the one hand, the Court of Appeal is emphatic that PC responsibility does not require 'absolute control'[37] and that a SC being an autonomous legal entity in charge of its own management and administration does not preclude a finding of PC control. At the same time, the facts of *Chandler* as featured in the Court of Appeal's deliberations indicate that a finding of control is conditional upon the PC being actively aware of the working conditions at the SC and the PC being in a position to intervene.[38] Additionally, the Court's reasoning suggests that control must be borne out by tangible, even physical signs of parent involvement in the subsidiary's operations. In *Chandler*, the SC had taken over the parent's business, preserving the operational design and organisation as they had been set up by the PC. Several factors indicated that parent and subsidiary used shared resources, such as group medical health advisers and group chemists who worked at both PC and SC premises. They also showed a prevailing practice of the PC issuing instructions to the SC which were treated as mandatory.[39] In sum, the understanding of control that emerges from *Chandler*, particularly when read in the light of earlier decisions in *Connelly* v *RTZ*[40] and *Lubbe,*[41] is one of localised, operational control that responds to the particular circumstances of the SC in question.

The *Chandler* version of 'control' created some scope for PC accountability for subsidiaries' actions, but its conditions are rarely met in the context of multinational corporate groupings.

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[33] *AAA* v *Unilever plc* [2018] EWCA Civ 1532, para. 36.
[34] *Caparo Industries plc* v *Dickman* [1990] 2 AC 605 and *Robinson* v *Chief Constable of West Yorkshire* [2018] UKSC 4which delimits the application of the *Caparo* test to 'novel cases'.
[35] *Vedanta*, paras 56 et seq., affirming that the conditions in *Vedanta* do not constitute a 'novel' variant of common law negligence and, therefore, the *Caparo* test does not need to be applied *de novo,* as per *Robinson*, n. 34 above.
[36] P. T. Muchlinski, *Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review I* 39 Amicus Curiae 3, 4 (2002).
[37] *Chandler* v *Cape plc* [2012] EWCA Civ 525, para. 66.
[38] Referred to as the 'four indicia' of *Chandler*, namely: (1) the business of the two companies is the same in a relevant respect; (2) the parent has superior knowledge on some aspect of health and safety; (3) the PC knows or has constructive knowledge that the subsidiary's system of work is unsafe; and (4) the PC knew or ought to have known that the SC would rely on its superior knowledge. *Ibid.*, para. 80.
[39] Ibid., paras 71-78.
[40] *Connelly* v *RTZ Corporation plc* [1997] UKHL 30.
[41] *Lubbe* v *Cape Plc* [2000] UKHL 41.

Instead of having actual knowledge of the working conditions in subsidiaries and controlling through localised instruction and oversight, PCs in multinational groupings typically exercise control via strategic planning, via the elaboration of company policy which is then expressed in codes of practice, through company manuals, guidelines and protocols. Such communications may (and often do) get into the nitty gritty of the procedures, standards and quality checks to which group members should adhere in order to meet company benchmarks, but they are usually formulated along sectoral rather than corporate entity-based lines, and apply across the corporate group rather than to individual subsidiaries. Moreover, compliance is typically primarily secured through SC self-assessment and certification instead of in-person inspection orchestrated by the PC. Arguably, control in contemporary corporate groupings assumes a regulatory rather than an operational character. The ties that bind PCs and their subsidiaries are not forged from a discrete set of solid, tangible links; they emanate from a transnational web of company regulation and guidance, simultaneously more remote and more pervasive than localised connections.

Considering the significant differences between operational and regulatory control, a court adhering tightly to the *Chandler* criteria would struggle to find that a PC has a duty of care vis-à-vis the victims of environmental harm perpetrated by a SC which is located thousands of miles away and in charge of its own operations. Yet in *Vedanta, Okpabi and Four Nigerian Farmers*, that is precisely what happened. The UK Supreme Court judgment in *Vedanta* is particularly enlightening. Here, Lord Briggs posits that, while *Chandler* depicts *a version* of control which may result in the PC being held accountable, it serves as an illustration and not a straitjacket.[42] The circumstances in which a PC can be deemed to exert control over its SCs are varied and irreducible to a limited, fixed set of conditions, as had been suggested by Sales LJ.[43] Most importantly, Lord Briggs rejects the notion of a general principle that a PC could never incur a duty of care in respect of the activities of a SC 'merely by laying down group-wide policies and guidelines, and expecting the management of each subsidiary to comply with them.'[44] Instead, he is

> 52. … not persuaded that there is any such reliable limiting principle. Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties …
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> 53. Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.

Vedanta was consolidated in the 2020 *Okpabi* decision, in which the Supreme Court overruled the earlier stance of the Appeal Court that corporate control for the purpose of establishing a duty of care requires operational control[45] and that the 'issuing of mandatory

[42] *Vedanta*, para. 56.
[43] Ibid., para 51.
[44] *Chandler*, para. 52.
[45] *Okpabi*, paras 79-81.

policies plainly cannot mean that a parent has taken control of the operations of a subsidiary (and, necessarily, every subsidiary) such as to give rise to a duty of care" (para 89).'[46] *Four Nigerian Farmers* v *Shell,* finally, involves the same corporate actors as *Okpabi*, and resulted in a decision on the merits holding Royal Dutch Shell liable for failing to prescribe the installation of up-to-date leak detection equipment in its subsidiaries. It affirms a similar willingness on the part of Dutch judiciary to contemplate PC accountability in the absence of on-the-ground operational control, and instead attach liability to situations of regulatory control.[47]

Conceptual Dislocations: From Operational to Regulatory Control

The change achieved in *Vedanta* and consolidated in *Okpabi* was the result of the court retaining an established criterion, that of 'control', but newly interpreting it with reference to different fields of knowledge. Whereas *Chandler* contextualised control with connotations that stem from the fields of engineering, technology and organisational design, *Vedanta*'s understanding of control hails from the world of information production, standard setting and behaviour-modification.[48] The court performed a concpetual dislocation and moved control from the operational to the regulatory sphere.

In this instance, it might be argued that qualifying this interpretational shift as 'dislocating' puts too negative a spin on the account. After all, the adoption of a regulatory rather than operational understanding of control is likely to facilitate an expansion of the circle of liability, as more PCs are drawn into the fold of legal accountability. Such development may well serve environmental justice, which has long been suppressed by the towering legal and practical obstacles standing between people exposed to poor, environmentally harmful working conditions and the corporate entities directly or indirectly benefiting from their exploitation. Moreover, in a globalised and intensely legalised world,[49] regulatory control is a more accurate representation than is operational control of how channels of influence are plotted and how practices are governed within corporate groupings[50]. Thirdly, a regulatory interpretation of corporate control attunes judicial reasoning to the ongoing changes to the notion of corporate group responsibility and its implications outside the courtroom.[51] To an extent, it streamlines court decisions with recent duty of vigilance legislation, which creates a degree of legal responsibility of large corporate entities not only for the actions of their subsidiaries but also across the global supply chain.[52]

Nevertheless, the reasoning in *Vedanta*, *Okpabi* and *Four Nigerian Farmers* also creates new complications, illustrating the more disruptive side of dislocation. Shifts in interpretation inject new uncertainties into decision making. For example, none of the decisions fully settle

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[46] *Okpabi*, para. 76 (quoting Court of Appeal position) and para. 143 (affirming *Vedanta*).
[47] *A.F. Akpan* v *RDS plc*, case number C/09/337050 / HA ZA 09-1580 (District Court of The Hague), 30 January 2013, para. 4.3. Discussed in Hans van Loon, *Principles and Building Blocks for a Global Legal Framework for Transnational Civil Litigation in Environmental Matters* 23 Uniform Law Review 298, 312-313 (2018).
[48] Julia Black, *Critical Reflections on Regulation* 27 Australian Journal of Legal Philosophy 2, 20 (2002).
[49] Veerle Heyvaert, *Transnational Environmental Regulation and Governance,* 6 (Cambridge University Press, 2018); Christian Brütsch & Dirk Lehmkuhl, *Complex Legalization and the Many Moves to Law* in *Law and Legalization in Transnational Regulation,* 13 (Routledge, 2007).
[50] Cf Ruth V. Aguilera, Valentina Marano and Ilir Haxhi, *International Corporate Governance: A Review and Opportunities for Future Research* 50 Journal of International Business Studies 457, 465 and 474 (2019).
[51] Paul Davies, *Corporate Liability for Wrongdoing within (Foreign) Subsidiaries: Mechanisms from Corporate Law, Tort and Regulation* (NUS Law Working Paper No. 2023/007, 2023).
[52] Cf nn. 26-27 above.

the question of the required extent of actual (rather than potential) regulatory involvement which a PC needs to display for it to assume a duty of care vis-à-vis parties harmed by the subsidiary. Future case law may deliver more clarity on how much actual involvement must be demonstrated to attribute harm to the PC, but in the intervening time the lack of clarity may weigh upon the risk calculations of both private and organised claimants when deciding whether to bring a case against a PC. Where environmental justice is chronically undersupplied, the downsides of such interpretational limbo may outweigh the opportunities it creates.

Moreover, the change in judicial approach towards the meaning of 'control' disrupts because it urges us to re-examine the normative justifications for the legal organisation of corporate responsibility. On the one hand, the court's acceptance of regulatory control as potentially constitutive of a duty of care aligns the case law more closely with developing 'duty of vigilance' legislation, yet on the other hand clear differences remain. Most prominently, duty of vigilance laws and proposals typically responsibilise corporate entities on the basis of their size, excluding smaller companies from their purview. In transnational tort cases, company size is irrelevant for determinations of control. Conversely, duty of vigilance legislation typically creates accountability not only with regard to corporate subsidiaries, but also relating to companies in the supply chain, regardless of their ownership. This is not the case in tort-based liability. These differences allude to the existence of various, distinctive and possibly even inconsistent normative justifications for responsibilising members of corporate groupings. In duty of vigilance laws and proposals, the basis for corporate responsibility does not straightforwardly relate to the company's actual control – whether operational or regulatory – but rather is co-determined by its size and purchasing power.

When we look beyond case law and legislation, grounds for normative justification multiply again. In addition to actual control, size and purchasing power, the financial benefit which companies obtain from working with environmentally irresponsible enterprises in the Global South may in itself be problematic. This view certainly has a degree of public resonance, as illustrated, for example, in comments made by Tom Goodhead, managing partner of the law firm PGMBM, relating to the Samarco litigation:

> BHP is a multinational that generates huge profits in the regions where it operates, and it is only right that the company … is held directly accountable at its headquarters. The days of huge corporations doing what they want in countries on the other side of the world and getting away with it are over.[53]

Arguably, traces of competing rationales for corporate liability are present even within *Vedanta* itself. The insistence that what matters is not whether the parent could theoretically exercise control, but instead whether it effectively exercised control, coupled with Lord Briggs' observation that corporate manuals may contain flawed instructions, indicates that PCs should be accountable when they are actually in charge and their instructions (or the deficiency thereof) actually cause physical harm. Yet at the same time, *Vedanta* repeatedly associates liability with the PC *proclaiming* to control its subsidiaries, even if such claims are factually untrue.[54] The wrongness in the latter scenario, it seems, does not reside in the fact

[53] Phoebe Weston, *Victims of Brazil's Mariana Dam Disaster Seek Compensation through UK Courts* (The Guardian, 5 April 2022).
[54] *Vedanta*, para. 53.

that the PC's poor decision making causes physical harm, but in the falseness of the claim.[55] The Court's reasoning suggests that if a PC unjustifiably claims to be in control of an SC which causes harm, then it is only fair that the PC is hoisted by its own petard. This may be a valid normative ground on which to hold a company liable, but it is undeniably a different one from being actually responsible for physical harm. Instead, the most plausible normative justification for holding a PC accountable in such circumstances is because it seeks to benefit, to derive profit, from making a false claim. The emphasis on publicly undertaken responsibility alludes to a judicial discomfort with corporations holding dominant shares in high-risk subsidiaries, not intervening in their management, reaping the rewards when profits are high yet staying out of the firing line when things go wrong. Yet this is exactly the scenario that is enabled by maintaining a distinction between potential and actual control, rendering the *Vedanta* reasoning inescapably conflicted.

Beyond Conceptual Dislocation

Considering both the positive momentum and the disruption flowing from the court's dislocation of the meaning of control, we might simply embrace the slightly improved prospects for environmental justice and tolerate residual shortcomings. Alternatively, we could seize this conceptual dislocation as an invitation fully to engage with the challenge of corporate accountability in a transnationalised world and try to imagine law that does not just work a little better than before, but that is capable of delivering environmental justice in a sustainable way.

The latter disposition might invite the question whether the principle of separation is still fit for purpose in a context of global corporate interdependency. Additionally, should the existing diversity in forms of shareholding, with corporate shareholders having vastly different information, resources, risk management strategies and influence from their individual and generalist counterparts, translate into a more diversified approach towards liability?[56] Should PCs that hold majority shares in polluting companies operating within the same sector continue to be insulated in principle from the fall-out of polluting activities?

By the same token, the dislocation of control in *Vedanta* and ensuing case caw invites reflection on the appropriate boundaries of a corporate duty of care. Should it remain the case that having the potential to control is insufficient; might there not be an expectation that PCs effectively exercise their influence in order to reduce the risk of harm caused by their subsidiaries? Could a case be made that the duty of care needs to be recast in instances where Global North companies knowingly invest in businesses located in countries where access to environmental justice is compromised? Or, is there an argument to map the duty of care not along the combination of ownership and control lines, but instead with reference to corporate groupings, so that the common law duty of care mirrors the legislative duty of vigilance? [57]

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[55] *Ibid*. Conceivably, one might counter that if the SC mistakenly assumes the PC is in control, then the PC's failure to act does indeed cause damage, but this explanation is difficult to square with the Court's emphasis on the PC having "publicly" undertaken responsibility.

[56] See Christian Witting, *Liability of Corporate Groups and Networks* (Cambridge University Press, 2018).

[57] For an early proposition along these lines, see Hugh Collins, *Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration* 53 The Modern Law Review 731 (1990). See also proposals by Witting, n. 56 above.

This wealth of questions obviously cannot be tackled, let alone answered, within the confines of one paper. It is however illustrative of the great opportunities that emerge in the wake of dislocation to reconsider, reappraise and reconfigure.

V. The Second Dislocation: From Home to Host Jurisdiction

Once the existence of a *prima facie* triable case against the PC of a polluting SC has been confirmed, the opportunity arises to join the claims against both entities to be tried before the same court. Claimant victims of pollution typically will request that the litigation in its entirety is moved to the home jurisdiction of the PC, located in the Global North. In such circumstances, the dislocation of corporate control triggers a second dislocation, namely, jurisdictional dislocation.

Jurisdictional Dislocation

As illustrated in *Vedanta*, *Okpabi* and *Four Nigerian Farmers*, requests for cases to be joined and litigated in the PC's home jurisdiction generally need to be substantiated on the basis that the latter is an appropriate or 'proper place' for litigation.[58] To this end, claimants must make at least one of the following three arguments:

- There is a substantive justification for dealing with the claim against the subsidiary in the jurisdiction of the PC (for example, the actions of the SC have impacts in the territory of the PC);
- Not joining the cases exposes the proceedings to a risk of irreconcilable judgments; or
- There are no real prospects for the claimants to obtain justice in the jurisdiction of the subsidiary.[59]

Experience shows that requests for joining cases are rarely justified with reference to the first ground. Most frequently, the claimants will invoke a combination of the second and third ground in order to move the case to the Global North. The risk of irreconcilable judgments, in particular, becomes hard to avoid once it has been decided that the PC has a case to answer. Indeed, as Lord Briggs notes with some exasperation in *Vedanta*, [60] once the PC faces a triable claim, the court effectively loses discretion to decline jurisdiction for the case against the SC. At the moment, this dynamic is a consequence of the provisions of Brussels II (Recast) and their interpretation in English case law,[61] which prevent English courts from staying proceedings against a PC while a related case involving an SC is tried abroad. This means there could be some rebalancing on this question in the post-Brexit landscape as the Brussels II Regulation no longer applies. Until further notice however, the risk of irreconcilable judgments exerts a strong consolidating push in litigation against multiple corporate group members.

Productive and Disruptive Aspects of Jurisdictional Dislocation

Joining cases in the Global North implies that claimants in transnational corporate liability cases may need to travel long and far in their quest for environmental justice, but the prospect also offers major advantages. Having their claims heard in the Global North may offer better access to legal expertise, as well as the support of international NGOs which are likely to be

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[58] See, in the UK example, paragraph 3.1(3) of Practice Direction 6B of the Civil Procedure Rules 1998 (UK), S.I. 1998 No. 3132.
[59] See Varvastian and Kalunga, n. 5 above, 328-230.
[60] *Vedanta*, paras 39-40.
[61] *Owusu* v *Jackson* ECLI:EU:C:2005:120.

better resourced than local branches.[62] It ensures that the litigation will unfold in well-staffed courts with a strong reputation for professionalism and impartiality – virtues which unfortunately cannot always be taken for granted in the relation to the judiciary in several Global South countries[63] – and it may give the claimants access to legal aid. From the NGOs' perspective, lawsuits in, say, the UK, the Netherlands or the US are more likely to catch media attention and facilitate awareness raising than litigation in Zambia, Nigeria or Indonesia. The corporate group defendants, in turn, get to combine forces rather than face a multitude of lawsuits (although, admittedly, they are often keen to forego this advantage in favour of maintaining conditions that are likely to hinder the plaintiffs more than the defence).

Other consequences of dislocation are less obviously beneficial to the pursuit of environmental justice. Preliminarily, we note that a decision to combine cases against corporations registered in different countries necessarily enhances the likelihood that the court will need to apply different sets of law in its adjudication, which complication is discussed further in Section VI below. Secondly, moving litigation about environmental pollution in the Global South to a Global North venue will unavoidably affect the ease with which the court can engage in fact-finding and consult local knowledge and experience. The assertion that claimants and, indeed, all parties involved in litigation enjoy better access to expertise in the PC's home jurisdiction traditionally carries weight in justifying the joining of cases. Yet 'expertise' in this context typically only refers to the highly professionalised training and knowledge practices of the Global North,[64] and often excludes alternative forms of specialist knowledge that could beneficially feed into complex adjudication. This is powerfully illustrated in the *Four Nigerian Farmers* litigation. In *Efanga*, an oil leak was reported to SPDC which sent out its engineers to assess and fix the damage.[65] As apparently happens often in such cases,[66] the local community would not grant the engineers access to the site, asserting that the SPDC representatives had not brought a gift for the community leader as a sign of respect, and therefore could not be admitted. The claimants asserted that such gifts are token tributes and their delivery could easily have been arranged. Hence, the local community's refusal to let the engineers pass could not constitute a justification for the ten days' delay between the leak being reported and it being plugged by SPDC.[67] The latter, for its part, argued that the absence of a gift was an ex-post rationalisation of the local community's refusal to cooperate, that the antagonism would not have been smoothed over by the hasty arrangement of a token gift, and that it was instead part of a deliberate strategy to boycott the SPDC and delay its response time.[68] In its deliberations on the issue, the Dutch court noted the difficulties of determining which explanation was most persuasive.[69] To the uninitiated, both accounts may indeed sound plausible while neither is particularly compelling. However, the picture could have looked very different from the vantage point of a Nigerian judge, who might have had much deeper knowledge and understanding of Nigerian hospitality customs and their role in the relations between local communities and large extractive enterprises. Such expertise would have transformed what the Dutch judiciary

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[62] Cf Andreas Hofmann and Daniel Naurin, *Explaining Interest Group Litigation in Europe: Evidence from the Comparative Interest Group Survey* 34 Governance 1235, 1237 (2021) .
[63] Cf Varvastian, n. 5 above, 328-329; Joana Setzer and Lisa Benjamin, *Climate Change Litigation in the Global South: Filling in Gaps* 114 AJIL Unbound 56, 57 (2020).
[64] Bertram, n. 11 above, p. 740.
[65] *Efanga*, para. 6.2.
[66] Cf similar accounts in *Akpan*, paras 2.5, 2.8 and 5.6; *Dooh*, para. 6.7.
[67] *Efanga*, para. 6.2.a.
[68] Ibid, paras 6.2.b and 6.2.d.
[69] Ibid., para. 6.6.

essentially approached as a "he said, she said" deliberation, to be decided on the basis of plausibility, into a potentially better substantiated decision.

Thirdly, the dislocation of jurisdiction could be viewed as yet another iteration of the continuing legal colonisation of the Global South by the Global North, which diminishes both the agency and the voice of the Global South in the transnational construction of justice.[70] This concern has certainly animated courts in the US, most famously in the Union Carbide *Bhopal* decision. The US District Court for the Southern District of New York declined jurisdiction and sent the case back to India with the observation that

> to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role.[71]

Admittedly, since the victims of the Bhopal disaster very much wanted litigation to be conducted in the US, the court's ostensibly respectful deference was coloured by at least a tinge of paternalism.[72] On a more cynical reading, the court's refusal to wade into the controversy involving one of the giants of American industry could appear consciously disingenuous; a self-serving judicial spin on the familiar "I'm simply not good enough for you" break-up line.[73] Nevertheless, such misgivings do not fully defuse the legitimate discomfort with courts in the Global North regularly being in a position of dismissing channels of justice in the Global South,[74] all the more when concerns about local access to justice are informed by arguably narrow and Global North-centred conceptualisations of professionalism and expertise.

Finally, we must consider the impact of large and complex cases, involving huge numbers of plaintiffs, being channelled consistently towards a handful of jurisdictions. Concerns about "foreign cases flooding the courts" clearly need to be handled with great circumspection, since racism and xenophobia can easily masquerade as so-called commonsensical – if generally unsubstantiated – worries about a host country's carrying capacity. Yet however problematic the subtext, it is difficult to ignore that the typical scale of transnational litigation, in combination with the distance from the *locus delicti*, may present serious obstacles to the swift and effective dispensation of justice. The *Samarco* case, which is currently pending on appeal in the UK, was initially dismissed on grounds which traded heavily on the "unmanageability of the claim." In its reasoning, the judge in first instance tried to anticipate how the litigation would progress, and despaired of the outlook:

> The selection of lead cases would not be from a homogeneous group but from an immense pool of claimants with grossly disparate interests. To reflect this, the number of such lead cases would be likely to be far in excess of those selected in any [Group Litigation Order] to date. Repeated visits to the Court of Appeal generating further

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[70] Iyan Offor, *Global Animal Law and the Problem of "Globabbe". Towards Decoloniality and Diversity in Global Animal Law* 12 Asian Journal of International Law 10, 13 (2022).
[71] *In Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986).
[72] Cf David W. Robertson, *Federal Doctrine of Forum Non Conveniens: An Object Lesson in Uncontrolled Discretion* 29 Texas International Law Journal 353, 372 (1994).
[73] For a recent critique of the US Bhopal decision, see Dahlia Colombo, *Business and Human Rights Symposium: Rejecting Jurisdiction to Avoid Imperialism – That Simple?*' (2021) at: http://opiniojuris.org/2021/06/25/business-and-human-rights-symposium-rejecting-jurisdiction-to-avoid-imperialism-that-simple/.
[74] Daniel Bertram, *Judicializing Environmental Governance? The Case of Transnational Corporate Accountability* 22 Global Environmental Politics 117, 123 (2022).

> costs, delays and uncertainties would be almost inevitable. There has already been one such expensive and abortive initiative in this case which was launched even before I had handed down this substantive judgment. In the meantime, developments in Brazil over the time which it would be likely to take for any given appeal to reach the Court of Appeal would be liable to complicate matters still further with applications by the parties to rely on fresh evidence. The prospect of almost interminable transatlantic iteration is both stark and real.[75]

In response, one might reasonably counter that these predictions could be excessively gloomy, especially where group litigation is an option.[76] Moreover, it is questionable whether logistical challenges should trump principled concerns of restricting access to justice for vulnerable claimants. At the same time, even if we wholeheartedly espouse the premise, it does not follow that logistical obstacles will magically evaporate.

Overcoming Jurisdictional Dislocation

One possible response to the challenges of jurisdictional dislocation starts from the premise that, since environmental pollution cases involving multinational corporations are inescapably transnational, jurisdiction too should be located at a level beyond the state. Solutions in this vein might include proposals for the establishment of a global or transnational court for environmental disputes, which might be better equipped to deal with the transboundary causes and consequences of environmental harm than its local counterparts.[77] Such court could have a permanent presence or assemble *ad hoc*. Conceivably, it might operate in cyberspace.

The existence of a transnational court might lift several impediments to access to environmental justice that beset transnational liability claims. It would allow claimants to bypass problematic domestic provision without rekindling concerns about judicial colonialism or epistemic bias. The availability of a new, bespoke court could moreover alleviate floodgate concerns and constitute an opportunity to craft clear admissibility benchmarks, so that litigation progresses to discussion on the merits more swiftly and without the towering costs that marked *Vedanta* an *Okpabi*. On the other hand, for victims of pollution the likelihood of remote litigation, whether in a physical space or online, remains less than ideal, and it could be naïve to assume that a multi-jurisdictional court might be insulated from the lengthy admissibility challenges that test domestic courts. Finally, it is unlikely that a proposal to establish a bespoke court to adjudicate transnational environmental disputes would receive sufficient political and economic support to come to fruition. Experience with campaigns for transnational environmental courts shows that,

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[75] *Municipio de Mariana*, para. 106 (referring to decision in 1st instance). Cf Bertram, n. 74 above, p. 119; Anne-Marie Slaughter, *A Global Community of Courts* 44 Harvard International Law Journal 191, 194-195 (2003), citing the Chief Justice of the Norwegian Supreme Court: "[t]he Supreme Court has to an increasing degree taken part in international collaboration among the highest courts. It is a natural obligation that, *in so far as we have the capacity*, we should take part in European and international debate and mutual interaction." (emphasis added).

[76] But see *Alame* v *Royal Dutch Shell Plc* [2022] EWHC 989 (TCC) 29 Apr 2022, stating that group litigation orders do not obviate the need for every individual claimant to complete a cause of action.

[77] Alessandra Lehmen, *The Case for the Creation of an International Environmental Court: Non-State Actors and International Environmental Dispute Resolution* 26 Colorado Natural Resources, Energy & Environmental Law Review 197 (2015) ; Stephen Hockman, *An International Court for the Environment* 11 Environmental Law Review 1 (2009); Joost Pauwelyn, *Judicial mechanisms: is there a need for a World Environment Court?* in *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms*, 150-177 (UNU Press, 2005).

notwithstanding bouts of real enthusiasm, so far none of the existing proposals have gained enough traction to move beyond the concept stage.

Alternative solutions to jurisdictional dislocation might focus on strengthening transnational cooperation between courts across jurisdictions.[78] Conceivably, inter-jurisdictional assistance between communities of lawyers as well as between judges could help to relieve the key resource and expertise pressures that currently complicate transnational litigation. This development would tap into a growing practice of transnational knowledge exchange, learning and support among judges active in environmental and climate litigation.[79] Moreover, in the light of society's radically expanded facility for online training, discussion and exchange in the post-covid landscape, establishing and maintaining such networks could happen at a fraction of the costs that would have been required a mere decade ago. Inter-jurisdictional cooperation and support could infuse host jurisdictions with the contextual knowledge and experience that is otherwise lacking in transnational litigation, or could conceivably harness home-jurisdiction provision so that victims of pollution could sue both the PC and the locally polluting SC in a Global South forum, without fear of seeing their access to justice obstructed by under-resourcing or incompetence. Ideally, inter-jurisdictional networks might even offer the justice system in the Global South a degree of insulation against undue political pressure, threats or corruption.

Like the establishment of a transnational environmental court, inter-jurisdictional cooperation would generate new challenges. Digital advances notwithstanding, cooperation and exchange networks take time and effort to nurture. Additionally, if it did indeed become an expectation for courts to advise and assist each other in transnational cases, this would unleash a host of organisational dilemmas. To name but the most obvious, inter-jurisdictional cooperation would create new roles and responsibilities for the judiciary which would need to be accounted for in the mandate as well as in the workload of courts and in the working conditions of judges and supporting staff. Conventions would need to be agreed regarding issues such as the discretion afforded to judges in either reaching out to peers via such networks or accepting or declining requests for assistance, as well as the form, basic content and timing of both requests for assistance and responses. Added to the organisational challenges are the many legal questions which would emerge, ranging from the legal status of cooperation requests and the evidentiary quality of inter-jurisdictional advice to the impact of inter-jurisdictional cooperation on the transnational enforceability of ensuing judgments. Yet these reflections do not and should not stifle attempts at overcoming the drawbacks of jurisdictional dislocation. On the contrary, they are a reminder that reconfiguration, with all the headaches it entails, invariable delivers new pathways for problem-solving.

VI. The Third Dislocation: From Home to Host Adjudication

The dislocation of corporate control from an operational to a regulatory framing facilitates a dislocation of jurisdiction: it increases the likelihood that victims of pollution in the Global South will have a viable claim against the PC, which enables the plaintiff to request that the cases against parent and subsidiary be litigated together in the Global North. Dislocation of jurisdiction, in turn, is likely to trigger a dislocation of adjudication, as judges in the Global

[78] E.g., van Loon, n. 47 above at 301–303.
[79] Geetanjali Ganguly, *Judicial Transnationalization* in *Research Handbook on Transnational Environmental Law,* 301 (Edward Elgar, 2020).

North in all likelihood will need to interpret and apply legal provisions which are foreign to them.[80]

Dislocation of Adjudication

The need to determine which legal regime applies to matters before the court unquestionably adds complexity to proceedings that involve transboundary impacts of pollution and/or parties located in multiple jurisdictions. For the purposes of this discussion, it is unnecessary to delve into the intricacies of conflict of laws (or, in civil law countries, international private law) doctrines which are typically marshalled to resolve choice of law dilemmas, as what concerns us here are the consequences, namely, the likelihood that judges will apply foreign law in adjudication. For example, in the *Efanga* lawsuit which forms part of *Four Nigerian Farmers* v *Shell*, the Dutch court applied Nigerian law to settle substantive liability questions, but Dutch law for procedural matters.[81] For evidentiary matters, questions on the allocation of the burden of proof were answered with reference to Dutch law, yet the standard of proof was governed by Nigerian law.[82] Moreover, Nigerian law heavily draws on English law, particularly in the sphere of common law claims such as nuisance and negligence.[83] Hence, the *Four Nigerian Farmers* litigation effectively showcases judges juggling three different national legal systems in the resolution of transnational liability claims.

The Risks and Countervailing Risks of Dislocating Adjudication

Whereas conceptual and jurisdictional dislocation have opened new and broadly welcoming judicial pathways for victims of pollution, the dislocation of adjudication poses greater challenges. Indeed, it may impair the quality of judicial decisions for two countervailing yet related reasons. First, there is the risk that judges will get the foreign law wrong. Secondly, there is the arguably greater countervailing risk that, for fear of being perceived as disrespectful vis-à-vis a foreign legal system, [84] judges will stifle any appetite for judicial innovation and adopt deeply conservative decisions. Both risks are illustrated in the *Four Nigerian Farmers* cases.

The *Four Nigerian Farmers* litigation required Dutch judges to interpret and apply Dutch, Nigerian, and English legal provisions, including the notoriously complex and often downright perplexing doctrines of English tort law. The Hague Court unquestionably deserves praise for the seriousness and dedication with which it set about this task, but its interpretation of, for example, the common law rule in *Rylands* v *Fletcher* arguably is questionable. *Rylands* v *Fletcher* posits that a person who introduces a hazard into an environment will be held liable if that hazardous entity escapes and causes damage to the property of others. The rule has been refined in subsequent judgments to require that the defendant should have known that the entity – whether a herd of bulls or a stockpile of solvents – could cause damage if it escaped, but the inherent dangerousness of the entity or activity absolves the claimant from having to prove unreasonableness or negligence beyond the 'knowingly foreseeable' threshold.[85] Yet in *Efanga*, the Dutch Court asserts that, since it is unproven that an oil leak resulted from poor maintenance by the defendant, and may instead have been caused by an act of vandalism, *Rylands* v *Fletcher* does not apply.[86] This

[80] van Loon, n. 47 above at 306.
[81] *Efanga*, para. 3.1.
[82] *Ibid*.
[83] *Efanga*, para. 3.12.
[84] Bertram, n. 74 above, 128.
[85] *Cambridge Water* v *Eastern Counties Leather plc* [1994] 2 AC 264 House of Lords.
[86] *Efanga*, para. 5.30.

reasoning mistakenly introduces an additional evidentiary threshold for claimants, who must go beyond arguing that the damage was 'knowingly foreseeable' and show negligence on the part of SPDC.

Further on, the Court again struggles with *Rylands* v *Fletcher*'s famously cryptic reference to 'a person who, for his own purposes, brings onto the land and keeps there anything likely to do mischief if it escapes.'[87] The Dutch Court assumes that the 'thing likely to do mischief' is the spilled oil, rather than the oil as it ordinarily flows through the pipeline. Since the defendant SPDC did not keep this spilled oil 'for his own purposes', the Court reasons that *Rylands* v *Fletcher* does not apply.[88] However comparable English cases such as *Transco* v *Stockport*[89] indicate that 'the thing likely to do mischief' is not leaked oil, or escaped gas, but the oil or gas in the pipeline. In contrast to the spilled material, this substance is most certainly kept for the purposes of the defendant. Hence, the Dutch court twice narrowed the remit of *Rylands* v *Fletcher* beyond the limitations set in English law. [90]

Secondly, the Hague Court's reasoning in *Efanga* equally illustrates the countervailing risk of host jurisdictions unquestioningly following case law from the home jurisdiction, even if the latter rests on debatable foundations. The Nigerian Oil Pollution Act (OPA) holds licensees strictly liable for harm caused by oil pollution from their licensed activities, unless the harm was caused by vandalism. In earlier case law, Nigerian courts have held that allegations of vandalism in the context of statutory liability should clear the criminal rather than civil evidentiary threshold and be proven beyond reasonable doubt. The defendants in *Efanga* opposed the application of a criminal evidentiary threshold in civil litigation and argued that a preponderance of the evidence standard should prevail. In its response, the Hague Court observed that existing judicial practice in Nigeria had been established and that the defendants' objections 'did not change this at all'. [91] The merit of the practice was taken for granted without commentary and the Court proceeded to apply the 'beyond reasonable doubt' standard of evidence which SPDC failed to meet.

Initially, this example may seem poorly chosen as an example of disruption because, in this instance, following Nigerian judicial practice resulted in a win for the claimants. On further reflection however, it is unclear whether such unquestioning acceptance as displayed by the Dutch court is in the long-term interest of oil pollution victims in Nigeria, and even of the claimants in the case. The insertion of a criminal law evidentiary standard into civil litigation is undeniably jarring, and hard to justify on principled grounds. The key justification for a reasonable doubt threshold is to protect crime suspects. However, in the case of OPA liability litigation the threshold indirectly protects the plaintiffs, who are not under suspicion of any crime. Even more problematically, as no criminal prosecution is pending, the evidence that ordinarily could help to prove an act of vandalism is not being gathered. The Nigerian judicial interpretation of the OPA therefore appears difficult to square with considerations of fairness. It may incidentally redress some of the discrepancies in power and resources between private claimants and corporate defendants that typify environmental litigation, but only if we accept the premise that two wrongs do make a right.

Furthermore, as a tactic to ease the path of plaintiffs in pollution claims, the approach can easily backfire. Indeed, this happened in *Efanga*: because SPDC's liability was deemed to be

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[87] *Rylands* v *Fletcher* (1868) L.R. 3 H.L. 330, at 340.
[88] *Efanga*, para. 6.29.
[89] *Transco Plc v Stockport MBC* [2003] UKHL 61.
[90] For similar critiques see Lucas Roorda, *Broken English: A Critique of the Dutch Court of Appeal Decision in Four Nigerian Farmers and Milieudefensie v Shell* 12 Transnational Legal Theory 144 (2021).
[91] *Efanga*, para. 5.10.

established under the OPA, which maintains a strict liability standard, the claim against the PC RDS failed.[92] The Court reasoned that since SPDC was liable on a 'no fault' basis, its PC could not have been negligent. Moreover, the "beyond reasonable doubt" threshold infuses the court's reasoning with a degree of artificiality. For a range of complex reasons, oil pipe vandalism is rife in Nigeria.[93] If oil companies are held liable for the damage, this should not happen on account of obstructively high evidentiary thresholds, but rather because the risk of vandalism is entirely foreseeable. Consequently, it should be reasonable to expect oil companies to anticipate acts of vandalism and either boost their defences or build up resilience. A failure to manage the risk of vandalism, in this case, becomes an act of negligence or unreasonableness and, thus, a foundation for common law liability.[94] Establishing legal accountability along these lines would obviate any need to either prove or disprove vandalism and open the door not only to SC but also PC liability, both of which factors could improve rather than dim the prospects for plaintiffs in a sustainable and legitimate way.

In sum, since courts have less expertise and less confidence in their decision-making when applying foreign law, they face a heightened risk of getting the law wrong as well as a countervailing heightened risk of failing to exercise judgment. In both cases the quality of adjudication suffers. In the context of environmental litigation, the risk of under-confidence resulting in uncritical, conservative decision-making is arguably the most damaging. For a combination of reasons, ranging from the difficulty of proving environmental harm[95] and pinpointing the exact cause of the harm[96] to the challenges surrounding the valuation of environmental damage, [97] tort law has traditionally been an inhospitable territory for victims of pollution. Correspondingly, 'big wins' for the environment have tended to involve acts of judicial innovation, ranging from a willingness to relax the 'but for' standard of causation in the UK[98] to the construction of a state's failure to adopt credible climate change policies as a breach of human rights in Pakistan.[99] Where judges feel they must tread carefully, they are unlikely to take big steps.

Relocating Adjudication

Since the disruptive impacts of dislocated adjudication are significant and benefits are harder to discern, the quest for more systemic, radical reform of transnational environmental litigation involving corporate groupings becomes even more urgent. Mirroring the discussions in the context of dislocated jurisdiction, it is possible to pursue different pathways

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[92] Ibid., paras 5.28-5.31.
[93] Albert Oshienemen et al., *An Investigation Into Root Causes of Sabotage and Vandalism of Pipes: A Major Environmental Hazard in Niger Delta,* Nigeria Selected papers from the International Conference on Capacity Building for Research and Innovation in Disaster Resilience (2019), 22 available at: https://pure.hud.ac.uk/ws/files/17757036/An_investigation_into_root_causes_of_sabotage_and_vandalism_of_pipes_A_major_environmental_hazard_in_Niger_Delta_Nigeria.pdf; Ahmed Tukur Umar and Mohamed Shahwahid Hajj Othman, *Causes and Consequences of Crude Oil Pipeline Vandalism in the Niger Delta Region of Nigeria: A Confirmatory Factor Analysis Approach* 5 Cogent Economics & Finance 1353199 (2017).
[94] *Empress Car Company (Abertillery) Ltd.* v *National Rivers Authority* [1996] EWHC J1211-1.
[95] See *Regina (Boggis) and another* v. *Natural England* [2009] EWCA Civ 1061 (on whether coastal erosion constitutes environmental harm to be averted or whether erosion itself is a natural phenomenon that should be protected).
[96] E.g., *Graham & Graham* v. *Rechem* [1996] Env LR 158 (QB) (did exposure to dioxins cause illness in livestock).
[97] E.g., *Barr* v. *Biffa* [2012] EWCA Civ 312 (on how to price the cost of pollution caused by stench from a waste treatment plant).
[98] *Fairchild* v. *Glenhaven Funeral Services Ltd* [2002] UKHL 22.
[99] *Leghari* v. *Federation of Pakistan* (2015) W.P. No. 25501/201.

to change. One might involve the development of a 'transnational law of tort' to govern disputes where harm was allegedly caused by transnationally operating corporate groups. Particularly when coupled with the establishment of a transnational environmental court, this option would obviate the need for courts to apply foreign law and it could constitute a *tabula rasa* moment enabling the development of a body of law which is fully responsive to the nature and context of contemporary environmental pollution. Political feasibility, on the other hand, is a different matter. Earlier work by the International Law Commission on liability for transboundary harm has not progressed beyond the publication of draft principles,[100] and it is difficult to imagine that domestic courts would willingly cede jurisdiction to a new forum operating under newly developed laws. Then again, in view of the rising tide of climate litigation,[101] environmental litigation is unquestionably in a state of flux, which might open up pathways previously deemed unnavigable.

A second and possibly more attainable response would plough the furrow of enhanced inter-jurisdictional cooperation, as explored in Section V. Closer cooperation between courts in the various jurisdictions involved in transnational environmental litigation, rather than a binary choice for home or host jurisdiction, might significantly curb both the risk of misinterpreting foreign law and the inclination towards judicial conservativism. Evidently, the rules of engagement between courts would need to be developed and clarified, and this would undoubtedly be a fraught and geopolitically precarious endeavour. Yet the potential benefits of enhanced judicial cooperation, both in terms of enhancing the quality of adjudication and the delivery of environmental justice, make it a fully worthwhile challenge.

VII. Concluding Remarks

The past five years have witnessed remarkable breakthroughs in the field of corporate group liability for environmental harm, with both courts and the legislature in certain countries showing an increased willingness to take seriously the transnational context in which corporate environmental harm is perpetrated. Such developments are rightly celebrated. Equally importantly, periods of change can and should serve as an occasion to expand horizons; to query whether fixes that have been introduced should be accepted as final or instead be treated as fledgling steps towards systemic change. This paper argued that, considering the positive contributions but also the new challenges and the limitations thrown up by conceptual, jurisdictional and adjudicative dislocation, the latter stance is the better one.

The pathway of reconceptualising control in corporate groupings and of organising a genuinely transnationalised infrastructure for environmental litigation involving corporate groups will undoubtedly be beset with challenges. Yet it is equally lit by the promise of delivering better and more sustainable responses to the persistent failures of environmental justice that have characterised the relationship between corporate groups, home and host states, and victims of pollution for centuries.

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[100] See Reports on the 58th session of the International Law Commission available at: https://legal.un.org/ilc/sessions/58/.

[101] Cf Katerina Mitkidis and Theodora N. Valkanou, *Climate Change Litigation: Trends, Policy Implications and the Way Forward* 9 Transnational Environmental Law 11 (2020).