Foreign Direct Liability and Beyond

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Foreign Direct Liability and Beyond

Exploring the role of tort law in promoting international corporate social responsibility and accountability

Aansprakelijkheid van multinationale concerns voor schade aangericht aan mens en milieu in het buitenland

Een studie naar de rol van het civiele aansprakelijkheidsrecht bij het bevorderen van internationaal maatschappelijk verantwoord ondernemen (met een samenvatting in het Nederlands)

Proefschrift

ter verkrijging van de graad van doctor aan de Universiteit Utrecht
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door

Liesbeth Francisca Hubertina Enneking

geboren op 2 juni 1979
te Nijmegen

Promotoren: Prof.dr. I. Giesen
Prof.dr. M.L. Lennarts

For my mother

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It has been a long and winding road that has brought me to this point. When I started out on this journey in August 2006, I was in a completely different place in my life than where I am today. It has been a unique adventure, though, in the course of which I have visited many special places, enjoyed a lot of memorable experiences, and gained tons of new insights. I have also met a lot of wonderful people along the way, and have gotten to know those who were in my life already in new ways.

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Liesbeth Enneking
Utrecht, March 2012

Preface

Recent developments emerging after the completion of this thesis

This study will provide an exploration of the emerging socio-legal trend in Western societies towards transnational civil litigation against multinational corporations in relation to harm caused to people and planet abroad. One of the main driving forces behind this trend towards what are referred to here as 'foreign direct liability cases' has been provided by the Alien Tort Statute (ATS). This obscure 1789 US federal statute was 'rediscovered' in the 1980s as a legal basis for tort-based civil litigation before US federal courts aimed at addressing and obtaining redress for international human rights violations perpetrated anywhere in the world. Since the late 1990s, dozens of civil claims have been brought on the basis of the Alien Tort Statute against a score of multinational corporations that have found themselves subject to the exercise of personal jurisdiction by US federal courts.

Throughout this study, reference will be made at various points to the ATS-based foreign direct liability case of *Kiobel v. Shell*, which is currently pending before the US Supreme Court. The *Kiobel* case deals with the alleged involvement of Anglo/Dutch multinational Shell in human rights violations perpetrated in the 1990s by the Nigerian government against environmental activists protesting the detrimental impacts of oil extraction activities in the Ogoniland region of the Niger Delta. In September 2010, the Second Circuit Court of Appeals rendered a decision in this case holding that corporate actors cannot be held liable under the Alien Tort Statute. This decision forms part of what has been described as a recent tendency among (some) US federal courts to slowly close the door to tort-based civil liability claims against multinational corporations on the basis of the Alien Tort Statute. It seems that the reason for this more critical stance with respect to the desirability of using the Alien Tort Statute as a private law enforcement mechanism that can be relied on to realise corporate accountability for international human rights violations perpetrated abroad, is connected to concerns about the potentially far-reaching implications of these cases.

One of the main concerns expressed in this respect relates to what is perceived to be the extraterritorial nature of tort claims brought under the Alien Tort Statute, which often pertain to foreign actors and activities undertaken abroad. Arguably, however, this extraterritorial nature of ATS-based civil litigation seems to be caused more by the liberal rules on personal jurisdiction applied in civil cases that are brought before US courts, than by any measure of extraterritoriality that may be said to be inherent in the Alien Tort Statute itself. Other concerns pertain to the potential implications of ATS-based civil litigation against multinational corporations for US foreign policy relations on the one hand, and for the competitiveness of US-based multinationals, on the other. Finally, there is the concern that the Alien Tort Statute might invite 'forum shopping' by attracting great

numbers of foreign direct liability claims that have little or no connection to the US legal order but could unduly burden the US federal court system.

The plaintiffs in the *Kiobel* case petitioned the US Supreme Court, and in October 2011 the Supreme Court announced that it would hear their appeal of the Second Circuit Court of Appeals' decision on the issue of corporate liability under the Alien Tort Statute. Oral arguments were held in February 2012. In an unexpected and somewhat unusual turn of events, the Supreme Court in March 2012 instructed the parties to the *Kiobel* case to file supplemental briefs on a second question, namely whether the Alien Tort Statute allows US federal courts to hear lawsuits alleging international human rights violations that occur outside of the territory of the United States. This particular question had not been addressed in the *Kiobel* case before, but did feature in the briefs filed by and on behalf of the corporate defendants in this case in relation to the Supreme Court appeal.

The Supreme Court is not expected to render its decision on these two matters pertaining to the scope of liability under the Alien Tort Statute before the fall of 2012. If it were to hold that corporations cannot be held liable under the Alien Tort Statute, this would deal a significant blow to the international human rights movement, which tends to see ATS-based civil litigation as one of the most promising contemporary avenues for the enforcement of international human rights norms against corporate violators. Still, this would leave open the possibility of filing ATS-based civil claims against individual corporate officers for their involvement in human rights violations perpetrated in the course of their companies' activities in host countries. If however the Supreme Court were to hold that it is not possible at all to bring civil claims before US federal courts in relation to human rights violations perpetrated outside of the United States on the basis of the Alien Tort Statute, this avenue would be closed of as well.

Still, even if the Alien Tort Statute would be closed off as a way to hold multinational corporations accountable for their involvement in international human rights violations perpetrated in developing host countries, this would in my view not spell the end to the contemporary socio-legal trend towards foreign direct liability cases. After all, as will be discussed extensively throughout this study, the possibility of initiating foreign direct liability claims before US state courts and before courts in other Western societies on the basis of general principles of tort law, remains. Although this type of tort-based litigation may not engender the level of moral condemnation that claims pertaining to corporate human rights violations on the basis of the Alien Tort Statute do, it does allow for claims in relation to a much broader range of people- and planet-related norm violations resulting from multinational corporations' transnational activities.

Importantly, questions posed at oral argument by some of the Supreme Court Justices with respect to the perceived extraterritorial nature of the Alien Tort Statute also raise the issue whether ATS-like civil litigation could also be brought before courts in other

countries, even where that litigation involves foreign parties and activities undertaken abroad. And indeed, as will be discussed in detail in part II of this study, ATS-like civil litigation can be brought before domestic courts in EU Member States like the Netherlands, under certain circumstances even where there are only very few or no connections between the case and the forum country involved. This is exemplified for instance by the transnational civil claims against Royal Dutch Shell and its Nigerian subsidiary Shell Petroleum Development Company in relation to oil pollution caused in Nigeria, which are currently pending before the The Hague district court in the Netherlands.

One of the main questions to be addressed in this study is under what circumstances foreign direct liability cases can be brought before domestic courts in the EU Member States, and in the Netherlands in particular. It is clear from the recent developments under discussion here that in doing so, it provides a timely and highly relevant contribution to the contemporary debate on the role that the law, and Western society systems of tort law in particular, may play in promoting international corporate social responsibility and accountability. These are interesting times for the contemporary socio-legal trend towards foreign direct liability cases, on both sides of the Atlantic.

Liesbeth Enneking
Utrecht, 2 April 2012

Overview

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List of abbreviations

This list includes the main abbreviations used throughout this study.

ATCA	Alien Tort Claims Act
ATS	Alien Tort Statute
BIT	Bilateral Investment Treaty
CEO	Chief Executive Officer
CSR	Corporate Social Responsibility
EC	European Commission
ECCJ	European Coalition for Corporate Justice
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HR	Hoge Raad (Dutch Supreme Court)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ILO	International Labour Organisation
IMF	International Monetary Fund
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
SRSG	Special Representative to the Secretary-General of the United Nations
UDHR	Universal Declaration of Human Rights
HL	House of Lords (Supreme Court of the United Kingdom)
UNEP	United Nations Environment Programme
UNHRC	United Nations Human Rights Council
UK	United Kingdom
UN	United Nations
US	United States
WTO	World Trade Organisation

PART I

Prologue

Introduction

In July 2011, the United Nations Environment Programme (UNEP) released a report making clear that the environmental pollution in the Ogoniland region of the Niger delta as a result of over 50 years of oil operations there is far more extensive than had previously been assumed.[1] According to the report, local citizens throughout the Ogoni region are exposed to petroleum hydrocarbons every day, not only through contaminated land sites and water sources but also through air pollution related to local oil industry operations, which is said to affect the quality of life of close to one million people. In one region, local citizens are drinking water from a well that has been contaminated as a result of an oil spill from a nearby pipeline that occurred more than six years ago; benzene contamination levels in this well are over 900 times above World Health Organization guidelines. At other sites, contamination levels are up to over 1000 times the local standard; local communities are aware of this but continue to use the water for drinking, bathing, washing and cooking for lack of alternatives. UNEP Executive Director Achim Steiner has commented that "[t]*he oil industry has been a key sector of the Nigerian economy for over 50 years, but many Nigerians have paid a high price* [...]".[2]

According to the UNEP report, countering and cleaning up the damage to drinking water, land, creeks and important ecosystems such as mangroves that has been caused by oil spills in that region and stimulating a sustainable recovery may take as much as 25 to 30 years. Environmental restoration of the region will require the deployment of modern technology, improved environmental monitoring and collaborative action between the Nigerian government, local citizens and the oil industry. The environmental restoration exercise that will be necessary to bring the local environment in the region back to full, productive health may well turn out to be the world's most wide-ranging and long-term oil clean-up exercise ever undertaken. In order to support this comprehensive environmental restoration exercise, the report recommends the establishment of a number of new institutions in Nigeria, including a restoration fund that requires an initial capital injection of US$1 billion, which should be provided by the oil industry and the Nigerian government. However, before the clean-up of the contaminated creeks, sediments and mangroves can begin, all sources of ongoing contamination must be brought to an end. The report recommends in this respect that the Nigerian government improves the regulatory requirements set with respect to the oil and gas sector and that it better monitors and enforces compliance with those requirements. The report also recommends that local oil

1 UNEP Report 2011.

2 See, for instance: 'UNEP Ogoniland oil assessment reveals extent of environmental contamination and threats to human health', 4 August 2011, available at the UNEP website: <www.unep.org/newscentre/default.aspx?DocumentID=2649&ArticleID=8827>, Persson 2011a.

industry operators take steps in order to prevent further oil spills and to improve their performance especially when it comes to oil spill clean-up and remediation.[3]

One of the oil companies involved is Anglo/Dutch oil multinational Shell, which has been active for over 50 years in the oil extraction industry in Nigeria. Its local subsidiary, Shell Petroleum Development Company of Nigeria Ltd. (SPDC), is the operator of a local joint venture with the Nigerian state oil company and a number of other foreign oil multinationals, and the largest private oil company in Nigeria with over 6000 kms of oil pipelines. It is one of the two key companies with operational facilities in the Ogoniland region of the Niger Delta, although it ceased its oil production activities in that region in 1993 in the face of a massive campaign of public protest against the environmental impacts of the company's operations.[4] The UNEP report states that SPDC has created public safety issues by failing to apply its own procedures and/or industry best practice with respect to the control, maintenance and decommissioning of oilfield infrastructure in Ogoniland. In addition to this, its remediation efforts after oil spills are considered inadequate; the report states that even after the adoption of an improved remediation management system in January 2010 SPDC's performance in this respect still does not meet the local regulatory requirements or international best practice.[5]

The release of the UNEP report in July 2011 attracted widespread public attention especially in the UK and the Netherlands, where the multinational Shell group has its home base.[6] This was by no means the first time Shell's Nigerian oil extraction operations were the focal point of public scrutiny; over the past two decades Shell had already been under fire on various occasions in Western societies for its role in the environmental degradation in the Niger Delta, both in courts of public opinion and in courts of law. In the early 1990s, it became discredited for standing aside while the Nigerian military regime forcefully put down local opposition against the environmental impacts of its oil operations in the Ogoni region of the Niger Delta. This not only had reputational consequences for the oil multinational but also legal ones, as it became involved in civil lawsuits brought before federal courts in the US for its alleged involvement in human rights violations perpetrated by Nigerian government forces in this respect.[7] One of these cases eventually resulted in an out-of-court settlement in 2009 that involved a payment by Shell of $15.5 million to the

3 See, for an overview of the recommendations made: UNEP Report 2011, pp. 200-231.

4 See, for example: 'Shell interests in Nigeria', April 2011, available at the Shell website: <www-static.shell.com/static/nga/downloads/pdfs/briefing_notes/shell_interests.pdf>. See also: UNEP Report 2011, pp. 43-46; Depuyt & Lindijer 2011.

5 UNEP Report 2011, pp. 142-151. See also, for instance: 'Oil spoils', *The Economist*, 13 August 2011, p. 30.

6 See, for example: Persson 2011a; Persson 2011b; Vidal 2011b; 'Oil spoils', *The Economist*, 13 August 2011, p. 30.

7 See the Business & Human Rights Resources Centre website for more information on the context of and legal proceedings in these cases: <www.businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria>.

plaintiffs and to a trust intended to benefit the Ogoni people;[8] another one is still ongoing and is in fact currently pending before the US Supreme Court.[9]

Around the same time that the US civil claims against SPDC and its Anglo/Dutch parent company were settled, Shell became the target of civil claims in the Netherlands, this time for its responsibility for the harmful consequences of a number of oil spills from SPDC-operated pipelines; these claims, brought by a number of Nigerian farmers and the Dutch NGO Milieudefensie (Friends of the Earth Netherlands), are currently pending before the The Hague district court.[10] In addition, in July 2011, on the eve of the release of the UNEP report, SPDC admitted liability in a similar civil lawsuit that had been brought against it and its Anglo/Dutch parent company in the UK on behalf of some 69,000 inhabitants of the Ogoniland region of the Niger Delta who claimed to have suffered harm as a result of two major oil spills there in 2008.[11] It has been speculated that this admission of liability (which is likely to result in an out-of-court settlement), in combination with the findings of the UNEP report, have opened the door to further legal claims to be brought against Shell before domestic courts in Europe for harm caused to people and planet in the Niger Delta as a result of its activities there.[12] Most recently, in October 2011, a new civil lawsuit was filed in the US against Shell by one of the villages in the Ogoniland region of the Niger Delta, seeking $1 billion in damages for pollution caused by Shell's oil exploration activities there, which is claimed to be a result of the company's wilful and negligent pursuit of profits over protection of the environment and inhabitants of the Niger Delta.[13]

The civil lawsuits mentioned here are notable not only because of some of the interesting and novel legal issues they raise, but also and perhaps especially because of the broader legal and socio-political context within which they are set. For one thing, they form part of a wider, global trend towards civil liability claims against (parent companies of) multinational corporations for harm caused in the course of their operations in host countries, brought before courts in their home countries. From the inception of this trend in the late 1990s, a growing number of these cases have been brought before civil courts in various Western societies, particularly in the US but increasingly also in other countries such as the UK, Australia, Canada and, with the initiation of the abovementioned

8 See, for instance: 'Oil spoils', *The Economist*, 13 August 2011, p. 30; Persson 2011b. See also, more elaborately: Lambooy 2010, pp. 385-434.

9 See, for instance: Denniston 2011b as well as Stohr 2011, who notes that the Supreme Court is likely to rule on this case in June 2012. See more elaborately sub-section 3.3.2.

10 See the Milieudefensie website for more information on these cases, including legal documents and a chronological account of the procedures so far as well as their expected further course: <www.milieudefensie.nl/english/shell-in-nigeria/oil-leaks/documents-on-the-shell-legal-case>. See more elaborately sub-section 3.2.2.

11 See, for instance: Depuyt & Lindijer 2011; Persson 2011b; Vidal 2011a.

12 See, for instance: Depuyt & Lindijer 2011; Persson 2011b.

13 See, for instance: Gambrell 2011.

claims against Shell, now also the Netherlands. Without exception and regardless of in which country and on which legal basis they have been brought, these cases, sometimes referred to as foreign direct liability cases, are raising many interesting legal questions. They are challenging legal practitioners, courts and legal scholars alike to explore the boundaries of positive law in fields such as public international law, corporate law, private international law and tort law and to reconsider well-established legal doctrines in these fields.[14]

Next to the proliferation of this specific type of lawsuit, a more general international tendency to explore the legal options available to those seeking to address the negative consequences of internationally operating business enterprises' activities around the globe is revealing itself, a development that is closely linked to contemporary socio-political debates on corporate social responsibility and accountability. In an era characterized, at least in Western societies, by liberalization, deregulation and privatization, companies rather than governments are increasingly the ones to set the rules of the game. At the same time, in a world characterized by globalization and an accompanying rise in transboundary trade, investment and production, but also by vastly divergent levels of development in different societies and concomitant variances in standards of living of their inhabitants, the question arises as to who is to step in when international business practices lead to socially unacceptable results. This question ties in with the more general issue of global business regulation: how can internationally operating business enterprises be effectively regulated in an international order featuring political, regulatory and legal structures that still take as their point of departure traditional notions of state sovereignty, territoriality and national interest?[15]

It is against this broader legal and socio-political background that the previously mentioned civil lawsuits against Shell, as well as similar claims brought before Western society courts against (parent companies of) other multinational corporations, should be and are increasingly being understood. Internationally operating business enterprises are finding themselves faced with growing media scrutiny about the impacts of their operations overseas, along with mounting public pressure, especially in Western societies, to make sure similar standards are adopted throughout their worldwide operations, including their production and retail chains. At the same time, Western society policymakers are facing growing socio-political pressure to search for ways to adequately regulate the transboundary activities of internationally operating business enterprises operating out of their territories, with a view to promoting international corporate social responsibility

14 See, for a further characterization of this type of transnational tort-based civil litigation sub-section 1.3.1 and Chapter 3. See, for a selection of cases involving business and human rights issues, the Business & Human Rights Resource Centre website: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases>. See also, for a more elaborate discussion of six salient cases, sub-section 3.2.2.

15 See, for a further elaboration of the contemporary issues surrounding notions of global business regulation and corporate social responsibility, sections 1.1 and 1.2, respectively.

and accountability. Meanwhile, often with the help of one or more of an increasingly widespread, well-informed and experienced global network of NGOs, local individuals, groups and communities that have been detrimentally affected by the local operations of internationally operating business enterprises are increasingly turning to Western society civil courts in order to claim compensation for the damage suffered.[16]

These developments raise many questions, both with respect to their economic and socio-political context and with respect to their legal context. One of the main legal questions to arise is whether and to what extent multinational corporations' parent companies can be held civilly liable for harm caused to people and planet in the course of those multinational groups' operations around the world. Other questions that arise are under what circumstances may such claims be brought before courts in the Western society home countries of those multinational corporations, on the basis of what law should the legal issues arising in them be resolved, and which practical and procedural circumstances are crucial in determining the feasibility of bringing this type of transnational tort-based civil litigation against multinational corporations before Western society home country courts. In a broader perspective, questions arise as to the respective responsibilities of states and corporate actors in protecting people and planet from the detrimental impacts of corporate activities, the way in which Western society home countries can regulate the transnational activities of 'their' internationally operating business enterprises, and the role that the law may play in promoting socially responsible business behaviour not only at home but also abroad.

The main research question that this study seeks to address is whether and to what extent domestic systems of tort law may play a role when it comes to the promotion of international corporate social responsibility and accountability.[17] As a result of the ongoing proliferation of foreign direct liability cases outside the US and recent developments in the field of international corporate social responsibility and accountability, this is a very timely question. Policymakers on both sides of the Atlantic are coming to the point where they will have to decide whether, and if so how to support (or at least not counteract) the contemporary socio-legal trend towards foreign direct liability cases and to allow their systems of tort law to play a role in promoting international corporate social responsibility and accountability, more generally. This study seeks to provide a scholarly legal basis for this debate, and will ultimately come to a number of recommendations on what the priorities should be in this context on the legal and policy agenda in the near future. To this end, the contemporary socio-legal trend towards foreign direct liability cases will be further explored and put into its legal, socio-political and conceptual context.

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16 See, more elaborately: section 1.3. See also, for instance, with a focus on the previously mentioned Dutch Shell cases: Enneking 2010.

17 See, more elaborately: sub-section 1.3.3 and section 2.1.

In this introductory part, the setting and background of the contemporary socio-legal trend towards foreign direct liability cases will be discussed in more detail (Chapter 1). Following that, there will be a brief elaboration of the methodology adopted in order to come to an answer to the main research question, and an outline of the remainder of this study (Chapter 2). This study was completed on 1 September 2011 and, with a few exceptions, incorporates relevant developments only up to that date.

1 Setting and background

1.1 Economic globalization and global business regulation

1.1.1 Economic globalization: feats and failures

The past centuries have seen an ever-growing interconnectedness of people across the globe. The economic, societal, cultural, political, ecological and legal realities of any one society are increasingly affected by those of other societies. Especially over the last five decades this process of globalization[1] has accelerated sharply as a result of significant technological advancements in the fields of communications and transportation.[2] The world has become bigger, in the sense that individuals from all over the world find themselves in increasingly expanding social environments, transforming them from local citizens into global citizens. At the same time, however, the world has become smaller, in the sense that people in different countries or even on different continents are only a phone call or a mouse click away from one another. This has resulted in a contemporary reality in which events, activities or decisions taken on one side of the globe are increasingly likely to affect individuals on the other side of the globe. Globalization's impact on our existing structures and institutions (economic, societal, political, legal, etc.) is both all-embracing and permanent; it is a process that leaves no sphere untouched and the changes it brings about seem largely irreversible.[3]

In the economic sphere, the process of globalization has gone hand in hand with the Western world's championship of capitalism as the economic ideal and a concomitant

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1 There are numerous definitions of the concept of globalization; I will therefore limit myself to simply quoting the wikipedia page on globalization (http://en.wikipedia.org/wiki/Globalization): "*Globalization (or globalisation) describes a process by which regional economies, societies, and cultures have become integrated through a globe-spanning network of communication and trade. The term is sometimes used to refer specifically to economic globalization: the integration of national economies into the international economy through trade, foreign direct investment, capital flows, migration, and the spread of technology. However, globalization is usually recognized as being driven by a combination of economic, technological, sociocultural, political, and biological factors. The term can also refer to the transnational circulation of ideas, languages, or popular culture through acculturation*" (citations omitted). See also: Mullerat 2010, pp. 120-123.

2 Globalization may be said to have occurred in three distinct waves, including the European expansion and conquest between 1450 and 1850, the major expansion in the spread and entrenchment of European empires between 1850 and 1945 and the wave of contemporary globalization from the 1960s which is said to mark a new epoch in human affairs. See, for instance: McGrew 2008, p. 22. See also, with a different categorization: Mullerat 2010, pp. 124-127.

3 See also, however: Ruggie 2002, who predicts a shift away from globalization, "[...] *unless we manage to strengthen the fabric of global community*" in order to deal with globalization's many challenges. Another question that has been raised is whether globalization will survive the contemporary international financial crisis: Wolf 2008.

drive towards free markets, free trade, privatization and deregulation. Combined, these developments have greatly boosted international trade and investment. Economic globalization[4] has undeniably had many beneficial consequences, as in countries all over the world it has led to the creation of wealth, jobs and income, generated innovation, technological advances and development, reduced poverty and brought about overall higher standards of living. At the same time, however, the urgency of global issues such as poverty, famine, disease, environmental degradation, corruption, exploitation, human rights violations and overpopulation has not abated. And despite the progress that the past decades of rapid globalization have brought in some parts of the developing world, the way these issues affect individuals and communities across the globe remains unevenly divided. Overall, the gap between the world's 'haves' and its 'have-nots', sometimes referred to as the 'North-South divide' or 'the development gap',[5] only seems to be growing.[6]

Increasingly advanced information and communication technology and the concomitant rise of modern media have allowed people around the world to take cognizance of these global issues, wrongs and challenges and to wonder whether the contemporary international economic system is just; many believe that it is not. More and more people are coming to see economic globalization as part of the problem rather than of the solution, as something that exacerbates rather than ameliorates the global issues mentioned here and, more generally, the uneven distribution of poverty and misfortune on the one hand and wealth and prosperity on the other among the world's inhabitants.[7] The recognition that economic development entails both benefits and burdens and that in practice it is

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4 Economic globalization, which may be described as "[…] *the closer economic integration of the countries of the world through the increased flow of goods and services, capital, and even labor*" is but part of the broader notion of globalization, which also encompasses things such as "[…] *the international flow of ideas and knowledge, the sharing of cultures, global civil society, and the global environmental movement*". See Stiglitz 2006, p. 4.

5 The Longman online dictionary (available at <www.ldoceonline.com/dictionary/North-South-divide-the>) defines the North-South divide as "*the difference between the rich and poor countries of the world, which is shown by people's standard of living and by the level of industrial and economic development. The expression the North is used to mean the richer countries which are mainly in Europe, North America, and parts of East Asia, and the South is used to mean the poorer countries of Africa, Asia, and Central and South America*". It can rightly be argued, however, that this traditional distinction is becoming increasingly outdated, *inter alia* with the rise of the so-called BRIC countries, and should instead be referred to for instance as 'the development gap' (as is done, for instance, by Cole 1981).

6 See, generally and with further figures and references: Mullerat 2010, pp. 119-137; Thomas 2008, pp. 470-488; Dine 2005, pp. 1-40. See also, elaborately, Pogge 2001, who notes that although "[...] *global markets are more open on the whole, and private investment is much more mobile than before* [...] *such capital mobility has, on the whole, brought little progress to the world's poorest populations*" (p. 12).

7 See, for instance, with further references, Dine 2005, pp. 1-40. See also, elaborately: Pogge 2008, who states, *inter alia*: "*We, the affluent countries and their citizens, continue to impose a global economic order under which millions avoidably die each year from poverty-related causes. We would regard it as a grave injustice if such an economic order were imposed within a national society. We must regard our imposition of the present global order as a grave injustice unless we have a plausible rationale for a suitable double standard. We do not have such a plausible rationale*" (p. 109).

our planet and the people living in developing societies that are carrying the costs of the developed world's economic progress has led to calls for an international economic system that is more fair, just and sustainable. What began with the anti-globalization protests at the World Trade Organization (WTO) meetings in Seattle in 1999 has since developed into a much more broad-based, fundamental (sometimes even fundamentalist)[8] critique of economic globalization and its perceived downsides.[9]

The main objection that is raised against economic globalization is that the contemporary international economic system based on capitalism, neo-liberalism and free and open world markets (the so-called 'Washington consensus') that is currently being imposed on countries around the world through global institutions such as the WTO, the International Monetary Fund (IMF) and the World Bank, benefits those living in the world's richest societies to the detriment of those living in the world's poorest societies.[10] Stiglitz notes that those who are discontented with economic globalization tend to raise five different but connected concerns. First of all, they argue that "[t]*he rules of the game that govern globalization are unfair, specifically designed to benefit the advanced industrial countries*". Secondly, they contend that "[g]*lobalization advances material values over other values, such as a concern for the environment or for life itself*". A further criticism of economic globalization is that the way it has been managed "[...] *has taken away much of the developing countries' sovereignty, and their ability to make decisions themselves in key areas that affect their citizens' well-being*". Another point of contention is that "[w]*hile the advocates of globalization have claimed that everyone will benefit economically, there is plenty of evidence from both developing and developed counties that there are many losers in both*". And, finally, one of the main criticisms of economic globalization is that "*the economic system that has been pressed upon the developing countries – in some cases essentially forced upon them – is inappropriate and often grossly damaging*".[11]

One of the things that this more critical approach to economic globalization has starkly illuminated is that its rapid advancement over the past decades has only partly been matched by the development of global institutional capacity to set its course and to deal with any adverse consequences that the contemporary international economic system may have and/or injustices it may cause. The contemporary international legal order in many ways still reflects the traditional Westphalian system of sovereign nation states with its strong notions of territoriality, state sovereignty and national interests and as such

8 Compare Barber 2003.

9 See, for instance: Mullerat 2010, pp. 125-137; Zerk 2006, pp. 18-21.

10 For further detail, see Stiglitz 2006, pp. 3-19. See also, for instance, Dine 2005, who notes, *inter alia*: "*The 'Washington consensus' has adhered to a rigorous programme of liberalisation of trade, driven through by WTO rules and IMF and World Bank conditionalities. It has become clear that this relentless liberalisation has not brought universal benefits and in particular has exacerbated the conditions of those in most severe poverty*" (p. 76).

11 Stiglitz 2006, p. 9.

remains premised on principles of equality, autonomy and non-interference.[12] As a result, each individual state is left to deal with actors operating and/or issues arising within its territory, even where supra-national actors and issues are concerned. In a globalized world, however, some actors and some issues have simply become too big and too powerful to be handled unilaterally, as in effect economic globalization "[…] *has unleashed market forces that by themselves are so strong that governments, especially in the developing world, often cannot control them*".[13] This means that in the end, it is the poorest of the poor living in developing societies with governments unable or unwilling to protect their citizens from the downside of economic globalization who are likely to be the ones hardest hit.[14]

Due to the contemporary international legal order's state-based nature, global governance and the formulation and implementation of collective responses to global issues largely remain inter-state matters. As such, they are dependent on states' willingness to cooperate internationally through international organizations or multilateral treaty regimes. However, the areas within which the international community has been willing and able to come to actual restrictions on and/or effective regulation of international trade, investment and production in favour of sustainability and development related goals and a more fair and just international economic system have so far remained few and far between. Whereas:

> "[t]*hose rules that favour global market expansion have become more robust and enforceable in the last decade or two*"; "[r]*ules intended to promote equally valid social objectives, such as poverty reduction, labour standards, human rights or environmental quality, lag behind and in some instances have actually become weaker*".[15]

Accordingly, it has been noted in this respect that: "[t]*rade has been globalised – justice not yet*".[16]

The WTO, for example, through which states basically shape, maintain and where necessary impose restrictions on the international economic system, has as its main objective the liberalization of international trade; as such, its regime may restrict rather than encourage states to deploy trade measures in the pursuit of other objectives, such

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12 Compare, for instance, Dine 2005, pp. 68-76, who notes that "[t]*he primacy of nation states in international law creates obstacles to regulatory processes*" (p. 68) and depicts the nation state as a 'moral deflection device' when it comes to assuming responsibility for the downsides of the contemporary international economic system.

13 See, for instance: McGrew 2008, pp. 23-29; Stiglitz 2006, p. 20.

14 See, for instance, Pogge 2001, pp. 17-22, who states, *inter alia*: "*In many ways, our global order is disadvantageous to the global poor by sustaining oppression and corruption, and hence poverty, in the developing world.* […] *To be sure, the global poor have their own governments. But almost all of them are too weak to exert real influence on the organization of the global economy. More important, these governments have little incentive to attend to the needs of their poor compatriots, as their continuation in power depends on the local elite and on foreign governments and corporations*" (pp. 21-22).

15 Ruggie 2002, p. 30.

16 Van Dam 2008, pp. 17-21.

as poverty reduction, protection of the environment or advancing human rights.[17] At the same time, multilateral treaty regimes addressing global issues such as poverty, inequality, depletion of resources, climate change, etc. have been notoriously hard to conclude due to a lack of state consensus as a result of diverging national interests; where international agreements are realized, they often provide vague statements of (good) intention more than anything else.[18] Even in the international human rights field, where after the Second World War a number of broadly supported and fairly specific instruments have been endorsed, such as the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the implementation and enforcement of their provisions ultimately remains a state matter.[19]

1.1.2 The rise and rise of multinational corporations

The last decades have seen a significant growth in numbers, size and impact of internationally operating business enterprises around the world. Economic globalization and the accompanying boost of international trade and investment have simultaneously opened the door to and been fuelled by an increasing number and variety of global business actors that conduct their business operations through increasingly complex global systems of production. In search of natural resources, low production costs through cheap labour and/or produce, and favourable market conditions, these internationally operating business enterprises allocate their business activities and production processes to those locations where they can be performed or produced most efficiently and cost-effectively. As a result, many production processes today involve highly integrated transboundary webs of buyers, suppliers, joint venture partners, parent companies, subsidiaries and other types of affiliates and business partners, both of a private and of a public nature.[20] In today's world, the activities of internationally operating business enterprises "[...] *have a profound and incredible impact on the economy and development of nations, the global environment, and the lives of citizens*".[21]

The business actors that have arguably most readily adapted to our contemporary globalized world are multinational corporations,[22] which are set apart from other

17 Compare, generally, Nollkaemper 2009, pp. 323-354. See also: Amoa 2011, pp. 216-225; Dine 2005, pp. 76-79.
18 Compare, for instance: Braithwaite & Drahos 2000, pp. 294-295.
19 Compare, for instance: Van Dam 2008, pp. 23, 29-32;
20 See, for instance: Mullerat 2010, pp. 85-89 and Dine 2005, who discusses "[...] *the central role played by companies in globalisation and international trade*" (pp. 10-32).
21 Mullerat 2010, p. 85.
22 The term multinational corporation, or multinational, has a number of synonyms, such as multinational enterprise and transnational corporation, that refer to roughly the same concept, although exact definitions vary. According to the website of the United Nations Conference on Trade and Development (UNCTAD): "[a] *transnational corporation (TNC) is generally regarded as an enterprise comprising entities in more than*

internationally operating business enterprises by their particular group structures and investment patterns. Typically, multinational corporations conduct the majority of their transboundary activities through foreign direct investments;[23] as such, their operational webs are primarily made up of direct investor enterprises that are connected to dozens (or hundreds) of other separately incorporated enterprises around the world through links of ownership and control.[24] Equity-based international group structures allow multinational corporations' parent companies/head offices to exercise top-down managerial influence and control over (the activities of) their foreign subsidiaries. This enables them to pursue common strategies and to implement coherent policies throughout their groups, while formally retaining separateness, a feature that makes multinational corporations uniquely suitable for dealing with the economic and regulatory realities of today's globalized world.[25]

At the same time, however, it has to be noted that the distinction between multinational corporations as such and other types of internationally operating business enterprises is in reality not always very sharp. Multinational corporations, traditionally defined as companies that own assets located in the territories of more than one state, either directly or through wholly-owned or partly-owned subsidiaries, and that operate on an integrated basis subject to the overall management of the parent company, may at one point have been the main corporate players in the international arena. However, internationally operating business enterprises are typically able to creatively adapt their organizational and legal structures to the diversity of market-related, functional and regulatory requirements and challenges they may be faced with.[26] Thus, over time and under the influence of changing international investment patterns and management techniques, "[…] *the management*

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one country which operate under a system of decision-making that permits coherent policies and a common strategy. The entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the others and, in particular, to share knowledge, resources and responsibilities with the others", <www.unctad.org/Templates/Page.asp?intItemID=3159&lang=1>.

23 According to the definition of the Organization for Economic Cooperation and Development (OECD), foreign direct investment is "[…] *a category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise.*" According to the OECD-definition, such a relationship exists when the parent company holds, directly or indirectly, 10% or more of the voting power of the foreign subsidiary. See the glossary of foreign direct investment terms and definitions on the OECD website: <www.oecd.org/dataoecd/56/1/2487495.pdf>. This reading of the notion is fairly common, as is also evident from the UNCTAD website: <www.unctad.org/Templates/Page.asp?intItemID=3146&lang=1>.

24 For further detail on the role of foreign direct investments in the contemporary international economic system, see Dine 2005, pp. 22-26.

25 See, for instance, Muchlinski 2007, pp. 5-8. See also Dine 2005, pp. 43-53, who notes that: "[m]*ultinational and transnational companies do not exist as an entity defined or recognised by law. They are made up of complex structures of individual companies with an enormous variety of interrelationships*" (p. 48). Dine depicts companies and (multinational/transnational) corporate groups as moral deflection devices that are used to provide ethical 'loopholes'.

26 Compare Muchlinski, 2007, pp. 45-46, 51-52.

structures of international commercial enterprises have become increasingly diverse".[27] As a result, the range of popular international organizational structures is expanding and contract-based arrangements, such as franchises, licences, joint ventures, and distribution arrangements more and more often complement or take the place of equity-based arrangements.[28]

Accordingly, in today's international economic arena there are in practice many types of international business structures, whether equity-based or non-equity-based, within which operations are coordinated through the exercise of a significant measure of influence or control by one company over others.[29] Still, it has to be noted that even where multinational corporations are involved, the degree of centralized control exercised by multinational corporations' parent companies over their foreign affiliates differs from group to group. After all, the extent to which parent companies may actually influence their subsidiaries' day-to-day activities is dependent for instance on each group's institutional set-up and on actual internal policies and practices.[30] It has to be noted in this respect that it is also becoming increasingly common for multinational corporations to move, where circumstances so require, from a more hierarchical and centralized organizational structure to more heterarchical, decentralized and open organizational structures.[31]

Multinational corporations are today some of the biggest, most numerous and most influential players in the global arena.[32] According to recent estimates, there are currently some 80,000 parent companies of multinational corporations worldwide, which together own around 800,000 foreign affiliates; about three-quarters of these parent companies are located in developed economies, whereas the majority of their foreign subsidiaries are located in developing economies.[33] It is a well-known fact that the annual turnover of the

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27 Zerk 2006, pp. 49-52.

28 Zerk 2006, pp. 49-52.

29 Zerk states in this respect concerning control in non-equity-based international business structures: "*Companies can also control each other in other ways. Franchising and distribution agreements will often contain very detailed provisions as to how the contacted-out business is to be run, the performance of which is closely monitored by the grantor of the franchise or distribution rights. The need to manage risks associated with a long-term supply agreement may lead to a purchaser being given rights to be consulted on and to participate in certain of its supplier's business decisions, arguably another form of 'control'. 'Control' relationships may exist even in the absence of any express provisions in a contract: relative bargaining positions, surrounding market conditions such as the availability of alternative resources or suppliers, and the practicalities of enforcing laws and agreements may all affect the dynamics of commercial relationships.*"; Zerk 2006, p. 53.

30 It is possible for instance that a parent company only has a small equity interest in a subsidiary but may nevertheless be able to exercise substantial control over that subsidiary. Compare, for instance: Zerk 2006, pp. 52-53. Of course, the reverse is also possible: a parent company may have a substantial equity interest in a subsidiary, but in reality exercise only a limited measure of de facto control over the subsidiary's policies and day-to-day activities.

31 Compare Muchlinski 2007, pp. 45-51.

32 See, for an overview of the principal phases of growth of multinational corporations and explanations for their expansion: Muchlinski 2007, pp. 8-43. See also: Mullerat 2010, pp. 85-89.

33 UNCTAD World Investment Report 2009: Transnational Corporations, Agricultural Production and Development, Annex table A.1.8 ('Number of parent corporations and foreign affiliates, by region and

major multinational corporations exceeds the gross domestic products of many countries, especially those of developing countries.[34] Consider Shell and Nigeria, for example; Royal Dutch Shell was the world's second biggest company in 2010, according to the 2011 Fortune Global 500 list, with a total of $378.2 billion in revenues, whereas Nigeria's GDP in that same year amounted to almost half of that ($193.7 billion).[35]

It is often said that many of these multinational corporations "[…] *are powerful enough to set their own rules and to sidestep national regulation*".[36] Their political sway primarily derives from the benefits they bring to any country within which they are located (economic growth, revenues, jobs, development and innovation), in combination with the organizational flexibility and international mobility that typically enable them to seek out the most favourable establishment climate. Stiglitz notes in this respect that:

> "*If governments decide to tax or regulate them in ways they don't like, they threaten to move elsewhere. There is always another country that will welcome their tax revenues, jobs, and foreign investment*".[37]

According to Braithwaite & Drahos, "[t]*he global law-makers today are the men who run the largest corporations, the US, and the EC*".[38] This ability of multinational corporations to seek out the most favourable regulatory environment for their business activities is further enabled by the fact that from a legal perspective multinational corporations tend to be viewed not as entities but as complex structures of individual companies. Accordingly, each of these companies has a separate legal status from the other group companies and is subject to the rules and regulations of the particular country in which it is based, which means that the legal control of the multinational corporation as a whole and its transnational activities is fragmented among the different states in which business activities are undertaken by its individual group members.[39]

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economy, latest available year'), pp. 222-224. According to UNCTAD definitions, "[t]*ransnational corporations are incorporated or unincorporated enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owing a certain equity capital stake.* […] *A foreign affiliate is an incorporated or unincorporated enterprise in which an investor, who is resident in another economy, owns a stake that permits a lasting interest in the management of that enterprise* […]" (<www.unctad.org/Templates/Page.asp?intItemID=3148&lang=1>).

34 Similarly, for instance: Mullerat 2010, pp. 85-89; Muchlinski 2007, p. 3; Stiglitz 2006, pp. 187-188.

35 See the CNN website (<http://money.cnn.com/magazines/fortune/global500/2011/full_list/>) and the World Bank website (<http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>), respectively.

36 Muchlinski 2007, p. 3.

37 Stiglitz 2006, p. 188.

38 Braithwaite & Drahos 2000 (p. 629).

39 Similarly, for instance: Dine 2005, pp. 43-53.

The continuing rise in power of multinational corporations vis-à-vis the states in which they operate is looked at suspiciously by many commentators, as it is feared that economic globalization and the contemporary international economic system have created:

> "[...] *a climate in which dominant corporations are enjoying increasing levels of economic and political clout that are sometimes out of balance with the tangible benefits they provide to society*".[40]

One of the main concerns is that in their pursuit of profits and favourable regulatory environments, multinational corporations exercise downward pressure on regulatory standards in their states of residence as well as in states that aspire to attract foreign investments. Developing host countries, in particular, may be incentivized to engage in a 'race to the bottom' vis-à-vis other states, lowering national regulatory standards on matters such as health and safety, the environment, human rights, etc. in order to promote foreign trade and attract foreign investments, often to the detriment of their own citizens. Matters are made worse by the fact that bribery and corruption are often endemic in these states, contributing to a societal environment in which governments and local elites are enabled and encouraged, in pursuit of their own, private (financial) interests, to make the needs of their citizens and compatriots subservient to the demands of foreign investors.[41] At the same time, in multinational corporations' developed home countries corruption and bribery have largely been replaced by corporate lobbying and political campaign contributions as equally (sometimes even more) effective ways for companies to substantially influence government policies.[42]

Next to their significant influence on the domestic policies and regulatory environments in the home and host countries in which they operate, multinational corporations' powers also extend to the international level. They are often said to be able to exercise substantial influence over the realization and design of international trade agreements, as well as over other subject matters on the international agenda that may somehow affect their worldwide activities.[43] Tell-tale examples include multinational corporations' direct participation in international standard setting in some sectors, such as the telecommunications sector, but also corporate attempts to avert international regulation like an international regime on greenhouse gas emissions at the Kyoto climate conference in 1997 and thereafter.[44] In fact, notwithstanding the fact that states remain the principal

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40 See, with further references: Mullerat 2010, pp. 87-88 and Dine 2005, p. 47.

41 See, for instance, Van Dam 2008, p. 18; Stiglitz 2006, p. 196; Dine 2005, pp. 47-51, 222. See also, however, Zerk 2006, p. 45, who notes that "[d]*espite the level of media attention given to allegations of abuses by multinationals, there is no agreement as to whether the presence of multinationals causes the overall social and environmental standards in host states to rise, to fall or to stay the same*" (citations omitted).

42 See, for example: Stiglitz 2006, pp. 191-192; Dine 2005, pp. 27-31. See also, elaborately: Reich 2007, pp. 131-167.

43 Stiglitz 2006, p. 197. See also, generally: Braithwaite & Drahos 2000, in particular pp. 488-494.

44 See, respectively: Braithwaite & Drahos 2000, pp. 322-359; Breder, Brown & Vidal 1997.

subjects of public international law and the only ones to possess full rights and duties on the international plane, multinational corporations may be said to have acquired a *status aparte* within the international arena, including certain directly enforceable rights under public international law.[45]

In their capacity as international investors, for example, multinational corporations are the primary subjects of bilateral investment treaties (BITs) between the home and host states within which they operate, through which the terms and conditions are set under which home state private actors can invest in the host state economy; in addition, they may conclude private investment contracts with the host countries involved. Under these instruments, which usually allow the corporate actors involved to pursue international arbitration claims against the host state if they feel their rights and interests have been violated, multinational corporations are protected from host state measures that might diminish the value of their foreign direct investments in that state.[46] The use of these instruments has received criticism, however, for potentially restricting the scope for host states to raise domestic standards on matters such as labour, health and safety, the environment and human rights, at least vis-à-vis the multinational corporations involved.[47]

1.1.3 Tales of international corporate misconduct

In today's globalized world, shaped by notions of free markets, free trade, privatization and deregulation, and due to the fragmented nature of state control over their transnational activities, multinational corporations (as well as other internationally operating business enterprises) find themselves with a freedom of action that is restricted only to a very limited extent by legal rules and regulations.[48] In line with the fact that the contemporary international legal order continues to view states as the primary bearers of international rights and duties, it is traditionally assumed that multinational corporations in their capacity as private, non-state actors do not in principle have any direct duties under public

45 See, for example: Nollkaemper, 2009, pp. 55-57.

46 US-based oil multinational Chevron, for example, successfully filed arbitration claims against Ecuador, alleging that it violated a US-Ecuador BIT by allegedly delaying rulings in a civil dispute before its courts not unlike the civil lawsuit against Shell discussed at the outset of this chapter. See the website of the Business & Human Rights Resource Centre for an overview of the civil lawsuit, including reference to the arbitration between Chevron/Texaco and Ecuador: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador>. See also: Muir Watt 2011, pp. 347-349.

47 One of the concerns is that the use of so-called 'stabilization clauses' in private investment contracts between multinationals and host states may create obstacles to applying new social and environmental legislation to investment projects in the host state. See, elaborately: IFC/UN Report (Shemberg) 2008. See also, for instance: Nollkaemper 2009, p. 345; Van Dam 2008, pp. 19-20.

48 See, for instance: Van Dam 2008, pp. 17-22.

international law.[49] This means that in the still prevailing territorially-based international order of separate sovereign nation states, it is up to individual states to deal with those arms of multinational corporations that are located within their territories and to legally regulate those corporate activities that take place within their borders. It is true that this status quo is subject to change, as is evidenced by the slowly but steadily growing number of international norms, especially in the international human rights field, that are considered to be able to directly bestow rights and impose duties on private actors.[50] Still, the few norms of public international law that can at present be said to apply directly to corporate actors tend to rely on domestic legal mechanisms for their enforcement, as there are currently no international fora in existence before which corporate violations of such norms can be addressed.[51]

As mentioned, the consequence is that multinational corporations and their transboundary operations are typically subjected to a geographically fragmented patchwork of legal rules and regulations that generally vary from one country to the next as different countries make different policy choices in this respect. This, in combination with their political clout and organizational mobility and flexibility, enables these multinationals to largely shape the transnational regulatory reality within which they conduct their operations, and to seek out those regulatory circumstances that allow them to pursue maximum profits with a minimum of restrictions on their international freedom of action.[52] Dine notes in this respect that:

> "*So far as companies are concerned, they benefit both from national laws which permit groups of companies to operate as a power block while treating them in law as separate companies and operations, and international laws which impose difficult jurisdictional barriers between the different component companies in groups so that it becomes exceptionally difficult to call companies to account for any wrongs that may be committed*".[53]

Increasingly, however, this status quo, in which the regulation of multinational corporations (and other internationally operating business enterprises) and their transboundary activities is left largely to market processes and local rules, is perceived to be unsatisfactory and even problematic as it may lead to undesirable and even unjust results. It is common knowledge that markets are not infallible and it has been suggested

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49 Note, however, that this basic assumption is increasingly being challenged, for instance by developments in the field of human rights, with the growing acceptance worldwide that there may be such a thing as corporate responsibilities under public international law for human rights violations. See, more elaborately on the role of multinational corporations under international law: Zerk 2006, pp. 60-103. See also: Alston 2005.

50 See, for instance: Nollkaemper 2009, pp. 47-60.

51 See, for a detailed study of corporate liability under public international law: Stoitchkova 2010.

52 See, critically: Dine 2005, pp. 43-90; Addo 1999, pp. 9-12. See also *supra* sub-section 1.1.2.

53 Dine 2005, p. 45.

that "[...] *the inequality seen in the international market is unjust and should be classified as a market failure*".[54] A related, more 'classical' source of market failure is that of externalities, which may occur where activities have consequences for which the private actors engaging in them do not pay the costs (or receive the benefits). This may lead to a misalignment between private incentives on the one hand and social costs (and benefits) on the other, for instance when companies are not incentivized to bear the full costs resulting from their operations where the legal rules that apply to them and their operations do not specifically require them to do so. In the international arena in particular, where free trade and free markets encourage internationally operating business enterprises to seek out the most favourable regulatory environments in their pursuit of low costs, low prices and maximum profits, there may be insufficient incentives for these companies to internalize all of the costs ensuing from their production processes (and subsequently pass those costs on to their buyers/consumers through higher prices).[55]

And, indeed, the past decades have shown that whereas multinational corporations have spread around the world many of globalization's benefits, including jobs, innovation and improved overall levels of welfare, they have also imposed costs, not only on societies as a whole but also on particular individuals and groups of individuals living within those societies.[56] Due to ever-advancing information and communication technology, modern media, and a growing network of internationally active NGOs, increasing numbers of incidents involving corporate wrongdoing all over the world have been reported and have been taken cognizance of by growing audiences worldwide.[57] Notorious examples include the 1984 Bhopal disaster in which a poisonous gas cloud leaked from a pesticide plant in Bhopal, India (owned by an Indian subsidiary of US-based Union Carbide Corporation, now part of Dow Chemical), killing tens of thousands of people living in its vicinity;[58] clothing and shoe manufacturers such as Nike which permit extremely poor labour conditions in the factories ('sweatshops') of their overseas suppliers;[59] and the alleged involvement of US oil company Unocal in human rights violations perpetrated by the

54 Dine 2005, pp. 1-40, 65-68 (quote p. 65).

55 Compare, for instance: Van Dam 2008, pp. 17-18; Stiglitz 2006, pp. 188-197; Dine 2005, pp. 41-96.

56 Similarly, for instance: Mullerat 2010, pp. 89-92.

57 A good example of the growing transparency and body of information available in this respect is the increasingly elaborate website of the Business & Human Rights Resource Centre, which tracks and reports both the positive and the negative human rights impacts of more than 5,100 companies around the world: <www.business-humanrights.org>.

58 See, for a discussion of this disaster and its legal aftermath: Cassels 1991. See also the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuits regulatoryaction/LawsuitsSelectedcases/UnionCarbideDowlawsuitreBhopal>.

59 See, for instance, the Global Exchange website: <www.globalexchange.org/sweatfree/nike/faq>. The international campaign against Nike on this matter eventually even led to the involvement of the US courts, as is further elaborated, for instance, on the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/NikelawsuitKaskyvNikeredenialoflabourabuses>

Burmese military government during the construction of a local gas pipeline.[60] More recently, incidents such as the 2006 dumping of hazardous waste in Abidjan, Ivory Coast, by a local disposal company entrusted with the waste by petroleum trading multinational Trafigura,[61] and the profoundly detrimental impacts of over 20 years of oil exploration activities in the Ogoniland region of the Nigerian Niger Delta (as spotlighted by the aforementioned UNEP report),[62] have provoked disapproval around the world.

These international accounts of corporate wrongdoing have highlighted the unwanted, unjust and potentially harmful – in some cases even disastrous – consequences of the global regulatory deficit with respect to multinational corporations (as well as internationally operating enterprises more generally) and their transboundary activities.[63] It has been noted that:

> "[…] *the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences* […] *provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation*".[64]

The ones hardest hit in this respect have been those living in developing host countries, where weak and/or corrupt governance structures and relatively lax local regulatory standards on matters such as labour, health and safety, human rights and the environment often all but invite multinational corporations to externalize part of the costs of their production processes and leave them to be borne by local citizens there. At the same time, however, it is precisely those lax regulatory standards that often allow the developing host countries involved to attract foreign direct investments and accompanying benefits in the first place, enabling them to compete with multinational corporations' developed home countries that usually feature much more demanding regulatory regimes.

Complicated moral issues may arise where the same business practices that are subject to an extensive web of rules and regulations imposing strict behavioural norms in developed home countries are left only sparsely regulated in developing host countries, potentially to the detriment of local citizens and/or the local environment.[65] The moral issues raised

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60 See, for an overview of the legal aftermath of these events, the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnocallawsuitreBurma>.

61 See, for an overview of the legal aftermath of these events, the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire>.

62 UNEP Report 2011. See also, more elaborately and with further references, the Introduction to part I of this study.

63 Compare UNHRC Report (Ruggie) 2006, pp. 3-4.

64 UNHRC Report (Ruggie) 2008, p. 3.

65 See, for instance: Kerr, Janda & Pitts 2009, p. 288-290; Dine 2005, pp. 48-49, 68-76.

by such 'double standards'[66] are most stark where production processes are carried out in host countries by or on behalf of multinational corporations (or other internationally operating business enterprises) in ways that would be absolutely inadmissible in the home countries in which the multinational corporations in question are based. Unfortunately, as is also evidenced by the growing stream of tales of corporate wrongdoing engaged in by multinational corporations (which may represent only the proverbial tip of the iceberg), examples abound in this respect of business practices exacting an unduly heavy toll on the health and safety, labour conditions and/or human rights of local employees, local communities and/or the local environment in the host countries involved. The most precarious examples include situations in which internationally operating business enterprises become involved (directly or indirectly) in human rights violations (e.g., forced labour, child labour, violations of the right to life, torture)[67] or even international crimes (e.g., war crimes, crimes against humanity, genocide),[68] as well as other instances of blatant disregard for human and ecological well-being.[69]

Considering that the greater part of the benefits accrued by multinational corporations through their host country operations tends to flow back to their home countries, to the benefit of Western society shareholders and consumers in the form of higher profits and lower prices, the question may legitimately be asked in such cases whether those living in

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66 See, for instance: McCulloch & Tweedale 2004, who show that even as in the 1960s leading UK-based asbestos companies developed a sophisticated knowledge of asbestos-related diseases, this knowledge was not applied to their asbestos mining operations in South Africa where social and political factors, especially apartheid, allowed them to apply double standards; this practice continued even after 1960 when the serious hazard of mesothelioma was identified. See also, for instance: Corrêa-Filho *et al.* 2010.

67 Examples include the aforementioned alleged involvement by Shell in human rights violations perpetrated by the Nigerian military regime against local environmental activists protesting against the environmental impacts of oil operations in the Ogoni region of the Niger Delta in 1995 and by Unocal in human rights violations perpetrated by the Burmese military government during the construction of a local gas pipeline in the mid-1990s, as well as allegations against Firestone that the working conditions at its Liberian rubber plantation amount to forced labour and that the company profits from the use of illegal child labour. See for further examples the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/.

68 Examples include the alleged involvement by Talisman Energy in an armed campaign of ethnic cleansing by the Sudanese government against the non-Muslim Sudanese living in the area of Talisman's oil concession in southern Sudan that amounted to genocide and the (direct or indirect) involvement of internationally operating business enterprises in international crimes perpetrated in domestic conflicts in developing host countries such as Sierra Leone, Democratic Republic of Congo and Angola and/or by local authoritarian regimes (see, with further references: Stoitchkova 2010, pp. 2-4). See for further examples the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/.

69 Examples include the contribution by multinational corporations to widespread and severe environmental damage in host countries such as Nigeria (Shell), Ecuador (Chevron) and Papua New Guinea (Rio Tinto), as well as the authorization, condonation and/or operationalization of business activities in developing host countries that are known to involve excessive risks to human health, such as the aforementioned asbestos-mining activities in South Africa. See for further examples the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/.

developing host countries are in fact paying the price of the developed world's progress.[70] Dine, for instance, notes in this respect that:

> "[i]*t needs to be recognised that all of us living in comfort in the rich nations of the world are benefiting from the deeds of corporations regularly vilified in the anti-globalisation press*";

while adding that:

> "[m]*oral indignation about the terrible behaviour of some corporations* [...] *must not be allowed to obscure the fact that companies are designed by societies and their profits underpin much of our wealth. So when they strike bargains with evil regimes, repatriate their profits and sell us goods produced at low prices because of sweated or slave labour, this is not because of the inherent evil of the people that work in corporations but as a direct result of the legal design of corporations and the operation of the international legal system which provides them with many opportunities yet fails to regulate*".[71]

1.1.4 The challenge of global business regulation

In recognition of the potential moral issues involved in global business operations, multinational corporations' transnational activities, especially those in developing host countries with poor regulatory records on societal issues such as human rights, health and safety, labour, corruption and environmental degradation, have come under increasing scrutiny. NGOs in particular have been keeping close tabs on the impact of corporate practices on local citizens and communities as well as the local environment in those states, and have not hesitated to turn to the media in cases of alleged corporate misconduct. As a result, policymakers as well as investors, consumers and the public at large in some of the Western home countries where these corporate actors are based have also started to take note, a tendency that has led to increasing demands for greater transparency by internationally operating business enterprises on the impacts of their activities abroad.[72] In response, many of the larger and more 'visible' multinational corporations have undertaken or joined a growing variety of self-regulatory initiatives in order to somehow publicly account for the way in which they do business abroad.[73] Examples include the adoption of corporate codes of conduct by companies individually or collectively at branch or industry levels, the joining of reporting mechanisms such as

70 Dine 2005, pp. 1-96. See also, generally: Pogge 2008.
71 Dine 2005, pp. 3 and 44, respectively.
72 See, generally on the role of the media and on that of NGOs in this context: Mullerat 2010, pp. 269-275 and 301-306, respectively, as well as Kerr, Janda & Pitts 2009, pp. 35-38.
73 See, generally on the growing efforts to improve transparency by internationally operating business enterprises: Kerr, Janda & Pitts 2009, pp. 239-284.

the Global Reporting Initiative, and the implementation of corporate policies that seek to address the issues that may arise within the supply-chain.[74]

Despite these efforts, however, concerns remain over whether the combination of market mechanisms, local rules and multinational corporations' self-regulatory schemes provides a sufficient guarantee against corporate-related wrongs in this global context. Corporate self-regulatory initiatives are often dismissed as 'window-dressing' aimed at mollifying investors and consumers and staving off further state-based regulation, on the one hand, and criticized for their usual shortcomings as to substance, implementation and verification, on the other. The general feeling seems to be that without external guidance as to their contents and/or without external monitoring and enforcement, these self-regulatory initiatives, due to their often non-binding character, will not be able to bring about any meaningful improvements in the transnational activities of internationally operating business enterprises.[75] Concerns in this respect pertain particularly to the fact that whereas these mechanisms may have a positive effect on corporate 'leaders' in this context in stimulating and to some extent rewarding best practices, they do not provide sufficient incentives for corporate 'laggards' with poor human rights, labour, health and safety or environmental records to substantially change their ways.[76]

As discussed, the number of international legal instruments that adequately address the issues that may arise in this global business context is very limited. Those instruments that do exist typically address state rather than private actors and as such are dependent for their implementation and enforcement on individual states' ability and willingness to do so domestically.[77] International instruments that do directly address internationally operating business enterprises and their activities, such as the OECD Guidelines for Multinational Enterprises,[78] are typically soft law instruments and as such non-binding in nature, making compliance with the standards set out in them a matter of corporate discretion, at least in principle. Furthermore, with some exceptions such as the European Court of Human Rights and international commercial arbitral tribunals, international complaints procedures are generally open only to state complainants and not to the host countries' individuals actually suffering the detrimental effects of multinational corporations' transnational activities. Moreover, as a result of the state-centred nature of the international rules they seek to enforce, these international procedures typically only extend to complaints about wrongdoing by state or state-related actors.[79] This status quo may be subject to change, however, as is evidenced by the emergence of international

74 See on the role of self-regulation and codes of conduct in this context, for instance: Mullerat 2010, pp. 251-267; Jenkins 2001.

75 For more detail, see, for instance: Mullerat 2010, pp. 264-267; Kerr, Janda & Pitts 2009, pp. 93-99; Jenkins 2001, pp. 26-30.

76 Compare, for instance: Kerr, Janda & Pitts 2009, pp. 97-98; UNHRC Report (Ruggie) 2008, p. 4.

77 See *supra* sub-section 1.1.2.

78 OECD Guidelines for Multinational Enterprises, adopted in 1976 and updated in 2011. See further the OECD website: <www.oecd.org/dataoecd/43/29/48004323.pdf>.

79 See further: Zerk 2006, pp. 60-103.

criminal tribunals such as the Nuremberg Tribunal and the International Criminal Court, before which private actors may be tried for certain international crimes such as war crimes, crimes against humanity, genocide and torture. Still, for the time being, the statutes of these international tribunals typically only allow for the adjudication of claims against individuals (*i.e.*, natural persons), precluding jurisdiction over companies (*i.e.*, legal persons).[80]

Over the past few years, tales of corporate misconduct in combination with concerns more generally over the potential moral issues involved in global business operations and (the lack of) corporate accountability in this respect have given rise to growing calls for the introduction of more stringent, broader-based, institutionalized and legally binding regulatory mechanisms addressing the global operations of multinational corporations (and other internationally operating business enterprises) and the impacts thereof.[81] These calls, while primarily driven by NGOs, seem to be finding increasing public, scholarly and political support especially in Western societies and even some endorsement by corporate 'leaders' who seek to level the playing field by having their best practices turned into international norms.[82] Many suggestions on how to improve the global regulatory environment for internationally operating business enterprises and their activities have been made so far, ranging from the reformation of existing instruments and/or institutions (the WTO, for example) to the introduction of new ones, such as a world court with jurisdiction over multinational corporations or binding international standards for multinational corporations in specific subject matter areas.[83] So far, the most revolutionary proposals in this respect have concerned the human rights field, where would-be transformationalists have found receptive ground in the relatively large catalogue of fundamental and (near-) universal substantive human rights norms already available, along with a large body of influential non-governmental and inter-governmental organisations committed to endorsing these norms (including the United Nations, Amnesty International, etc.).

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80 See, for more detail: Stoitchkova 2010, pp. 12-18 and further.

81 Similarly: Kerr, Janda & Pitts 2009, pp. 30-31 and further; UNHRC Report (Ruggie) 2007, where it is noted, *inter alia*, that: "*There is no magic in the marketplace. Markets function efficiently and sustainably only when certain institutional parameters are in place. The preconditions for success generally are assumed to include the protection of property rights, the enforceability of contracts, competition, and the smooth flow of information. But a key requisite is often overlooked: curtailing individual and social harms imposed by markets. History demonstrates that without adequate institutional underpinnings markets will fail to deliver their full benefits and may even become socially unsustainable*" (p. 3, citations omitted). See also, for instance: Amao 2011, pp. 274-285; Mullerat 2010, pp. 372-377; 461-462; Černič 2010, pp. 253-269.

82 Compare, for instance: Van Dam 2008, pp. 22, 51-54.

83 For the proposals for a World Court of Human Rights, the jurisdiction of which would also extend over transnational corporations, see, for instance: UDHR Report (Scheinin) 2009. See on the potential convergence of the WTO and human rights, for instance: Amoa 2011, pp. 218-225; Jägers 2007. And see, on the failed UN attempts to formulate a binding set of human rights norms for internationally operating business enterprises, for example: Kinley, Nolan & Zerial 2007.

As a result of these developments, policymakers around the world and especially in multinational corporations' Western home countries are now finding themselves faced with the question of how to respond to these public calls for increased global business regulation. Coming up with a regulatory response that is compatible with contemporary societal, economic, political and legal realities is not an easy task, however. After all, as has been set out above, collective responses to global issues are scarce in today's world, where the process of economic globalization has far outpaced the development of global institutions able to deal with its consequences. In addition, multilateral cooperation in regulating internationally operating business enterprises with a view to limiting their adverse impacts on individuals, communities and the environment in different societies around the world is hampered significantly by the difficulties in reaching consensus between states with different national interests as a result of highly divergent levels of development, economic interests, political circumstances and regulatory potential. Unilateral state action, at the same time, is problematic in this international context especially in two respects. On the one hand, multinational corporations' inherent mobility and flexibility, as already discussed, enable them to steer clear of overly stringent regulatory environments, reducing the effectiveness of unilaterally imposed rules and regulations in this respect. On the other hand, economic interests render it of overriding importance for any state to provide internationally operating business enterprises with a favourable investment climate, and to promote the international competitiveness of its corporate citizens.

The consequence of these complicating factors is that despite existing concerns over the potential negative impacts of multinational corporations' operations in host countries, and despite the abundance of suggestions as to how to address the governance gap that exists with respect to internationally operating business enterprises and their worldwide activities, the actual development and implementation of adequate regulatory responses has lagged behind so far.

1.2 Corporate social responsibility and accountability in a globalizing world

1.2.1 Changing attitudes on corporate responsibilities

The developments described in the previous section coincide with an important shift in societal attitudes over the past decades as regards the role of companies in society, also in relation to that of governments. As far back as the Industrial Revolution, notions of *laissez-faire* and the idea that industry-related societal costs are the price society must pay for the benefits of economic growth and increasing welfare prevailed in most Western societies. In the following centuries, these notions were gradually abandoned in favour of the idea that it is in fact a government's task to actively protect society from those negative

side-effects of corporate activities that place an undue burden on society as a whole or on specific groups or individuals within that society. In today's world, notwithstanding the fundamental changes brought about by globalization, the point of departure is (still) that the promotion of the public interest and, to the extent considered necessary, the protection of private interests is the responsibility of the government of the state within the territory of which those interests or the interest bearers concerned are located.[84]

In reality, the actual level of protection against corporate-induced harms differs from society to society. In any particular society, a government makes its own determination as to which interests should be promoted or protected and at what cost, a determination that manifests itself in the rules and regulations it imposes on actors and activities within its boundaries. In any democratic state based on the rule of law, this balance of interests and the accompanying legal system will in principle reflect the majority opinion of its citizens; it is often remarked in this respect that "[i]*n a democracy, the people get the government they deserve*".[85] In less democratic states and/or in states with high levels of corruption, governments are typically much less sensitive to the wants and needs of their people;[86] at the same time, the rule of law is (much) stronger within some societies than within others.[87] And even apart from these factors, different societies make different decisions when it comes to entrepreneurial freedom of action versus protection against industry-related societal costs, according to each society's stage of development and accompanying socio-economic standards and general level of welfare enjoyed by its citizens. These circumstances are typically reflected in the regulatory standards that different societies impose on business actors and business activities locally. As has been discussed, regulatory

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84 See, for instance, on the congruence of states and the public domain in the Westphalian international system: Ruggie 2004, pp. 504-507, who also emphasizes, however, that this traditional system of global governance is subject to dramatic change as a global public domain is currently emerging that is no longer coterminous with the system of states.

85 The source of this popular statement is unclear, although it is often incorrectly credited to Alexis de Tocqueville. See, for instance: 'The people get the government they deserve', *The Big Apple* blog (8 February 2010), available at <www.barrypopik.com/index.php/new_york_city/entry/the_people_get_the_government_they_deserve/>.

86 The Democracy Index of the Economist Intelligence Unit provides an overview of the state of democracy in countries around the world, ranking some 170 countries based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture. See the latest ranking in the Democracy Index 2010, 'Democracy in retreat', available at <http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf>. Nigeria, for instance, is qualified as an 'authoritarian regime' and ranks 123 out of 167. See, for a ranking of states according to perceived levels of public sector corruption, Transparency International's Corruption Perceptions Index, the latest version of which is available at <www.transparency.org/policy_research/surveys_indices/cpi/2010>. In this index, Nigeria scores 2.4 on a scale from 0 (highly corrupt) to 10 (very clean).

87 The World Justice Project's Rule of Law Index assesses and scores the overall strength of the 'rule of law' in various countries on the basis of some 70 factors, organized under four overarching principles: accountable government; publicized and stable laws that protect fundamental rights; accessible, fair and efficient process; access to justice. See, more elaborately and with the latest assessment (2011), the website of the World Justice Project, <http://worldjusticeproject.org/sites/default/files/wjproli2011_0.pdf>. In Nigeria, issues affecting the effective rule of law include especially corruption, civil conflict, political violence, crime and vigilante justice: pp. 36, 82.

standards on matters such as human rights, labour, health and safety and the environment tend to be less strict in developing societies than they are in Western societies. But also in the latter, the past few decades have seen a general shift away from government interference in corporate activities, in favour of free markets, free trade, privatization and deregulation.[88]

Meanwhile, the powers and potential of business actors have grown exponentially since the Industrial Revolution, along with their impacts on the societies within which they operate. Around the world, business associations and corporate lobby groups are able to exercise an enormous influence on politicians and policymakers, both on and off the record. Goods, services and jobs developed, produced and provided by companies have come to play an indispensable role in the lives of all those living in today's industrialized societies; it has become impossible to imagine life without computers, mobile phones, televisions, cars, planes, etc. But along with benefits do come costs, in the sense that the growth of the business sector and the intensification and increase in scale of industry and corporate activity also give rise to increased and/or new risks of negative societal impacts that are somehow aggravated by or linked to the goods, services and jobs produced and provided and the industrial activities employed. New risks may lie for instance in the use of new technologies, materials or substances (or the application of existing ones in new ways or for new purposes) while their precise qualities and/or impacts on human health or the natural environment are not yet known, as may be the case for example with nanotechnology, and as has proven to be the case for example with asbestos.[89] And, as has been described, now that the activities of more and more business actors are going global, one way or another, so are their products, innovations, brands and jobs, as well as their impacts; multinational corporations in particular have come to rival states in terms of economic, political and societal domination.[90]

The rise of corporate impact both domestically and internationally, also against the background of what is generally perceived as poor and/or declining state power and authority, has given rise to discussion over the responsibilities that companies have towards the societies within which they operate. In principle, as private actors companies have the same rights and responsibilities as individuals do, at least to the extent that those rights and responsibilities are compatible with their status of legal persons rather than natural persons. Business corporations are independent legal entities with their own assets, privileges and liabilities that exist separately from their shareholders, whose liability for the debts of the company is limited in principle to the amount paid for the ownership of

88 See *supra* section 1.1.

89 See, for instance: WRR Report 2008. See also, with respect to (liability for) asbestos-related diseases De Kezel 2012 and, with respect to the risks of the use of nanotechnology particularly in pharmaceuticals, food and consumer products, RIVM Report (Van Zijverden/Sips) 2008.

90 See *supra* section 1.1.

their share.[91] Especially in the Anglo-American tradition, business corporations are often said to have a responsibility to their shareholders only, a responsibility that is typically interpreted as requiring corporate executives to strive for maximum profits so as to optimize the value of shareholder investments, albeit within the boundaries of the rights and responsibilities attached to the legal status of the business corporations involved and any other rules that apply to corporate activities in the societies within which they operate. Other countries for instance on the European continent, by contrast, have over the past decades adopted so-called stakeholder-oriented models of corporate governance, which are geared more towards long-term value maximization and also take into account the interests of other corporate stakeholders such as employees and society as a whole.[92]

Societal attitudes towards business actors and their societal responsibilities have shifted significantly over the past decades.[93] Regardless of the particular corporate governance model adopted, in all Western societies the question whether business corporations in light of their increasingly pervasive societal role and impacts may be expected to take into account an even broader range of stakeholders whose interests may be detrimentally affected by their business activities, has become more prominent; to what extent do business actors have societal responsibilities that go beyond the responsibility to further the private interests of those directly involved in the corporation itself?[94] This development, which extends to both domestically and internationally operating business enterprises, has been particularly strong over the past two decades, encouraged by the growing public awareness and scrutiny of contemporary business practices that has been enabled by information made available to the general public in this respect by increasingly activist NGOs and through modern media and communication devices.[95] Still, Jenkins has noted in this respect that:

> "*In many ways* [this development] *is only the latest manifestation of a longstanding debate over the relationship between business and society. Since the rise of the corporation in its modern form in the late nineteenth century, this debate has ebbed and flowed, through periods when corporations extend their control and periods in which society attempts to regulate the growth of corporate power and corporations attempt to re-establish their legitimacy in the face of public criticism*".[96]

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91 For more detail, see, for instance: Armour, Hansmann & Kraakman 2009, pp. 5-16, discussing the five core structural characteristics of the business corporation: "*(1) legal personality, (2) limited liability, (3) transferable shares, (4) centralized management under a broad structure, and (5) shared ownership by contributors of capital*" (p. 5); Dine 2005, p. 48.

92 See, for instance, with further references: Eijsbouts 2011, pp. 48-51; Eijsbouts 2010, pp. 49-60; Donaldson & Preston 1995; Lynch Fannon 2006, pp. 424-428. See also *infra* sub-section 1.2.2 and sub-section 7.2.1.

93 See, for example: Zerk 2006, pp. 7-59.

94 See, generally, for instance: Mullerat 2010; Eijsbouts, Kristen et al. 2010a; Reich 2007, pp. 168-208.

95 See, for instance: Jenkins 2005, pp. 526-528; Parkinson 1999.

96 Jenkins 2005, p. 526.

For a long time, the traditional view prevailed that companies' contribution to society lies in the very fact that by creating added value for their proprietors, they create added value for society and that the unfettered pursuit of self-interest by corporate actors through free markets and free trade would eventually lead to optimal results not only for business actors but also for the societies within which they operate.[97] Since the 1960s and 1970s, however, it has become more and more common, especially in Western societies, to expect companies' contributions to society to go beyond their narrow purpose of serving their proprietors' private interests by generating optimal profits while staying within the confines of the law. Companies, when determining their business strategies, leading their business operations and taking their business decisions, are increasingly considered to have a responsibility to take into account a broadening range of private and public interests that could potentially be affected by those strategies, operations and decisions, even where such interests are not expressly protected through government-imposed regulations.[98]

1.2.2 Contemporary debates on corporate social responsibility

These changing attitudes to business actors' societal responsibilities have resulted in increasing socio-political pressure on companies, especially in Western societies, to operate in a socially responsible manner by integrating in their operational management consideration of the impact that their activities may have on people- and planet-related interests and concerns, and to account for the way in which they do so. As already mentioned, many companies, especially those with highly visible public profiles, have responded to this pressure by laying down their own ideas on responsible business practices and their core values in corporate codes of conduct.[99] Dispute persists, however, as to the extent to which companies may be expected to set aside their own private interests for the benefit of those of others and/or for the public good. Or, in other words: how should companies balance their main aim and private interest, the pursuit of profits, against broader people- and planet-related interests?[100]

It is this very dispute that lies at the basis of today's socio-political debates on corporate social responsibility (CSR), which have domestic politicians, policymakers, business representatives, NGOs, especially those from the environmental, labour and human rights fields, and other civil society actors crossing swords over what makes

97 See, for a classical expression of this traditional view on the social responsibilities of business actors: Friedman 1970.

98 See, for instance: Eijsbouts 2011, pp. 32-37; Mullerat 2010, pp. 63-71; Addo 1999.

99 More elaborately on the legal aspects of such corporate codes of conduct: MacLeay 2006; Kolk & Van Tulder 2005; Murphy 2005; Behrman 2001.

100 The concept generally referred to in this context is the so-called 'triple bottom line' of 'people, planet, profit', which is often used to refer to the growing public expectation that business actors integrate environmental and societal considerations into their business practices, next to financial/economic considerations. See, more elaborately, Mullerat 2010, pp. 149-154 and Kerr, Janda & Pitts 2009, p. 24.

corporate behaviour socially responsible and the roles of governments, business actors and other private actors in realizing it. These debates have typically been spurred on by the perceived need to address societal and global issues such as inequality, climate change, depletion of resources, poverty, disease, environmental degradation, conflict, corruption and fundamental rights violations. As such, their primary focus has been on a range of interests, values and goals that goes far beyond those internal to or directly associated with any business association's core business; the main CSR stakeholders are generally considered to be all those potentially affected by the operations of the companies concerned, such as local communities or individuals, neighbours, employees, but also society at large and communal concerns such as the environment. Accordingly, CSR debates are to be distinguished from contemporary debates on corporate governance, in which the corporate interest and the internal interrelationships between those involved in its management and control (primarily: shareholders and directors) are at the centre. There is a certain degree of overlap between the two notions, however, depending also on the particular definition of corporate interest that is adopted and the position that is assigned to non-shareholder stakeholders (employees, creditors, etc.) in each legal system.[101]

One of the main questions to be answered is what the relationship is between the notion of corporate social responsibility and the law.[102] As discussed, the protection and/or promotion of CSR-related interests, values and goals may already be taken into account in government-imposed legal rules and regulations, to an extent that varies from society to society. In addition, many companies themselves, through corporate codes of conduct and/or through other voluntary initiatives, such as the adoption of best practices, adherence to guidelines or membership of reporting initiatives, already seek to address the issues and meet the societal expectations that exist in this respect. The primary point of contention underlying today's CSR debates, however, is to what extent corporations may be expected to give precedence to people- and planet-related interests where to do so would run counter to their overall goal of profit-maximization, especially if such expectations are based on moral or ethical considerations but not on legal obligations. It is this matter that keeps the participants to the debates divided, with business actors on the one side, civil society actors such as environmental and human rights NGOs on the other side and politicians and policymakers somewhere in between, also depending on the particular political creed and/or official position of the institutions they serve.

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101 See, for instance: Walsh & Lowry 2011. See also Eijsbouts 2011, pp. 42-45, who supports the view that the corporate governance concept should be seen as encompassing the concept of corporate social responsibility. See further sub-section 7.2.1.

102 See, for instance: McBarnet 2007. Some other recent volumes that go into the legal aspects of corporate social responsibility include Mullerat 2011; Amao 2011; Mullerat 2010; Lambooy 2010; Kerr, Janda & Pitts 2009; McBarnet, Voiculescu & Campbell 2007; Zerk 2006; Dine 2005.

It is at this point that a distinction may be made between the notions of corporate social responsibility and corporate accountability. Mullerat notes on these two closely interrelated concepts:

> "*Corporate 'responsibility' and corporate 'accountability' are very often used interchangeably. When a corporation acts 'responsibly', it means the company is conducting its business activities in a reliable, trustworthy, and credible manner. 'Accountability', however, means corporations must adhere to regulatory or legal requirements or otherwise be held liable or face sanctions. The fundamental difference between the two concepts is that corporate 'accountability' requires independent oversight and enforcement mechanisms to ensure compliance, whereas corporate 'responsibility' traditionally relies on voluntary self-regulation*".[103]

Together, these two concepts potentially cover a range of societal expectations with respect to corporate conduct, some of which may have a more normative dimension, while others have a more operational dimension. Legal obligations arising in this context tend to be connected primarily with the notion of corporate accountability, however, which tends to focus on the legal enforcement of normative standards on corporate social responsibility that apply to business actors at any given place and time.[104]

In the end, the CSR movement raises all sorts of questions as to the actual and ideal division and delineation, both within any particular society and globally, of responsibilities for the protection and/or promotion of societal (both private and public) interests between governments, business actors and other private actors. To what extent, for example, can a multinational oil company such as Shell be expected to take costly extra measures to prevent future oil spills from their pipelines in the Niger delta (whether a result of wear or of sabotage) where the law does not require them to do so? Or, in other words, to what extent are companies morally obliged to take account of private and/or public interests (potentially) impacted by their operations, where those interests are not protected by governmentally imposed and/or enforced rules and regulations? Similarly, to what extent is each state's government free to set its local regulatory standards, meant to protect local interests with respect to health and safety, the environment, labour, etc. against interference for instance as a result of local business activities, as high or as low as it considers opportune? Is there any minimum level of protection for local private and/or public interests that derives from international environmental, labour or human rights conventions, for example, and what are the responsibilities of companies as well as of other states if the obligations arising out of such instruments are not implemented and/or enforced locally?

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103 Mullerat 2010, p. 55.

104 Compare, for instance: Kerr, Janda & Pitts 2009, pp. 27-29; Eijsbouts, Kristen *et al.* 2010b, pp. 23-31. See further section 7.2.

A further question is to what extent Shell's shareholders would or should be willing to sacrifice some of their proceeds in order to allow Shell to carry through self-imposed investments to further reduce the societal (e.g., environmental) impacts of its operations? To what extent should companies and those participating in them seek to contribute to or further CSR-related societal goals, both domestically and internationally, such as sustainability, justice and equality? Should the bonuses of its directors be linked to the group's sustainability performance, for instance? Should institutional investors and/or banks desist from investing in or providing credit to companies or projects that are or run the risk of becoming associated with human rights violations? At the same time, the question may be asked to what extent businesses may be expected to provide the public at large in their home countries, and in particular their investors, creditors and consumers, with information on the circumstances under which their operations are conducted and their products are manufactured in the host countries in which they operate.

The next question is obviously to what extent these home country stakeholders would be interested, as well as willing, to draw consequences from such information. Would Western society car drivers be willing, for example, to pay fifty eurocents extra per litre of petrol if that would be the consequence of requiring Shell to conduct its oil exploration operations in the Niger delta in a more environmentally-friendly manner by spending more money for instance on preventing oil spills as a result of corrosion and/or sabotage? Or would they drive on to the next petrol station where prices are lower because they do not similarly reflect the true private and public costs of the production process that starts with the extraction of oil from a source in a host country such as Nigeria and ends with the sale of petrol at a petrol station in, say, the Netherlands? These are but a few of the questions currently facing companies as well as policymakers and the general public especially in Western societies as a result of today's changing attitudes towards corporate responsibilities.

1.2.3 International corporate social responsibility and accountability

With the rise of economic globalization, the growing dominance worldwide of internationally operating business enterprises, and the increasing stream of information on corporate best and worst practices abroad, CSR debates in most Western societies have now become focused on issues of international corporate social responsibility and accountability. As they bring up for discussion the division of responsibilities between state actors, corporate actors and other private actors across and beyond national borders, these debates raise complicated issues of morality and justice in a transboundary/global context.[105] At the forefront of the discussion is the matter of double standards; what is to be expected of internationally operating business enterprises undertaking activities in host

105 Compare, for instance: Mullerat 2010, pp. 68-71; Jenkins 2005.

countries where environmental, health and safety, labour and human rights standards are much less strict than in the developed home countries in which these companies are based? To what extent are they or should they be under any moral or legal obligation towards host country stakeholders (local employees, neighbours, local communities, etc.) and home country stakeholders (consumers, financiers, investors) to adopt better practices than those strictly required locally and/or to provide a measure of transparency on the conditions under which the local operations are carried out? These issues arise in particular where business actors operating out of developed home countries have some or most of their business activities carried out, whether through local subsidiaries, local contractors or otherwise, in developing host countries and emerging economies where regulatory standards are significantly less stringent than in the home countries involved and/or poorly enforced.[106] One of the most extreme scenarios in this respect is the situation in which internationally operating business enterprises operate in authoritarian regimes such as the South African apartheid regime or the Burmese military regime, or in conflict-ridden or failed states where public authorities are incapacitated or absent altogether, such as has been the case in Sierra Leone, Democratic Republic of Congo and Sudan.[107]

Matters of international corporate social responsibility and accountability are particularly at issue where the transboundary activities of multinational corporations are concerned, chiefly due to the potential for top-down management and control over foreign subsidiaries that is inherent, at least in theory, in their international group structures. At the same time, however, there is a growing recognition of the fact that also beyond these group structures there are many possible situations in which Western society-based internationally operating business enterprises may somehow be able to exercise influence over business practices abroad of their foreign buyers, suppliers, joint venture partners or other types of foreign business partners. After all, it is very possible that a company that has a long-standing and close working relationship with its foreign suppliers, for instance, will in practice have more say over the way they conduct their local operations than a parent company may have over any of the foreign subsidiaries to which it is directly or indirectly linked.[108] In all these situations of close transboundary working relationships, whether equity-based or contract-based, between large and powerful internationally operating business enterprises based in Western societies and their local host country business partners, questions may arise as to the extent to which the former may be expected to at least be acquainted with the local business practices of the latter, and where necessary to exert their influence to ameliorate them.

It is in light of these contemporary questions of international corporate social responsibility and accountability that the civil claims against Shell that are currently pending before

106 Compare, for instance: Mullerat 2010, pp. 183-191.
107 Compare *supra* sub-section 1.1.3.
108 See *supra* section 1.1.

the The Hague district court, as discussed in the introduction to this part, should be understood, as well as similar civil lawsuits against (parent companies of) multinational corporations brought before courts in their home countries. Both in fact and in law (as well as in ethics) the question may be raised, for instance, to what extent parent company Royal Dutch Shell can and should use any influence it may have over the environmental policies implemented throughout the Shell group to try to improve the environmental performance of its Nigerian subsidiary.[109]

As has been discussed, the international CSR-related performance of multinational corporations and other internationally operating business enterprises is with increasing frequency a matter of discussion in Western society courts of public opinion, often with adverse consequences for the reputation and/or sales figures of the companies involved. In the clothing industry, for example, high-profile global retailers/manufacturers such as Nike, Reebok and GAP have been subjected to heavy criticism and in some cases even consumer boycotts on the basis of allegations of poor labour conditions at their host country (sub-) contractors' facilities.[110] Increasingly, it seems, such issues now tend to raise not only moral but also legal issues in the Western society home countries of the internationally operating business enterprises involved, as is exemplified for instance by the US case of *Kasky* v. *Nike*, in which Nike was sued in a California state court under Californian laws for unfair competition and false advertising with respect to allegedly false or misleading public statements it had made in reaction to allegations of poor working conditions in the factories of its overseas suppliers.[111]

Still, despite these developments, a more structural application of the law, either at the international level or at the level of individual nation-states, in order to tackle issues of international corporate social responsibility and accountability, has so far failed to materialize.

In the end, the best policy option for approaching issues of international corporate social responsibility and accountability would arguably be through international cooperation and standard-setting. After all, the imposition around the world of binding international standards for corporate conduct would result in a level playing field for the business actors involved and would as such take away their incentive to engage in regulatory arbitrage.[112] This option, however, has in reality yielded only limited results so far. The

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109 See also: Enneking 2010.

110 See, generally on CSR in the clothing sector: Mullerat 2010, pp. 333-334.

111 See, for more information and further references on this case, the website of the Business & Human Rights Resource Centre, VN<www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatory action/LawsuitsSelectedcases/NikelawsuitKaskyvNikeredenialoflabourabuse>.The case was eventually settled for $1.5 million, which was paid to the Fair Labor Association for programme operations and worker development programmes focused on education and economic opportunity.

112 The term regulatory arbitrage has been used to refer to the ability of multinational corporations, due to their mobility of capital, "[...] *to exploit regulatory differences between states by (re)locating (or threatening to relocate) their production facilities in countries with more favourable regimes*"; see, with further references,

almost insurmountable difficulties inherent in reaching the consensus necessary to arrive at international standards in this context were clearly exemplified by a failed UN-driven attempt in 2004 to formulate binding norms on the human rights-related responsibilities of transnational corporations and other business enterprises.[113]

In those instances where international consensus has been reached and has resulted in binding international standards on CSR-related issues, for instance on certain international environmental issues, the effects of the international legal norms involved for the private parties they seek to address and/or protect in practice remain largely dependent on each nation state's willingness and ability to implement and enforce those norms. After all, as was mentioned before, there are no international fora available at present before which multinational corporations can be held to account for their (involvement in) violations of international norms.[114] Thus in the end even internationally agreed fundamental human rights norms, which may under circumstances also generate behavioural standards for private actors (including business actors), in principle rely for their actual implementation and effectuation on the ability and willingness of any host country involved to protect, promote and ensure the rights of their citizens, and to legally enforce those standards against locally operating internationally operating business enterprises where necessary.[115]

As is also clear from what has already been discussed, however, due to corruption, poor governance structures, and/or weak rule of law, local authorities especially in developing host countries are in reality often unable or unwilling to adequately address infringements of the human rights of local citizens and/or communities as a result of those operations, let alone other negative impacts on local private and/or public interests (for instance the environment) that cannot as easily be labelled as violations of international human rights norms. In fact, it is not uncommon that local host country authorities are themselves closely associated with the violations of for instance human rights, environmental, health and safety or labour norms, not only by turning a blind eye to them, but sometimes also by actively participating in them. Examples abound of situations in which internationally operating business enterprises have become complicit in human rights violations perpetrated by local government troops or government enterprises in the host countries in which they operate.

As discussed, a growing number of these examples of corporate involvement in human rights violations perpetrated abroad are now being addressed in Western society courts of

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Jenkins 2005, p. 527.

113 UN Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003). In its resolution 2004/116 of 20 April 2004, the UN Commission on Human Rights expressed the view that the UN Norms, although containing useful elements and ideas, have no legal standing. See, more elaborately on these norms and the controversy surrounding them: Amao 2011, pp. 40-44; Mullerat 2010, pp. 387-401; Kinley, Nolan & Zerial 2007; UNCHR Report (Ruggie) 2006, §§ 56-69.

114 See supra sub-section 1.1.3.

115 See, for instance: Van Dam 2008, pp. 23-26, 29-32; Zerk 2006, pp. 60-103; Dine 2005, pp. 167-221.

law. This is exemplified for instance by the aforementioned US civil lawsuits against Shell for its alleged complicity in human rights violations perpetrated by the Nigerian military government and security forces against local environmental activists, and against Unocal for its alleged complicity in human rights violations perpetrated by the Burmese military regime in furtherance of the construction a local gas pipeline.[116]

With the expansion of contemporary CSR debates beyond the domestic setting, the issue of international corporate social responsibility and accountability has also become an item on the agendas of many international policy fora. International organizations such as the ILO and the OECD at an early stage of the discussion had already formulated non-binding guidelines concerning the transboundary activities of internationally operating business enterprises.[117] Since then, other influential international organizations such as the UN and the EU have also become involved. The UN started to join the discussion in the 1970s as the issue of business and human rights became a recurring item on the global policy agenda, and has since become one of the driving forces behind it, focusing in particular on the human rights impacts of internationally operating business enterprises.[118] Around 2000 the EU started to develop its own CSR policy, which initially focused especially on social responsibility of business within the EU, but has over time also increasingly come to encompass the international dimension of promoting CSR by EU-based internationally operating business enterprises operating in developing countries, in particular as a form of international policy in the sphere of development cooperation.[119] It should be noted that within the context of the WTO, on the other hand, which arguably provides a very suitable forum for debate on the drawbacks of economic globalization, policy considerations pertaining to issues of international corporate social responsibility and accountability have so far only played a very marginal role.[120]

The main driving force behind these socio-political debates on international corporate social responsibility and accountability, both at the domestic level in many Western

116 See the introduction to this part and *supra* sub-section 1.1.3. See the Business & Human Rights Resources Centre website for more information on the context of and legal proceedings in this case and related cases: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria>.

117 See, respectively: the ILO Declaration of Principles concerning Multinational Enterprises and Social Policy 2001 (adopted in 1977, amended in 1991 and 2001), available at <www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf> and the OECD Guidelines for Multinational Enterprises 2011 (adopted in 1976, last amended in 2011), available at <www.oecd.org/dataoecd/43/29/48004323.pdf>.

118 See, generally: Karlsson & Granström 2011.

119 See, for more detail: Amao 2011, pp. 61-66, 207-248; Voiculescu 2007. See also: Lux, Skadegaard Thorsen & Meisling 2011 for an overview of EU initiatives in the CSR-field and Mullerat 2010 for an overview of the EU institutions involved in the CSR-field (pp. 408-410).

120 One of the main focal points of the debate that has been taking place in this context is the actual and desirable scope of the GATT 1994's general exception clause article XX. See, on the possibilities for further integrating CSR-related and/or human rights-related policy considerations into the WTO framework, for instance: Amoa 2011, pp. 218-225; Jägers 2007; Dine 2005, pp. 191-199.

societies and at the international level, have been civil society actors and in particular NGOs such as Amnesty International, Greenpeace, Friends of the Earth, the European Coalition for Corporate Justice, etc.[121] Although some take a more activist stance than others, most of the NGOs involved advocate policy approaches to international corporate social responsibility and accountability that are to some extent mandatory in nature, in the sense that they do not leave the issue to corporate discretion alone. The internationally operating business enterprises concerned, on the other hand, along with international business associations and other representatives of the international business community, tend to favour approaches that leave them free to integrate consideration of societal and environmental concerns in their business operations on a voluntary basis, with a minimum of outside (policy) interference. Notwithstanding this corporate emphasis on voluntarism when it comes to issues of international corporate social responsibility and accountability, there are also some business actors, especially those with good track records when it comes to CSR performance, that would support the adoption of more mandatory CSR instruments at the international level to the extent that this would create a more level playing field for business operations around the world.[122]

Stuck in between the two opposing sides of the contemporary debates on international corporate social responsibility and accountability, and restricted in their policy scope by today's geopolitical and international economic and legal realities, Western society policymakers find themselves in a tight spot on this issue. Domestically, they are torn between the need to respond to societal calls for regulatory interference in order to ensure that 'their' internationally operating business enterprises operate in a socially responsible manner, both at home and abroad, on the one hand, and the need to safeguard domestic economic and trade interests by providing a favourable business climate to and promoting the international competitiveness of those internationally operating business enterprises, on the other. At the international level, they are faced with the difficulties typically inherent in global business regulation, as unilateral policy action in this respect risks being considered as a politically unacceptable extraterritorial interference in the domestic policies of any host countries involved, while reaching the international consensus required to come to any kind of multilateral agreement is typically highly problematic in this context. Still, contemporary socio-political and legal developments, both domestically and internationally, are slowly but surely increasing the pressure on home country policymakers to come up with ways to promote and ensure the international corporate social responsibility and accountability of 'their' internationally operating business enterprises.

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121 Compare, for instance: Mullerat 2010, pp. 301-306; Kerr, Janda & Pitts 2009, pp. 35-38.

122 See, generally on the so-called mandatory vs. voluntary debate on CSR, for instance: Mullerat 2010, pp. 369-385; Kerr, Janda & Pitts 2009, pp. 93-104.

1.2.4 Current developments

Considering the universal applicability, fundamental nature and moral appeal of international human rights standards, it is perhaps not surprising that the focus of the debates on international corporate social responsibility and accountability around the world is currently in particular on the impact that internationally operating business enterprises may have on human rights.[123] The main driving force behind the recent developments in this field is the UN, where human rights bodies (in 2006 the Human Rights Council succeeded the UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights)[124] have over the past years persistently worked on identifying, clarifying and furthering the development of standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights. As was mentioned in the previous subsection, an ambitious attempt in 2004 to formulate a definitive and comprehensive set of standards (the UN 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights') failed, as the UN Commission on Human Rights refused to endorse them. Rather than stalling the process, however, instead this gave rise to an important new incentive: the appointment in July 2005 of a Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.[125]

This Special Representative, Professor John Ruggie, has in the course of his mandate set out a policy framework for business and human rights that has been unanimously welcomed by the UN Human Rights Council.[126] This framework has found broad support worldwide and is now being endorsed, employed, invoked and/or drawn upon by international organizations, national governments, business enterprises and associations, NGOs and others around the world.[127] It rests on three pillars: firstly, the duty of states to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; secondly, the responsibility of companies to respect human rights, which means to act with due diligence to avoid infringing the rights of others and to address adverse impacts that do occur; and, thirdly, the need for greater access for victims of corporate human rights abuse to effective judicial and non-

123 See, for instance, on the interplay between CSR and human rights: Amao 2011; Prandi & Lozano 2011; Černič 2010.

124 The Human Rights Council was established pursuant to General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human Rights Council', UN Doc A/RES/60/251 (2 April 2006).

125 See, for the establishment and scope of the Special Representative's (initial) mandate: UN Commission on Human Rights Resolution 2005/69, UN Doc E/CN.4/RES/2005/69 (20 April 2005), available at <http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc>. See, more elaborately and also addressing the failure of the UN Norms, UNHRC Report (Ruggie) 2006.

126 UN Human Rights Council Resolution 8/7, UN Doc A/HRC/RES/8/7 (18 June 2008), available at <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf>.

127 Similarly: UNHRC Report (Ruggie) 2011, p. 4.

judicial remedies.[128] Following its publication in 2008, it has been further expanded and developed by subsequent reports in 2009 and 2010 and a set of Guiding Principles meant to operationalize the framework, which were endorsed by the UN Human Rights Council in July 2011.[129]

The UN policy framework on business and human rights, due also to its broadly-based support and following, has given new impetus to the existing debates on international corporate social responsibility and accountability around the world, taking them to a whole new level.[130] It has been noted in this respect that:

> "[...] *the work of the SRSG and the Protect, Respect and Remedy framework must so far, regardless of the enormous work that lies ahead to close existing governance gaps, be considered as a UN success story in its endeavor to increase the awareness of, secure a positive development on, and create a workable framework for the business and human rights field*".[131]

Due to the framework's open-ended approach to the range of internationally recognized human rights that may potentially be impacted by the operations of internationally operating business enterprises, it is also likely to find application and/or provide inspiration beyond the context of the human rights field and the core human rights obligations, for instance in the health and safety and environmental fields.[132] Importantly, many of the insights and recommendations laid down in the UN framework on business and human rights and subsequent reports have already found their way into international soft law instruments such as the OECD Guidelines for Multinational Enterprises (which were revised in 2011) and private initiatives such as the ISO 26000 international standard on social responsibility.[133]

Despite these significant developments, the contemporary debates on international corporate social responsibility and accountability have by no means been settled. Many controversies persist, which is not surprising considering the widely divergent

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128 This framework was set out in UNHRC Report (Ruggie) 2008 and elaborated in subsequent reports. For a more complete overview of the activities undertaken and reports published by John Ruggie in the course of his mandate, see the website of the Business & Human Rights Resource Centre, which has a special webpage on the UN Special Representative with further links and references: <www.business-humanrights.org/SpecialRepPortal/Home>.

129 UN Human Rights Council Resolution 17/4, UN Doc A/HRC/Res/17/4 (6 July 2011), available at <www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf>.

130 The significant impact that John Ruggie's work in this respect has had and is still having on CSR debates around the world and those engaged in them is widely recognized. See, for instance: Karlsson & Granström 2011.

131 Karlsson & Grandström 2011, p. 306.

132 For more detail, see section 7.3.

133 Karlsson & Granström 2011, pp. 305-306.

backgrounds, interests, objectives and concerns of their participants, and the complicated nature of the issues involved. Furthermore, although the UN 'Protect, Respect and Remedy' policy framework on business and human rights provides significant conceptual guidance, it leaves the further identification and development of concrete moral and/or legal norms and behavioural standards to be worked out by others. The one thing that has been made very clear, however, is that the issue of business and human rights is by no means purely discretionary and that further steps by both governments and business actors are required.[134] Consequently, as the debates on international corporate social responsibility and accountability are gaining more perspective, and as the scope of duties and responsibilities and their distribution between state and business actors is further elaborated, the pressure on Western society policymakers to take affirmative action in line with the currently existing socio-political attitudes towards corporate responsibilities, is mounting. NGOs and (particularly left-wing) politicians keep pushing, both at the domestic level in Western societies and internationally, for policymakers to take diplomatic, economic and legal measures in this respect. According to their supporters, such measures should be aimed in particular at promoting the integration by business actors of people- and planet-related concerns in their business operations both at home and abroad, increasing transparency on their performance in this respect, and ensuring that internationally operating business enterprises engaging in behaviour that is considered to be sub-standard are somehow held accountable.[135]

The European Coalition for Corporate Justice, for example, which represents over 250 civil society organisations from different European countries, is actively lobbying at the EU level for the introduction of new legal rules or changes to existing ones in order to improve the accountability of EU-based multinational corporations for human rights-related and/or environmental damage caused by their operations in host countries. They propose, among other things, changes to existing reporting requirements and existing rules of private international law, as well as the introduction of rules on parent company liability, the improvement of disclosure of information by EU-based multinational corporations and the mitigation of obstacles faced by victims of corporate abuses seeking remedies before courts in the EU Member States.[136] Their proposals have been subscribed to by 110 Euro-parliamentarians and 30 national parliamentarians, as well as 73,000 European citizens.[137] In the Netherlands, recent CSR-related policy proposals by NGOs

134 For further detail on this matter, see, for instance: Eijsbouts 2011. See further section 7.3.

135 Compare, for instance, Eijsbouts 2011, who contends that the view that "[...] CSR norms intrinsically are voluntary in nature and limited to the 'domain beyond the law'" should be dismissed (quote p. 27), and suggests three major revisions of existing systems of company law with a view to promoting corporate social responsibility: a pluralist approach to the notion of 'the interest of the company'; better alignment of corporate group law with economic and organisational reality; and the establishment of a system of multinational enterprise liability for corporate violations of fundamental rights of third parties (pp. 48-55).

136 See for instance: ECCJ Report (Gregor) 2010.

137 See for instance the website of the MVO Platform, a network of Dutch civil society organisations active in the CSR field: 'Ruim 73.000 burgers roepen EU op om duidelijkere regels te stellen voor bedrijven', 12 July

include, among many others, the institution of a CSR Ombudsman as well as a number of legal measures in order to enhance the access to justice before Dutch civil courts of host country victims of damage caused by Dutch multinational corporations.[138] At the same time, the Dutch parliamentary committee on Economic Affairs, Agriculture and Innovation in March 2011 organised a round-table meeting on CSR in West Africa, in which Shell was asked to provide some transparency on its business practices in the Niger delta, in connection with its allegedly poor environmental record there.[139] This hearing was followed up barely a month later by a round-table meeting in the European Parliament on the fight against corruption in the Niger Delta.[140]

In response to the mounting socio-political pressure on both business actors and Western society policymakers to promote international corporate social responsibility and accountability generated by these developments, various policy initiatives have recently been launched or are currently under consideration. These have included, *inter alia*, studies of the socio-political and legal frameworks defining the feasibility of existing and potential future regulatory regimes dealing with the transboundary activities of internationally operating business enterprises. The European Union's Enterprise and Industry Directorate-General, for example, in 2009 commissioned a study of the legal framework on human rights and the environment applicable to European enterprises operating outside the EU, with the aim of mapping corporate responsibilities in that respect,[141] while the Dutch Ministry of Economic Affairs funded research into the liability of Dutch multinational corporations for violations of human rights norms, labour norms and environmental norms abroad.[142] In the transparency-sphere, there is talk, for instance, of the possible Europe-wide introduction of rules leading to fuller disclosure of money flows between companies and governments.[143] The European Parliament in November 2010 adopted a resolution in which it called for, *inter alia*, the incorporation in future EU trade agreements of CSR clauses.[144]

2011, available at <http://mvoplatform.nl/news-nl/ruim-73-000-burgers-roepen-eu-op-om-duidelijkere-regels-te-stellen-voor-bedrijven/>.

138 See, for an overview of the opinions on this matter by the Dutch MVO Platform, a network of Dutch civil society organisations in the CSR field, the MVO Platform website: <http://mvoplatform.nl/publications-nl/Publication_3682-nl/at_download/fullfile>.

139 See, for instance: 'Dutch lawmakers grill Shell over Nigerian operations', *Daily Trust* online version (27 January 2011), <http://dailytrust.dailytrust.com/index.php?option=com_content&view=article&id=10877:dutch-lawmakers-grill-shell-over-nigerian-operations&catid=3:business&Itemid=3>. This study's author participated in this round-table meeting as a legal expert.

140 See: 'European Parliament to investigate problems in the Niger delta' (20 April 2011), available at the website of the European United Left/Nordic Green Left European Parliamentary Group (GUE/NGL): <www.guengl.eu/showPage.php?ID=9553&LANG=1&GLANG=1>.

141 EC Report (Augenstein) 2010

142 DMEAFA Report (Castermans/Van Der Weide) 2009.

143 MacNamara & Thompson 2011.

144 European Parliament report on corporate social responsibility in international trade agreements, 2009/2201(INI) (11 November 2010), available at <www.europarl.europa.eu/sides/getDoc.do?

The European Commission has in its current CSR strategy, which was released in October 2011, reversed its former policy approach to CSR as a matter of corporate discretion.[145] This is a significant development in view of the Commission's insistence over the previous decade that corporate social responsibility should be defined as:

> "*a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis*".[146]

By contrast, in the renewed EU strategy 2011-2014 the Commission has redefined corporate social responsibility as "the responsibility of enterprises for their impacts on society" and indicated that public that public authorities should play a supporting role in this respect through a smart mix of voluntary and, where necessary, mandatory regulatory measures. It has further indicated that it will implement the UN policy framework on business and human rights and will by the end of 2012 publish a report on its priorities in this respect, while also inviting the Member States to develop their national plans on implementation by the end of 2012.[147]

In fact, many of the Member States have already come up with domestic initiatives to promote corporate social responsibility both at home and abroad. Examples include, for instance, regulations adopted in countries such as Belgium, Germany and the UK requiring pension funds to reveal the ethical, environmental and social performance criteria, if any, they use in deciding which companies to invest in. In 2001, France was one of the first countries to introduce mandatory disclosure in the annual reports and accounts of publicly listed companies on social and environmental issues; also as a result of the European Modernisation Directive, most other European countries have now followed suit.[148] Another example is the Business and Human Rights Project that has been set up in Denmark, which seeks to combine academic expertise with the business community's practical knowledge on the subject of business and human rights, for instance through the development of a Human Rights Compliance Assessment. In Sweden a Partnership on Global Responsibility has been launched in order to promote cooperation between the government, the business community and sectors of society on CSR-related matters.[149]

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pubRef=-//EP//NONSGML+REPORT+A7-2010-0317+0+DOC+PDF+V0//EN>. See more elaborately on the matter of human rights clauses in EU trade agreements: Amao 2011, pp. 215-248.

145 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011).

146 Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, COM (2001) 366 final (18 July 2001). See, for more detail and further references, for instance: Enneking 2009, pp. 907-910. See also further sub-sections 7.2.2 and 7.3.2.

147 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011), pp. 7, 14.

148 2003/51/EC. See, more elaborately: Lambooy 2010, pp. 147-169.

149 See, for more detail on these and other CSR-related initiatives within the EU Member States and with

However, it will be very interesting to see what further steps the European Commission and the individual EU Member States are going to take in response to the UN policy framework on business and human rights, especially since that policy framework also makes clear that states do have a role in promoting business conduct that is in conformity with international human rights norms, not only at home but also abroad. It thus seems that the next few years will see interesting and crucial developments in the field of international corporate social responsibility and accountability.

1.3 Defining and enforcing corporate responsibilities through civil procedures?

1.3.1 Corporate social responsibility and foreign direct liability

Interestingly, it seems that civil courts may end up playing a key role in the provision of at least some clarity on the scope and existence of the responsibilities of internationally operating business enterprises with respect to their transnational activities, as well as in holding them to account for socially irresponsible behaviour abroad. Consistent with the idea that "*today's social or moral concerns are likely to be tomorrow's legal obligations*",[150] some of the issues raised in the debates on international corporate social responsibility and accountability that have been discussed in the previous section are now being addressed in courts of law, not only in host countries but also in the Western society home countries of the internationally operating business enterprises involved. One of the most significant developments in this respect is the trend towards foreign direct liability cases that was mentioned in the introduction to this part, of which the civil liability lawsuits against Shell that are currently pending before the The Hague district court are a recent example.[151]

Increasingly, host country individuals or groups of individuals who have suffered harm as a result of any negative side-effects of multinational corporations' local activities and who for some reason cannot obtain locally adequate redress for the harm suffered, turn to Western society home country courts to try to hold (the parent companies of) the multinational corporations involved accountable for their detriment. As has been mentioned in the introduction to this part, a steadily growing number of this type of civil liability lawsuit have been brought before courts in various Western societies over the past decade and a half. Zerk has noted in this respect:

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further references: Lux, Thorsen & Meisling 2011, pp. 340-348.

150 Addo 1999, pp. 13-14.

151 See on this development, for instance: See also, for instance: Kerr, Janda & Pitts 2009 pp. 293-303; McBarnet 2007, pp. 38-39; Zerk 2006, pp. 198-240; Mason 2005, pp. 154 *et seq.*; Joseph 2004; Ward 2002, 2001a, 2001b and 2000.

> "*The past decade or so has seen a sharp increase in the number of 'foreign direct liability' ('FDL') claims, that is, claims brought in home state courts that target, not the subsidiary, but the parent company as the apparent 'orchestrator' of company-wide investment standards and policies. So far, a number of prominent home states have been affected – including the UK, the USA, Australia and Canada – and there is no reason to expect that it will stop there. A heady mix of factors – the high profile of CSR in these countries, the current level of media interest in cases of corporate wrongdoing, the availability of public interest lawyers willing to take on such cases, the financial and procedural advantages offered by many of these home state courts over foreign ('host state') alternatives (such as contingency fee representation or the possibility of class actions), the more than theoretical possibility of financial compensation, and generally better prospects for enforcement – makes further FDL litigation more than likely*".[152]

Of course, the factual backgrounds to these cases are diverse and so are the types of behaviour engaged in by the multinational corporations involved that the victims claim is wrongful and has caused their detriment. The corporate wrongs alleged in these cases range from allegations of corporate negligence in carrying out local business practices that pose unacceptable risks to local employees, neighbouring communities and/or the local environment, to allegations of corporate involvement, whether directly or indirectly, in human rights abuses and/or international crimes. Furthermore, the actual set-up of the claims and course of proceedings in these cases are usually determined to a large extent by the applicable rules of substantive tort law and the rules on civil procedure and litigation practices of the legal system in which they are brought, and therefore tend to vary according to where the claims are filed. Despite the variation between the different cases, however, there are also important similarities, as many of the legal questions raised in these cases and, in a broader context, the political and socio-legal issues raised by them are the same.[153]

Due to the novel combination of legal issues these cases present, mainly as a result of the fact that they bring together legal fields such as tort law, corporate law, public international law, civil procedural law, human rights law and private international law, each case has the potential in principle of setting important legal precedents.[154] So far, only few of the legal questions that are typically brought up in these cases, such as questions of jurisdiction, choice of law, duty of care, causation and/or the extent to which international legal norms can have direct or indirect effect in domestic law, have been conclusively settled by courts in any of the legal systems of the home states involved, however. Apart from the relative novelty of the trend towards these cases in combination with their typical drawn-out nature (with preliminary matters sometimes taking years to be battled out from first to final instance), this is largely to be attributed to the fact that many of these cases never

152 Zerk 2006, pp. 198-199.
153 See further chapter 3.
154 Compare, for instance: Enneking 2010.

make it to trial either because they are dismissed on preliminary issues or because they are settled out of court. In fact, many of the civil disputes that have followed the tales of corporate misconduct mentioned here so far have ended in out-of-court settlements between the parties involved.[155]

Another factor that binds these cases lies in their common societal, political and economic origins and impacts. On the one hand, as has been set out in the preceding two sections, the broader socio-political issues underlying and ultimately giving rise to these cases are the same. They include the closely related issues of global business regulation, double standards, detrimental societal impacts of corporate activities, the division of responsibilities between states and corporate actors (and other private actors) for people- and planet-related concerns, and corporate accountability in a transboundary context. On the other hand, these cases tend to have broad repercussions both for the host countries from which they originate and for the home countries in which they are brought, as they have the potential of transcending their legal context and exerting considerable influence over economic, societal and political relations both domestically and internationally. Furthermore, when considered in this broader context they not only raise issues *de lege lata* (focusing on the law as it exists), but also issues *de lege ferenda* (focusing on what the law should be). One of the main questions presented by these cases is for example whether, how and to what extent the home country civil courts dealing with them are supposed and/or are equipped to deal with their broader socio-political and economic origins and impacts. Another important question is whether home country policymakers, in view of the challenges inherent in global business regulation and the mounting socio-political pressure for regulatory action in order to promote international corporate social responsibility and accountability, should seek to enhance the prospects of this type of litigation brought before their domestic courts through legislative changes, and if so, in what way.[156]

The diverse yet similar nature of these foreign direct liability cases is readily exemplified, for instance, by the aforementioned civil lawsuits of this type that have been brought against Shell, not only in the Netherlands but also before courts in other Western societies, for people- and planet-related harm as a result of its oil extraction activities in the Nigerian Niger Delta. The immediate cause for the Dutch civil lawsuits against Shell that are currently pending before the The Hague district court are various instances of oil spills from pipelines operated by a local Shell subsidiary, which the plaintiffs have placed in the broader context of Shell's history of oil spills in the Niger Delta and the fact that many of these oil spills are left unaddressed, in combination with the (alleged) influence and control of Shell's local subsidiary over the leaking pipelines concerned as well as the say

155 See *supra* the introduction to this part, as well as sub-sections 1.1.3 and 3.3.1.
156 See, for instance: Enneking, Giesen *et al.* 2011.

that the Shell group (allegedly) has over the environmental policies of its subsidiaries.[157] Similarly, the class action filed in the UK by 69,000 inhabitants of the Ogoniland region of the Niger Delta, with respect to which Shell's Nigerian subsidiary recently admitted liability, pertained to Shell's liability for the detrimental effects of two extensive local oil spills in 2008.[158] As discussed, Shell has also faced foreign direct liability claims in the US for its alleged complicity in human rights violations perpetrated by the Nigerian military government and security forces against local environmental activists campaigning against the environmental degradation caused by oil extraction activities in the Ogoni region of Nigeria.[159] And since October 2011 a new lawsuit is pending against Shell in the US, again for its contribution to damage caused to people and planet in the Niger Delta as a result of its oil exploration activities there.[160]

It is clear that all of these cases have a common denominator beyond the fact that they all involve civil claims against both parent companies and local subsidiaries (as well as individuals) within the Shell group brought before courts in Western societies. In the end, they all bring up for discussion Shell's business practices in the Niger Delta and the detrimental impacts that those practices may have on the local environment as well as those living there. Thus, whereas the actual wrongs forming the basis of the civil claims involved are different in each case, something that arguably also has to do with the different causes of action available in the US, the UK and in the Dutch legal systems for the plaintiffs to base their claims on, their socio-political origins are very similar, and so are many of their socio-political impacts and broader legal issues raised in them. Arguably, this warrants the distinction of this type of transnational tort-based civil litigation from other types of litigation, and calls for further study of this particular phenomenon, something that the present study seeks to do.

Most of these foreign direct liability cases, which are often brought with the support of domestic or international NGOs, have attracted broad media coverage both domestically and internationally, raising awareness among the general public in the home countries involved as to the issues that may exist with respect to internationally operating business enterprises' transboundary business practices. Beyond that, they have attracted ample attention not only from lawyers, academics and civil society organizations, but also from

157 See the Milieudefensie website for further information, including the statement of claim in one of the three cases (the Oruma case): <http://milieudefensie.nl/english/shellinnigeria/oil-leaks> and <http://milieudefensie.nl/publicaties/bezwaren-uitspraken/subpoena-oruma>. See also the introduction to part I and, more elaborately, sub-section 3.2.2.

158 See, for instance: Mason 2011, as well as Depuyt & Lindijer 2011; Persson 2011b; Vidal 2011a. See also the introduction to part I and, more elaborately, sub-section 3.3.2.

159 See the Business & Human Rights Resources Centre website for more information on the context of and legal proceedings in these cases: <www.businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria>. See also the introduction to part I and, more elaborately, sub-section 3.1.2.

160 See, for instance: Gambrell 2011.

the international business community, international organizations such as the United Nations and the European Union, and politicians and policymakers from the home countries of the multinational corporations involved as well as from the host countries within which they operate. The UN 'Protect, Respect and Remedy' policy framework on business and human rights, for instance, recognizes this type of transnational tort-based civil litigation as one of the mechanisms through which victims of corporate human rights abuse may be provided with access to effective remedies.[161] Meanwhile, the European Parliament has called on the European Commission to monitor and where necessary take steps to further facilitate foreign direct liability cases brought before domestic courts in the EU Member States.[162] In the Netherlands, at the same time, there has been political debate as to the need for the government to take action in order to further enhance the feasibility of bringing such claims, for instance by introducing a legal aid fund for host country victims of people- and planet-related harm caused by the operations of Dutch multinational corporations abroad and/or by introducing a statutory scheme for parent company liability in this context.[163]

Regardless of the fact that they have attracted ample attention, these cases remain controversial as opinions on the desirability of this type of transnational tort-based civil litigation vary. Opponents tend to argue, among other things, that these cases and the issues underlying them should be dealt with by the local authorities in the host countries in which the consequences of the alleged corporate misconduct are felt. They condemn the involvement of home country courts as examples of neo-imperialistic interference by developed states with the sovereignty and policies of developing states and as a disruption of international relations in general and international trade relations in particular. The internationally operating business enterprises involved frequently complain of being subjected to trials by media and resulting reputational damage without even having been found guilty in a court of law. Proponents, on the other hand, typically focus on the high incidence and potentially far-reaching consequences of the detrimental societal impacts caused by and/or corporate wrongs committed in the course of internationally operating business enterprises' activities abroad, and the need to somehow improve corporate accountability in this respect. They point out the regulatory possibilities that this type of litigation offers to home countries as it allows them to judicially monitor and where necessary influence 'their' multinational corporations' behaviour abroad, while stressing the importance of allowing international and/or domestic norms on human rights, labour,

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161 Compare, for instance: UNHRC Report (Ruggie) 2011, principles 25&26, pp. 22-24. See also, more elaborately, sub-sections 7.3.3 and 7.3.4

162 'European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility: A new partnership (2006/2133(INI))', P6_TA(2007)0062, *Official Journal of the European Union* C 301 E/45 (13 December 2007), §§ 32, 37, 42. See, more elaborately: Enneking 2009, pp. 910-913.

163 See, for instance: 'Verslag van een algemeen overleg' (24 May 2011), Kamerstukken II, 2010-2011, 26 485, nr. 108, in which the Dutch State Secretary of Economic Affairs indicates that the Dutch government will not take action on either proposal (p. 27).

health and safety and the environment also to be enforced where this is problematic in the host countries involved. At the same time, they underline the need to provide host country victims of corporate misconduct with access to remedies especially where those are not available in their own countries.[164]

Whatever their perceived merits and demerits, each of these foreign direct liability cases is significant *per se* for the particular legal and socio-political issues it brings to the fore. The greatest significance of these cases arguably lies, however, in the bigger picture they present: the development of a trend towards bringing this type of civil lawsuit before home country courts and the potential role that these cases may play in defining the societal responsibilities that internationally operating business enterprises are expected to live up to with respect to their transnational activities. The societal relevance of these cases lies in their inherent legal novelty, their broad socio-political origins and impact, and also in the broader socio-legal questions that they raise. In the end, these cases and their underlying issues challenge lawyers, courts, legal academics and policymakers to go beyond legal dogmatism by exploring new legal grounds and reconsidering long-established legal notions, and to thus take an active role in changing not only society as a whole but also the global legal landscape for internationally operating business enterprises and their transnational activities.

1.3.2 Societal change and the law

The connection between a changing world with its resultant changing attitudes towards corporate social responsibility (as discussed in sections 1.1 and 1.2), and the ascent of the type of civil liability cases described here (section 1.3.1) may also be viewed from the more abstract point of view of the interplay between the law and societal change. It is generally assumed that a reciprocal relationship exists between law and societal change, even though the exact contents and parameters of this relationship remain a matter of controversy.[165] Basically, this relationship can work in two ways; societal changes can be viewed as causes of legal change, but the law can also be seen as an instrument of societal change.[166] Although these two takes on the interrelationship between law and societal change are seen by some as mutually exclusive, the better view seems to be that they "[…] *represent the two extremes of a continuum representing the relationship between law and social change*", and as such are complementary. This means that the law in its relationship

164 See further sub-section 3.2.3.

165 See, for a more detailed discussion of the relationship between societal change and legal change: Vago 2009, pp. 331-363; Friedman 1975, pp. 269-309.

166 It is important, however to keep in mind that the law will generally be only one of a multitude of interrelated causes that eventually result in a specific kind of societal change. Other mechanisms of change may include "[…] *technology, ideology, competition, conflict, political and economic factors, and structural strains*" (references omitted). Vago 2009, p. 332.

with societal change can be seen both as a dependent variable (an effect and/or indicator of societal change) and as an independent variable (a cause and/or facilitator of societal change).[167]

The law as an indicator of societal change

The law as it exists within any given society can be seen as a reflection of custom and public opinion within that society. Through legislation and case law, society's ideas of justice and its moral standards are translated into legal norms. In this view, the job of those 'creating' or perhaps rather 'finding' the law, legislators and courts, is to discern and subsequently codify or apply the prevailing societal norms and customs. Vranken notes in this respect:

> "[...] *there is a very direct and indispensable link between law and society. Legal rules translate the societal norms into general rules, which then change 'is' into 'ought'. They function as a normative framework that encompasses societal reality*".[168]

This also means that changes in public opinions and in societal norms and customs as a result of alterations in societal conditions, technology, knowledge, and shifting community values and attitudes – societal change – will sooner or later inevitably result in legal changes.[169] Since the Industrial Revolution, societal changes have come ever faster and their impact has been increasingly far-reaching, especially in Western societies. Accordingly, more and more demands have been made in those societies on the flexibility of the law and of those codifying and applying it.[170] Still, especially when it comes to legislative action, a certain time lag between societal change and a legal response to it remains inevitable, also because movements of societal change often meet with resistance of some sort, for instance because they conflict with traditional values and beliefs and prevailing customs, or because of their economic implications (*i.e.*, their expected costs).[171] It is therefore not unusual that certain changes taking place in society manifest themselves in that society's courtrooms first.[172]

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167 Vago 2009, pp. 332-334. See also: Friedman & Ladinsky 1967, p. 51: "*In mature societies, law will be an important indicator of social change; it is institutional cause and institutional effect at the same time, and a part of the broader pattern of collective perceptions and behavior in the resolution of social problems*".

168 Vranken 2006, p. 51.

169 According to Vago, social change "[…] *refers to a restructuring of the basic ways people in a society relate to each other with regard to government, economics, education, religion, family life, recreation, language, and other activities*". Vago 2009, pp. 331-332. Friedman and Ladinsky note: "*Social change may be revolutionary, but is normally comes about in a more-or-less orderly manner, out of the conscious and unconscious attempts of people to solve social problems through collective action. It is purposive and rational; although social actions have unanticipated consequences and often arise out of unconscious motivations, nonetheless social change at the conscious level involves definition of a state of affairs as a 'problem' and an attempt to solve that problem by the rational use of effective means*". Friedman & Ladinsky 1967, pp. 50-51.

170 Vago 2009, pp. 21-22, 332-337; Friedman 1975, pp. 48-59.

171 See, for a more detailed overview of factors that may constitute potential barriers to societal change: Vago 2009, pp. 354-362.

172 See, on the role of the courts in the evolution of the law, for instance: Friedmann 1972.

The field of private law, which basically deals with the interrelationships between society's private actors and can be invoked by those private actors for the protection of their private rights and interests, is particularly responsive to societal change. Because of its flexible, open and bottom-up nature it tends to leave ample room for the legal appraisal of novel societal issues and the accompanying establishment of new legal parameters for the interrelationships between those private actors. As such, it typically leaves it up to the civil judges dealing with any particular civil lawsuit to balance the different interests involved and to come up with a legal response that fits the public opinions and moral norms that exist in society with respect to any particular matter at any particular time.[173] Of course, a certain time lag is also inevitable here, due to private law's inherent *post facto* nature, which means that courts usually deal with private law issues only after a dispute has arisen; at the same time, for the sake of legal certainty, they cannot stray too far from the existing legal system.[174] Furthermore, it should also be noted that in line with the fact that different countries have different legal cultures, systems of private law in responding to societal change tend to be more dynamic in some societies than in others.[175]

Still, there are numerous examples in the field of private law and particularly in the field of tort law in various Western societies of influential case law reflecting the societal changes associated with the industrialisation era and the concomitant rise of the risk-based society. A famous example is the case of *Donoghue* v *Stevenson*, in which the UK House of Lords, in face of the inability of existing law and legal precedent to deal with the changing realities of modern society, introduced the tort of negligence and with that the general notion that one can be held liable for breaching a duty of care owed to another person, if this causes the other damage.[176] More recent examples of case law that may well

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173 See, for instance: Vranken 2006, pp. 8-9, 51. See also, more elaborately, section 8.3.

174 Compare, for instance: Vranken 2006, pp. 12-22, who notes that: "*As a corollary of being tethered to the past, a lawyer* [practising civil law] *has to jump with feet of clay. He cannot approach the conflict or problem in front of him with a free and open mind. He is expected to qualify it in terms of existing law, within which he shapes the story he is told into a legal case for which he has to find a solution. The number of solutions that are available is also limited. Creativity and innovation are not impossible, but they are limited by the existing system*" (p. 16, citations omitted).

175 Compare, for instance: Wilhelmsson, Paunio & Pohjolainen 2007; Van Dam 2006, pp. 122-129, who notes for instance that the system of precedent in English tort law "[...] *tends to a static rather than a dynamic approach. On the other hand, the sharp end of this principle has been softened by the House of Lords' ability not just to discover the law that is already there but also to create law by deviating from existing precedents* [...]" (p. 123).

176 See, for instance, in more detail and with further references: Harpwood 2006, pp. 19-24, who notes: "[...] *it is clear that the need to prove fault in order to establish liability in tort became increasingly important towards the end of the 19th century. As social attitudes changed* [...] *the volume of social legislation designed to improve the lives of employees, tenants and citizens naturally increased. Ascribing responsibility became easier with the advancement of science and greater competence in determining causation. There was a trend away from selfish individualism towards stronger social and civic responsibility. This trend eventually manifested itself in legal decisions culminating in the case of* Donoghue v Stevenson *in 1932, although there had been a large number of specific actions based on fault before this case. Allowing for a degree of cultural lag, the common law will inevitably follow some years behind enlightened social attitudes*" (p. 19). See also sub-section 10.1.2. See also: Friedmann 1972, pp. 161-168.

turn out to change the legal landscape of the future include the many private lawsuits brought before Western society courts against the tobacco industry for the detrimental health consequences of smoking[177] as well as climate change litigation in the US against corporate actors for their contribution to global warming.[178] These last two examples make clear that with globalization and the accompanying transnationalization of risks associated with the activities of private actors such as business associations, domestic fields of private law are increasingly asked to deal not only with legal issues raised by domestic societal changes, but also with societal changes occurring in other societies and/or globally.[179]

In the same way, the current proliferation of tort-based civil lawsuits against parent companies of multinational corporations for damages caused in host countries may be seen as a self-evident legal consequence of the change in attitudes towards corporate responsibilities in most Western societies. Fuelled by a number of significant contemporary societal developments, including in particular the Western societal trends towards industrialisation and the rise of the risk-based society, globalization, liberalization, deregulation and privatization, these cases, which arguably by now represent a socio-legal trend in their own right, are challenging lawmakers to go off the law's beaten track and venture into new legal realms. As has already been noted, due to the proliferation of these foreign direct liability cases civil courts in various Western societies now find themselves faced with lawsuits that challenge them to create novel precedents on the (legally enforceable) societal responsibilities of internationally operating business enterprises. Meanwhile, as is clear from what has been discussed before, legislators in those same societies find themselves faced with conflicting calls by pressure groups for various kinds of legislative interference, or, on the contrary, for a legislative stand-off on the matter.[180]

The law as a facilitator of societal change

Next to a reflection of societal customs and public opinions, the law may be seen as an instrument that may be employed to bring about or further societal change. According to Vago, "[s]*ince Roman times, great ages of social change and mobility almost always involved great use of law and litigation*";[181] Galligan notes that "[i]*t is a commonplace of modern*

177 Compare, for instance: Keirse 2000a, 2000b.

178 An ongoing case is the Kivalina lawsuit, brought before the US federal courts by native Alaskans against US-based oil, coal and power companies for their alleged contribution to global warming through their emissions of carbon dioxide and other greenhouse gasses. See, more elaborately the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuits regulatoryaction/LawsuitsSelectedcases/Kivalinalawsuitreglobalwarming>.

179 See, for instance: Whytock 2009, who notes that: "[...] *for better or for worse, domestic courts are pervasively involved in regulating transnational activity*" (p. 67). See also, for instance, on the role of the judge in a rapidly evolving and multi-layered society: Van Gerven & Lierman 2010, pp. 223-237.

180 See *supra* section 1.2 and sub-section 1.3.1.

181 Vago 2009, p. 337.

societies that law is used to bring about social change".[182] In fact, social engineering, in the sense of initiating, guiding and supporting societal change through a purposive, planned and directed application of the law, is viewed by many as its principal function in modern society.[183] This has resulted in growing demands on governments especially in Western societies to realize a desirable social status quo through tactical employment of public laws and regulations (*i.e.*, the body of rules that regulates the vertical relationships between a state and its citizens as well as between and within public entities, with the primary aim of promoting public interests). At the same time, there is an increasing tendency towards viewing not only public law, but also private law and private litigation in particular as a means to be deployed in the pursuit of broader societal aims, rather than a mere judicial reflection and execution of pre-existing societal norms.[184]

Individuals and social interest groups more and more often take matters into their own hands by attempting to influence societal reality in a certain way through the pursuit of civil lawsuits.[185] Especially in the US, the pursuit of societal change through litigation is a popular phenomenon, as civil litigation is commonly used there not only as a way to redress past civil wrongs and prevent future ones from occurring, but also to promote societal reform and influence future policies.[186] The relative success of public interest (or impact) litigation in the US has been explained by a rare coincidence of an activist legal profession that has access to the necessary financial resources, activist judges, a genuine societal movement and an acceptance by those in power of the outcomes of the public interest litigation.[187] Outside the US, however, what is perceived as the American 'claim culture' often meets with criticism.[188] In addition, the role of courts in any democratic state under the rule of law is generally curbed by traditional notions of the division of powers between the different branches of government, which means that, regardless of the forum country's legal culture, there are certain inherent limits to the feasibility of social engineering through legal (civil) procedures.[189]

The current tendency towards bringing civil lawsuits against (parent companies of) multinational corporations for damages caused in host countries can be seen not only

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182 Galligan 2007, p. 331.

183 Vago 2009, pp. 21-22.

184 See further section 9.3.

185 See, for a more detailed discussion, Vago 2009, pp. 21-22, 332-334, 337-363; Friedman 1975, pp. 59-60.

186 See, for instance, Stephens 2002, pp. 12-14 and 24-27, who states: "*Civil litigation in the United States* […] *has long been used as a means of promoting social reform*", and "*The United States has a long tradition of public interest impact litigation filed by private parties to seek recognition of problems and changes in future behavior*". For further detail on the phenomenon of 'public law litigation', see, for instance: Chayes 1976. See, on the same phenomenon in a transnational context: Koh 1991.

187 Friedman 1975, pp. 276-279. See also, more elaborately, sub-section 8.3.2.

188 Similarly, for instance: Hartlief 2009, pp. 4-5, 65-69.

189 The extent to which the law can indeed facilitate change in society is determined by a variety of factors. See, for a general discussion of the efficacy of law as an instrument of social change, and its advantages and limitations in fulfilling this role, Vago 2009, pp. 341-354. See also, on the boundaries of judicial activism, for instance: Van Gerven & Lierman, pp. 223-237; Kortmann 2009.

as an example of the way in which societal change may potentially result in legal change, but also as an attempt to use the law to bring about or further societal change when it comes to corporate social responsibility and accountability. The language used in these cases invariably places them in a broader societal or global perspective, such as that of the promotion of corporate social responsibility, the prevention of environmental degradation, the condemnation of human rights violations or the renunciation of abusive labour practices. The claimants in the Dutch Shell cases, for example, have made clear that their aim in bringing liability claims against Shell is not just to address the damages caused by past oil leaks, but also to bring about a change in Shell's corporate policies with respect to its oil exploration activities in Nigeria.[190] Many of these cases have been instigated or actively supported by civil society organisations (NGOs) that pursue broader aims and/or act in defence of broader, public interests.[191] McBarnet has noted in this respect:

> "*Civil society has also played a very direct role in bringing law into play, often in innovative and even surprising ways, to enforce CSR, and increasingly to make it a legal obligation. Instead of just seeking to influence state or international legislation, they have turned to the mechanisms offered in* private law*, essentially tort and contract, and used them to make direct legal inroads on 'voluntary' CSR*".[192]

As has been mentioned, the idea is often expressed by proponents of these cases, including not only civil society actors such as the NGOs supporting these cases but also by legal practitioners and academics, as well as some policymakers, that civil litigation of this kind may effectively induce internationally operating business enterprises to conduct their worldwide activities in a more socially responsible manner by factoring people- and planet- related concerns into their global business practices.[193] In light of the growing realization of the inadequacy of existing state-based modes of global business regulation, this type of transnational tort-based civil litigation is becoming a more and more popular way of using the law in order to promote international corporate social responsibility and accountability. According to McBarnet:

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190 See, for example: Garschagen 2011.

191 Especially in the US, a number of civil society organisations have specialized in bringing international corporate accountability cases before American courts. Notable examples are the Center for Constitutional Rights (<http://ccrjustice.org>), EarthRights International (<www.earthrights.org>) and International Rights Advocates (<www.iradvocates.org>). The Center for Constitutional Rights, for example, states on its website: "[…] *CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change*". International Rights Advocates states as its mission: "*By creatively using international human rights law in the US court system and those of other nations, International Rights Advocates (IRAdvocates) protects and empowers individuals victimized by multinational corporations and other powerful entities that traditionally enjoy impunity. Designed to foster global operations that, at a minimum, conform to human rights principles, IRAdvocates will challenge platitudes about social responsibility and contribute to eliminating the corporate practice of imposing human rights violations on others*.

192 McBarnet 2007, p. 38.

193 See generally on the prospects for actually bringing about societal change through the use of the law, Galligan 2007, pp. 330-354.

> "*Law is not just a tool of government, and governmental regulation is not the only way to try to control business through law. Civil society too is increasingly deploying legal mechanisms to constrain business. What is more, law is being deployed to* enforce*, rather than just to encourage, commitments by business to ethics, human rights, and social and environmental responsibility*".[194]

1.3.3 The role of tort law in promoting international corporate social responsibility and accountability

The legal basis of foreign direct liability cases ultimately lies in tort law.[195] Therefore, regardless of their complicated backgrounds and potentially far-reaching socio-political impacts, they are in the end also normal tort cases – maybe not very common or garden variety ones, but tort cases nonetheless.[196] The proliferation of these cases on this legal basis is perhaps not surprising, as the field of tort law, like that of private law in general, is particularly suitable for dealing with legal issues that arise in a context of societal change. It provides a legal framework for interference with the mutual relationships between private parties that is very flexible due to its open, standard-based structure and that may thus fairly easily accommodate shifting norms and values in times of change.[197] Through open norms such as the duty of care it allows civil courts considerable latitude in selecting the societal practices, customs and/or other social indicators that may be drawn upon for their legal appreciation of the behaviour under consideration. And at the same time it provides private parties with an avenue to have the societal acceptability of behaviour engaged in by other private parties that negatively affects them, tested in law by an independent adjudicator who has the authority to grant remedies if the contested behaviour does not live up to current legally relevant societal norms.[198]

However, the use of tort law in this context may at the same raise fundamental questions. One of the downsides of the flexibility provided by the use of often unwritten socio-legal norms is that it may result in a measure of legal uncertainty for those to whom those norms apply. A related difficulty pertains to the fact that tort law is generally only invoked after it has become clear that certain behaviour by one actor has certain negative consequences for another, meaning that the appreciation of the societal acceptability of

194 McBarnet 2007, p. 44.

195 The notion of 'tort law' is a terminology that is typically used in common law systems to refer to an area of law that in civil law systems is often referred to as the law of non-contractual obligations, extra-contractual liability, or civil responsibility for delicts/quasi-delicts. See, elaborately and from a comparative perspective: Zweigert & Kötz 1998, pp. 595-684.

196 See sections 5.4 and 6.4 for a more elaborate discussion of the legal foundations of these cases.

197 Compare, for instance: Friedmann 1972, pp. 161-190, who notes that: "[...] *this branch of the law must strongly reflect changing social conditions. The type and significance of risks incurred in social contact varies with the type of society in which we live. The principles of liability governing the readjustment are greatly influenced by changing moral and social ideas*" (p. 161).

198 See further chapter 9.

that behaviour and the sanctioning of behaviour that is deemed to be legally unacceptable generally only take place *ex post facto*. The risk inherent in this is that a civil court may judge past behaviour through the lens of current societal norms, which may not have been foreseeable for the private actor involved at the time of action, especially in times of change.[199] At the same time, there is always a certain tension between judicial activism and the need for a clear delineation of competences between the judiciary and the legislature in any legal system.[200] In this respect, the question arises whether, especially in times of societal change, courts should exercise restraint and/or leave the development of new legal norms reflecting the altered status quo to the legislature.

The role that tort law is currently being asked to play in addressing reprehensible behaviour by internationally operating business enterprises abroad and in promoting international corporate social responsibility and accountability more generally raises many questions, even apart from the particular difficulties inherent in shaping legal responses to changing societal attitudes. Additional difficulties are connected, for instance, to the fact that the corporate behaviour under scrutiny in foreign direct liability cases has typically, in whole or in part, taken place in a society different from that in which the court resides. A closely related issue is the fact that ideas on what constitutes socially acceptable behaviour tend to vary greatly not only within but also between societies, which has the potential of rendering these cases highly politically charged, both domestically and internationally. Furthermore, in light of the tort system's inherent limitations as well as the specific issues, actors and interests involved in these cases, the question may be raised whether tort law is such a suitable mechanism in this context, also in comparison with other legal and non-legal mechanisms that may potentially be relied on to induce internationally operating business enterprises to conduct their worldwide activities in a more socially responsible manner.

These are only some of the questions that arise with respect to the potential role of tort law in this context. They illustrate, however, that this study's overarching research question of **whether and to what extent the use of the tort system to promote socially responsible behaviour in internationally operating business enterprises is both desirable and legally and practically feasible**, remains a matter of discussion at this point. How may changing societal norms on the way in which companies ought to conduct their transnational business activities be expressed and/or socially engineered through civil procedures? Which factors determine the role that Western society systems of tort law may play in this context?[201] To what extent are civil courts in developed societies equipped and

199 Compare, for instance: Vranken 2006, pp. 4-22.

200 Compare, for instance: Van Gerven & Lierman 2010, pp. 215-271.

201 Note that the term 'tort system' as used throughout this study refers to the complex of rules and practices that pertains to non-contractual liability claims brought before a country's courts; in transnational cases, it may not necessarily coincide with the source of the substantive rules of tort law that are applied in order to determine such liability.

willing to deal with these cases as well as with their complex backgrounds and potentially far-reaching socio-political implications? Arguably, it is questions such as these that Western society policymakers should consider when determining whether and to what extent to allow and/or encourage the pursuit of foreign direct liability cases before their domestic courts with a view to promoting international corporate social responsibility and accountability by multinational corporations operating out of their territories.

As a result not only of the steady increase of this type of transnational tort-based civil litigation, but also of the rising societal calls for more adequate forms of global business regulation especially in the CSR context and more effective remedies for those who suffer harm to their people- and planet-related interests as a result of the transnational operations of internationally operating business enterprises, these matters are now reaching a critical point. Spurred on by the UN 'Protect, Respect and Remedy' framework on business and human rights, socio-political pressure on Western society policymakers to act upon this matter is on the increase, and policymakers are starting to respond, as is also clear from what has been discussed in sub-section 1.2.4. At this point, however, much is still unclear on the courses of action that are available when it comes to addressing issues of international corporate social responsibility and accountability, as well as on the desirability and feasibility of the options that do seem to exist, also taking into account their potential effects and side-effects and their comparative advantages and disadvantages.

Accordingly, there is a need to generate more information on this subject through further research; it is precisely here that this study seeks to make a contribution, by exploring the role that tort law may play in promoting international corporate social responsibility and accountability. In doing so, it provides a very timely contribution to the debate, considering the fact that the European Commission has, as mentioned, promised to publish a report on its priorities in implementing the UN policy framework on business and human rights by the end of 2012, and has also invited the Member States to develop their national plans on implementation by the end of 2012. This study will ultimately, on the basis of a thorough exploration of the contemporary socio-legal trend towards foreign direct liability cases and of the role that Western society systems of tort law may play in promoting international corporate social responsibility and accountability, come to a number of recommendations on what the priorities should be in this context on the legal and policy agenda in the near future.

2 Methodology and outline

2.1 Aim and method

2.1.1 Aim and focus

Aim

As has already been described, tort law may act both as an indicator and a facilitator of societal change. The purpose of this study is to explore the role of tort law, in view of the way it currently finds practical application within the tort system and of the way in which it may develop or may be developed in the future, in the changing societal context of corporate social responsibility and the accountability of internationally operating business enterprises. This study's point of departure is the contemporary socio-legal trend towards transnational tort-based civil liability claims against (parent companies of) multinational corporations for damage caused in the course of their operations abroad, brought before courts in their Western society home countries. This trend towards what are often termed foreign direct liability cases will be further explored, as well as its wider social, political, economic and legal context. Building on that exploration, the perspective will shift to the potential of domestic systems of private law when it comes to filling the regulatory gaps left by the absence of adequate systems of global business regulation. Following that, the focus will narrow to Western society systems of tort law and the role that those currently do and potentially may play in promoting international corporate social responsibility and accountability.

The central question in this study is to what extent and under what circumstances may Western society tort systems provide a good way of dealing with the issues and concerns underlying and giving rise to the contemporary socio-legal trend towards foreign direct liability cases, in particular the perceived need for internationally operating business enterprises to integrate an awareness and concern of people- and planet-related interests into their corporate policies, management decisions and corporate practices, not only at home but also abroad? In answering this question, the study departs from the contemporary socio-legal phenomenon of foreign direct liability cases and subsequently seeks to explain its coming into being, nature, particular features and legal manifestation before turning to the essence of the socio-political issues underlying this particular socio-legal phenomenon and exploring the way in which Western society tort systems may contribute to the solution of some of those issues. In doing so, this study seeks to add to the existing literature on the subject by connecting technical-juridical insights into this type of liability case (part II) with on the one hand a more abstract view of these cases and their socio-political context and on the other hand a more abstract view of the tort system

in general and the way tort law may function as a conduit in the interaction between societal changes and legal changes in this specific context (part III).

This study aims to add clarity and perspective to the socio-political and legal debates on foreign direct liability cases and provide a scholarly basis for further debate on the feasibility as well as the desirability of these cases, also considering the complexity of their underlying issues and the potential extent of their impacts, and the use of Western society tort systems to promote international corporate social responsibility and accountability. Its intended audience are legal scholars, legal practitioners and policymakers from Western societies in general and the Netherlands specifically who are dealing with the type of liability lawsuits against parent companies of multinational corporations under discussion here and/or with their broader context of international corporate social responsibility and accountability. At the same time, in line with this study's ambition to place these cases, their broader context and the societal developments they embody and/or are likely to provoke, more firmly within the academic debate on the potential and desirable place of the tort system within today's society, it also aims to address legal scholars with an interest in the role and bearings of the tort system and domestic systems of private law more generally in the contemporary globalizing world order.

In line with its primarily explorative nature, this study is not meant to give all the answers and provide all the solutions to the legal and non-legal issues that may arise in and as a result of liability claims against parent companies of multinational corporations for damage caused in host countries, although it will address these issues where necessary for a better understanding of these cases and their underlying issues and broader consequences. After all, most of the answers and solutions with respect to this relatively novel and evolving topic are not to hand yet and will over time have to be provided by the civil courts of various Western societies when dealing with these cases. Instead, this explorative study is meant to provide a scholarly point of departure for further discussion and a better understanding of the type of tort-based civil litigation that lies at the heart of this research, its broader socio-political context and the regulatory challenges it involves, all from a tort law perspective. As such, it takes a step back and looks at the potential of tort law, situated within the tort system and applied by civil courts according to the rules of civil procedure, when it comes to addressing the issues underlying and/or framing this type of tort-based civil litigation. Accordingly, the appraisal of the role of tort law in this context will not be focused on purely technical-juridical aspects, but will primarily address broader legal and non-legal aspects that are relevant within the wider socio-political context of corporate social responsibility and the accountability of internationally operating business enterprises.

Focus

As mentioned, the main focus of this study will be on tort law in general and the tort systems of Western societies in particular. Accordingly, the contemporary trend towards

foreign direct liability cases as well as the contemporary demand for (further) legal avenues to promote international corporate social responsibility and accountability will be approached from a tort law perspective. This approach, in which the emphasis is on the merits and demerits of the tort system as a mechanism for behavioural regulation and accountability in this context, is essentially norm-neutral. This means that it does not depart from any particular set of substantive norms, such as human rights norms, environmental norms, health and safety norms or labour norms, but instead focuses on tort law as a system through which such norms, whether written or unwritten, international or domestic, fundamental or non-fundamental, can be given (legal) effect. Accordingly, foreign direct liability cases are discussed regardless in principle of their specific factual backgrounds and/or the substantive norms the alleged violation of which forms the legal basis of these claims. As a result, the potential role of tort law when it comes to promoting international corporate social responsibility and accountability is viewed in principle in light of the full (and constantly shifting) range of societal, moral and/or legal norms that may play a role in this context. Noting this is especially important in view of the contemporary focus on business and human rights, a focus that is not adopted in this study, although human rights violations and human rights norms more generally will of course be reviewed and attention will be paid to their *status aparte* as fundamental and universally applicable international norms.

The emphasis on Western society tort systems in particular follows from the fact that the specific type of liability lawsuits prompting this study (foreign direct liability cases) are typically brought before courts in Western societies that are home to the headquarters of the multinational corporations involved. As will be further explored in part II, foreign direct liability claims have so far been brought chiefly in the US and other common law legal systems such as the UK, Canada and Australia, but do now also seem to be making their way into civil law legal systems such as the Dutch legal system. At the same time, the more general questions that arise with respect to global business regulation and the promotion of corporate social responsibility and accountability by internationally operating business enterprises, and the potential role in this respect of the law in general and domestic legal systems specifically are highly topical at this point in particular in the Western societies where those internationally operating business enterprises are based. As such, it is these societies' tort systems with respect to which the question as to their role in the context of international corporate social responsibility and accountability is particularly relevant.

Next to this emphasis on Western society tort systems, the study also focuses on multinational corporations as a sub-species of the broader category of internationally operating business enterprises. This particular emphasis is prompted by the fact that the foreign direct liability cases that lie at this study's core are usually aimed at multinational corporations' parent companies and are typically defined by the equity-based relationships between parent companies and their (direct or indirect) subsidiaries in internationally

operating groups and in the relationships of ownership and control between them. In practice, however, as has already been discussed, the distinction between multinational corporations and other types of internationally operating business enterprises is often not very sharp, while control-based relationships can also exist for instance between buyers and suppliers or in other kinds of contractual relationships. Furthermore, as is also clear from the foregoing, issues of international corporate social responsibility and accountability go beyond the focus on multinational corporations that is characteristic of foreign direct liability cases and instead encompass all internationally operating business enterprises and all forms of international trade and commercial co-operation. Consequently, although the focus of this study is on multinational corporations and their inherent parent-subsidiary control relationships, the findings within this limited scope will also be related to the broader picture of internationally operating business enterprises in general.

2.1.2 Perspectives and methodology

Perspectives

One of the main ambitions of this study is to transcend the confines of a purely dogmatic/legal positivist/technical-juridical approach to the subject and consider the issues and possible ways to address them at a more abstract level. In order to do so, the research topic is approached from a number of particular perspectives. First of all, an overall *law and society perspective* will be adopted throughout the study, in the sense that many of the legal aspects, issues and developments discussed will not only be examined from an internal, legal perspective, but also from the perspective of their broader, socio-political framework. This perspective, which in practice comes down to a strong focus on the law in context, has been introduced in this chapter and will be a recurring theme throughout the study. At the same time, a *holistic perspective* will be adopted with respect to the type of liability lawsuits under scrutiny in this study, meaning that they will be detached from their fact-specific, norm-specific and legal system-specific manifestations, in order to assess and discuss them on a more abstract level. Furthermore, in order to be able to assess the potential role of the tort system in this context in the abstract, the field of tort law itself will also be approached from a *transnational perspective* that is in essence system-neutral, meaning that the focus will be on the broad outlines and main characteristics of the tort system, rather than on technical legal system-specific details. This perspective is combined with a *lege ferenda/normative perspective*, which means that the emphasis will be not only on the role that the tort system currently plays when it comes to promoting international corporate social responsibility and accountability, but also and especially on the role that it can or could play in this context and the desirability of using, enhancing and/or extending this role in order to address some of the issues that arise in this context.

However, the fact that the choice is made here for a more abstract, meta-juridical account of the potential use of tort law in this context does not mean of course that a more dogmatic/legal positivist/technical-juridical account of the law will be completely left out. After all, any discussion of the law of torts, even if it is from a transnational and/or *lege ferenda*/normative perspective, requires a basic knowledge of the *lex lata* (*i.e.*, the law as it exists) and the way it functions in the legal systems concerned. As indicated before, the focus here is in principle on Western society tort systems, as the kind of liability lawsuits discussed here are typically brought before Western society courts and as it is in these systems that the possible application of tort law in order to address some of the issues arising in the context of international corporate social responsibility and accountability is particularly relevant. Thus, the broad picture of the general role of tort law in this context will be elaborated where necessary by reference to the particular features of some of the systems of tort law in modern Western societies. This approach fits in with the idea that any international or transnational legal study (in this case a study dealing with certain international tendencies) needs to combine an international orientation with a profound knowledge of national debate and legal practices on the subject, in order to be able to understand and interpret correctly the international tendencies under scrutiny.[1]

Thus, part II of this study will address the contemporary socio-legal trend towards foreign direct liability cases from a more technical-juridical perspective, on the basis of a combination of primary sources (i.e., statutory and case law) and secondary sources (i.e., literature references). Subsequently, part III of this study will look at this trend and its broader context from a more abstract perspective, drawing inspiration predominantly from secondary sources. In the epilogue (part IV) these two perspectives will be combined

Comparative approach

Where the research topic is considered at a more technical-juridical level and/or where relevant legal and societal developments are discussed, the focus will be on relevant rules and regulations, case law and developments both in the US and within the EU, in recognition of the fact that many of the key developments in the contemporary trend towards foreign direct liability cases have so far taken place within the American and (to a lesser extent) English legal systems. In addition, there will be a focus in particular on the Netherlands and the Dutch legal system, as the more abstract, broad lines that will be outlined in this study will be practically illustrated with a view to socio-political developments in the Netherlands as well as the rules and regulations that are applicable there and relevant court procedures before and case law produced by Dutch courts. The choice to focus on the Dutch context is primarily prompted by the author's familiarity with the Dutch legal system and with the legal and socio-political developments that have over the past few years taken place in the Netherlands in the field of international

1 See, similarly and with further references: Vranken 2010, pp. 327-328.

corporate social responsibility and accountability. The Dutch legal system is the first European continental civil law system within which foreign direct liability cases have been initiated and this development has sparked considerable interest and debate among Dutch policymakers, legal scholars, legal practitioners and civil society actors. Accordingly, this study seeks to place the contemporary socio-political and legal developments on this topic that are currently taking place in the Netherlands in a broader, more international socio-political and legal framework.

As a consequence of the choices made here, much of the available information and insights on the broader research topic, in the sense of case law and legal literature, technical-juridical as well as more abstract, come from the US, English and Dutch legal systems. As a more abstract discussion of foreign direct liability cases and of the role of tort law in promoting international corporate social responsibility and accountability can only take place against the background of a basic comparative understanding of the functioning both in theory and in practice of these legal systems in general and their tort systems specifically, comparisons will be made between the three systems at various points in this study. It should be noted, however, that the legal comparisons made here will be broad and functional in nature, with a focus on details only where relevant, as a system-wide more 'traditional' legal comparison between the three systems would far exceed the scope of this study and defy its purpose of providing a more abstract view on the subject.[2] In addition, the broad outline of the role and functioning of tort systems in Western societies provided in this study also rests on a basic comparative understanding of these systems and their similarities and differences, an understanding that is based in part on the broad body of comparative literature on European legal systems that has been prompted by the tendency towards harmonization/unification of these systems in the EU context.

In the end, these choices are meant to result in a study that combines a dogmatic/legal positivist/technical-juridical approach to (Western society) domestic systems of tort law with a more abstract approach to the tort system in general to come to an exploration of a specific international tendency that materializes through tort law but at the same time challenges the traditional boundaries of Western society tort systems and encourages

2 See, for the more 'traditional' approach to comparative law, for instance: Zweigert & Kötz 1998, pp. 1-62. For more detail on the idea of 'functional' comparative law, see (critically) Michaels 2006, who notes: "*First, functionalist comparative law is factual, it focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events. As a consequence, its objects are often judicial decisions as responses to real life situations, and legal systems are compared by considering their various judicial responses to similar situations. Second, functionalist comparative law combines its factual approach with the theory that facts must be understood in the light of their functional relation to society. Law and society are thus thought to be separable but related. Consequently, and third, function itself serves as* tertium comparationis*. Institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfil similar functions in different legal systems. A fourth element, not shared by all variants of functional method, is that functionality can serve as an evaluative criterion. Functionalist comparative law then becomes a 'better-law comparison' – the better of several laws is that which fulfils its function better than the others*" (p. 339).

us to rethink those systems in light of the new demands imposed upon them by the realities of modern (globalized) society. The tort system itself will be approached both as a dependent variable, an institution that reacts to and is shaped by today's societal demands and pressures, and as an independent variable, an institution that may be deployed to influence tomorrow's societal realities. After all, as has been mentioned before, tort law can act both as an indicator and as a facilitator of social change and both perspectives will be reviewed here.

'Argumentative' methodology

The methodology used in this study can be roughly compared with the 'argumentative methodology' introduced by Giesen, which amounts to the analysis of a research topic on the basis of a mix of arguments drawn from a variety of disciplines.[3] On the basis of this 'multidimensional approach' the researcher looks across the boundaries of his/her legal field of departure to a number of relevant other legal fields, other legal systems and other disciplines in order to gather a variety of arguments (legal and non-legal) that have a direct bearing on the issue that the research seeks to address.[4] The reason for doing so is to identify and make explicit the widest range of existing legal and policy reasons for or against a certain solution to the issue that lies at the heart of the research.[5] Accordingly, in this study the arguments used to assess whether and to what extent Western society tort systems can and should play a role in promoting international corporate social responsibility and accountability are drawn from a variety of sources. The sources of information primarily relied on include the practical and legal experiences with foreign direct liability cases in the US, English and Dutch legal systems in particular, regulatory literature and literature on the fundamentals of tort law, more practical information (literature and case law) on the tort system's functioning in practice, in particular in Western societies and with a focus on its interaction with other relevant legal fields in this context such as private international law, corporate law and public international law. In addition, arguments will be drawn from more general insights that are inspired by perspectives from other legal fields, as well as from political (particularly international relations), economic (particularly law and economics) and sociological (particularly law and society) perspectives on the matter.

This approach fits in very well with the general tendency in contemporary legal research towards a contextualization of the law, which means that increasing value is attached to legal research that looks beyond the narrow confines of legal dogma in search of the broader context and impacts of the subject of study, and that incorporates wider, legal and non-legal arguments. It allows the researcher to see legal issues, phenomena and developments not only from an internal legal perspective (which focuses on technical-

3 See, for more detail: Giesen 2005a, pp. 13-16; Giesen 2005b, pp. 18-21.

4 Giesen's use of the term 'multidimensional approach' (*multidimensionale benadering*) was in turn inspired by Van Boom 2003, p. 36.

5 Compare Giesen 2005a, p. 14, and Giesen 2005b, p. 18.

juridical aspects of the law in force on the matter, such as legislative history and case law) but also in a wider perspective by drawing on insights from a variety of other legal contexts (*i.e.*, other legal fields, other legal systems) and non-legal contexts (*i.e.*, non-legal disciplines such as economics, psychology, sociology). Arguably, such an approach may in some cases do more justice to the diversity inherent in the law itself and in the way it comes into existence and subsequently develops. Also, it keeps the researcher from adopting, and reasoning on the basis of, an overly restricted legalistic view that might reduce the practical applicability of the outcomes of any legal study.[6]

2.1.3 Relevance and state of the art

Relevance

The relevance of this explorative study into foreign liability cases and, in a broader context, the role of tort law in promoting international corporate social responsibility and accountability, is readily made apparent by the current trend towards these cases that is gathering pace in a growing number of Western societies as well as the more general socio-political debates on international corporate social responsibility and accountability that are taking place in many Western societies. Civil courts and legal practitioners in these societies are faced with a complicated new type of tort case, as virtually all of these cases raise novel legal issues and challenge the civil courts seized of them to set precedents whose impacts may far exceed the parties involved in each case.[7] At the same time, policymakers are faced with calls for regulatory action to enhance the corporate accountability of their internationally operating business enterprises but are also expected to advance the interests of their business communities both domestically and internationally. In addition, they have to deal with the possibility that the international relations between home and host countries may come under pressure as a result of the home countries' passive or active involvement in these cases or in regulatory initiatives aimed at the activities abroad of their internationally operating business enterprises. The general uncertainty with respect to the legal aspects and impacts of these cases as well as their broader context has already led policymakers at various levels to commission legal studies into this matter. Still, due to their inherently limited scope and ambit these studies leave much territory uncharted and many questions unanswered.[8]

The increasing attention in Western societies on both the socio-political debates on international corporate social responsibility and accountability and the contemporary trend towards foreign direct liability cases, as well as the many lingering questions and uncertainties in this regard, have also drawn an increasing measure of scholarly attention.

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6 Compare Vranken 2010, pp. 321, 322.
7 Similarly: Enneking 2010, pp. 401-402.
8 Compare the Introduction to part I and section 1.3.

As the topic of corporate social responsibility, once a subject reserved for open-toed sandals and woolly socks types and activists, has become more mainstream, academic interest in it has grown. Although especially initially the topic was seen as a more ethical and/or political topic and as such the province of philosophers, political scientists and sociologists, legal scholars have also caught on as the subject's legal aspects have become more obvious, partly also as a result of the proliferation of the type of liability lawsuits under discussion here. As a result, the academic body of knowledge on international corporate social responsibility and accountability in general and foreign direct liability cases more particularly is growing fast. Still, many issues and questions remain to be considered, mainly as a result of the complicated nature of some of the issues involved and the quick succession of developments in this continuously evolving field of study.

State of the art

Although there have been quite a number of academic studies in the recent past that have dealt with the type of liability lawsuits under discussion here and/or the legal aspects of their broader socio-political context of international corporate social responsibility and accountability, only relatively few studies so far have approached these cases as well as their broader context from the particular, more abstract tort law perspective that is adopted here.[9] Of course, the tort law perspective is only one of a broad range of legal and non-legal (*e.g.* political, sociological, philosophical, economic, trade, international relations) angles from which these cases and their broader context can be studied. The focus here will be on studies looking into the legal aspects of the topic, of which I will name but a few.

Many existing studies focus on the substantive content of the norms that may potentially be violated by internationally operating business enterprises; popular perspectives in this respect are the human rights perspective,[10] the environmental perspective[11] and the labour perspective.[12] As already mentioned, it is the business and human rights perspective in particular that has been popular has over the past few years, also due to the attention paid to this topic within the UN.[13] Other studies take a more enforcement-based approach to the subject, as they focus on various regulatory and/or enforcement options that presently are or potentially could be made available in the different fields of law and at different levels to prevent and/or address norm violations by internationally operating business enterprises. In this sense, it is possible to look at the subject from, for instance, a public international law perspective,[14] an international criminal law perspective,[15] a (domestic) criminal

9 Compare, however: Eroglu 2008 and Van Dam 2008.
10 For example: Van Der Heijden 2011; Amao 2011; Černič 2010; Dine 2005; Jägers 2002.
11 For example: Mason 2005.
12 For example: Van Den Heuvel 2009; Van Hoek 2008.
13 See, for more detail: sub-section 1.2.4.
14 For example: Lubbers, Van Genugten & Lambooy 2008; Zerk 2006; Kamminga & Zia-Zarifi 2000.
15 For example: Stoitchkova 2010.

law perspective,[16] a (domestic) corporate law perspective[17] or a trade law perspective.[18] Alternatively, there are studies that focus not on the regulator, but on the actor that is to be regulated: multinational corporations,[19] or, in a broader sense, internationally operating business enterprises.[20] Furthermore, as the effects of globalization in the international arena as well as on domestic legal systems are becoming more visible, another, more abstract body of literature is forming around 'new' topics such as global/transnational (business) regulation and multi-level private law.[21] Of course, many of these studies in fact combine two or more of the abovementioned perspectives.

Those studies that do approach the subject from a tort law perspective tend to focus more on the system-specific technical-juridical aspects of foreign direct liability cases and of the tort systems involved. Especially in the US, where to date the majority of these cases have been initiated, there is a burgeoning body of academic literature on the cases that have so far been brought there and their specific legal foundations in US law and system-specific legal aspects.[22] As the trend towards this type of liability lawsuit is becoming more and more visible and is spreading outside the US as well, non-US legal scholars are also catching on; this has resulted in a growing number of mostly classic comparative legal studies with a focus on technical-juridical aspects of the domestic tort law systems involved that are relevant in this context.[23] When it comes to more abstract discussions of the potential and desirable role of tort law in this context, however, which take into account both the possibilities offered by domestic systems of private law when it comes to global business regulation and the particular nature and confines of contemporary Western society tort systems, a lot of ground has still to be covered. It is this particular gap that this research seeks to fill.

In line with its aim and focus, this particular study takes an approach that in principle is neutral with respect to the content of the substantive norms at play and that transcends both the peculiarities of individual legal systems and the confines of the law as it currently exists. As such, the study does not commit itself to any one subject matter-based agenda (for instance the advancement of human rights interests, environmental interests, labour interests, trade interests or business interests), nor to the technical-juridical status quo in any of the legal systems concerned. Rather, its central point of departure is the question whether and to what extent it can and should be left to domestic civil courts to weigh the competing interests involved in this context and to establish on a case-to-case basis which interests should prevail. In the end, it will be up to Western society policymakers

16 For example: Kristen 20109.
17 For example: Eijsbouts 2010.
18 For example: Jägers 2007.
19 For example: Muchlinski 2007.
20 For example: Braithwaite & Drahos 2000.
21 For example: Teubner 1997; Van Gerven & Lierman 2010.
22 For example: Joseph 2004.
23 For example: Van Der Heijden 2011; Engle 2011.

to determine whether this type of tort-based civil litigation provides a desirable means of promoting their policy aims in the field of international corporate social responsibility and accountability and so should as such be encouraged, or not. By providing a better understanding of these cases and their socio-political context, as well as of the potential and limitations of the tort system, this study aims to contribute by combining insights on the technical-juridical aspects of these cases with insights from the fields of corporate social responsibility, global business regulation and tort law. This should allow for a better understanding of the broader socio-political context of these cases and the advantages and disadvantages of the use of the tort system to promote international corporate social responsibility and accountability.

Date of completion and references
This study was completed on 1 September 2011 and, with a few exceptions, incorporates relevant developments only up to that date. All web references were accurate on or after that date. References to literature, policy documents and case law will where possible be abbreviated in footnotes; they are included in more detail in the bibliography to this study.

2.2 Outline and reader's guide

2.2.1 Outline

This study will be divided into four parts. The present part of this study (part I) contains a prologue that provides a general introduction to the contemporary trend towards foreign direct liability cases that is the focus of this study. Chapter 1 provides an overview of the setting and background to this trend, whereas chapter 2 aims to give an idea of the methodology adopted in this study and of the outline of the remaining parts.

In part II of this study, the contemporary socio-legal trend towards foreign direct liability cases will be further explored with a focus on its legal status quo. The general framework of this legal status quo will be gradually set out in the first three chapters of that part (chapters 3-5), after which a number of issues will be worked out further in a discussion (chapter 6). To this end, chapter 3 will provide an outline of the emerging socio-legal trend towards foreign direct liability cases, followed by a further characterization of this type of transnational tort-based civil litigation. In chapter 4, the factors that determine the legal and practical feasibility of bringing such cases before Western society home country courts will be introduced with a view to the applicable legal and practical circumstances in the US on the one hand and in the European Union Member States on the other. Following that, chapter 5 will zoom in on the legal and practical feasibility of bringing foreign direct liability cases before courts in the Netherlands and on the basis of Dutch tort law. On the basis of these findings, this part will be drawn to a close in chapter

6 with a discussion in which answers will be sought to some of the questions raised in or by the preceding chapters. These questions are whether the contemporary socio-legal trend towards foreign direct liability cases is a durable trend, whether it is a desirable one, what the feasibility is of foreign direct liability claims brought before domestic courts in Europe and, finally, what the feasibility is of foreign direct liability claims brought in the Netherlands. This discussion will be rounded off with some concluding remarks on the legal status quo of the contemporary socio-legal trend towards foreign direct liability cases.

In part III of this study, the contemporary socio-legal trend towards foreign direct liability cases will be further explored with a focus on its broader socio-political and legal perspectives. The general framework of these broader perspectives will be gradually set out in the first three chapters of this part (chapters 7-9), after which a number of issues will be further worked out in a discussion (chapter 10). To this end, chapter 7 will provide a sketch of the broader socio-political context within which this type of transnational tort-based civil litigation is set. In chapter 8, the contemporary challenges of global business regulation with a view to the promotion of international corporate social responsibility and accountability will be further explored. Following this, chapter 9 will investigate the potential role that Western society systems of tort law may play in this broader context. On the basis of these findings, this part will round off in chapter 10 with a discussion in which answers will be sought to various some of the questions raised in or by the preceding chapters. These questions are how the contemporary socio-legal trend towards foreign direct liability cases should be understood in a broader societal context, as well as whether, in what way and to what extent Western society home country systems of tort law can and should play a role in promoting international corporate social responsibility and accountability.

The final part of this study (part IV) contains an epilogue that will provide a recap and some final remarks on the findings of this study.

2.2.2 Reader's guide

The introductory part to this study (part I) provides a basis for both part II and part III of the study, which means that either part can be read separately from the other. The same is true for the individual chapters in each part, including the discussion chapters at the end of each part (chapters 6 and 10), and the overall conclusion (part IV).

Part II of this study approaches the contemporary socio-legal trend towards foreign direct liability cases from a more legal positivist/technical-juridical perspective. Those interested in learning more about the contemporary socio-political trend towards foreign direct liability cases are advised to read chapter 3. Those interested in learning more about the different legal factors determining the feasibility of those cases are advised to read

chapter 4, which compares the way in which those factors work out in the US on the one hand and the EU Member States on the other, and chapter 5, which focuses on the way in which those factors work out in the Dutch legal order. Chapter 6 provides a further discussion of the main findings generated by the general legal frameworks that have been set out in chapters 3-5, including a number of barriers to the successful pursuit of foreign direct liability cases.

Part III of this study deals with the contemporary socio-legal trend towards foreign direct liability cases at a more abstract level. Those interested in learning more about the broader socio-political context of foreign direct liability cases and the contemporary socio-political debates on international corporate social responsibility and accountability are advised to read chapter 7. Those interested in learning more about global business regulation and the potential role of domestic systems of private law in that respect are advised to read chapter 8. Those interested in learning more about the tort system and its potential role(s) in promoting international corporate social responsibility and accountability are advised to read chapter 9. Chapter 10 provides a further discussion of the main findings generated by the general legal frameworks that have been set out in chapters 7-9, including a number of policy recommendations for enhancing the role that tort law may play in promoting international corporate social responsibility and accountability through the pursuit of foreign direct liability cases.

Part IV provides a conclusion in which the various themes that have been set out throughout the study will be brought together.

PART II

Foreign direct liability cases: status quo

Introduction

As discussed in part I, the law may act as an indicator and a facilitator of societal change. The field of private law, due to its flexible, open, standard-based and responsive nature, is particularly open to societal changes, as it allows private parties to raise novel legal claims and/or to challenge existing laws, legal doctrines and precedents in light of contemporary societal issues and changing societal norms and relationships. This is clearly evidenced by the contemporary socio-legal trend towards civil litigation brought before home country courts against (parent companies of) multinational corporations for harm caused to people- and planet-related interests as a result of their host country activities, which is currently starting to become visible in a growing number of Western societies. The various civil claims that have been brought before courts in the US, the UK and the Netherlands against oil multinational Shell for the detrimental impacts of its oil production activities in the Nigerian Niger Delta represent only the tip of the iceberg in this respect. In fact, many more parent companies of multinational corporations have over the past two decades been faced with similar transnational tort-based civil claims brought by or on behalf of host country citizens suffering harm as a result of the detrimental impacts of their operations and/or those of their local subsidiaries, business partners and/or sub-contractors over which they have a measure of control.

In this part, the contemporary socio-legal trend towards foreign direct liability cases will be further explored with a focus on its legal status quo. The general framework of this legal status quo will be gradually set out in the first three chapters of this part, after which a number of issues will be worked out further in a discussion. To this end, chapter 3 will provide an outline of the emerging socio-legal trend towards foreign direct liability cases, followed by a further characterization of this type of transnational tort-based civil litigation. In chapter 4, the factors that determine the legal and practical feasibility of bringing such cases before Western society home country courts will be introduced with a view to the applicable legal and practical circumstances in the US on the one hand and in the European Union Member States on the other. Following that, chapter 5 will focus on the legal and practical feasibility of bringing foreign direct liability cases before courts in the Netherlands.

On the basis of these findings, this part will draw to a close in chapter 6 with a discussion in which answers will be sought to those questions raised in or by the preceding chapters that are most relevant in light of the contemporary status quo of the socio-legal trend towards foreign direct liability cases and of their broader socio-political context formed by Western society debates on international corporate social responsibility and accountability. These questions comprise whether the contemporary socio-legal trend towards foreign direct liability cases is a durable trend, whether it is a desirable one, what the feasibility

is of foreign direct liability claims brought before domestic courts in Europe and, finally, what the feasibility is of foreign direct liability claims brought in the Netherlands. This discussion will be rounded off with some concluding remarks on the legal status quo of the contemporary socio-legal trend towards foreign direct liability cases.

In line with its predominantly technical-juridical nature, the discussion in this part will be based on a combination of primary sources (i.e., statutory and case law) and secondary sources (i.e., literature references). At various places, relevant legal norms and practices in the US will be contrasted to comparable norms and practices in the EU Member States, and the Netherlands in particular. Whereas chapters 3 and 4 will focus on the legal framework determining the feasibility of foreign direct liability claims brought before US (federal) courts on the one hand, and domestic courts in Europe on the other, chapter 5 will focus in particular on the legal framework determining the feasibility of foreign direct liability cases brought in the Dutch legal system. Chapter 6 will provide a discussion and summary of the findings in part II of this study, as well as a link between this part and part III of this study, and will as such seek to frame the new insights provided both in what has been discussed before and in what will be discussed after.

The focus on the US as a point of departure in the following chapters is prompted by the fact that the far majority of foreign direct liability claims so far have been pursued in the US (federal) legal order. The focus on the feasibility of Dutch foreign direct liability cases in a separate chapter is prompted by the idea that the discussion on the Dutch situation is likely to be of particular relevance to Dutch policymakers, practitioners, NGOs and companies, but may be of less relevance for those outside the Netherlands. The desire to provide a chapter on the Dutch situation that can be read independently from the other chapters inevitably brings with it a certain measure of overlap between the different chapters.

As mentioned already in chapter 2, the legal comparisons made in this part will be functional in nature, with a focus on details only where possible and relevant. After all, the main aim of this part of the study is to provide a tour d'horizon of the technical-juridical factors that are likely to determine the feasibility of foreign direct liability cases brought before courts on either side of the Atlantic. A more 'traditional' legal comparison that would necessarily be restricted to specific subject matter areas and might be a bit premature considering the limited number of foreign direct liability claims brought outside the US so far and the scarcity of legal precedent on these cases beyond preliminary matters also in the US.

3 The rise and times of foreign direct liability cases

3.1 The emergence of a socio-legal trend

3.1.1 An old statute put to new use

It may be argued that the socio-legal trend towards bringing civil liability suits against (parent companies of) multinational corporations for damage caused in host countries before Western society courts, which was highlighted in chapter 1, took off in the United States during the 1990s. One of its early precursors was the litigation before US courts that followed the widely publicized Bhopal disaster, considered by many to be the world's worst industrial toxic disaster to date.[1] This incident took place in 1984 when a poisonous gas cloud escaped from a chemical plant in Bhopal, India, leading to the death or bodily injury of tens of thousands people living in the vicinity of the factory. In its aftermath, numerous damages claims were filed before US courts seeking to hold Union Carbide Corporation (now Dow Chemical), the US-based parent company of the local company that owned and operated the chemical plant, liable for the harm suffered by the local victims.[2] Still, it took more than another decade for the vague outlines of an actual trend towards similar cases to become visible, as it was not until the late 1990s that more and more civil suits were starting to be brought before US courts by host country victims seeking to address the detrimental consequences of multinational corporations' overseas activities.

The sudden rise in popularity of this type of transnational civil liability claim around that time was undoubtedly spurred on by the plaintiff-friendly US litigation culture and the tendency in the US of trying to achieve societal change through litigation.[3] But the

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1 See, for instance: Brummelman 2011.

2 These claims were dismissed in the US as the court considered that the case should be tried in the Indian legal system, rather than in the US. See *In re Union Carbide gas plant disaster at Bhopal, India in December 1984*, 634 F.Supp. 842 (S.D.N.Y. 1986), order aff'd as modified by *In re Union Carbide Corp Gas Plant Disaster at Bhopal, India in December 1984* 809 F.2d 195 (2nd Cir. (N.Y.) 1987). They were eventually settled in 1989, but the aftereffects of this disaster still continue to be felt by local Bhopal residents. See, for instance: Brummelman 2011. See, for the case history and further references, the Business & Human Rights Resource Centre website, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnionCarbideDowlawsuitreBhopal>. See, for a highly informative discussion of the disaster, its causes and its legal (and socio-political) aftermath: Cassels 1991. See also Struycken 1995, pp. 70-71 and *infra* sub-section 3.2.2.

3 As was already mentioned in sub-section 1.3.2, civil litigation is commonly used in the US not only as a way to redress past civil wrongs and prevent future ones from occurring, but also to promote social reform and influence future policies. See, more elaborately: sections 4.5.2 and 8.3.2. See also Enneking 2009, pp. 905, 931-934.

principal moving spirit behind it was the 'rediscovery' of an obscure and controversial US federal statute that had been enacted as early as 1789 as part of the US Federal Judiciary Act: the Alien Tort Statute (ATS), also known as the Alien Tort Claims Act (ATCA). This statute, which has famously been referred to as a "*legal Lohengrin*", since "*no one seems to know whence it came*" (or, more particularly: how it was supposed to be interpreted),[4] provides:

> "*The 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*".[5]

Having lain dormant for some 200 years after its inception, the ATS was put to new use in the 1980s in the landmark case of *Filártiga* v *Peña-Irala*.[6] In this case, the statute acted as a legal basis for a civil action that was brought before a US federal court by two former inhabitants of Paraguay against a former Paraguayan police inspector-general for the alleged torture and killing of a member of their family. The success of this claim, with the plaintiffs being awarded around $10 million in damages, proved the ATS's potential as a legal basis for tort claims brought before US federal courts by non-US citizens (aliens)[7] for certain violations of public international law (primarily in the sense of customary international law),[8] committed anywhere in the world.[9] As has been stated in this respect:

> "*In terms of the international protection of human rights, this decision must count as one of the most significant judicial judgments ever rendered, placing the ATS at the center of human rights adjudication*".[10]

Following the Filártiga-case, this modern interpretation of the ATS was confirmed and expanded by other US district and circuit courts, and the statute fast became famous for providing a legal basis upon which those who had suffered egregious breaches of their human rights could bring civil lawsuits against their wrongdoers before US federal courts. McBarnet notes:

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4 See, with further references, Dhooge 2006, pp. 397-398.

5 28 United States Code § 1350. This section was originally enacted in the Judiciary Act of 1789 chapter 20 § 9, 1 Stat 73, 77. See, for instance: Buxbaum & Caron 2010, p. 511.

6 *Filártiga v. Peña-Irala*, 630 F.2d 876 (2nd Cir. (N.Y.) 1980), on remand to *Filártiga v. Peña-Irala*, 577 F.Supp. 860 (E.D.N.Y. 1984).

7 The ATS only pertains to claims made by aliens, meaning that US citizens cannot file claims under this statute. See, more elaborately on the interpretation of the word 'alien' in this context: Anderson Berry 2009.

8 Customary international law (international custom) is one of the main sources of public international law, next to international conventions, decisions of international organisations, general principles of law, equity and unilateral state acts. See, more elaborately: Nollkaemper 2009, pp. 177-214. See, for a discussion of the (arguable lack of) relevance of the international treaty-limb of the Alien Tort Statute: Joseph 2004, pp. 53-54.

9 See, for example: Joseph 2004, pp. 17-18. See also, with further references: Enneking 2007.

10 Buxbaum & Caron 2010.

> "*The use of ATCA is an example of highly creative legal enforcement by NGOs concerned with human rights abuses, but with no way of enforcing claims through more conventional legal routes*".[11]

Initially, ATS-based civil claims for violations of norms of public international law perpetrated abroad were mostly aimed at states and (foreign) public officials as human rights violators.[12] This is not surprising, considering that due to the international legal order's state-centred nature, norms of public international law, which provide the basis for ATS-based civil claims, primarily apply to states and those acting on their behalf. After all, despite the significant changes to today's world order brought about by globalization, the point of departure of the contemporary international legal order still remains that states are the principal bearers of international legal capacity and that the legal position of private (non-state) actors is determined in principle by national legal orders and by domestic legal norms. However, since the Second World War it has become more and more accepted that norms of public international law may sometimes also create direct rights and duties for private (non-state) actors, including not only individuals but potentially also corporate entities.[13]

In recognition of these developments, US federal courts in subsequent ATS cases also allowed the statute to be applied to wrongdoing by private actors in the absence of any state involvement, for instance to private individuals alleged to have perpetrated human rights violations such as genocide and forced labour.[14] As a result, the range of perpetrators of human rights violations that could be targeted by ATS claims gradually expanded. In turn, these developments paved the way for an expansion of the ATS's reach to liability suits brought against corporate actors in general and multinational corporations specifically for their alleged (involvement in) violations of customary international law perpetrated abroad in the course of their international operations.[15] McBarnet and Schmidt have noted in this respect:

> "*For ATCA to become a tool of corporate accountability, three key transformations were necessary. It had to be established, first, that the 1789 statute's reference to the law of nations could apply in the context of contemporary law on human rights; second – given the focus of international law on states – that it could apply to private actors other than just governments and state officials; and third, that it could apply to business corporations*".[16]

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11 McBarnet 2007, p. 39. See also, for instance: Joseph 2004, p. 22.

12 See, on the requirement of state action: Joseph 2004, pp. 33-47.

13 For further explanation of the status of multinational corporations under international law, see Zerk 2006, pp. 60-103. See also, for instance: Nollkaemper 2009, pp. 47-60 and section 1.1.

14 See, for more detail and with further references: Joseph 2004, pp. 48-49. See also, with a focus on corporate actors: Zerk 2006, pp. 209-211.

15 See, for an overview of the evolution of ATS litigation, for instance: McBarnet & Schmidt 2007; Kochan 2005, pp. 110-119.

16 McBarnet & Schmidt 2007 pp. 150-152, who add to this: "*A fourth important issue was whether it could apply*

3.1.2 Foreign direct liability claims brought before US courts: ATS and beyond

The rise of corporate ATS claims

In 1997, the California district court in the case of *Doe v. Unocal* rendered what was a watershed judgment in the development of ATS-based human rights litigation, as it was the first US federal court to assume jurisdiction under the ATS over a claim against a corporate actor.[17] The case involved a class action against US-based multinational oil corporation Unocal, its president and its CEO, as well as against French oil company Total, the Burmese military regime (the State Law and Order Restoration Council, SLORC) and the state-owned and controlled Myanmar Oil and Gas Enterprise (MOGE), which had been brought before the California district court in 1996.[18] The plaintiffs in this case, farmers from the Tenarassim region of Burma, stated that they had been subjected to a variety of human rights violations, including forced labour, murder, rape, and torture, that had been perpetrated by SLORC in furtherance of the Yadana gas pipeline project in Burma, a project jointly run by Unocal, Total and MOGE.[19] In its decision, the district court permitted the plaintiffs' claims against Unocal, which were based on the multinational corporation's alleged complicity in human rights violations perpetrated by the Burmese military and police forces, to proceed. In effect, this decision as well as subsequent decisions in the *Unocal* case implied that the ATS did provide the federal courts involved with subject-matter jurisdiction over the Burmese plaintiffs' liability claims against Unocal and thus that corporate actors were not necessarily exempt from ATS-based liability claims.[20]

The decisions in the *Unocal* case opened the door for further cases in which the ATS was used as a legal basis for liability claims before US federal courts against US-based multinational corporations for wrongdoing perpetrated and damage caused in the course of their activities in host countries. McBarnet and Schmidt have noted in this respect that:

> "[...] *one could read the Unocal litigation* [...] *as a success – and it is cited today in new suits – since it warned that particularly close connections between corporations and*

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where corporations were complicit in the violations without necessarily executing them themselves. Along the way, human rights activists using ATCA in suits against companies also had to overcome an array of specific defences".

17 Unocal 2007. For further detail, see, for instance: McBarnet & Schmidt 2007, pp. 164-169; Kochan 2005, pp. 116-117; Joseph 2004, p. 22.

18 This case was eventually settled out of court in 2005. See, for the case history and further references, the website of Earthrights International: <www.earthrights.org/legal/doe-v-unocal-case-history> and <www.earthrights.org/legal/doe-v-unocal>. See also the reproduction of facts and allegations in *Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D.Cal., 1997), pp. 880-885 and see *infra* sub-section 3.2.2.

19 Another, similar action was filed in September 1996 by four villagers from the Tenasserim region, the Federation of Trade Unions of Burma and the Burmese government in exile against Unocal *et al.*; this action was also allowed by the district court, *National Coalition Government of the Union of Burma et al. v. Unocal, Inc. et al.*, 176 F.R.D. 329 (C.D.Cal. 1997).

20 Compare, for instance: McBarnet & Schmidt 2007, pp. 164-169; Joseph 2004, pp. 22, 68-71.

> *foreign states might be sufficient for liability, and – a key accomplishment – it established that corporations were not barred from ATCA suits per se*".[21]

And indeed, the long considered moribund ATS has over the past thirty years increasingly been used by NGOs and human rights lawyers to hold multinational corporations accountable before US federal courts for their alleged involvement in human rights violations committed outside the US.[22] In the wake of the 1997 *Unocal* decision, dozens of ATS-based civil claims have been brought by host country citizens before US federal courts against a score of internationally operating business enterprises, including – among many others – Chevron, Coca-Cola, Rio Tinto, IBM, Chiquita, ExxonMobil, Firestone, Occidental, Drummond and Pfizer. The subject matter of these claims has concerned a wide variety of alleged abuses by the defendant multinational corporations, ranging from involuntary experimentation on children in Nigeria to severe environmental degradation of rainforests and rivers in Ecuador and to complicity in human rights abuses perpetrated in host countries such as (apartheid-era) South Africa, Sudan and Colombia.[23]

As in the *Unocal* case, the claims in these ATS-based cases against multinational corporations have typically been based on violations of international law perpetrated abroad, generally in developing countries and/or failed states and states with totalitarian regimes, by or with the tacit or explicit consent and/or support of the corporate actors concerned. They have primarily targeted US-based arms of the multinational corporations involved, often the parent companies/head offices, in many cases along with a range of co-defendants, including individual managers, directors and employees within the defendant companies as well as subsidiaries, joint venture partners and others that have somehow also been involved in the harmful activities at issue. Although some of these claims have concerned allegations of direct involvement by the corporate actors involved in human rights violations and/or international crimes perpetrated abroad, the majority have concerned the alleged indirect involvement of the corporate defendants in violations of international norms perpetrated by local third parties, including local subsidiaries, joint-

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21 McBarnet & Schmidt 2007, p. 167 (citations omitted). See also, for instance: Kochan 2005, pp. 117-119, who states with respect to the Unocal case (and in particular the 2002 appellate decision in this case): "[...] *the foundation of various court holdings including* Unocal – *that corporations may be liable for violations of human rights under theories of customary international law – is the critical consequence of this case* […]".

22 See also, for instance: Childress 2011, p. 6.

23 Compare, for instance: Murray, Kinley & Pitts 2011, p. 2. See, for an overview of the factual background and legal proceedings of a large number of these ATS-based foreign direct liability cases, the Business & Human Rights Resource Centre website: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases>. Note, however, that many of these cases have not made it to trial as a result either of pre-trial dismissals or of out-of-court settlements; others are still pending. See further sub-section 1.3.1 and *infra* sub-section 3.3.1.

venture partners and/or (sub-)contractors, which in many cases have some connection to the governments of the host states in which the violations take place.[24]

Most of these cases have turned out to be complicated, drawn-out, and high-profile lawsuits that have invariably raised difficult and often controversial legal and socio-political issues, attracting ample attention from politicians, the media and the public at large not only within but also outside the US. One of the most controversial yet exemplary corporate ATS cases of the past few years has undoubtedly been the Apartheid litigation, in which victims of the former South African Apartheid regime have sued a score of multinational corporations for their alleged direct and/or indirect involvement in the wide range of human rights violations committed by the South African Apartheid regime between 1948 and 1994. The plaintiffs in this litigation claim that the defendant multinational corporations knowingly supported this regime by providing the funds, technology, systems, equipment and other support necessary to keep it in place, thus profiting from its abusive policies, and by continuing to do so even after its practices had been universally condemned and international sanctions had been imposed.[25]

One of the multinational corporations that has over the past few years been at the centre of attention due to its involvement in a series of high-profile ATS-based liability lawsuits is multinational oil corporation Shell. As is clear from what has been discussed before, it became the subject of ATS-based civil liability claims before US federal courts as early as 1996.[26] These claims pertained to Shell's alleged complicity in human rights violations (including torture and summary execution) perpetrated by the Nigerian military government and security forces against local Nigerian environmental activists campaigning against the environmental damage caused by oil extraction activities in the Ogoni region of Nigeria. These Nigerian environmentalists, who became known as the 'Ogoni Nine' headed by the well-known Nigerian author/producer/environmental activist Ken Saro-Wiwa, had been detained illegally in 1994 by the Nigerian military government, held incommunicado in military custody, then tried by a special court established by the military government using procedures in violation of international fair trial standards, convicted and summarily executed. According to the claimants, relatives of the deceased, Shell was complicit in these human rights abuses by – through its Nigerian subsidiary – providing transport to the Nigerian troops, allowing company premises to be used as staging areas for raids against local citizens and paying and providing food to the soldiers.[27]

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24 See Childress 2011, pp. 17-18, who provides a useful overview of the modern rise (and fall) of the ATS in US federal courts (pp. 10-26). See also, elaborately: Joseph 2004, pp. 50-53.

25 See, for an overview of facts of this case and the course of the legal proceedings, *In re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004), pp. 542-546 and *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 241-245. See, for the case history and further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ApartheidreparationslawsuitsreSoAfrica>, as well as *infra* sub-section 3.2.2.

26 See the Introduction to Part I and sub-section 1.3.1.

27 See, for the case history and further references, the website of the Business & Human Rights Resource Centre:

One of the ATS-based civil cases against Shell that originated from these events, the case of *Wiwa v. Shell*, was settled out of court in June 2009 for $15.5 million.[28] A related case, the case of *Kiobel v. Shell*, is currently pending before the US Supreme Court after having been rejected by the New York Court of Appeals, which decided in September 2010 that the ATS could not act as a basis for civil claims for violations of customary international law by corporate defendants.[29] As will be discussed further below, the decision of the Supreme Court in this case, which is expected in June 2012, will prove to be a landmark decision as it will determine the fate of the contemporary line of corporate ATS-based civil lawsuits under discussion here.[30] In the meantime, a new ATS-based foreign direct liability claim was filed against Shell in October 2011, this time by Nigerian villagers seeking compensation for the widespread environmental pollution allegedly caused by Shell's oil exploration activities in the Ogoniland region of the Niger Delta.[31]

Confusion in the courts: the interpretation of the ATS

As over time more and more ATS-based civil lawsuits have been brought before US federal courts against not only foreign public officials but increasingly also against private individuals and corporate actors, it has become obvious that the exact interpretation of the statute itself and the limits to its scope remain matters of dispute. Much of this controversy of course derives from the fact that the statute was introduced in a time long ago when the world was a different place, in which the statute's import, the reasons for its existence, and its intended use were probably very different from the way it has been used since its 'rediscovery' in the late 20th century. Dhooge has noted in this respect:

> "*Judicial interpretation of the ATCA has been complicated by the complete absence of legislative history as well as judicial elaboration in opinions prior to the 1980s. The ATCA is not mentioned in the debates surrounding the adoption of the first Judiciary Act, and there is no evidence of what its drafters intended by its inclusion*".[32]

One of the main issues regarding the interpretation and scope of the ATS that has long kept the different district and circuit courts divided was the question whether and to what extent the ATS is merely a jurisdictional statute providing the federal courts with subject matter jurisdiction over a specific category of transnational tort claims, or whether it may also provide a cause of action under international law and/or act as authority for US federal courts to create (recognize) new causes of action in tort for modern-day

<www.businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria>.

28 See, for instance: 'Oil spoils', *The Economist*, 13 August 2011, p. 30; Persson 2011b. See also, in more detail: Lambooy 2010, pp. 385-434.

29 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. (N.Y.) 2010).

30 See, for instance: Denniston 2011b; Stohr 2011.See also, more elaborately, *infra* sub-section 3.3.2.

31 See, for instance: Gambrell 2011.

32 Dhooge 2006, p. 397 (citations omitted).

violations of norms of customary international law.[33] This issue is closely connected, on the one hand, to the fact that in common law systems for a tort claim to be actionable it is required that the claim can be based on one of a number of specific, pre-existing causes of action[34] and, on the other hand, to the fact that norms of customary international law may not automatically be applicable within the US domestic legal order.[35] It has raised particular controversy since US federal courts, with their inherent limitations in subject matter jurisdiction and due also to separation-of-powers constraints, are not generally authorized to recognize and apply new common law causes of action derived from the law of nations without any legislative guidance.[36]

In 2004, the Supreme Court for the first (and, so far, only) time gave an opinion on the ATS and its interpretation and scope in the case of *Sosa v. Alvarez-Machain*.[37] In a majority opinion it decided that the ATS is jurisdictional in nature but that it does authorize US federal courts to recognize causes of action ensuing from the violation of international norms, albeit only for a very limited class of international norms in existence today.[38] The Court noted with respect to the discretion of the federal courts to recognize new causes of action of this kind under the law of nations: "[…] *the judicial power should be exercised on the understanding that the door* [to further independent judicial recognition of international norms that are actionable under the ATS] *is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today*".[39] Thus, although according to the Supreme Court federal courts have a discretion to recognize new causes of action in common law based on violations of the law of nations, they should exercise restraint in doing so and:

> "[...] *require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized*".[40]

The '18th century paradigms' referred to by the court are the violations of the law of nations that the First Congress probably had in mind when enacting the ATS: violation of safe conducts, infringement of the rights of ambassadors, and piracy.[41]

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33 Similarly: Murray, Kinley & Pitts 2011, pp. 4, 5-10.
34 Compare, for instance: Zweigert & Kötz 1998, pp. 605-615. See further sub-section 4.4.2.
35 Bianchi 2004, pp. 754-757, 777-779. See further sub-section 4.4.1.
36 See, for instance, Childress 2011, pp. 10-16.
37 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
38 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), pp. 724-725. See also: Kochan 2003, p. 121. Note that the court was deeply divided on the matter; see further sub-section 4.4.1.
39 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), p. 729.
40 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), p. 725.
41 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), p. 724. See more elaborately, for instance: Murray, Kinley & Pitts 2011, pp. 5-10.

In the end, even though the Court's ruling in the *Sosa* case may have answered some of the questions regarding the scope and limits of the ATS, the decision has been widely criticized for arguably having created more confusion than clarity.[42] One of the main points of contention is that it has provided the lower courts with only minimal direction as to the norms of customary international law that do qualify for application in ATS-based tort claims. Apart from indicating that a norm of customary international law should be specific, universal and obligatory (to an extent comparable to the aforementioned 18th century paradigms), and that the lower courts should also take into account the practical consequences of providing a remedy in tort on the basis of the ATS for a violation of any such norm, the Supreme Court's decision has failed to provide clarity on which norms of customary international law meet this standard.[43] At the same time, a number of other crucial questions have also been left unanswered; these include, *inter alia*, the question as to which source of law should determine standards of secondary liability (*e.g.*, liability for aiding and abetting human rights violations perpetrated by another) as well as the question as to which source of law determines whether corporate actors can be held liable for (their complicity in) violations of norms of customary international law.[44] As will be further discussed below, it is these particular issues that have recently turned out to be of crucial importance for the continued feasibility of bringing ATS-based foreign direct liability cases before US federal courts.[45]

US alternatives to corporate ATS claims

All the same, what has become clear from the many transnational tort-based civil lawsuits that have been pursued on the basis of the ATS over the past two decades is not only that the ATS may play a crucial role in providing foreign victims of human rights abuses with access to remedies before US domestic courts, but also that the ATS is controversial and inherently limited in scope. After all, due to the state-centred character of public international law and the fact that as a result most international norms pertain to state action only, the range of norms of customary international law upon which ATS-based

42 See, for instance: Nemeroff 2008, p. 231. See also: Murray, Kinley & Pitts 2011; Childress 2011, pp. 15-16; Satterfield 2008.

43 Norms of customary international law that prior to the Supreme Court's *Sosa* decision had been accepted by the lower courts as a basis for ATS-based claims include: "[...] *prohibitions on torture, summary execution, genocide, war crimes, sexual assault, forced labour, slavery, forced relocation, disappearance, cruel, inhuman and degrading treatment (including medical experimentation without informed consent), forced exile, forced displacement, arbitrary detention, arbitrary arrest, crimes against humanity, racial discrimination, aircraft hijacking, and pollution contrary to UNCLOS, as well as rights to association, and freedoms of political belief, opinion, and expression*"; Joseph 2004, pp. 22-33 (quote pp. 26-27, citations omitted). The one thing that the Supreme Court did make clear in this respect in its *Sosa* decision was that the prohibition on arbitrary detention that was at the basis of the ATS claim in the *Sosa* case did *not* meet the standard of a norm of customary international law with a specificity, universality and definitiveness comparable to that of the 18th century paradigms. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), pp. 733-738.

44 See, for instance: Murray, Kinley & Pitts 2011, pp. 9-10.

45 See further *infra* sub-section 3.3.2.

civil claims can be brought is inherently limited, especially where the defendants are private individuals and/or corporate actors.[46] Furthermore, over the past several years the ATS's reach has substantially been constrained by federal courts, particularly in cases involving corporate defendants, possibly due to a hesitance inspired by the fact that the disputes underlying ATS-based claims usually only have very limited connections to the US legal order.[47] Significant limitations to the feasibility of pursuing (corporate) ATS-based lawsuits may potentially stem for instance from the doctrine of *forum non conveniens* (according to which the court may dismiss a transnational case in favour of its adjudication by an alternative foreign court),[48] the political question doctrine (according to which the court has a discretion to abstain from deciding a dispute that presents a 'political question'),[49] and considerations of exhaustion of local remedies (according to which plaintiffs may be required to have exhausted any remedies available in their domestic legal system before asserting a claim in a foreign forum).[50]

As a consequence of the controversy and limitations inherent in the ATS but in line with the increase in popularity over the past two decades of pursuing transnational tort-based civil litigation against internationally operating business enterprises as a result of the examples set by ATS-based foreign direct liability claims, other legal avenues for bringing this type of claim before US courts are also increasingly being explored. There are various other US federal statutes that may under specific circumstances provide (alternative) legal bases for bringing this type of civil liability claim before US federal courts.[51] In addition, corporate ATS claims have regularly been accompanied by transnational tort-based civil claims against (parent companies of) multinational corporations on the basis of alleged violations of US state and/or host country statutes and/or US state and/or host country principles of tort law; such claims have been brought both before US federal courts and before US state courts.[52] Thus, although still dominated by the ATS and its particular

46 See also, for instance: sub-section 4.4.1.

47 For more detail, see Childress 2011, pp. 1-32, who notes: "*Federal courts have begun to limit the reach of the ATS in cases involving alleged human rights violations by corporations. Courts have done this by not only interpreting international law but by employing domestic procedural devices that limit the application of international law in domestic courts*" (p. 22).

48 For further explanation, see, for instance: Joseph 2004, pp. 87-99. See also sub-section 4.2.1.

49 For more detail, see, for instance: Endicott 2010.

50 For further explanation,see, for instance: Waugh 2010.

51 These include: the Racketeer Influenced and Corrupt Organizations Statute (18 United States Code § 1962 (2002)), on the basis of which damages can be claimed that result from a company's 'racketeering' activities, a broad notion that may also encompass activities committed abroad; the Torture Victim Protection Act (Pub.L. 102-256, 106 Stat. 73 (1991)), on the basis of which a civil suit can be filed against individuals who, acting in an official capacity for any foreign nation, committed torture and/or extrajudicial killing; and 28 United States Code § 1331, under which US federal courts have subject-matter jurisdiction over civil claims on the basis of an alleged violation of the Constitution, laws or treaties of the United States. See for a discussion of these and other legal bases in US federal law, with further references: Joseph 2004, pp. 61-63, 77-80.

52 See, for more detail and with further references: Joseph 2004, pp. 65-66.

requirements, foreign direct liability cases brought before US courts increasingly come in different shapes and sizes.[53]

The complaint in the *Unocal* case, for instance, comprised not only ATS-based claims, but also claims on the basis of, *inter alia*, the California Constitution art. 1 §6 (prohibition on slavery and involuntary servitude), the California Business & Professions Code §17200 (dealing with unfair competition) and California state tort law (*i.e.*, wrongful death, battery, false imprisonment, assault, intentional and/or negligent infliction of emotional distress, negligence and recklessness, negligence per se, conversion, negligent hiring, negligent supervision).[54] Similarly, the claims against US-based Union Carbide Corporation (now Dow Chemical) that followed the Bhopal disaster were based on domestic principles of tort law (alleging that the parent company was liable for its own negligence and/or was strictly liable for the damage caused by the hazardous activities of its Indian subsidiary).[55] More recently, foreign direct liability cases against Exxon Mobil (relating to natural gas extraction activities in Indonesia) and Chevron (pertaining to activities undertaken in response to rebels taking an oil platform in Nigeria) have been allowed to proceed by the US federal courts involved on the basis of District of Columbia state law claims of wrongful death, theft by coercion and assault and battery, and California state and Nigerian law claims of negligence and intentional torts, respectively.[56]

3.1.3 Foreign direct liability claims brought outside the US: parent company liability on the basis of negligence

The tendency towards bringing transnational tort-based civil claims against (parent companies of) multinational corporations for damages caused in host countries has

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53 Compare also: Childress 2011, who notes: "*In recent ATS cases, plaintiffs have not only pled ATS claims but also claims in diversity or supplemental claims, alleging the same facts as a violation of state or foreign law. One should expect such claims to rise as substantive ATS law is restricted by federal courts*" (p. 40). Accordingly, Childress predicts that due to the increasing limitations for (corporate) ATS-based claims, "[...] *the next wave of international human rights litigation will be waged under state and foreign law and in some cases in state court*" (p. 54). See also, more elaborately: sub-section 3.3.2.

54 When the plaintiffs' state law-based claims in this case were dismissed in the federal procedure without a further ruling on them, they refiled those claims in California state court, which allowed a number of these claims to proceed to trial. The case was eventually settled out of court in 2005. See, for the case history and further references, the Earthrights website: <www.earthrights.org/legal/doe-v-unocal>. See, for a more elaborate discussion of these claims brought before the California state courts on the basis of California state tort law: Joseph 2004, pp. 68-71.

55 See, for example, Joseph 2004, p. 72. See also, more elaborately, *infra* sub-section 3.3.2.

56 See, for instance: Childress 2011, pp. 40-41. See also, more elaborately and with further references, the website of the Business and Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ExxonMobillawsuitreAceh> and <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ChevronlawsuitreNigeria>, respectively. Note that whereas the former case is still ongoing, in the latter case a jury found in favour of defendant Chevron on all claims.

not been confined to US federal and state courts.[57] Similar suits have been filed before courts in other Western societies such as Canada, the United Kingdom, Australia and the Netherlands against multinational corporations incorporated or headquartered there, albeit on a far smaller scale so far. Resembling the aforementioned foreign direct liability cases that have been brought on the basis of US state tort law, these claims have principally been based on general principles of domestic tort law and the tort of negligence in particular, rather than on any specific piece of legislation such as the ATS.[58] As a consequence, in these cases the focus has been not so much on corporate violations of international human rights norms and/or international crimes, but rather on corporate violations of duties of care towards local individuals and/or communities in the host countries in which the multinational corporations operate.[59] Still, as will be further explored below, these cases bear fundamental similarities to those brought before US federal and state courts.[60]

A well-known case of this type that has been brought in the UK was the group action by some 3,000 South African plaintiffs who sought compensation from UK-based multinational Cape plc. (now Gencor) for asbestos-related personal injuries and losses they had allegedly sustained while working for or living in the vicinity of various asbestos mines and mills operated by Cape's South African subsidiaries.[61] The main legal issue in this case was formulated as follows:

> "*Whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers an/or*

57 See, already in 2001: Ward 2001b, who sees an "[…] *increasing trend for parent companies of multinational corporate groups to face litigation in developed country courts over environmental, social and human rights impacts in developing countries*" (p. 451).

58 See, on the absence of any equivalent to the purely American ATCA in Europe or anywhere else outside the US: Joseph 2004, pp. 19-20. See also: Stephens 2002, p. 32, who states: "*No other legal system has a comparable statute*". Note that an attempt has been made to bring a case similar to the *Unocal* case against Unocal's joint venture partner Total in Belgium (since the claims against Total had been dismissed by the US federal courts for lack of personal jurisdiction, see *infra* sub-section 3.2.2), on the basis of a 1993 Belgian law of universal jurisdiction. See, for a case history and further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuits regulatoryaction/LawsuitsSelectedcases/TotallawsuitinBelgiumreBurma>.

59 Ward 2001b, p. 456. Joseph notes that "[u]*nlike ATCA claims, ordinary transnational tort claims will not normally be drafted in human rights language. Nevertheless, these cases raise important human rights issues*"; Joseph 2004, p. 76. See also: Enneking 2010, pp. 403-404.

60 See further *infra* section 3.3.

61 The parties to this litigation eventually reached an out-of-court settlement in 2003. See, for the case history and further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/CapeGencorlawsuitsreSoAfrica>. See also, for an overview of the facts of the case and the course of the legal proceedings, *Lubbe And Others v. Cape Plc, Afrika And Others v. Same* [2000] 2 Lloyd's Rep. 383, pp. 383-386, 387-389.

> *other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company*".[62]

Accordingly, the case revolved not around the alleged complicity of corporate actors in violations of international human rights norms perpetrated abroad like the large majority of its US-based counterparts, but around the alleged negligence of a home country-based parent company of a multinational corporation in failing to exercise due care with respect to the people- and planet-related interests of host country third parties when directing the transnational activities of its corporate group.[63]

Prior to the *Cape* case, UK courts had already been faced with some similar transnational tort-based civil liability claims against UK-based (parent companies of) multinational corporations for damage caused in host countries. These included a number of civil actions brought in the UK between 1994 and 1998 against UK-based chemicals company Thor Chemicals, which had, after receiving sustained criticism in the UK over its health and safety record, relocated its mercury recycling operations lock, stock and barrel to South Africa where they were operated by a local subsidiary. The plaintiffs, who claimed to have suffered mercury poisoning as a result, sought to hold Thor and its director liable in tort for setting up and maintaining operations in South Africa which they knew or ought to have known were unsafe for the people working in them.[64] In the same period, claims were brought in the UK against Rio Tinto (R.T.Z. Corporation) by a former worker at its Namibian uranium mines for asbestos-related personal injuries sustained while working at those mines, which had been operated by a local subsidiary. The claim against the parent, R.T.Z. Corporation plc, was based on the allegation that it had either devised its Namibian subsidiary's policy on health, safety and the environment, or that it had advised its subsidiary on the contents of that policy. It was further alleged that R.T.Z. employees had implemented the policy and supervised health, safety and/or environmental protection at the mine.[65]

Similar claims were pursued also in other non-US Western societies. In Australia, a civil claim was brought as early as 1994 against Australian mining company BHP for damages resulting from the pollution of the Ok Tedi River in Papua New Guinea and adjoining land caused by the mining activities of one of its local subsidiaries.[66] In 1997, Canada-based

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62 *Lubbe & Ors v. Cape plc.*, [1998] C.L.C. 1559, p. 1568. See further *infra* sub-section 3.2.2.

63 Similarly, for example: Ward 2001b.

64 These cases resulted in two out-of-court settlements, one in 1997 for £1.3 million (for a total of 20 workers) and one in 2000 for £270,000 (for a further 21 workers). See, for instance: Ward 2001a, available at <www.chathamhouse.org.uk/files/3028_roleoffdl.pdf>. See also: *Ngcobo and others v Thor Chemical Holdings Ltd. and another* [1995] T.L.R. 579 and *Sithole and others v Thor Chemical Holdings Ltd. and another* [1999] T.L.R. 110.

65 *Connelly v R.T.Z. Corporation Plc. and Another* [1997] UKHL 30.

66 This case was settled in 1996; the settlement terms included financial compensation of AUS$40 million as well as measures to limit further damage. This settlement, however, did not effectively put an end to the matter; a case brought in 2007 before a local Papua New Guinea court against (now) BHP Billiton is

international gold producer Cambior was sued in the Quebec Superior Court by a public interest group seeking compensation on behalf of a large group of Guyanese citizens for damages caused by the failing of a tailings dam at a local mine that was operated by one of Cambior's subsidiaries.[67]

A more recent example of this type of transnational tort-based civil litigation brought before non-US Western society courts against (parent companies of) multinational corporations for damage caused in host countries is the group action that was brought by some 30,000 Ivorians before the London High Court against Dutch international petroleum trader Trafigura. This litigation followed the 2006 incident involving the Probo Koala, a ship chartered by Trafigura's London office, which unloaded a shipment of alleged toxic waste that was later disposed of at open air sites around the Ivorian port city of Abidjan, allegedly resulting in personal injuries to a large group of local Ivorian citizens.[68] Other examples include the aforementioned foreign direct liability claims against Shell's Anglo-Dutch parent company and its Nigerian subsidiary that have recently been brought before UK and Dutch courts. In a closely related development, in October 2011 two French NGOs filed a criminal complaint together with an application to join the proceedings as a civil party against a French company for its alleged complicity, through its supply of communication surveillance equipment, in grave human rights violations perpetrated by the Libyan regime under Gaddafi.[69]

As noted, the admission of liability by Shell's Nigerian subsidiary in the former case, which should result in an out-of-court settlement between the oil multinational and the 69,000 inhabitants of the Nigerian Bodo community for the damage caused by two major oil spills, may open the door to further foreign direct liability claims against Shell before domestic courts in Europe in relation to the detrimental consequences of the Shell group's activities in the Nigerian Niger Delta.[70] As will be discussed further below, it is very possible that in combination with the increasing restrictions imposed upon corporate ATS claims, these developments may well result in a shift in focus both from the ATS as

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still pending. See, for the case history and further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/BHPlawsuitrePapuaNewGuinea>.

67 The case was dismissed in 1998, as the court considered the Guyanese courts to be in a better position for its adjudication. Thereupon, two successive lawsuits were brought against Cambior in Guyana with respect to this matter, but both were dismissed; in the second of these, the plaintiffs were ordered to pay the defendants' legal costs. See, for the case history and further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/CambiorlawsuitreGuyana>.

68 The parties to this litigation reached an out-of-court settlement in 2009. See, for the case history and further references, the website of the Business and Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire>. See also further *infra* sub-section 3.2.2.

69 See more elaborately the website of the International Federation of Human Rights, one of the instigators of the complaint: <www.fidh.org/FIDH-and-LDH-file-a-complaint>.

70 See, for instance: Depuyt & Lindijer 2011; Persson 2011b. See also the Introduction to Part I.

the primary basis for foreign direct liability cases to general principles of tort law and the tort of negligence in particular, and also from US (federal) courts as the primary venue for foreign direct liability cases to domestic courts in other Western societies.[71]

3.2 Foreign direct liability cases further defined

3.2.1 Definition

All of the cases forming part of the socio-legal trend towards transnational tort-based civil liability claims brought before Western society courts against (parent companies of) multinational corporations for damage caused as a result of the detrimental impact on people and planet of their operations in host countries that is under discussion here, share a number of characteristic features.[72] Notwithstanding the fact that of course each individual claim within this category of civil cases comes with its own particular factual background and has its own particular legal profile, a profile that is also strongly affected by the legal system in which that particular claim is brought and the legal basis upon which it is brought, the particular characteristics that all of these cases have in common set them apart as a specific category of civil litigation. Thus, there are certain threads that connect all of the cases discussed here, no matter whether they are brought for instance before US federal or state courts or before courts in other Western societies such as Australia, Canada, the UK or the Netherlands, and no matter whether they are brought for instance on the basis of the ATS or on another legal basis such as general principles of domestic tort law. Those common threads can be defined in various ways, depending on the particular lens through which one chooses to look at these cases. One way of looking at these cases is to focus on their human rights content and to describe them as a form of international or transnational human rights litigation;[73] others, however, have taken different perspectives, for example describing this type of litigation as a form of international law litigation[74] or as transnational public law litigation.[75]

The designation that arguably fits in best with this study's norm-neutral focus on tort law (as was discussed in sub-section 2.1.1) is to refer to these cases as 'foreign direct liability cases' (or, when referring more specifically to the claims made in these cases, 'foreign direct liability claims'). This term was coined over a decade ago, to denote

71 See further sub-section 3.3.2.
72 See further *infra* sub-section 3.2.3.
73 Compare, for instance: Van Der Heijden 2011; Joseph 2004; Scott 2001.
74 See, for instance: Childress 2011.
75 See, for instance: Koh 1991.

> "[...] *a new wave of claims that aim to hold parent companies legally accountable for negative environmental, health and safety, labour, or human rights impacts associated with the operations of members of their corporate family in developing countries.*"

These claims, which were considered to "[...] *represent the flip side of foreign direct investment*" were described as forming part of an

> "[...] *increasing trend for parent companies of multinational corporate groups to face litigation in developed country courts over environmental, social and human rights impacts in developing countries*".[76]

As is clear from the foregoing, the term 'foreign direct liability cases' is used here to refer to tort-based civil liability claims brought against parent companies of multinational corporations before courts in their Western society home countries for harm caused to the people- and planet-related interests of third parties (local employees, neighbours, local communities, etc.) in developing host countries as a result of the local activities of the multinational corporations involved.

Over the past decade, the term has found some following among commentators writing on the subject.[77] Its definition highlights the transnational nature of these cases, as well as the fact that the claims in these cases are typically based on tort law and principally aimed at the parent companies of the multinational corporations involved in an attempt to hold them liable for their direct or indirect involvement in the harmful business practices carried out in developing host countries that have resulted in the damage caused to the plaintiffs. Importantly, the term is neutral as regards the allegedly violated substantive norms underlying the claim. As such, it may cover transnational civil claims arising out of violations of a wide range of norms such as human rights norms, environmental norms, health and safety norms and labour norms. In doing so, it also does not distinguish between the norms in question on the basis of the source from which they derive, meaning that it potentially covers claims arising from alleged violations of both written or unwritten legal norms, hard law or soft law standards, norms that are derived from public international law as well as norms that are derived from domestic (home or host country) law, norms that are derived from general custom, etc.

3.2.2 Brief case studies of six foreign direct liability cases

Due to its broad definition, the term 'foreign direct liability cases' covers virtually all of the transnational tort-based civil liability cases discussed here so far. Some well-known

76 Ward 2001b, p. 454. See also Ward 2000; Ward 2001a; Ward 2002.
77 See, for example: Kerr, Janda & Pitts 2009, pp. 293-303; Wouters & Chanet 2008; Zerk 2006, pp. 3, 198 *et seq*.

examples of cases that may be said to fall within the ambit of the categorization adopted here and that have already come up in this chapter include the Bhopal litigation, the *Unocal* case, the *Cape* case, the Apartheid litigation, the *Trafigura* case and the Dutch Shell cases.[78] In order to stress the potential variety of cases that may be characterized as foreign direct liability cases, brief case studies will be provided here of all six cases before continuing in the next sub-section with a further discussion of these types of cases and their most salient features.

The Bhopal litigation

As already mentioned, the Bhopal litigation followed the 1984 Bhopal disaster which left hundreds of thousands[79] of Indian citizens living in the vicinity of the Bhopal chemical plant, operated by an Indian subsidiary of US-based multinational Union Carbide Corporation (UCC, now Dow Chemical),[80] dead or seriously injured after the escape of a poisonous gas cloud.[81] The incident gave rise to a multitude of civil claims seeking to hold parent company UCC liable for the harm suffered by the local victims, which were filed both in India and before US courts.[82] The claims were based partly on the Indian common law doctrine of multinational enterprise liability (a form of strict liability within multinational enterprises)[83] and partly on the parent company's allegedly negligent role in the design and construction of the Indian plant and in subsequent safety monitoring.[84] Relevant facts included the fact that UCC had a large degree of management control over its Indian subsidiary and had been intensively involved in its local activities (including not only the design, construction and safety monitoring of the plant but also for instance

78 As there are many more cases that may fall under this heading, any selection of cases is inevitably random and it should be noted that due to the relative novelty of the socio-legal trend towards this type of transnational civil litigation, and due to the diversity of cases belonging to this trend, each and every case is likely to bring something new to the table. See, similarly: Enneking 2010, pp. 401-402. As has been mentioned before, the website of the Business & Human Rights Resource Centre provides an extensive list of similar type cases, with case histories and further references for each case, at <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases>. Note, however, that the list of cases represented there is not necessarily exhaustive and that a number of the cases included in the list do not fall within the ambit of the definition of 'foreign direct liability cases'.

79 In fact, it seems that nobody really knows how many people have truly been affected by the Bhopal disaster; what is clear is that tens of thousands of its survivors are still suffering today. See, for instance: Brummelman 2011.

80 Connecticut-based Union Carbide Corporation at the time indirectly (through a 100% subsidiary, Union Carbide Eastern) held 50.9% of the stock of the local company, Union Carbide India Limited, which was incorporated under Indian law; the rest of the stock was owned by Indian institutional investors. See Struycken 1995, pp. 70-71.

81 See, for a highly informative discussion of the disaster, its causes and its legal (and socio-political) aftermath: Cassels 1991.

82 See, for the case history and further references, the Business & Human Rights Resource Centre website, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnionCarbideDowlawsuitreBhopal>. See also: Cummings 1986.

83 See further sub-section 4.4.3.

84 See for instance, with further references: Struycken 1995, pp. 70-71; Zerk 2006, p. 219.

the decision to store large quantities of the toxic agent that eventually caused the Bhopal disaster there).[85] Union Carbide however maintained that the disaster was the result of an act of sabotage, that it had not been involved in the Bhopal operation, and that the Indian government was contributorily negligent as it had allowed slums to be built in the vicinity of the plant and had not enforced its own safety standards.[86]

In 1985, the various US claims were joined and assigned to the New York federal district court, while the Indian government enacted legislation which provided that it had the exclusive right to represent Indian plaintiffs in India and elsewhere in connection with the tragedy (the 'Bhopal Gas Leakage Disaster Act 1985').[87] In May 1986, the joint case was dismissed on grounds of *forum non conveniens*, as the court considered that the case should be tried in the Indian legal system, rather than in the US.[88] It held:

> "*The administrative burden of this immense litigation would unfairly tax this or any American tribunal. The cost to American taxpayers of supporting the litigation in the United States would be excessive. When another, adequate and more convenient forum so clearly exists, there is no reason to press the United States judiciary to the limits of its capacity. No American interest in the outcome of this litigation outweighs the interest of India in applying Indian law and Indian values to the task of resolving this case. The Bhopal plant was regulated by Indian agencies. The Union of India has a very strong interest in the aftermath of the accident which affected its citizens on its own soil. Perhaps Indian regulations were ignored or contravened. India may wish to determine whether the regulations imposed on the chemical industry within its boundaries were sufficiently stringent. The Indian interests far outweigh the interests of citizens of the United States in the litigation*".[89]

With respect to the claims by the plaintiffs, as represented by the Indian government, that the courts of India would not be up to conducting the Bhopal litigation, the court considered:

> "*The Court thus finds itself faced with a paradox. In the Court's view, 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. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the*

85 Struycken 1995, pp. 70-71.
86 For more detail, see Cassels 1991, p. 23.
87 *In re Union Carbide gas plant disaster at Bhopal, India in December 1984*, 601 F.Supp. 1035 (Jud.Pan.Mult. Lit., 1985), order aff'd as modified by *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec.*, 1984, 809 F.2d 195.
88 For a more detailed discussion, see Cummings 1986.
89 *In re Union Carbide gas plant disaster at Bhopal, India in December 1984*, 634 F.Supp. 842 (S.D.N.Y. 1986), p. 867.

> *world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947.*"[90]

In 1989, the Indian Supreme Court announced a court-endorsed settlement between the Indian government, acting on behalf of the victims, and Union Carbide, which involved a payment of $470 million by the multinational corporation to the victims. The greater part of this sum was not disbursed among the claimants until 2004, however.[91] In the end, this outcome to the attempts to secure civil redress and/or some form of justice for the Bhopal victims is generally perceived as utterly unsatisfactory and a judicial failure.[92] A number of new civil actions have over the years been filed before US federal courts against Union Carbide, addressing, *inter alia*, the alleged ongoing contamination at and around the Bhopal plant site; one of these claims is still pending.[93] In June 2010, 16 years after the disaster, an Indian court sentenced eight Indian former plant employees to two years imprisonment and monetary fines of $2,125 per person for criminally negligent homicide; an arrest warrant against former UCC chairman Warren Anderson was issued in 2003 but never acted upon. Also as regards these criminal proceedings, the general sentiment is that their outcomes are 'too little, too late'.[94] Recent promises by the Indian government to negotiate a new settlement with Dow Chemical and to try to get UCC's former chairman (who is now 90 years of age) extradited are widely seen as empty and meaningless; more meaningful, perhaps, is its 2010 decision to allocate an extra $300 million for compensation of the victims and cleaning up of the Bhopal site.[95]

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90 *In re Union Carbide gas plant disaster at Bhopal, India in December 1984*, 634 F.Supp. 842 (S.D.N.Y. 1986), p. 867. The court's decision in this matter has not remained uncriticized. See, for a critique and further references: Cassels 1991, pp. 16-20.

91 See, generally on the course of affairs in this matter and for further references, the Business & Human Rights Resource Centre website, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuits regulatoryaction/LawsuitsSelectedcases/UnionCarbideDowlawsuitreBhopal>.

92 See, for a critical review of the Bhopal disaster and the roles played by both the Indian government and Union Carbide in the events leading up to it as well as its aftermath, a 2004 report by Amnesty International, 'Clouds of Injustice: Bhopal disaster 20 years on', Amnesty International Publications (2004), available at <www.amnesty.org/en/library/asset/ASA20/015/2004/en/fa14a821-d584-11dd-bb24-1fb85fe8fa05/asa200152004en.pdf>. See also: Brummelman 2011, pp. 28-29; Venkatesan 2009; Earthrights International, 'A legacy of harm: twenty five years after the Bhopal disaster, affected communities are still suffering' (3 December 2009), available at <www.earthrights.org/about/news/legacy-harm-twenty-five-years-after-bhopal-disaster-affected-communities-are-still-suffer>.

93 See, for the case history and further references, the Earthrights International website: <www.earthrights.org/legal/bano-v-union-carbide>, and also the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnionCarbideDowlawsuitreBhopal>.

94 'Bhopal trial: eight convicted over India gas disaster', *BBC News online*, 7 June 2010, <http://news.bbc.co.uk/2/hi/8725140.stm>.

95 Brummelman 2011.

The Unocal case

As already discussed, a class action was brought before the California district court in 1996 against US-based Unocal Corporation, its president and its CEO, as well as against French oil company Total, the Burmese military regime (the State Law and Order Restoration Council, SLORC) and the state-owned and controlled Myanmar Oil and Gas Enterprise (MOGE).[96] At stake in this case was the alleged involvement (directly or indirectly) of the various defendants in human rights violations perpetrated against local farmers from the Tenarassim region of Burma.[97] The human rights violations at issue had allegedly been perpetrated by the Burmese military regime in furtherance of a local gas pipeline project jointly run by Unocal, Total and MOGE, and included forced labour, murder, rape and torture. The involvement of multinational oil corporations Unocal and Total in these human rights violations was claimed to lie in the fact that they had made use of SLORC's services in clearing the pipeline route and providing security for the pipeline knowing that SLORC had a history of human rights abuses, and that they in fact had been aware of and benefited from the abuses perpetrated by SLORC while acting on behalf of the joint venture. The claims were based on the ATS, as well as on a number of other legal bases derived from US federal law and California state law.[98]

While the claims against the other defendants were eventually dismissed for lack of personal jurisdiction and/or on grounds of sovereign immunity, the California district court in 1997 held in what was to become a watershed decision that the ATS provided it with subject-matter jurisdiction to hear the claims against Unocal.[99] Three years later, however, the same court dismissed all of the remaining federal claims following a motion for summary judgment made by Unocal, considering, *inter alia*, that although there was evidence suggesting that the human rights abuses had indeed been perpetrated and that Unocal had been aware of and had benefited from these abuses, it had not actively participated in or cooperated with the alleged human rights abuses and as such could

96 See also *supra* sub-section 3.1.2. Another, similar action was filed in September 1996 by four villagers from the Tenasserim region, the Federation of Trade Unions of Burma and the Burmese government in exile against Unocal *et al.*; this action was also allowed by the district court, *National Coalition Government of the Union of Burma et al. v. Unocal, Inc. et al.*, 176 F.R.D. 329 (C.D.Cal. 1997).

97 See, for the case history and further references, the website of Earthrights International: <www.earthrights.org/legal/doe-v-unocal-case-history> and <www.earthrights.org/legal/doe-v-unocal>, as well as the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnocallawsuitreBurma>.

98 See the reproduction of facts and allegations in *Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D.Cal., 1997), pp. 880-885.

99 *Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D.Cal., 1997), aff'd in part rev'd in part by *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. (Cal.) 2002), reh. en banc granted by 395 F.3d 978 (9th Cir. (Cal.) 2003), and on reh. en banc 403 F.3d 708 (9th Cir. (Cal.) 2005). In the same decision, the claims against SLORC and MOGE were dismissed on grounds of sovereign immunity. The claims against Total were dismissed at a later stage, for lack of personal jurisdiction: *Doe v. Unocal Corp.*, 27 F.Supp.2d 1174, (C.D.Cal.,1998), aff'd *Doe v. Unocal Corp.*, 248 F.3d 915, (9th Cir. (Cal.) 2001). By August 2000, the remaining defendants in the *Doe v. Unocal* action were Unocal Corporation, Union Oil Company of California, and Unocal's president and its CEO: *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294 (C.D.Cal., 2000), p. 1295.

not be held liable.[100] This decision was partly reversed on appeal in 2002, as the Ninth Circuit Court of Appeals determined that the plaintiffs had presented enough evidence[101] for the claims on Unocal's alleged aiding and abetting of the human rights abuses of forced labour, murder and rape to go to trial.[102] In 2003, the Appeals Court granted a request for a rehearing of the case before an 11-judge en banc panel.[103]

Parallel to the federal court proceedings, an action was brought in California state court in 2000; this action, which sought to hold Unocal tortiously liable on the basis of California state law with respect to its participation in the Yadana pipeline, encompassed a number of claims that had been dismissed in the federal procedure without a ruling on them.[104] After having survived various motions to dismiss made by Unocal, a number of these claims were allowed to proceed to trial, as the court decided that on the basis of the available evidence a jury might find that the joint venture in which Unocal participated hired the Burmese military and that it might on that basis hold Unocal vicariously liable for the human rights abuses committed by that same military. The trial date for a jury trial in the state case on the plaintiffs' claims of murder, rape, and forced labour was set for June 2005.[105]

In March 2005, the parties to all of the remaining claims agreed to a confidential out-of-court settlement, which was hailed by some as a historic victory not only for the plaintiffs but also for human rights and the corporate accountability movement. Soon after the announcement of the settlement, Unocal was taken over by Chevron-Texaco.[106] Attempts

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100 *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294 (C.D.Cal., 2000) aff'd in part rev'd in part by *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. (Cal.) 2002), reh. en banc granted by 395 F.3d 978 (9th Cir. (Cal.) 2003), and on reh. en banc 403 F.3d 708 (9th Cir. (Cal.) 2005). Note that this decision was vacated in *John Doe I v. Unocal corp.*, 403 F.3d 708 (9th Cir. (Cal.), 2005). See for an overview of the course of the proceedings up to the appeal in 2002, *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. (Cal.) 2002), pp. 942-944.

101 The evidence presented included, among many other things, a communication by Total to Unocal stating: "[...] *About forced labour used by the troops assigned to provide security on our pipeline project, let us admit between Unocal and Total that we might be in a grey zone*". *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. (Cal.) 2002), pp. 946-956. See pp. 937-942 for an overview of the evidence available at that stage on Unocal's knowledge that the Burmese military was providing security and other services for the project and it was allegedly committing human rights abuses in connection with the project.

102 *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. (Cal.) 2002), reh.'g en banc granted by *Doe I v. Unocal Corp.,* 395 F.3d 978 (9th Cir. (Cal.), 2003), on reh.'g en banc *John Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. (Cal.), 2005). According to the court, plaintiffs did not need to show that Unocal controlled the Burmese military's actions; rather, they only needed to demonstrate that Unocal knowingly gave practical assistance or encouragement to the military in perpetrating the abuses, and that this had a substantial effect on their perpetration, in order to establish Unocal's liability (pp. 947-953).

103 *Doe I v. Unocal Corp.,* 395 F.3d 978 (9th Cir. (Cal.).

104 See *supra* section 3.1.2.

105 See the Earthrights International website for the case history as well as various legal documents related to the state case: <www.earthrights.org/legal/doe-v-unocal-case-history> and <www.earthrights.org/legal/doe-v-unocal>.

106 See, for instance, the Earthrights International website: 'Historic advance for universal human rights: Unocal to compensate Burmese villagers' (2 April 2005), <www.earthrights.org/legal/historic-advance-universal-human-rights-unocal-compensate-burmese-villagers>. The settlement terminated both the California state case and the federal case that was still pending. As a result of the settlement, the planned rehearing en banc

to bring a criminal case in Belgium against Total, one of the other joint venture partners in the Yadana pipeline project, on the basis of a 1993 Belgian law providing Belgian courts with universal jurisdiction over certain international crimes, came to a definitive end in March 2008, as the Belgian authorities decided to drop the case.[107]

The Cape case

The *Cape* case involved a group action brought in the UK by South African plaintiffs seeking compensation from UK-based multinational Cape plc for asbestos-related personal injuries and losses they had allegedly sustained while working for or living in the vicinity of various asbestos mines and mills operated by Cape's South African subsidiaries.[108] By the time the first claims in this case were filed in 1997 before the English High Court, Cape plc had long sold its South African mining interests and did not have any presence or assets in South Africa anymore; the claims therefore only pertained to the plaintiffs' alleged exposure to asbestos in the period up to 1979, when Cape sold its shares in most of its South African subsidiaries. The central claim against Cape plc was that whereas it allegedly had (or could have) been aware of the fact that exposure to asbestos is gravely injurious to health, and whereas it had been able to exercise *de facto* control over its foreign subsidiaries, it had failed to take the proper steps to ensure that proper working practices were followed and proper safety precautions were observed throughout the group.[109]

Cape sought to stay the proceedings on grounds of *forum non conveniens*, arguing that a South African forum would be a more appropriate venue for trial of the case than an English forum. This preliminary issue turned out to be a highly contentious one that ultimately went all the way up to the House of Lords.[110] The Law Lords agreed with the

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of the federal case ended in April 2005 in a grant of the parties' stipulated motion to dismiss, as well as the grant of a motion to vacate the district court opinion in *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294 (C.D.Cal., 2000). See *John Doe I v. Unocal corp.*, 403 F.3d 708 (9th Cir. (Cal.), 2005).

107 See, for the case history and further references on this criminal case against Total, its chairman and the former director of its Burmese operations, the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TotallawsuitinBelgiumreBurma>.

108 See, for the case history and further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/CapeGencorlawsuitsreSoAfrica>. See also, for an overview of the facts of the case and the course of the legal proceedings, *Lubbe And Others v Cape Plc, Afrika And Others v Same* [2000] 2 Lloyd's Rep. 383, pp. 383-386, 387-389.

109 *Lubbe And Others v Cape Plc, Afrika And Others v Same* [2000] 2 Lloyd's Rep. 383, p. 387. See also *Connelly v R.T.Z. Corporation Plc. and Another* [1997] UKHL 30. This latter case, which had already been brought before the London High Court in 1994, was relied upon extensively in the *Cape* case, as it was considered to be very similar both factually and legally. See also *supra* sub-section 3.1.3.

110 The applicable principle here was that "*a stay will only be granted on the ground of forum non conveniens where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice*". See, for a discussion of the applicable principles and further references, *Lubbe And Others v Cape Plc, Afrika And Others v Same* [2000] 2 Lloyd's Rep. 383, pp. 389-390.

defendant that a South African court would *prima facie* be a more appropriate venue for the action as on balance there were more factors connecting the case to that forum, and also considering the fact that by this time the group of claimants had grown to over 3,000 South African citizens.[111] However, they also found that the plaintiffs had sufficiently established that substantial justice could not be done in a South African forum, as it would be impossible for the plaintiffs to obtain the funding, legal representation and expert evidence there needed for proceedings of this weight and complexity.[112] For this reason, the Law Lords decided to allow the case to proceed in England where legal representation and adequate funding were available to the plaintiffs.[113]

After this decision by the House of Lords, which was made in 2000, even more claimants joined the case, raising the total number of plaintiffs to some 7,500. In 2001, Cape agreed to a £21 million out-of-court settlement with the plaintiffs, but soon thereafter reneged on that deal due to financial difficulties. As a result, the litigation recommenced in September 2002 against Cape plc as well as against a new defendant, the South African company Gencor, which had in 1979 taken over most of Cape's South African asbestos operations. In 2003, a new settlement was reached between the plaintiffs and the two defendants, this time involving a £7.5 million settlement between Cape plc and the claimants, a £7.5 million settlement between Gencor and the claimants and a £35 million South African trust fund administered by Gencor to compensate South African victims of asbestos-related diseases who were not represented in the group action.[114] A number of further claims on behalf of these plaintiffs have successfully been brought against the Johns Manville Trust, a trust fund that was set up to meet the ongoing liabilities of the US-based Johns Manville corporation, once the world's main asbestos producers until it went bankrupt in the 1980s

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111 Although most of the information and evidence with respect to the question of the responsibility of Cape plc as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries was likely to be available at its offices in the UK, it was clear that the information and evidence pertaining to the personal injury issues relevant to each individual would be more readily available in South Africa. As the initial claims turned into a group action involving over 3,000 plaintiffs, the enhanced significance of these personal injury issues tipped the balance in favour of South Africa as being the more appropriate forum. *Lubbe And Others v Cape Plc, Afrika And Others v Same* [2000] 2 Lloyd's Rep. 383, pp. 390-391.

112 *Lubbe And Others v Cape Plc, Afrika And Others v Same* [2000] 2 Lloyd's Rep. 383, pp. 391-393. It was considered that the submissions by the plaintiffs on the funding issue were reinforced by the lack, as yet, of developed procedures for handling group actions in South Africa (p. 393).

113 Significantly, in reaching this decision, the Law Lords did not get around to addressing two other important legal questions that had been raised: *Lubbe And Others v Cape Plc, Afrika And Others v Same* [2000] 2 Lloyd's Rep. 383, p. 394. The first was the question whether a stay of the proceedings "[…] *would violate the plaintiffs' rights guaranteed by art. 6 of the European Convention* [on Human Rights] *since it would, because of the lack of funding and legal representation in South Africa, deny them a fair trial on terms of litigious equality with the defendant*". The second was the question whether the Court was precluded by art. 2 of the EC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels 1968 (Brussels Convention) from granting a stay of the proceedings on the basis of *forum non conveniens*.

114 See, also for further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/CapeGencorlawsuitsreSoAfrica>. See also, for an overview of the facts and legal proceedings, *In re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004), pp. 542-546.

amid countless lawsuits related to asbestos, which had also held shares in Cape's South African operations and mines.[115]

The Apartheid litigation

As previously mentioned, the Apartheid litigation is arguably one of the most controversial yet exemplary ATS-based foreign direct liability cases of the past few years.[116] It started around 2002, as multiple civil claims were filed in various US district courts against a score of multinational corporations on behalf of massive classes of South Africans who had suffered damages under the apartheid regime that governed South Africa from 1948 to 1994.[117] The actions, which were brought by three main groups of plaintiffs,[118] were centralized for pre-trial proceedings and transferred to the Southern District of New York.[119] The core allegations underlying them were that the defendant multinationals had been directly and/or indirectly involved in the wide range of human rights violations committed by the apartheid regime, as they had knowingly supported it by providing the funds, technology, systems, equipment and other support necessary to keep it in place, and had profited from its abusive policies, continuing to do so even after its practices had been universally condemned and international sanctions had been imposed.[120] The plaintiffs claimed that in so doing the defendants had violated international law and were thus subject to suit in US federal courts under, *inter alia*, the ATS.[121] They sought varying forms of relief, including: monetary relief in the form of compensatory and punitive damages, the imposition of a trust fund and restitution and disgorgement of all monies that could be linked to aiding, conspiring with, or benefiting from apartheid South Africa; equitable relief in the form of the appointment of an independent international historical commission, the creation of affirmative action and educational programmes and production by the defendants of documents related to their activities in apartheid South

115 'Leigh Day & Co recover £ 150,000 for South African victims', website Leigh Day & Co solicitors (22 January 2007), <www.leighday.co.uk/news/news-archive/leigh-day-co-recover-a3150-000-for-south-african>.

116 See *supra* sub-section 3.1.2.

117 See, for the case history and further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ApartheidreparationslawsuitsreSoAfrica>.

118 These three (main) groups of plaintiffs were the group led by Lungisile Ntsebeza ('Ntsebeza plaintiffs'), the group led by Hermina Digwamaje ('Digwamaje plaintiffs') and the group led by the South Africa-based Khulumani Support Group ('Khulumani plaintiffs'): *In re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004), p. 542.

119 *In re South African Apartheid Litigation*, 238 F.Supp.2d 1379.

120 See, for an overview of facts of this case and the course of the legal proceedings, *In re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004), pp. 542-546. See also *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 241-245.

121 Note that the plaintiffs also relied on some alternative jurisdictional grounds and that the Digwamaje plaintiffs also based their claims on two other statutes, viz. the Torture Victim Protection Act and the Racketeer Influenced and Corrupt Organizations Act: *In re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004), pp. 542-543.

Africa; and injunctive relief preventing the defendant multinationals from destroying, transferring or modifying such documents.[122]

Whereas a number of the defendants successfully argued that the New York district court had no personal jurisdiction over them, the other defendants moved to dismiss the actions altogether, a motion that was granted by the New York district court in October 2004. The district court held, *inter alia*, that the aiding and abetting of violations of customary international law perpetrated abroad by a third party, in this case the South African apartheid regime, could not in itself provide a basis for jurisdiction under the ATS.[123] This decision was reversed (in part), however, in 2007 by the Second Circuit Court of Appeals, and the case was remanded back to the district court for further proceedings.[124] The defendants then petitioned the Supreme Court for a writ of certiorari, asking the Court to hear their appeal against the US Court of Appeals' judgment, but the Court declared it could not intervene in the case as four of the nine Supreme Court justices had to recuse themselves for apparent conflicts, since they had interests in one or more of the defendant companies, which effectively meant that the 2007 Court of Appeals judgment was upheld.[125]

In April 2009 the district court, after having elaborately dealt with all of the key legal issues in the case, allowed a trimmed-down version of the case to proceed.[126] It did so notwithstanding significant political pressure by both the South African and the US government to dismiss the claims on prudential grounds in view of their potentially major international political and economic impacts.[127] In September 2009, the South African

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122 See *In re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004), pp. 545-546, as well as the various complaints.

123 *In re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004), aff'd in part, vac'd in part, remanded by *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2nd Cir. (N.Y.) 2007), judgment aff'd by *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (U.S. 2008), and on remand *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009).

124 The Court of Appeals judgment featured a short *per curiam* opinion, along with individual opinions by the three judges presiding over the case. The district court's dismissal of the claims was reversed only with respect to the plaintiffs' claims on the basis of the Alien Tort Statute; the dismissal of the claims based on legal and jurisdictional bases other than the ATS was upheld. See *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 258-264.

125 See *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (U.S. 2008). This unusual outcome of the appeal to the Supreme Court meant that the judgment under appeal was automatically affirmed, whereas the Court's decision itself (a non-precedential summary order) did not make law nor set any precedent. See also: Greenhouse 2008.

126 *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), certificate of appealability denied by 624 F.Supp.2d 336 (S.D.N.Y. 2009), and certification granted in part by 2009 WL 3364035 (S.D.N.Y. 2009), and motion to certify appeal denied by 2009 WL 5177981 (S.D.N.Y. 2009). It is important to note, however, that at the motion to dismiss stage of the litigation the question is not whether the plaintiffs have substantiated their allegations, but whether they should get a chance to do so in the trial phase; they must raise a plausible claim. See, on the applicable legal standards at the motion to dismiss stage, *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), p. 245.

127 *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 276-286. Note that the Supreme Court in a 2004 judgment in a footnote in another ATS case already named the *Apartheid* litigation as an example of cases in which "*a policy of case-specific deference to the political branches*" could play a role:

government, which had previously openly opposed the Apartheid litigation, indicated that it "*is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law*".[128] Similarly, the US government (under Obama) in December 2009 filed a Statement of Interest arguing that the court should allow the litigation to continue in the district court.[129] The district court's decision not to grant the defendants' motion to dismiss is currently under appeal; the outcome of the appeal is likely to be largely determined by the outcome of another Second Circuit corporate ATS case, the aforementioned case of *Kiobel v. Shell*, which as will be discussed further below is currently pending before the US Supreme Court.[130]

The Trafigura case

A 2006 environmental/public health scandal in Côte d'Ivoire, where the Probo Koala, a ship chartered by the London office of Netherlands-based international commodities trading group Trafigura Beheer BV, had unloaded a shipment of alleged toxic waste that was later disposed of at open-air sites around the Ivorian port city of Abidjan, resulted in a group action brought in the UK by over 30,000 Ivorians claiming to have suffered personal injuries as a result of exposure to this toxic waste.[131] The plaintiffs accused Trafigura of having shipped the untreated chemical waste to Côte d'Ivoire in full knowledge of its toxic qualities and of the fact that there were no local facilities in Côte d'Ivoire that were capable of effectively and safely disposing of it. They claimed that in doing so, Trafigura had acted negligently and that this, and the nuisance resulting from its actions, caused the injuries to the local citizens, rendering Trafigura liable for the ensuing damages.[132]

Sosa v. Alvarez-Machain, 542 U.S. 692, footnote 21. See, for a discussion of this legal issue, *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 276-286. See also, critically and from a South African perspective: Bond 2008.

128 See the letter to the New York district court by the South African Minister of Justice and Constitutional Development Note, available at <www.khulumani.net/attachments/343_RSA.Min.Justice_letter_J.Scheindlin_09.01.09.PDF>.

129 See the brief by the US Attorney for the United States as *amicus curiae* supporting appellees with respect to the defendants' appeal to the Court of Appeal for the Second Circuit, No. 09-2778-cv (30 November 2009) arguing that the appeal should be dismissed. See also, with further references, a note on the *The view from LL2* blog, available at <http://viewfromll2.com/2009/12/09/the-alien-tort-statute-under-the-obama-administration-executive-suggestions-vs-explicit-requests/>.

130 See further *infra* sub-section 3.3.2.

131 See, for the case history and further references, the website of the Business and Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire>. See, for an overview of the events leading up to and following the dumping of waste that took place between the evening of 19 and the morning of 20 August 2006, the addendum to the 2009 report to the UN Human Rights Council by the UN Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu, A/HRC/12/26/Add.2 (2 September 2009), p. 7 *et seq*. According to official estimates, 15 people died, 69 were hospitalized and there were more than 108,000 medical consultations resulting from the incident (p. 9).

132 See, for the case history and further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelected

Trafigura strongly contested these claims, repudiating the allegation that the waste was toxic and categorically denying that it could have caused personal injuries on the scale complained of. It further denied liability arguing that it had entrusted the waste's disposal to a local Ivorian disposal company, Tommy, and that in doing so it had had no reason to suspect that Tommy would improperly dispose of it.[133]

The Trafigura case attracted a lot of media attention, which on the one hand led to a trial by media of main character Trafigura that was not at all times fair,[134] but on the other hand also created a certain measure of transparency with respect to the Probo Koala incident and its aftermath.[135] An example is the publication in September 2009 of a trail of internal e-mail communications between some of Trafigura's top executives and those responsible for the Probo Koala, which strongly suggests an awareness on the part of those involved of the potentially harmful (corrosive and toxic) nature of the waste (at times referred to as "*the shit*"), as well as a general sentiment that the waste should be disposed of as quickly and cheaply as possible, no matter where and no matter how, in order to maximize profits.[136] It was not long thereafter that the parties to this civil case reached a settlement agreement. The settlement involved a payout of close to $50 million to the plaintiffs (around $1,500 per person) as well as a joint statement by Trafigura and the plaintiffs' legal counsel in which Trafigura denied responsibility for the incident and in which it is acknowledged that "[...] *the slops could at worst have caused a range of short term low level flu like symptoms and anxiety*".[137]

As it turned out, however, the settlement did not definitively conclude the Probo Koala incident's legal aftermath for either party. For the plaintiffs and their legal counsel the distribution of the settlement funds proved to be unexpectedly tricky due to corrupt practices locally, although in March 2010 the funds were eventually distributed to their rightful recipients.[138] For Trafigura, the story continues, as it is involved in a currently

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cases/TrafiguralawsuitsreCtedIvoire>. See also: Enneking 2008a, pp. 284-285.

133 See also: Zerk 2010, p. 168.

134 See the Trafigura website for an overview of facts from Trafigura's point of view: <www.trafigura.com/PDF/Trafigura%20&%20The%20Probo%20Koala.pdf>. Note also, however, that inaccurate public statements may have been made on both sides: in January 2010 Greenpeace Netherlands lodged a complaint with the Dutch Advertising Code Foundation over public statements made by Trafigura, which has been sustained by the Dutch Advertising Code Foundation. See Hirsch 2010.

135 See also *infra* sub-section 3.2.3.

136 See, with a further link to the e-mails concerned: Leigh 2009.

137 See, for example, Chazan 2009. See also the joint statement as well as related statements on Trafigura's website: <www.trafigura.com/our_news/probo_koala_updates/articles/trafigura_and_the_probo_koala.aspx>.

138 See, for instance, 'Fear over Ivory Coast ruling on Trafigura waste pay-out', *BBC News* (online version) (22 January 2010), <http://news.bbc.co.uk/2/hi/africa/8475362.stm>; 'Agreement gives hope to Ivorian toxic waste claimants' (14 February 2010), available from the website of plaintiffs' counsel, Leigh Day & Co solicitors, <www.leighday.co.uk/news/news-archive-2010/agreement-gives-hope-to-ivorian-toxic-waste>; M. Chown Oved, 'Ivory Coast waste victims get $1,500 checks', *Bloomberg Businessweek* (online version) (3 March 2010), <www.businessweek.com/ap/financialnews/D9E784501.htm>. Note that as early as February 2007, Trafigura had already entered into a settlement agreement with the Ivorian government, on the basis of which it paid the Ivorian government $198 million for a compensation fund,

ongoing Dutch criminal procedure relating to criminal offences perpetrated in the Netherlands prior to the Probo Koala incident.[139] On 23 July 2010, the Amsterdam district court found Trafigura Beheer guilty of importing waste into the Netherlands whilst concealing its hazardous qualities and of illegitimately exporting the waste to the Ivory Coast, and imposed a €1 million fine;[140] this decision is currently under appeal. A complaint concerning failure to prosecute for an offence, which was lodged by Greenpeace Netherlands in reaction to the Dutch public prosecutor's decision not to press charges against Trafigura for serious environmental pollution caused locally in Côte d'Ivoire, was dismissed by the The Hague district court in April 2011.[141]

The Dutch Shell cases

In November 2008, the first of a total of three related civil claims was brought before the The Hague district court by Nigerian farmers and the Dutch NGO Milieudefensie against parent company Royal Dutch Shell plc (RDS) and its Nigerian subsidiary Shell Petroleum and Development Company of Nigeria Ltd. (SPDC); two further claims were filed in May 2009. All three cases pertain to oil spills from SPDC-operated oil pipelines or wellheads in Nigeria's Niger Delta area, which according to the plaintiffs have resulted in damage to their fishponds, crops, livelihoods, health, as well as to the local environmental at large of the communities in which they live.[142] The core allegations against SPDC are that, in its

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the construction of a waste treatment plant and to assist in the recovery operations, in exchange for which the Ivorian government agreed to drop any current or future prosecutions or claims against Trafigura for the incident and to release some Trafigura executives and representatives of a Trafigura subsidiary who had been imprisoned in Côte d'Ivoire following the dumping scandal. Only one-third of this settlement amount eventually ended up with the victims, however. See, for example, the website of the Business and Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuits regulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire>.

139 Criminal charges relating to events in the Netherlands that preceded the Trafigura incident were brought against, *inter alia*, Trafigura Beheer B.V., the Probo Koala's captain and a London-based Trafigura official. In essence, all three defendants are being accused of having tried to dispose of the waste cheaply in the Netherlands by concealing its potentially harmful qualities and of having illegitimately exported the waste from the Netherlands when the costs of disposing of the waste there proved to be expensive, due to its toxic qualities. Trafigura is being blamed for having with malicious intent put its own, financial interests before health and environmental interests, both in the Netherlands and in Côte d'Ivoire. Criminal charges relating to these events were also brought against a number of other defendants, including the local Amsterdam authorities and the Amsterdam harbour installations. See, for further references to the case documents: 'Uitspraak in zaak Probo Koala (BROOM II) Trafigura Beheer B.V.' (26 July 2010) on the website rechtennieuws.nl: <http://rechtennieuws.nl/29772/uitspraak-in-zaak-probo-koala-broom-ii-trafigura-beheer-b_v_.html>. See also: Leigh 2010.

140 Rechtbank Amsterdam, LJN BN2149 (23 July 2010). In addition, a Trafigura employee was sentenced to a provisional jail sentence of 6 months and a €25,000 fine for his actual control of the prohibited conduct; similarly, the ship's captain was sentenced to provisional imprisonment for complicity in the prohibited conduct. See, for further references to the case documents: 'Uitspraak in zaak Probo Koala (BROOM II) Trafigura Beheer B.V.' (26 July 2010) on the website rechtennieuws.nl: <http://rechtennieuws.nl/29772/uitspraak-in-zaak-probo-koala-broom-ii-trafigura-beheer-b_v_.html>.

141 Rechtbank 's-Gravenhage, LJN BQ1012 (12 April 2011). This complaint was brought on the basis of article 12 of the Dutch Code of Criminal Procedure.

142 See, for case histories and further references, the website of the Business & Human Rights Resource Centre,

capacity of operator of the pipelines involved, it has not exercised due care in preventing the oil spills from occurring by failing to take adequate measures to prevent or stop the spills and/or to mitigate their consequences, and by failing to fully and properly clean up the contaminated sites afterwards. The core allegations against RDS are that, in its capacity of SPDC's parent company, it has failed to exercise due care by not using its influence over the group's environmental policies to ensure that the local oil extraction activities engaged in by its Nigerian subsidiary were undertaken in a prudent fashion and with due care for people and planet locally. The relief sought by the plaintiffs is similar in all three cases: declaratory judgments holding that both RDS and SPDC have acted unlawfully and as such are liable for the damages caused to the Nigerian farmers and the local environment, as well as injunctions ordering the defendants to repair or bring up to standard the oil pipelines and wellheads involved, to properly clean up the contaminated areas, to exercise diligence and adhere to best practices in future operations in the affected areas, and to adopt effective contingency plans in order to limit the risks and consequences of future oil spills.[143]

Shell has contested the various claims on all counts, underlining first of all that the oil spills are a local Nigerian matter in which Dutch courts and Dutch law (and/or a Dutch NGO like Milieudefensie) have no place. Accordingly, Shell has raised preliminary defences in all three cases with respect to the The Hague court's jurisdiction over the claims against the Nigeria-based SPDC, disputing the plaintiffs' assertion that such jurisdiction could be founded on the connection of those claims with the claims against Anglo-Dutch RDS (over which the court's jurisdiction is uncontested).[144] Furthermore, Shell has asserted, *inter alia*, that under Nigerian law (which it claims to be the applicable law) the multinational group's Dutch parent company (RDS) bears no responsibility for the oil spills or their harmful consequences as due to (Nigerian) corporate law principles of separate legal personality and limited liability it cannot be said to owe a duty of care towards third parties that are affected by its local subsidiary's activities. In addition, even

<www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreoilpollutioninNigeria>. See also: Enneking 2010, as well as the website of the Dutch NGO Milieudefensie for an overview of documents filed in these cases and further references, including an English translation of a number of the main legal documents: <http://milieudefensie.nl/oliewinning/shell/olie lekkages/documenten-shellrechtszaak#juridischedocumenten> and <http://milieudefensie.nl/english/shell innigeria/oil-leaks/documents-on-the-shell-legal-case#legal>.

143 See, for instance, the complaint in the Oruma case, available (in English) at the Milieudefensie website: <http://milieudefensie.nl/publicaties/bezwaren-uitspraken/subpoena-oruma>. See also for an overview of some of the other legal documents, such as for instance the The Hague district court's judgment on jurisdiction, available (in English) at the Milieudefensie website: <http://milieudefensie.nl/english/shellinnigeria/oil-leaks/documents-on-the-shell-legal-case#legal>.

144 The plaintiffs based their assertion on article 7 of the Dutch Code of Civil Procedure. The court's jurisdiction over RDS, the Shell group's which is headquartered in the Netherlands, remained uncontested as it incontrovertibly followed from the regime on international jurisdiction in civil cases that is laid down in the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement in civil and commercial matters, 2001 *OJ* L12/1). See, more elaborately and with further references: Enneking 2010.

where such a duty may be said to exist, Shell states that this could not lead to a legal duty on the part of parent company RDS to verify and/or intervene in its Nigerian subsidiary's local activities. Shell has further argued that Nigerian subsidiary SPDC can also not be held liable under Nigerian law for the damage resulting from the oil spills, as it claims the spills were a result of sabotage rather than of equipment failure and that consequently SPDC, which could not be required to prevent such sabotage, cannot be said to have been at fault. It is further asserted that SPDC's clean-up and remediation efforts were adequate and in compliance with local standards.[145]

In late 2009/early 2010, the district court dismissed Shell's preliminary argument that the court was not authorised to exercise jurisdiction over (the claims against) Nigeria-based SPDC in all three cases. It found that the claims against SPDC were sufficiently connected to those against Netherlands-based parent company RDS as to warrant their joint adjudication, thus providing it with jurisdiction over the claims against both defendants.[146] Following these decisions, the plaintiffs slightly amended their claims in two of the cases (adding RDS's legal predecessors Shell Transport and Trading Company and Dutch Shell Petroleum N.V. as defendants) and requested the court to order the disclosure by Shell of some key evidentiary documents. This request was refused by the The Hague District Court, however, which ruled, *inter alia*, that the plaintiffs will only be allowed access to certain key documents pertaining to for instance the condition of the pipelines and the Shell group's internal policies and operational practices once they have further substantiated their claims that the spills were not caused by sabotage and that Shell's Netherlands-based parent company may be held liable for those spills under Nigerian law.[147] Final written

145 See, for instance, Shell's response to the complaint in the Oruma case, available (in English) at the Milieudefensie website: <http://milieudefensie.nl/publicaties/bezwaren-uitspraken/shells-response-to-the-subpoenas>.

146 *Oguru et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*, Rechtbank 's-Gravenhage, LJN BK8616 (30 December 2009) (concerning oil spills near the Nigerian village of Oruma); *Akpan et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*, Rechtbank 's-Gravenhage, LJN BM1469 (24 February 2010) (concerning oil spills near the Nigerian village of Ikot Ada Udo); *Dooh et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*, Rechtbank 's-Gravenhage, LJN BM1470 (24 February 2010) (concerning oil spills near the Nigerian village of Goi). See, more elaborately, section 6.2. Note that Shell also raised a preliminary lis pendens defence in the Ikot Ada Udo case with reference to similar claims that have been brought in Nigeria; this defence was rejected by the The Hague District Court, however. See *Akpan et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*, Rechtbank 's-Gravenhage, LJN BU 3512 (1 December 2010).

147 *Oguru et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.; Oguru et al. v. Shell Petroleum N.V. and The "Shell" Transport and Trading Company Limited*, Rechtbank 's-Gravenhage, case nos. 330891/HA ZA 09-0579 and 365498/HA ZA 10-1677 (14 September 2011), available at the Milieudefensie website: <http://milieudefensie.nl/publicaties/bezwaren-uitspraken/vonnis-inzake-het-exhibitieverzoek-in-rechtszaak-tegen-shell-van-milieudefensie-en-nigeriaanse-boeren-2>. In the same judgment, the court also (provisionally) determined that Nigerian law is the law applicable to the case and that NGO Milieudefensie, contrary to Shell's assertions on this matter, does have standing to sue alongside the Nigerian plaintiffs (pp. 7-8). See also further *infra* sub-section 3.3.2.

pleas will be submitted in December 2011; the first court hearings in the main actions are expected to take place in 2012.[148]

3.2.3 A characterization

The type of transnational tort-based civil liability cases under discussion here, which as discussed may be referred to as foreign direct liability cases, share a number of characteristics that set them apart from other types of civil litigation. In essence, all of these foreign direct liability cases can be said to involve tort claims against (parent companies of) multinational corporations brought before domestic courts in their Western society home countries by host country victims who have suffered damage as a result of the detrimental impacts of the operations of the multinational corporations involved on people and planet locally in those host countries, which are typically developing countries. As can be inferred from the six case studies in the previous sub-section and as will be further discussed here, these cases may be said to have five distinct common characteristics. These include: the fact that they involve non-contractual liability (tort) claims for violations of norms seeking to protect people- and planet-related interests; the fact that these claims are usually aimed at multinational corporations' parent companies that are only indirectly involved in the norm violations allegedly perpetrated; the fact that these cases are transnational in nature and typically take place in a 'North-South' (developed country-developing country) setting; the fact that the parties to these cases are typically unevenly matched where it comes to insight in and control over the activities in question as well as to level of organisation and financial means; and the fact that these cases tend to have a distinct 'public interest' character.

Non-contractual liability claims for people- and planet-related norm violations

A common feature that stands out in all of these cases is that they involve tort claims (*i.e.*, non-contractual liability claims) arising out of alleged violations of international or domestic (home or host country) norms, whether written or unwritten, that seek to protect people- and planet-related interests. The mechanism to address the alleged norm violations is typically found in domestic principles of tort law, whether derived from the tort system of the home country or from that of the host country. The norms allegedly violated in these cases include in particular human rights norms, environmental norms, labour norms, health & safety standards and/or more general standards of proper social conduct (which may also be referred to as duties of care). As discussed, ATS-based foreign direct liability claims are typically based on alleged violations of norms of customary international law that amount to international human rights violations and/or international crimes, such as forced labour, murder, rape and torture in the *Unocal* case and crimes of apartheid

148 See the Milieudefensie website: <http://milieudefensie.nl/english/shellinnigeria/oil-leaks>.

in the Apartheid litigation.[149] Non-ATS-based foreign direct liability cases, on the other hand, are not usually limited to alleged violations of public international law (which, as discussed, only rarely apply directly to private actors), nor to human rights norms. Instead, they may involve alleged violations of a wide variety of written or unwritten norms that are derived from public international law as well as from domestic home or host country law and that have as their main objective the protection of people- and planet-related interests.[150] Examples include violations of home country statutory provisions on unfair business practices (in the *Unocal* state case), and/or violations of unwritten duties of care with respect to the rightful interests of host country third parties like local employees or neighbours (compare the Bhopal litigation, the *Unocal* state case, the *Cape* case, the Trafigura case and the Dutch Shell cases).

The alleged norm violations in these cases have typically arisen in the course of the local host country operations of the multinational corporations involved, which are usually carried out by local subsidiaries, local joint venture partners and/or local (sub) contractors; in many cases, as for instance in the *Unocal* case, (some of) these local business partners are state actors or otherwise closely linked to the governments of the host countries involved. The claims in these cases, however, are typically principally aimed at the parent companies of these multinational corporations, with the local subsidiaries, business partners and/or sub-contractors sometimes sued as co-defendants; in some cases, claims are brought not only against corporate defendants, but also against the individual decision makers in charge of the operations such as local directors or others like the Probo Koala's captain in the Trafigura case. The damage claimed to be a result of those norm violations usually consists of personal damage, property damage and/or environmental damage affecting host country locals, in particular employees of the local operators and/or those living in the vicinity of the sites of the local activities; many of these cases involve larger groups of victims.

The remedies sought by the affected host country citizens through these claims usually comprise compensatory as well as, where possible, punitive damages for the harm suffered, and are sometimes combined with claims for alternative (non-monetary) forms of relief in the form of injunctions preventing further harm, declaratory relief, disgorgement of profits or otherwise. As discussed in the previous sub-section, the different groups of plaintiffs in the Apartheid litigation, for example, sought a wide variety of remedies, including not only monetary relief but also the imposition of a trust fund, restitution and disgorgement of all monies that could be linked to aiding, conspiring with, or benefiting from apartheid South Africa, the appointment of an independent international historical commission, the creation of affirmative action and educational programmes and production by the defendants of documents related to their activities in apartheid South Africa; and injunctive relief preventing the defendant multinationals from destroying, transferring or modifying

149 See *supra* sub-section 3.1.2.
150 See *supra* sub-section 3.1.3.

such documents. The plaintiffs in the Dutch Shell cases seek not only court declarations holding that RDS and SPDC are liable for the damages suffered by them, which will enable them to claim compensation in further proceedings, but also court orders imposing on these companies duties to replace old sections of pipeline, to adequately clean up the soil and purify the water sources around the oil spills, to properly maintain the pipelines in the future, as well as to implement adequate oil spill contingency plans.

Parent company liability for indirect involvement in norm violations

In some foreign direct liability cases the claims are based on the alleged direct, active involvement on the part of the corporate defendants in the norm violations allegedly perpetrated; more often, however, the claims pertain to their indirect involvement in norm violations perpetrated by others. Irrespective of their specific legal basis, it is typically the parent companies of the multinational corporations involved that are the primary target of these foreign direct liability claims, in the sense that they are sought to be held liable for harmful host country activities that have in fact been carried out by local subsidiaries, business partners and/or sub-contractors. As already discussed in sub-section 1.1.2, their connections to local actors and activities in the host countries in which activities are under taken by their multinational corporations may be diverse in nature. The connections in question may be described as 'vertical' where parent companies are sought to be held liable in connection with activities carried out by their local subsidiaries.[151] The connections between the parent companies involved and the local operators may also be more 'horizontal' in nature where they are sought to be held liable for their involvement in activities engaged in by local business partners or sub-contractors to which they may be factually or contractually connected, possibly through more formalized forms of cooperation such as joint ventures, for example.[152] The alleged tortious behaviour by the defendant parent companies in these cases is often constructed as lying in the fact that they have either actively contributed to or have failed to prevent harmful activities that were ultimately carried out by the local parties to which they were horizontally, vertically or diagonally connected.

One of the main reasons for primarily targeting multinational corporations' parent companies in foreign direct liability cases lies in the comparative advantages that are associated with bringing claims against these parent companies rather than against their

151 Note, however, that in many cases the connection between the parent companies involved and their local subsidiaries is in fact also an indirect one: "*Few multinationals are so ill-advised that they do business directly in far flung foreign places. Instead, most multinationals are great-great grandparent corporations, or great grand parents, of the entity (subsidiary) doing business and committing the acts of which the plaintiffs complain. Interleaved between the great grandchild corporation and the household name multinational may be two or three layers of subsidiaries, corporations which we might term a parent, a grandparent, and a great grandparent*"; Branson 2010, p. 3 (citations omitted).

152 In reality, the indirect connection of the defendant parent companies to the local actors and activities in these cases tends to encompass both horizontal and vertical forms of cooperation, and may as such be described as 'diagonal' in nature.

local subsidiaries, business partners and/or sub-contractors in these particular cases. In many of them, bringing claims against the local subsidiaries, business partners and/or sub-contractors of the multinational corporations involved has turned out or is likely to be problematic. This may be the case for instance where the local parties concerned do not exist anymore (compare the *Cape* case), where they are likely to be judgment-proof (meaning that satisfaction of a judgment against them is likely to be problematic or even impossible due to lack of corporate funds/financial insolvency), or where they are somehow part of or closely connected to a corrupt or oppressive local regime (compare the *Unocal* case). Furthermore, by bringing claims against multinational corporations' parent companies rather than against their local subsidiaries, business partners and/or sub-contractors, host country plaintiffs can address corporate malpractices more systematically by seeking to hold accountable and provide behavioural incentives to those who ultimately control, coordinate and profit from the multinational groups' international operations. Another incentive for bringing these claims against multinational corporations' parent companies that plays an important role in these cases is that doing so typically enables the host country plaintiffs to bring their claims before Western society home country rather than host country fora, which, as will be further discussed below, tends to involve certain comparative advantages.[153]

ATS-based foreign direct liability cases, such as for example the *Unocal* case and the Apartheid litigation, typically revolve around the question whether the corporate defendants can be said through their actions to have knowingly contributed to the perpetration of international human rights violations/international crimes by others, usually state actors (in these two cases the Burmese military government and the South African apartheid government, respectively).[154] It has been noted in this respect that:

> "[f]*ew legitimate firms may ever directly commit acts that amount to international crimes. But there is greater risk of their facing allegations of 'complicity' in such crimes. For example, of the more than forty ATCA cases brought against companies in the US – now the largest body of domestic jurisprudence regarding corporate responsibility for international crimes – most have concerned alleged complicity, where the actual perpetrators were public or private security forces, other government agents, or armed factions in civil conflicts*".[155]

153 Compare, for instance: Kerr, Janda & Pitts, 2009, p. 294.

154 See, respectively, for instance: *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. (Cal.) 2002), pp. 944-955 and *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 255-263. Similarly: Murray, Kinley & Pitts 2011, p. 10. See also, more elaborately on the legal notion of 'complicity' in this context: Report of the Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, "Clarifying the concepts of 'sphere of influence' and 'complicity'", A/HRC/8/16 (15 May 2008), pp. 8-16.

155 UNHRC Report (Ruggie) 2007, p. 10, where it is noted: (citations omitted). Similarly: Keitner 2008, p. 63.

The choice for this construction of corporate complicity in ATS-based foreign direct liability cases is of course also largely inspired by the fact that due to the state-centric nature of the international legal order and consequently also of public international law, most norms of customary international law (which, as discussed, form the subject matter of ATS-based foreign direct liability cases) do not apply to private actors such as corporations directly, if at all.[156] Even more indirect involvement may be claimed to exist where the multinational corporations involved have not directly been involved in the human rights abuses perpetrated by others, but where they have knowingly benefited from them, as may be said of many multinational corporations that operated in South Africa during the apartheid regime, or when they stay silent in the face of widespread and systematic human rights violations.[157]

However, even these cases in which the alleged norm violations giving rise to foreign direct liability claims are ultimately perpetrated by local state actors usually also involve local members of the corporate group that have somehow acted in concert with them. As a consequence, irrespective of whether state actors have been involved in the harmful activities, or not, the large majority of these ATS-based foreign direct liability claims (also) involve claims against parent companies for activities engaged in by their subsidiaries.[158] Many of these claims involve theories of indirect (or secondary) liability on the basis of which parent companies can be held responsible for the actions of those local third parties.[159] These are often derived from international criminal law, but may also be derived from domestic law theories of indirect liability, such as theories of strict liability and enterprise liability in the Bhopal litigation and theories of alter ego (corporate veil piercing) and agency (vicarious liability) in the Apartheid litigation.[160]

However, constructions such as these where one corporate actor is sought to be held liable for (the actions of) another corporate actor by – in effect – identifying the two, risk being at odds with the fundamental corporate law principle of separate legal personality. Furthermore, constructions of parent company (shareholder) liability for the debts/activities of their subsidiaries risk running counter to the corporate law principle of limited liability. Also with a view to these potential tensions, non-ATS-based foreign

156 Similarly, for instance: Joseph 2004, p. 33. Note that in a recent decision in the case of *Kiobel v. Shell* the Second Circuit Court of Appeals came to the conclusion that at present there are no norms of customary international law in existence that apply to corporate actors, whether directly or indirectly. See, more elaborately, *supra* sub-section 3.3.2.

157 See, for instance: Clapham & Jerbi 2001.

158 Similarly: Joseph 2004, p. 129.

159 See, elaborately: Joseph 2004, pp. 129-143.

160 For a more detailed discussion of such theories of indirect (secondary) liability, see sub-section 4.4.3. See also, for instance: *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 270-276. Note that in ATS-based foreign direct liability cases the question whether theories of indirect (secondary) liability should be derived from international or from domestic legal sources remains a matter of contention; see *supra* sub-section 3.3.2.

direct liability cases are often construed as direct (or primary) liability claims rather than as indirect (or secondary) liability claims. The alleged tortious behaviour upon which these claims are based is not that of the local host country corporate actors, but that of the parent companies themselves, which are sought to be held liable for their own actions and/or inactions through which they have allegedly violated their own legal responsibilities vis-à-vis people and planet in the host countries concerned.[161]

As is exemplified for instance by the *Cape* case and the Dutch Shell cases, most of these claims are construed as the breach of a duty of care by the parent company involved vis-à-vis local host country individuals such as local employees and/or neighbours. Such a duty of care may arise from any knowledge that the parent company may have or should have as regards the potential risks to people- and planet-related interests involved in its multinational group's host country operations, in combination with its ability to supervise or control these operations as well as those carrying them out. The parent company may then be held liable for the damages resulting from the multinational corporation's host country activities if the efforts it has made, in light of its knowledge of and its involvement with and/or supervision or control over its local subsidiaries, business partners and/or sub-contractors and the activities carried out by them, falls short of a standard of reasonable care.

However, irrespective of the particular construction used, all of these constructions imply one way or another that the defendant parent companies were in a position to exercise some form of control over local host country actors and their activities, and that they should have done so in order to prevent the allegedly tortious behaviour from taking place and the damage from arising.

Transnational claims in a North-South setting

A closely connected common feature that stands out in all of these cases is their transnational character, which may manifest itself in various ways. First of all, foreign direct liability claims are typically transboundary in nature, as the detrimental impacts on people and planet underlying these cases typically occur in the host countries in which the multinational corporations involved operate, while the resulting harm suffered by host country locals in turn gives rise to foreign direct liability claims that are brought before home country courts and through which the host country plaintiffs seek to hold these multinational corporations' parent companies liable for their damage. Furthermore, the claims in these cases are often construed as transboundary tort claims, in which the *Handlungsort* (*i.e.*, the place where the harmful conduct takes place) is said to lie in the home country boardrooms from where the parent companies of the multinational corporations involved (are supposed to) manage, supervise, control and/or coordinate their international operations, while the *Erfolgsort* (*i.e.*, the place where the damage arises)

161 See similarly, for instance: Joseph 2004, pp. 129-132; Ward 2001b, p. 460. See also, with further references: Enneking 2009, pp. 921-926. See also further section 4.4.

is said to lie in the host countries where those operations cause damage as a result of their detrimental impacts on people and planet locally. Such a construction was used in the Bhopal litigation and in the *Cape* case, for instance, and is also at issue (among other things) in the Dutch Shell cases. In addition, these cases derive their transnational character from the fact that they often require domestic (home country) courts to apply international or foreign (host country) legal norms and principles.[162]

The transnational nature of foreign direct liability cases is further defined by the fact that they take place in a 'North-South' setting in which multinational corporations that are based in and operate out of developed, Western society home countries have a detrimental effect on people- and planet-related local interests in host countries that are typically developing countries, emerging economies and/or failed states. Because of this North-South setting, these cases typically revolve around situations of double standards, as these multinational corporations and their activities tend to be subject to much stricter rules and regulations in the home countries in which they are based and from which they manage, supervise, control, and/or coordinate their international operations, than in the host countries in which those operations are actually carried out, usually by local affiliates or sub-contractors. These situations of double standards tend to raise complicated issues, not only moral ones but also legal ones, ultimately leading to the question in many of these cases whether and under what circumstances home country courts may be asked to hold multinational corporations to higher behavioural standards with respect to their local host country operations than those that are imposed or would in practice be enforced locally.[163] As is obvious from for instance the Apartheid litigation, the answer to this question raises issues of extraterritoriality and may potentially have implications for the international relations between home and host countries involved; US courts in particular have been known to dismiss foreign direct liability claims for this reason (compare for instance the Bhopal litigation).

Closely connected to these cases' North-South setting is the fact that it will usually be far more advantageous to the host country plaintiffs to bring their claims before home country fora than to bring them before host country fora, a circumstance that provides them with a further reason for primarily targeting multinational corporations' parent companies rather than their local subsidiaries, business partners and/or sub-contractors. In many of these cases, litigation of the matter through the host country legal system has proved to be or is likely to be highly problematic or even impossible in practice. This may be the case, for instance, where the claims also implicate the local regime (compare the *Unocal* case), or where the defendant multinational corporations are so intimately linked to or so powerful compared with the governments of the host countries involved that it is unlikely that courts in those countries would be willing or able to pass and/or enforce judgments against them. It is also possible that the host country legal system is just not up

162 See also, more elaborately, sections 4.2 and 4.3.
163 See also, more elaborately, chapter 1.

to the task of adequately dealing with complex, lengthy proceedings of this type (compare the Bhopal litigation), and/or that bringing this type of claim there is practically not feasible, for instance because of the unavailability of legal aid or of adequate and affordable legal representation (compare the *Cape* case).

At the same time, bringing these claims before home country fora is likely to entail certain substantive legal, procedural and/or practical advantages for the host country plaintiffs involved. These may include, among other things, the benefits connected with possibilities to file class actions, to enter into contingency fee arrangements with legal counsel and to apply for legal aid, benefits that, as will be discussed further below, may prove essential as these cases are characterized by a significant inequality of arms on various levels between the host country plaintiffs and the corporate defendants they seek to hold accountable. In addition, especially in this North-South setting where double standards often play an important role, the host country plaintiffs involved may seek not only potentially higher home country levels of damages, but also the benefits that may ensue from home country substantive legal rules and standards, to the extent that those are applicable on the basis of home country provisions of private international law. After all, even where home country tort law is not applicable to the foreign direct liability claim at hand, home country courts may under certain circumstances still take into consideration relevant home country behavioural standards as well as relevant home country policies, norms and values when judging the corporate defendants' allegedly tortious behaviour. This is likely to become ever more important as the increasing interest in Western societies in international corporate social responsibility and accountability is likely to promote sentiments like those in the Trafigura case, with respect to which it was mentioned (by counsel for the plaintiffs):

> "*Although the event took place thousands of miles away, it is right that this British company is made to account for its actions by the British courts, and made to pay British levels of damages for what happened. A British company should act in Abidjan in exactly the same way as they would act in Abergavenny*".[164]

Lack of transparency and inequality of arms

Another feature that is characteristic of foreign direct liability cases is that the parties to these cases are typically unevenly matched, as the corporate defendants are usually in a much better position than the host country plaintiffs with respect to both information and finances. The fact that there is typically little transparency with respect to the often complex group and operational structures of the multinational corporations involved, and also on the way in which their international operations are actually coordinated, controlled, managed and/or supervised, may significantly hamper host country plaintiffs seeking to hold them accountable. At the same time, the fact that the host country plaintiffs usually

164 Verkaik 2006.

only have very limited financial means at their disposal from which to finance these often complex, expensive and drawn-out legal procedures, tends to put them at a significant disadvantage vis-à-vis their corporate opponents.[165]

As discussed in chapter 1, multinational corporations are typically made up of a complex web of numerous legal entities of various forms and shapes, which are based in different countries and incorporated under different laws. As such, they usually feature complex, layered group structures that are very opaque to outsiders. Along with these complex and layered group structures come even more complex command structures, which are often characterized by the existence of numerous types of mutual relations and control structures between legal entities within the group, which are to some extent determined by the intra-group relations of ownership, but which may also be of a more *de facto* nature. US-based Union Carbide Corporation (UCC), for instance, which was the main corporate defendant in the Bhopal litigation, was in theory only indirectly connected to the local Bhopal factory; in practice, however, parent company UCC's involvement with the local Indian subsidiary in charge of the Bhopal factory and with the activities carried out by it was very direct.[166] It has been noted in this respect that:

> "[t]*he one defining element of a multinational enterprise is that the investing public relates to the large group of companies – through shares purchased and sold, capital contributed and dividends received, management supported or replaced – at one level only, i.e. at the level of the parent company. All the other relationships among members of* [the] *group, even though they may cross frontiers and time zones and language changes, are essentially internal, within the enterprise as a whole*".[167]

These complex and nontransparent group and organizational structures tend to put the host country plaintiffs in these foreign direct liability cases at a distinct disadvantage. After all, they make it very difficult for the host country plaintiffs involved firstly to determine which legal entities within a multinational group may be held legally responsible for the harm suffered by them, and secondly to gather enough evidence on the actual involvement of each of these legal entities with the harmful host country operations

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165 See also: Enneking 2009, p. 933.

166 UCC was indirectly connected to Union Carbide of India Limited (UCIL), the local joint venture corporation that owned and operated the factory, through a 100% subsidiary (Union Carbide Eastern, UCE), which in turn held only part (50.9%) of the shares in the local Indian subsidiary; the other 49.1% of the shares in UCIL were held by Indian institutional investors. That UCC's involvement was nonetheless of a very direct nature is proved clearly by the following facts: UCC planned, designed, supervised and gave technical support to the construction of the local pesticide factory; UCC decided (against the will of UCIL in fact) to store dangerously large quantities there of the pesticide that eventually caused the Bhopal disaster; UCC was aware on the basis of internal reports (which were not revealed to the factory management) of the large health and safety risks involved in the storage of the pesticide; UCC was planning to reorganise UCIL; four of UCIL's directors were employees of UCE, while the fifth was UCC's deputy-chairman; UCIL needed UCE's permission for expenditure over $10,000. See Struycken 1995, pp. 70-71.

167 Lowenfeld 1996, p. 82 (citations omitted).

to properly substantiate their claims. At the same time, foreign direct liability cases are usually characterized by an inequality of arms between the host country plaintiffs and their corporate opponents as regards financial scope. This characteristic is made more significant by these cases' North-South setting and the fact that they typically involve highly complex, strongly opposed and very time-consuming legal procedures that are therefore also usually very costly. After all, whereas the socio-political and economic influence of the multinational corporations involved in these cases will typically rival that of many states, the host country plaintiffs initiating them generally belong to politically and economically marginalized groups that are unlikely to receive any financial or practical support from their own authorities enabling them to pursue their complex transnational claims.

Public interest nature

A final common feature of foreign direct liability cases is that they tend to have a certain 'public interest' nature due to their broader socio-political implications. Objectives are sought to be pursued in most of these cases that go beyond financial compensation of the host country individuals who have suffered damage as a result of the detrimental impacts of multinational corporations' local activities. These cases typically seek to address broader issues, as is apparent also from the fact that these cases and those initiating them are often actively supported by public interest groups that promote broader people- and planet-related interests such as the protection of the (local) environment or the promotion of human rights. In fact, it is likely that the host country plaintiffs involved in these cases would in many cases be prevented from pursuing this type of transnational civil litigation, which as discussed typically involves transnational tort claims that are highly complex, vastly time-consuming and (therefore) also very costly, if it were not for the active support and involvement of home country-based or host-country based non-profit organisations. Examples include the Center for Constitutional Rights (which has legally supported various ATS-based foreign direct liability claims, including claims against Shell and Chevron),[168] Earthrights International (which has legally supported various US-based foreign direct liability claims including the *Unocal* case),[169] the Khulumani Support Group (which represents some of the plaintiffs in the Apartheid litigation)[170] and Friends of the Earth Netherlands (which is currently involved as a plaintiff in the Dutch Shell cases).[171]

Closely connected to their public interest nature is the high socio-political profile that these foreign direct liability cases typically have due to their broader socio-political implications. This manifests itself not only in the close attention paid to these cases by the media and the public at large, but also in the close attention paid to – and sometimes even

168 See the Center for Constitutional Rights website: <http://ccrjustice.org/corporate-human-rights-abuse>.
169 See the Earthrights International website: <www.earthrights.org/legal>.
170 See the Khulumani Support Group website: <www.khulumani.net/reparations/corporate.html>.
171 See the Friends of the Earth Netherlands (Milieudefensie) website: <http://milieudefensie.nl/english/shellinnigeria/oil-leaks/the-people-of-nigeria-versus-shell>.

active involvement in – these cases by policymakers and civil society groups. Especially in US-based foreign direct liability cases policymakers and societal pressure groups have on various occasions filed solicited or unsolicited statements of interests and/or *amicus curiae* briefs directed at the courts dealing with these cases. A good example is the Apartheid litigation, where not only the South African and US governments but also a wide range of public interest groups, corporate lobby groups, groups of academics and others have shared with the US courts involved their views with respect to the legal and socio-political aspects of the litigation.

In fact, the US Supreme Court even suggested in a footnote to its decision in the *Sosa* case that certain ATS cases might require a policy of case-specific deference to the political branches. It noted that especially in cases such as the Apartheid litigation there could be "*a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy*".[172] As is also made clear by the New York district court's 2009 decision in the Apartheid litigation, however, US federal courts will not necessarily treat such statements as dispositive and may see fit to judge these cases no matter what broad socio-political implications they may have.[173]

3.3 Status quo and recent developments

3.3.1 The current state of affairs

As is clear from what has been discussed in this chapter, the contemporary socio-legal trend towards foreign direct liability cases is a relatively 'new' one. On the one hand, the number of cases brought so far is still limited, although increasing rapidly. According to recent estimates, around 150 corporate ATS cases have so far been filed before US federal courts, with between 6 and 10 new cases being filed annually.[174] Added to that is a still modest number of foreign direct liability claims brought before courts in Western societies outside the US, a number that as will be discussed further below may potentially rise following recent developments both in corporate ATS cases and in foreign direct liability claims brought before domestic courts in Europe. On the other hand, the trend itself remains somewhat unsettled due both to the controversy surrounding the ATS, which has so far provided its initial and main drive and legal basis, and to the relative lack so far of 'success stories' providing clear judicial precedent.

Of the foreign direct liability cases that have been brought so far, only very few have been conclusively settled by a court of law. A fair number of foreign direct liability cases are currently pending, mostly in pre-trial stages, like for instance the Apartheid litigation

172 *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), footnote 21, p. 733.
173 *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 280-281.
174 See, with further references: Childress 2011, p. 6.

and the Dutch Shell cases.[175] A substantial number of foreign direct liability cases have been dismissed at pre-trial stages prior to a full merits hearing, following jurisdictional challenges or on other grounds such as, for example, the non-justiciability of the claims due to their political nature and/or implications, prescription of the claims or failure to state a claim upon which relief can be granted.[176] Furthermore, a good number of cases, including the cases against Unocal, Cape plc and Trafigura, have resulted in out-of-court settlements, but usually only after defendants' attempts at pre-trial dismissal had failed.[177] Up until now, only a very small number of these cases have in fact made it as far as trial;[178] of the cases discussed here so far, the Dutch Shell cases are the ones most likely to proceed to a substantive court appraisal of the main action somewhere in the near future.

Only a handful of these cases have to date delivered a judgment on the merits. The first corporate ATS lawsuit to reach trial was a case against Drummond Company and one of its subsidiaries for their alleged involvement in the torture and killing of three labour leaders by Colombian paramilitaries in 2001. Most of the claims were dismissed at pre-trial stages and the single remaining claim against Drummond that its alleged (indirect) involvement in the murders of the trade union leaders made the local Drummond subsidiary complicit in war crimes in 2007 resulted in a jury verdict and final judgment in favour of the defendants. This judgment did not bring an end to this case, however, as a number of related claims against Drummond on the basis of similar allegations are currently pending in US federal court.[179] In the previously mentioned corporate ATS case against oil producer Chevron for its alleged complicity in human rights abuses perpetrated by the Nigerian military and police vis-à-vis locals protesting against Chevron's environmental practices in the Niger delta, a federal jury in December 2008 similarly cleared the company of liability.[180] This verdict has been upheld on appeal, despite arguments on behalf of the plaintiffs that the federal trial court had erroneously charged them with the burden of proof as to the allegedly improper behaviour of the Nigerian troops about a decade earlier.[181]

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175 According to recent estimates, some 14 corporate ATS cases are currently pending, with 7 further ATS claims having been dismissed pending other proceedings; see Goldhaber 2010.

176 Compare, for instance: Childress 2011, who notes that: "[...] *most ATS cases have resulted in rulings favorable to corporate defendants*" (p. 6).

177 According to recent estimates, some 17 corporate ATS cases have resulted in out-of-court settlements; see Goldhaber 2010. As is clear from the foregoing, there have also been settlements in a number of non-ATS-based foreign direct liability cases, such as the Bhopal case, the *Cape* case, the Trafigura case and, most recently, the case brought against Shell by the Nigerian Bodo community.

178 In that sense, not much has changed since 2004, when Joseph stated that: "[n]*one of the salient cases has yet been decided on the merits*"; Joseph 2004, p. 20 (citations omitted).

179 See, for the case history and further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/DrummondlawsuitreColombia>.

180 *Bowoto v. Chevron Corp.*, 2006 WL 2604591 (N.D. Cal. 2006), aff'd by *Bowoto v. Chevron Corp.* 621 F.3d 1116 (9th Cir. (Cal.) 2010). See also *supra* sub-section 3.1.2.

181 See, for the case history and further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelected

Of the few foreign direct liability cases that have reached a judgment on the merits, only a very small number has so far led to a judgment in favour of the plaintiffs.[182] One of the first foreign direct liability cases to deliver a verdict in favour of the plaintiffs was *Licea v. Curaçao Drydock Company*, in which the Florida District Court in October 2008 awarded the plaintiffs $80 million in damages.[183] This case was brought by three Cuban nationals against the operator of a drydock facility located on Curaçao (Netherlands Antilles), on the basis of allegations that the Curaçao Drydock Company had, in collaboration with the Cuban government, trafficked them from Cuba to Curaçao under threat of physical and psychological harm, including the threat of imprisonment, and had subsequently forced them to work on its ships and oil platforms there. In a non-jury default judgment, the presiding judge decided that the claims of forced labour and international human trafficking that were alleged in this only partly defended action constituted actionable claims under the ATS and that "[g]*iven the overwhelming and uncontroverted evidence in this matter,* [p]*laintiffs certainly proved their claim to both compensatory and punitive damages*".[184]

He then proceeded to determine the amount of damages to be awarded to the plaintiffs and, after consideration of quantifications of damages in other ATS cases (against individual defendants) and related human rights cases, awarded a total of $50 million in compensatory damages and $30 million in punitive damages. In determining the amount of punitive damages, it was noted that

> "[…] *given the egregiousness of* [d]*efendant's conduct and the central role it played in the conspiracy, the role the conspiracy played in thwarting U.S. policy and perpetuating the subjugation of the Cuban people, the fact that the offenses at issue are universally condemned, the fact that* [d]*efendant retains its ill-gotten gains from the Cuban forced labor scheme, and the fact that other actors likewise must be deterred,* [p]*laintiffs should be awarded significant punitive damages. Such an award will act as a deterrent, and will reflect the international revulsion against international human trafficking and forced labor*".[185]

It should be mentioned, however, that it seems that the plaintiffs in this case have so far been unable to execute this court decision against the defendant.[186]

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cases/ChevronlawsuitreNigeria>.

182 Childress 2011, pp. 20-21.

183 *Licea v. Curaçao Drydock Company, Inc.*, 584 F.Supp.2d 1355 (S.D. Fla., 2008). Another example is: *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, No. 08 Civ.1659 (BMC) (E.D.N.Y. Aug. 6, 2009), ECF No. 48 ($1.5 million ATS jury verdict entered against defendant holding company for torture), *appeal filed*, No. 09-4483-cv (2d Cir.), as mentioned in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. (N.Y.) 2010), p. 161.

184 *Licea v. Curaçao Drydock Company, Inc.*, 584 F.Supp.2d 1355 (S.D. Fla., 2008), at 1358, 1363.

185 *Licea v. Curaçao Drydock Company, Inc.*, 584 F.Supp.2d 1355 (S.D. Fla., 2008), at 1366.

186 They therefore in January 2010 filed a motion for supplementary proceedings to implead and add as judgment debtors the Curaçao and Netherlands Antilles governments, which the plaintiffs assert are the

Despite the scarcity so far of 'success stories' for plaintiffs in foreign direct liability cases and of clear judicial precedent on the substantial issues lying at their basis, the odds do seem to be improving, however:

> "*For years, federal courts regularly dismissed corporate ATS cases. Recently, however, plaintiffs have gained victories. Since 2007, four corporate ATS cases have proceeded to trial, resulting in one verdict for plaintiffs on ATS grounds. In addition, several corporate ATS cases have settled for well over ten million dollars. In 2008, two courts entered judgments against corporate ATS defendants, for 7.7 million dollars and eighty million dollars respectively. In short, over the past few years, ATS cases appear to be achieving greater successes than before*".[187]

Outside the US it is the Dutch Shell cases that seem closest to a court ruling on matters of substantive (parent company) liability. The recent admission of liability by Shell's Nigerian subsidiary Shell Petroleum Development Company of Nigeria Ltd. (SPDC) following a UK class action against SPDC and Anglo/Dutch parent company Royal Dutch Shell (RDS) brought by 69,000 inhabitants of the Nigerian Bodo community for two major oil spills in 2008 makes an out-of-court settlement between the parties in this case likely, if they manage to reach an agreement on the amount of compensation to be paid, that is.[188] However, it is therefore also likely to preclude further litigation and thus the creation of further judicial precedent on some of the legal issues arising in this type of transnational tort-based civil litigation. In fact, the price paid by the plaintiffs for SPDC's agreement to formally admit liability and concede to the jurisdiction of the UK was that they would drop their claims against parent company RDS.[189] This effectively puts the focus on the Dutch Shell cases as regards the question whether parent companies of multinational corporations can be held liable before European domestic courts and on the basis of general principles of tort law for harm caused to people and planet in host countries as a result of the local activities of their corporate groups.[190] As mentioned before, the The

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100% owners and alter egos of the Curaçao Drydock Company; *Licea v. Curaçao Drydock Company, Inc.*, 2010 WL 1502848 (Trial Motion, Memorandum and Affidavit) (S.D. Fla., 2010). This motion has been contested by the intended government defendants, which have filed a motion to dismiss for lack of subject matter jurisdiction and on grounds of sovereign immunity; *Licea v. Curaçao Drydock Company, Inc.*, 2010 WL 3903683 (Trial Motion, Memorandum and Affidavit) (S.D.Fla., 2010). A court decision on this issue has so far not been made.

187 Drimmer & Lamoree 2011, p. 465 (citations omitted).

188 Compare, for instance: Vidal 2011a and Goldhaber 2011, who notes that suggestions by the Financial Times that SPDC's admission of liability might potentially lead to a payout of over $400 million were disposed of by SPDC as "*massively in excess of the true position*".

189 Compare Goldhaber 2011 and the press release on the website of the plaintiffs' lawyers in this case: 'Shell accepts responsibility for oil spill in Nigeria', 3 August 2011, available at the website of Leigh Day & Co Solicitors: <www.leighday.co.uk/News/2011/August-2011/Shell-accepts-responsibility-for-oil-spill-in-Nige>.

190 Similarly: Goldhaber 2011.

Hague district court's decisions on the merits of these cases are expected somewhere in 2012.[191]

3.3.2 Recent developments in the US, the UK and the Netherlands

Corporate liability under the ATS and the Kiobel case

The seemingly improving odds for plaintiffs in ATS-based foreign direct liability cases as described at the close of the preceding sub-section are in danger of being annulled by other, more recent and potentially more permanent developments in the field of corporate ATS litigation. These developments seem to paint a far bleaker picture for future ATS-based foreign direct liability cases, as it has been noted that there may in fact be an overall tendency for federal courts to be "[...] *closing the door for plaintiffs to use the ATS to police the activities of non-state actors occurring outside of the United States*".[192] This tendency seems to reveal itself in recent restrictive interpretations of substantive law in corporate ATS cases by federal courts in various Circuits, as well as the strict application of federal procedural devices in these cases, frequently resulting in their dismissal before questions of substantive law can be raised in the first place. An example is the adoption in the *Talisman* case, as will be briefly discussed below, of an interpretation of the standard for accomplice liability that potentially severely limits the scope of corporate ATS cases pertaining to corporate complicity in international human rights violations. Other examples include the introduction of 'exhaustion of local remedies' requirements in corporate ATS cases as well as the imposition of higher pleading standards on plaintiffs in ATS cases.[193] A recent decision of the Second Circuit Court of Appeals in the previously mentioned case of *Kiobel v. Shell* in which, as will be discussed further below, the idea of corporate liability under the ATS was rejected altogether, seems to be the latest and most drastic expression of this tendency.[194]

Arguably, many of these developments may be traced back to the continuing lack of clarity surrounding the modern-day scope and interpretation of the ATS that has remained even after the Supreme Court's decision in the *Sosa* case, which as discussed was the first and to date remains the only Supreme Court judgment on the ATS and its limits.[195] In its decision, the court did not address the matter of corporate liability under the ATS as such; in a footnote to its decision, however, the Supreme Court made what has now turned out to be a crucial statement in this respect:

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191 See *supra* sub-section 3.2.2.
192 Childress 2011, p. 8. Similarly: Childress 2010a.
193 Childress 2011, pp. 21-26
194 See also the Introduction to Part I, sub-section 1.3.1 and *supra* sub-section 1.2.2.
195 See *supra* sub-section 3.1.2. See also, in more detail: Murray, Kinley & Pitts 2011.

> "*A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual*".[196]

The Supreme Court in its footnote seems to suggest that the source of law that should be looked at in order to determine the 'scope of liability' for a violation of a norm of customary international law cognizable under the ATS is that of public international law and not domestic law (more particularly federal common law), but in reality leaves the matter undecided. As such, it leaves an important part of the ATS unexplained, since this 'scope of liability' has been interpreted to encompass issues that are potentially crucial especially in corporate ATS cases such as the liability of private actors as opposed to state actors, the applicable standards for secondary liability (*e.g.*, liability for aiding and abetting human rights violations perpetrated by another) and the liability of corporate actors as opposed to private individuals. It is no surprise, therefore, that this 'vertical' choice-of-law issue, which had actually already surfaced prior to the Supreme Court's decision in the *Sosa* case, has given rise to widespread controversy among the many district and circuit courts that have dealt with (corporate) ATS claims since.[197]

The potentially far-reaching effects of this controversy for ATS-based foreign direct liability cases were made clear for instance by the Second Circuit Court of Appeals' 2009 decision in the *Talisman* case, which pertained to the alleged complicity of Canadian energy company Talisman in human rights violations perpetrated by the Sudanese government (including extrajudicial killing, forced displacement, etc.) in order to facilitate oil exploration in southern Sudan.[198] In its decision, the court decided that international law was the source of law for determining the standard for aiding and abetting liability. It further decided that for the defendant to be held liable under this international law standard for having aided and abetted human rights violations perpetrated by another, it needed to have provided the perpetrator with practical assistance that had a substantial effect on the perpetration of the crime with the *purpose* of facilitating the commission of that crime.[199] Obviously, by requiring intent on the part of the corporate defendant rather than mere indifference or carelessness, this decision, which has been criticized and which may not find following in all of the other Circuits, has raised the bar very (arguably almost impossibly) high for future ATS-based foreign direct liability claims brought before Second Circuit courts in an attempt to hold multinational corporations

196 *Sosa v. Alvarez*-Machain, 542 U.S. 692 (2004), p. 732, footnote 20.

197 See, critically: Murray, Kinley & Pitts 2011. See also sub-section 4.3.

198 See, for the case history and further references the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelected cases/TalismanlawsuitreSudan>.

199 *Presbyterian Church of Sudan v Talisman Energy, Inc.*, 582 F.3d 244 (2nd Cir. (N.Y.) 2009), cert. denied by 131 S.Ct. 122 (U.S. 2010) and cert. denied by 131 S.Ct. 79 (U.S. 2010).

liable for having aided and abetted international human rights violations perpetrated by host country governments.[200]

In September 2010, the Second Circuit in the case of *Kiobel v. Shell*, which as mentioned before revolves around Shell's alleged complicity in human rights abuses perpetrated by the Nigerian government against Nigerian environmental activists, delivered another blow to proponents of ATS-based foreign direct liability cases, again in relation to the 'vertical' choice of law issues pertaining to the scope of liability under the ATS.[201] In its judgment, the court took the opportunity to go into one of the unresolved issues with respect to the ATS, namely whether "[...] *the jurisdiction granted by the ATS extend*[s] *to civil actions brought against corporations under the law of nations*".[202] Again, the court looked to international law in order to determine whether the 'scope of liability' for violations of norms of customary international law under the ATS extends to corporate actors as it does to private individuals. In doing so, the majority of the court came to the conclusion that civil claims against corporations cannot directly be based on customary international law, and as such fall outside the limited subject matter jurisdiction provided by the ATS, holding that:

> "[...] *because customary international law imposes individual liability for a limited number of international crimes – including war crimes, crimes against humanity (such as genocide), and torture – we have held that the ATS provides jurisdiction over claims in tort against individuals who are alleged to have committed such crimes. As we explain in detail below, however, customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations. We must conclude, therefore, that insofar as plaintiffs bring claims under the ATS against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs' claims fall outside the limited jurisdiction provided by the ATS*".[203]

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200 For more detail, see: Murray, Kinley & Pitts 2011, pp. 10-15.

201 *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2nd Cir. (N.Y.) 2010), reh. denied by 2011 WL 338048 (2nd Cir. (N.Y.) 2011) and reh. en banc denied by 2011 WL 338151 (2nd Cir.(N.Y.) Feb 04, 2011), and petition on certiorari filed (No. 10-1491, 10A1006, June 2011). See, for the case history and further references, the website of the Business & Human Rights Resource Centre < www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria>.

202 *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2nd Cir. (N.Y.) 2010), p. 117. Note that in a 2007 judgment in the Apartheid litigation, the Court of Appeals for the Second Circuit had already observed that in previous corporate ATS cases before it, it had "[...] repeatedly treated the issue of whether corporations may be held liable under the ATCA as indistinguishable from the question of whether private individuals may be"; see *Khulumani v. Barclay Nat. Bank Ltd*., 504 F.3d 254 (2nd Cir. (N.Y.) 2007), pp. 282-283, where the issue was discussed (see particularly the partly concurring and partly dissenting opinion of Judge Korman, pp. 321-326) but not decided as the defendants in that case had not objected to the imposition of liability on that basis.

203 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. (N.Y.) 2010), pp. 115-149, majority opinion by Judge Cabranes (quote p. 120). See also, critically: Murray, Kinley & Pitts 2011.

The consequences of this decision are hard to calculate at this point, but it has led many commentators to speculate on the 'death' of corporate liability under the ATS.[204] After all, in effect the ruling limits jurisdiction under the ATS to claims against natural persons, at least within the Second Circuit where it provides binding authority for lower courts to follow.[205] At the same time, however, it should be noted that the court itself was divided on the matter, as one of the judges on the three-judge panel concurred only in the dismissal of the complaint, but not in the majority opinion itself. In a separate opinion, Judge Leval asserts:

> "*The rule in cases under the ATS is quite simple. The law of nations sets worldwide norms of conduct, prohibiting certain universally condemned heinous acts. That body of law, however, takes no position on whether its norms may be enforced by civil actions for compensatory damages. It leaves that decision to be separately decided by each nation.* [...] *No principle of domestic or international law supports the majority's conclusion that the norms enforceable through the ATS – such as the prohibition by international law of genocide, slavery, war crimes, piracy, etc. – apply only to natural persons and not to corporations, leaving corporations immune from suit and free to retain profits earned through such acts*".[206]

Furthermore, the Second Circuit Court of Appeal's ruling does not bind federal courts in other circuits, although some of them have responded favourably to motions to dismiss based on the arguments in the *Kiobel* case that have since been raised by corporate defendants.[207] Other Circuit courts, however, including those in the DC and 7th Circuits, have clearly indicated in subsequent cases that they reject the Second Circuit's reading on corporate liability under the ATS.[208]

Importantly, the Second Circuit Court of Appeals' decision in *Kiobel* is also not yet carved in stone, since the *Kiobel* plaintiffs in June 2011 asked the US Supreme Court to review the ruling. In their petition, they have requested the Court to answer two questions. Firstly, they have raised a procedural point about whether the Circuit Court should have

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204 See, for instance: Goldhaber 2010; Ku 2010; Childress 2010. See also, critically: Murray, Kinley & Pitts 2011, as well as sub-section 6.1.1.

205 Plaintiffs' request for en banc rehearing of the case was denied: *Kiobel v. Royal Dutch Petroleum Co*., 2011 WL 338151 (2nd Cir.(N.Y.) Feb 04, 2011). Note, however, that the en banc Court was highly divided and split 5-5 in refusing to reconsider the panel result.

206 *Kiobel v. Royal Dutch Petroleum Co.*, 2010 621 F.3d 111 (2nd Cir. (N.Y.) 2010), pp. 150-196, separate opinion Judge Leval (quote p. 153).

207 Childress 2011, pp. 7-8.

208 See, for instance: Bellinger 2011, commenting on the DC Circuit Court of Appeals' decision of 8 July 2011 in the case of *Doe v. ExxonMobil et al.* and Ku 2011, commenting on the 7th Circuit Court of Appeals' decision of 11 July 2011 in the case of *Flomo v. Firestone Natural Rubber Company*. See the website of the Business & Human Rights Resource Centre for case histories and further references on both cases: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ExxonMobillawsuitreAceh> and <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/FirestonelawsuitreLiberia>, respectively.

addressed the question of corporate liability under the ATS at all, as this issue had not been raised by either side and had consequently also not been dealt with by the District Court in this case. Secondly, they have raised the question whether corporations are immune from ATS-based civil liability for human rights violations and/or international crimes, or whether they can be held liable for such violations of customary international law as any private individual would. They contend in this respect that the Second Circuit Court of Appeals decision, which *de facto* renders corporations immune to ATS-based civil claims in US federal courts, conflicts with previous rulings in other Circuits, as well as that the same issue of corporate liability under the ATS is currently under review in three other federal appeals courts.[209]

In October 2011, the Supreme Court indicated that it has agreed to accept the *Kiobel* case for review.[210] It is clear that this decision, which is expected around June 2012, will be highly determinative for the future of ATS-based foreign direct liability claims.

The Bodo settlement and parent company liability

Recent developments in other Western societies seem to paint a far rosier picture for the future of foreign direct liability cases. As discussed, a class action brought in the UK against Shell by the Nigerian Bodo community for two major oil spills in 2008 is likely to lead to an out-of-court settlement sometime in the near future. As was also mentioned in the previous sub-section, however, this course of events precludes further litigation of the issues in this case and thus the creation of judicial precedent that seems to be needed, not only in the UK but also in other Western societies, in order to make the contemporary socio-legal trend towards foreign direct liability cases a more permanent feature of today's legal landscape. In particular the controversial matter of parent company liability in these cases will not come up for further legal challenge in this matter, as the plaintiffs have agreed to drop their claims against Shell parent company RDS in return for Nigerian subsidiary SPDC's admission of liability.

On the other hand, the course of events in this case has, as has been mentioned before, given rise to speculations that more of these kinds of transnational tort-based civil liability claims may be expected before domestic European courts in the near future, not only against Shell but also against (parent companies of) other multinational corporations.[211] This would obviously increase the possibility of creating some judicial precedent on the substantive issues in foreign direct liability cases, which might in turn provide the socio-legal trend under discussion here with some much-needed legal footing and durability in a time when its original legal basis, the ATS, is the subject of mounting controversy.

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209 See L. Denniston, 'Major new corporate case at Court', on the US Supreme Court weblog (7 June 2011), <www.scotusblog.com/2011/06/major-new-corporate-case-at-court/>.

210 See, for instance: Denniston 2011b; Stohr 2011.

211 See, for instance: Depuyt & Lindijer 2011; Persson 2011b. See also the Introduction to Part I and *supra* sub-section 3.1.3.

Goldhaber has noted in this respect that one of the lessons of *Bodo* for business and human rights is that:

> "[...] *the common law model of corporate human rights accountability is starting to make the Alien Tort Statute look pretty weak by comparison.* Bodo *confirms that plaintiffs may have other options if the corporate alien tort hits a dead end*".[212]

He also points out, however, that the future of UK-based foreign direct liability cases may also not be all that secure, as the British Parliament is debating a Legal Aid Bill that could in its current form deter future foreign direct liability cases from being brought before courts in the UK.[213]

Interestingly, a recent court case before the Queen's Bench Division of the English High Court shows that some of the answers to the legal issues posed in foreign direct liability cases may also come from precedents set in other types of claims. In April 2011, the court held in the case of *Chandler v. Cape plc* that under certain circumstances a parent company of a corporate group may owe a duty of care to an employee of its subsidiary who has suffered personal injuries (contracted asbestosis) due to exposure to asbestos in the course of his employment.[214] This case closely resembles the previously mentioned foreign direct liability case brought against Cape plc by employees of its South African subsidiary, except that the subsidiary and claimant in the *Chandler* case were both based in the UK and not overseas. As will also be briefly discussed in the next chapter, it provides a clear example of judicial precedent which suggests that in foreign direct liability cases parent companies of multinational corporations may also be held liable in principle for the damages caused to third parties by the overseas activities undertaken by their local partners on the basis of general principles of tort law (or, more specifically, the English tort of negligence).[215]

Procedural hurdles in the Dutch Shell cases

As mentioned in the previous sub-section, the Dutch Shell cases that are currently pending before the The Hague district court are the foreign direct liability cases that at present seem closest to a judgment on substantial issues of (parent company) liability, at least outside

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212 Goldhaber 2011.

213 Goldhaber 2011. See also: 'CAFOD warns government: Do not end legal protection for victims of UK multinationals', 21 July 2011, available at the website of CAFOD, the official Catholic aid agency for England and Wales: <www.cafod.org.uk/news/international-news/no-to-legal-aid-bill-2011-07-21>, where it is noted, *inter alia*: "*The Government's new 'Legal Aid Bill' seeks to prevent 'ambulance chasing' by legal firms using 'no win-no fee' arrangements to claim large success fees from defendants. However, its sweeping provisions will also remove the 'success fee' paid to specialist law firms that bring human rights abuse cases against UK multinationals operating overseas, substantially reducing the economic viability of these cases for those firms. These provisions will therefore prevent many claimants in poor countries seeking justice in the UK, even though they are not currently eligible for legal aid and the legislation will therefore provide no savings to the taxpayer*".

214 *Chandler v Cape Plc.* [2011] EWHC 951 (QB) (14 April 2011).

215 See further sub-section 4.4.3. See also, on the *Cape* case, *supra* sub-section 3.2.2.

the US. However, the court's September 2011 decisions in these three claims do not look altogether advantageous to the plaintiffs.[216] In its corresponding decisions in each of the three claims, the court has first of all (provisionally) settled two other matters. It has determined that on the basis of Dutch communal choice-of-law rules the law on the basis of which the claims are to be decided is Nigerian law and, more particularly, the law that is applicable in the Nigerian state of Bayelsa, where the oil spills in dispute and their harmful consequences have occurred. Furthermore, it has also determined that contrary to Shell's assertions Milieudefensie, a Dutch NGO concerned with protecting the environment at a global level, may rightfully join the plaintiffs in their claims in these cases as a representative organisation acting on behalf of the local communities and the local environment at large that have been affected by the oil spills in dispute.

With respect to the plaintiffs' request for Shell to provide exhibits of certain key evidentiary documents pertaining to for instance the condition of the oil pipelines involved and the Shell group's internal policies and operational practices, the court has not ruled in favour of the plaintiffs. It has basically indicated that the plaintiffs do not meet the (relatively strict) requirements set by Dutch civil procedural law in this respect. According to the court, the plaintiffs have so far not sufficiently substantiated their claims that the oil spills in dispute are a result of equipment failure rather than sabotage, as is claimed by Shell, and thus cannot be said at this point to have a legitimate interest in the disclosure by Shell of documents regarding the condition and maintenance of those pipelines. Similarly, the court has held that they lack legitimate interest at this point with respect to their request for exhibition of documents relating to parental control over SPDC's environmental policies and/or awareness of the local situation and oil spills, as well as to SPDC's policies regarding oil spills, the security and maintenance of the oil pipelines by SPDC and the ownership and control relationships within the local joint venture in charge of those pipelines. The court argues in this respect that the plaintiffs have so far not sufficiently substantiated their claims that the Shell defendants can be held liable for the damage caused by the oil spills. The plaintiffs' appeal to the 'equality of arms' principle that flows from article 6 of the European Convention on Human Rights does not change the court's opinion on this matter.

All in all, the September 2011 judgments of the The Hague district court in the Dutch Shell cases make clear that the plaintiffs in these cases will need to further substantiate their claims in preparation for the next phase of these cases in which the court will look at the main legal issues in dispute: the alleged liability of SPDC and/or its Anglo/Dutch parent

216 *Oguru et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.; Oguru et al. v. Shell Petroleum N.V. and The "Shell" Transport and Trading Company Limited*, Rechtbank 's-Gravenhage, case nos. 330891/HA ZA 09-0579 and 365498/HA ZA 10-1677 (14 September 2011); *Akpan et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*, Rechtbank 's-Gravenhage, case no. 337050/HA ZA 09-1580 (14 September 2011); *Dooh et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.; Dooh et al. v. Shell Petroleum N.V. and The "Shell" Transport and Trading Company Limited*, Rechtbank 's-Gravenhage, case nos. 337058/HA ZA 09-1581 and 365482/HA ZA 10-1665 (14 September 2011). See the Milieudefensie website for further references: <http://milieudefensie.nl/oliewinning/shell/olielekkages/documenten-shellrechtszaak#juridischedocumenten>. See also *supra* sub-section 3.2.2.

company RDS (or its predecessors) for the people- and planet-related harm caused as a result of the oil spills at issue. The judgments also make clear that the Dutch procedural system on evidence gathering may not be particularly conducive to this particular type of transnational tort-based civil litigation due to its relatively strict standards.[217] After all, foreign direct liability cases as discussed tend to be characterized, *inter alia*, both by a total lack of transparency on intra-group relations and also by inequality of arms to the detriment of the host country plaintiffs in these cases.[218] Whether and to what extent the court's decision will affect the plaintiffs' abilities to pursue their claims against Shell will become clear in 2012, when the parties and the court will turn to the main action in these cases.[219]

3.4 Concluding remarks

In this chapter, the emergence has been traced of a socio-legal trend towards a particular type of transnational tort-based civil litigation before Western society courts. Over the last two decades, an increasing number of transnational tort claims have been brought against parent companies of multinational corporations before home country courts by host country plaintiffs who have suffered harm as a result of the detrimental impacts of these groups' transnational activities on people and planet locally. Although most claims so far have been brought before US (federal) courts, the trend has also spread to other Western societies, such as the UK, Australia, Canada, the Netherlands and France.

These so-called foreign direct liability cases are typically initiated using existing legal bases. In the US, many cases have been brought on the basis of the obscure and controversial 1789 Alien Tort Statute. Outside the US, foreign direct liability claims have mainly been based on general principles of tort law and the tort of negligence in particular. These cases have a number of distinct characteristics that set them apart from other types of (transnational) tort claims and that raise novel and complex legal issues. Many of these issues remain unresolved at this point, due to a dearth of precedent so far on the merits of these claims.

Recent developments in the US, the UK and the Netherlands are changing the legal landscape within which these cases are set, as some doors are being closed to the further pursuit of these claims, while other ones are being opened. In the next chapter, some of the main factors determining the legal and practical feasibility of foreign direct liability cases will be further explored. A general framework will be set out, focusing on the one hand on relevant legal, procedural and practical circumstances in the US and on the other hand on corresponding legal, procedural and practical circumstances in Europe.

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217 See, for further detail and in comparative perspective, sub-sections 5.4.2 and 6.4.1.
218 See *supra* sub-section 3.2.3.
219 See also *supra* sub-section 3.2.2.

4 Legal and practical feasibility further explored

4.1 The (continued) feasibility of foreign direct liability cases

4.1.1 A leading role for tort law (and the tort of negligence in particular)

As is clear from the previous chapter, foreign direct liability cases are typically based on tort law, whether through specific statutory provisions such as the Alien Tort Statute (ATS) or through the general principles of tort law that are featured in the domestic laws of the home countries (or, in the US, states) or host countries involved. In fact, recent developments both within and outside the US suggest that the focus of these claims may shift in the near future away from the use of the ATS and towards the use of general principles of tort law and the tort of negligence in particular. After all, the recent proliferation and relative 'success' (*i.e.*, settlements in the *Cape* case and the Trafigura case, admission of liability by Shell in a class action brought by the Nigerian Bodo community) of foreign direct liability claims before domestic courts in Europe seem to underline the fact that foreign direct liability claims brought on the basis of general principles of tort law provide a viable alternative to corporate ATS claims. The significance of this message is increasing as US federal courts seem to be on a mission to progressively restrict the feasibility of corporate ATS claims. Eventually, this may well result in a definitive shift in focus both from the ATS as the primary basis for foreign direct liability cases to general principles of tort law and the tort of negligence in particular, and from US (federal) courts as the primary venue for foreign direct liability cases to domestic courts in other Western societies.[1]

In a 2008 report of the International Commission of Jurists (ICJ) on civil remedies for corporate complicity in gross human rights abuses, it is found that for a number of reasons, "[...] *civil liability is increasingly important as a means of assuring legal accountability when a company is complicit in gross human rights abuses*".[2] Many of the reasons advanced by the report for the increasing importance of civil liability in this particular context are also relevant in the somewhat broader context of foreign direct liability cases, which as discussed may pertain not only to corporate complicity in international human rights abuses, but also to other types of wrongful corporate behaviour that cannot as easily be labelled as a violation of international human rights but nevertheless cause harm to people and planet in the host countries where the defendant multinational corporations carry out

1 Compare, for instance: Goldhaber 2011. See also further sub-sections 3.3.2 and 6.1.2, as well as section 6.3.
2 ICJ Report (Civil Remedies) 2008, p. 4.

their activities.[3] The report argues, for instance, that a finding of civil liability, even apart from the fact that it is likely to have a meaningful impact on the situation and lives of those detrimentally impacted through the provision of appropriate remedies, may also:

> "[...] *significantly influence patterns of behaviour in a society, raising expectations as to what is acceptable conduct, and preventing repeat of particular conduct, by both the actor held liable, and by other actors who operate in similar spheres or find themselves in similar situations*".[4]

Another feature that, according to the report, renders civil liability increasingly important in this context is that tort claims may be initiated privately by the host country victims of perceived corporate wrongdoing in this respect.[5] This is particularly important considering the fact that, as has been discussed before, governmental authorities in the host countries involved may for various reasons be unable or unwilling to provide their citizens with adequate protection against such abuses.[6] Furthermore, tort systems around the world are typically aimed at protecting "[...] '*interests*' *such as life, liberty, dignity, physical and mental integrity, and property*" and as such are particularly suitable for addressing infringements of people- and planet-related interests, regardless of whether or not those infringements can be labelled as human rights violations.[7]

Another factor that renders tort-based civil liability attractive for host country victims seeking to hold (parent companies) of multinational corporations accountable for harm caused to people and planet as a result of their host country operations is that tort systems tend to allow claims not only against the primary perpetrator of a norm violation, but also against other actors whose conduct has somehow contributed to the harm suffered.[8] This is an important factor especially in light of the previously mentioned fact that the corporate defendants in question are typically only indirectly involved in the harmful host country activities.[9] A final reason for the importance of civil liability in this context that is mentioned by the report is the fact that the pursuit of civil liability claims may be one of the few legal avenues or even the only legal avenue to remedy that is open to the host country victims in these cases, due to the fact that alternative legal avenues, for instance within the fields of public international law or domestic criminal law, may not provide

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3 See further section 3.2.
4 ICJ Report (Civil Remedies) 2008, p. 4.
5 *Id*.
6 See further sub-section 3.2.3.
7 ICJ Report (Civil Remedies) 2008, p. 4.
8 The ICJ Report (Civil Remedies) 2008 states in this respect (p. 5): "[...] *for the purposes of civil liability it is irrelevant whether or not the company whose liability is sought was a primary or secondary actor* [...] *In general, all actors whose conduct contributes in greater or lesser ways to harm suffered by another, can potentially face civil liability whether or not they instigated the situation, actively inflicted the harm, or helped a principal actor*".
9 Compare sub-section 3.2.3.

recourse against corporate actors.[10] Still, as will be discussed in the next sub-section and further elaborated in the remainder of this chapter, the availability of tort-based civil remedies in this context remains dependent on a number of factors that in the end determine the feasibility for host country victims of pursuing corporate accountability by bringing foreign direct liability cases.

Depending also on the particular circumstances of the case and on the legal system involved, alternative legal routes may be available through which host country victims may seek to hold (parent companies of) multinational corporations accountable for harm caused to people and planet as a result of their transnational activities. One example is the pursuit of tort-based civil liability claims against individual corporate officers and directors; in fact, it has been suggested that such claims might increase in popularity if the US Supreme Court were to hold that corporate actors could not be held liable on the basis of the ATS.[11] The question may of course be raised as to whether the host country plaintiffs' objectives in pursuing their foreign direct liability claims in the first place could be met by targeting individual corporate officers, considering for instance that the financial scope of such individuals will generally be much more limited than that of the company itself and the fact that such instances of individual liability may not have the impact on corporate culture, policies and operational practices that is sought.

Another alternative to tort-based foreign direct liability cases may be provided by corporate law theories of piercing the corporate veil, on the basis of which a parent company may be held liable for the actions and/or debts of its subsidiary.[12] As will be further discussed below, however, courts in consideration of fundamental corporate law principles of separate legal personality and limited liability will only in exceptional cases allow the corporate veil to be pierced, which renders the (potential) role for this legal alternative to tort-based civil liability claims a very marginal one. Even more remote legal alternatives are for instance those of criminal or contractual liability. However, the use of criminal law as a corporate accountability mechanism in this particular context is problematic for three main reasons: criminal procedures can generally not be initiated by private actors but are dependent on state initiative in this respect; criminal law may not always allow for the prosecution of corporate actors; and, apart from a few limited exceptions, it is not easily applied in a transnational context.[13] Contractual liability, on the other hand, is also destined to play a limited role as a corporate accountability mechanism in this respect, as it will generally not be available to the host country victims who will, in many cases, not be in a contractual relationship with the corporate actors they seek to

10 ICJ Report (Civil Remedies) 2008, p. 5.

11 See, for instance: Bellinger 2010.

12 See, for instance, Joseph 2004, pp. 129-132, who notes that "[...] *the corporate veil poses a formidable obstacle to transnational human rights claimants seeking redress from corporate parents for the actions of their subsidiaries*" (quote p. 131, citations omitted).

13 Compare also, for more detail: ICJ Report (Criminal law and international crimes) 2008.

hold liable for the harm caused to their people- and planet-related interests as a result of the host country activities of the multinational corporations involved.[14]

Thus, the legal developments that have been set out in chapters 1 and 3 clearly show that the type of transnational tort-based civil claims characterized here as foreign direct liability cases represent the most relevant and feasible route for host country victims to pursue in order to hold (parent companies of) multinational corporations accountable for harm caused to people and planet abroad. Accordingly, and also in recognition of the developments set out here, the focus in the following chapters will be on foreign direct liability cases in general and on those brought on the basis of the tort of negligence in particular. Nonetheless, some attention will also be paid to closely related substantive legal bases such as the ATS and/or alternative theories of parent company liability where they are relevant for a better understanding of the nature, scope and limits of the contemporary socio-legal trend towards foreign direct liability cases and the feasibility of bringing such cases before Western society home country courts.

4.1.2 Four factors

The contemporary trend towards foreign direct liability cases exists because host country citizens who have suffered harm as a result of detrimental impacts of multinational corporations' international operations on people and planet in the host countries where they live, have found ways to have their misfortune addressed by home country courts using civil claims brought on the basis of existing principles of tort law. Considering the increasing popularity of pursuing foreign direct liability claims that is evidenced by the growing number of claims brought before courts in a growing number of Western societies, it seems safe to say that there remain sufficient causes and incentives for host country victims to pursue such claims, despite the fact that they are a lengthy, difficult, costly and stressful route to justice. As will be discussed further in section 6.1, the apparent decline of the ATS as a legal basis for this type of transnational tort-based civil litigation against multinational corporations is likely to signify a mere change of course rather than an end to this trend, also in view of the fact that alternative legal bases are available and have been used before to pursue foreign direct liability claims although, up until now, not nearly as frequently as the ATS itself.

In the end, however, the future development of the contemporary trend towards foreign direct liability cases is of course determined by the continued feasibility of actually bringing such claims before Western society courts, which largely depends on the legal, procedural and practical opportunities and barriers that exist in this respect in the Western societies in which prospective plaintiffs seek to bring their claims. There are a number of elements that may be said to primarily determine the legal and practical

14 Compare also sub-section 3.2.3.

feasibility of bringing foreign direct liability claims, and they can roughly be categorized into four factors: jurisdiction; applicable law; substantive legal basis; and procedural and practical circumstances. These four factors that together largely determine the feasibility of foreign direct liability claims will be briefly set out below before being further explored in the remainder of this chapter. In line with the aim and focus of this study, the emphasis in doing so will be on the relevant legal, procedural and practical circumstances within the US on the one hand and within the EU Member States on the other.[15] The basic legal framework set out in this chapter will be further elaborated in chapter 5 from the perspective of the Dutch legal system, whilst section 6.3 will provide a further discussion of some of the findings made here.

Jurisdiction

First of all, as in any civil claim with international aspects that is brought before a domestic court, private international law provisions play an important role in foreign direct liability cases.[16] The rules on civil jurisdiction that are applicable in the home countries where foreign direct liability claims are brought before domestic courts will, in each case, determine whether and to what extent the home country courts seized of these matters have jurisdiction to adjudicate on them. It should be noted that in the US, in line with its federalist state system and ensuing competition between federal and state courts, a distinction is made in this respect between personal jurisdiction ("[...] *the power of the court to render a judgment against particular persons or things*) and subject matter jurisdiction ("[...] *the power or competence of a court to adjudicate particular categories of claims*").[17] In a more general sense, the notion of jurisdiction at issue here pertains to what may be termed 'judicial jurisdiction' or 'jurisdiction to adjudicate', and should as such be distinguished from 'legislative' or 'prescriptive' jurisdiction (which refers to a state's authority in an international context "[...] *to make its laws generally applicable to persons or activities*") and 'enforcement jurisdiction' (which refers to a state's authority in an international context "[...] *to induce or compel compliance, or punish noncompliance, with its laws*").[18] Generally speaking, jurisdictional issues play a pivotal role in many transnational disputes, as forum selection may have vital consequences for the way in which such a dispute is resolved.[19]

Depending on the particular regimes on (personal) jurisdiction that are applicable in the home countries where the cases are brought, the question of jurisdiction may be a crucial matter in this type of transnational tort-based civil litigation. After all, due to the strong connection to the host country that these claims typically have, as that

15 See further sub-sections 2.1.1 and 2.1.2.
16 For more detail, see, for instance: Zerk 2006, pp. 113-133.
17 See, generally, with a focus on international civil litigation in US courts: Born & Rutledge 2007, pp. 1-217.
18 See, in more detail and with a focus on international civil litigation in US courts: Born & Rutledge 2007 (quote p. 1, citations omitted).
19 Born & Rutledge 2007, p. 2.

is usually the location where (at least part of) the harmful behaviour has taken place, where people- and planet-related interests have been detrimentally affected, where the resulting damage has arisen, and where the plaintiffs are located (as well as some of the defendants where local subsidiaries, business partners and/or sub-contractors are sued as co-defendants next to the parent companies of the multinational corporations involved), the exercise of jurisdiction in these cases by home country fora may not be a given. In principle, the circumstances under which civil courts may exercise jurisdiction over cases of a transboundary nature are determined by the domestic rules of private international law that apply in the forum country (or, in the US, forum state). These rules may in turn emanate from or be supplemented by non-domestic sources of law, as is the case for instance in the EU Member States where the regime of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies.[20]

Applicable law

Once it has been established that the court before which a foreign direct liability claim has been brought has jurisdiction to hear the matter, the question arises on the basis of which legal norms the transboundary civil claim should be adjudicated. After all, transnational litigation inevitably presents questions of applicable law (or choice of law) where two or more states are able to prescribe substantive rules of conduct regulating the private actors and activities in dispute. Accordingly, courts dealing with transnational civil disputes need to select on the basis of the domestic rules of private international law that apply in the forum country (or, in the US, forum state) which of the legal systems of the states connected to the transnational civil dispute should govern the claims. In principle, different choice of law regimes may apply depending on the characterization of the transnational claims in dispute, for instance as tort claims, contractual claims, or otherwise; rules of private international law may also flow from non-domestic sources of law, such as the EU's Rome II Regulation on the law applicable to non-contractual obligations.[21]

Again, due to these cases' strong connections to the host country, it is not at all a given that the home country courts adjudicating foreign direct liability claims will be able to do so on the basis of home country substantive norms. In fact, in many of these cases the home country courts involved will have to formulate their judgment with respect to the alleged wrongfulness of the corporate conduct in question as well as with respect to its legal consequences predominantly on foreign (host country) sources of law. Yet another choice of law issue that may play a role in these cases, especially in those brought before US federal courts on the basis of the ATS, is the choice of law between norms of customary

20 See, generally on the role of the (personal) jurisdiction factor in this context: Enneking 2009, pp. 913-919; Wouters & Ryngaert 2009; Muchlinski 2007, pp. 140-160; Zerk 2006, pp. 117-127; Joseph 2004, pp. 83-99. See also further *infra* section 4.2.

21 See, generally, with a focus on international civil litigation in US courts: Born & Rutledge 2007, pp. 613-750

international law and norms of domestic law (for instance, federal common law). Since the substantive norms of tort law that apply in one country may be very different from those which apply in another, the outcome of a tort dispute may vary radically depending on the law that is applied to it. Similarly, as is clear from what has been discussed before, ATS-based litigation has shown that international legal standards on, for instance, liability for aiding and abetting and corporate liability may be very different from domestic legal standards on these matters.[22] Thus, "[...] *the outcome of choice of law analysis is often directly relevant to the outcome of the dispute*".[23]

Substantive legal basis

A further factor determining the feasibility of foreign direct liability claims is the availability in the applicable system of tort law of a legal basis upon which this particular type of transnational tort-based civil litigation can be brought. As is clear from what has been discussed before, the legal basis for foreign direct liability claims is typically found in the field of tort law. These claims may be based on a specific domestic legal doctrine where available, such as the ATS, on the basis of which transnational tort claims can under certain (strict) conditions, be based directly on violations of customary international law. Where such a specific legal doctrine is unavailable, however, as will be the case in most legal systems, such claims are typically based on more general principles of domestic tort law, in particular the tort of negligence.[24] Both types of legal basis for foreign direct liability claims will be reviewed here, although the discussion of the ATS as a legal basis for foreign direct liability claims will be kept brief as it has already been reviewed in chapter 3. Furthermore, due to the scarcity so far of legal precedent on the merits of this type of transnational tort-based civil claim, the discussion will mainly revolve around the theoretical possibilities and challenges that exist in this respect.[25]

Furthermore, as has also been discussed before, foreign direct liability claims are for various reasons typically primarily aimed at the parent companies of the multinational corporations that have in the course of their transnational activities caused harm to people and planet in host countries.[26] Their involvement in the harmful activities and/or the norm violations is usually indirect, as it is typically the actions or inactions of local subsidiaries, business partners and/or (sub-)contractors that are most closely connected to the harm caused.[27] As a result, the plaintiffs in these cases have based their claims on a variety of different theories of parent company liability, depending on the particular facts involved

22 Compare sub-section 3.3.2.

23 Born & Rutledge 2007, p. 562. See, generally on the role of the applicable law factor in this context: Enneking 2009, pp. 926-931; Enneking 2008a; Zerk 2006 pp. 127-131. See also further *infra* section 4.3.

24 See further sub-sections 3.1.2, 3.1.3, 3.2.3 and 3.3.2.

25 See, generally on the role of the substantive legal basis factor in this context, for instance: Koebele 2009; Enneking 2009, pp. 921-926; Zerk 2006, pp. 198-240; Joseph 2004, pp. 21-81, 113-128. See also further *infra* section 4.4.

26 See further sub-section 3.2.3.

27 See further sub-section 3.2.3.

and the particular legal bases available. The amount of case law in this field is very limited, which means that the discussion of the feasibility of these theories as a basis for foreign direct liability claims necessarily remains mostly theoretical in nature.[28]

Procedural and practical circumstances

A final factor that tends to have a crucial impact on the feasibility of foreign direct liability claims is formed by the relevant procedural and practical circumstances under which these claims can be brought before Western society home country courts. There are a number of circumstances that are particularly likely to play a role in this context. These include: the financial aspects of bringing foreign direct liability claims, also considering their typical complex and drawn-out nature; the availability of expert legal and practical assistance; the possibilities for bringing collective actions; circumstances relating to the collection of evidence and burden of proof; rules pertaining to prescription or limitation of claims; and the available remedies. A further factor of importance in this respect is the extent to which the home country legal culture in general is conducive to this type of litigation. As has been mentioned before, the US is generally seen as presenting the best overall picture in this respect.[29] Still, as is clear from the proliferation of foreign direct liability claims outside the US, procedural and practical circumstances in other Western society home countries may also be sufficiently conducive to this type of litigation to allow host country victims to pursue such claims there.[30]

Depending on the legal system(s) involved, most of these circumstances are seen as matters of civil procedure and/or legal culture; some, however, may be seen as belonging to the field of substantive tort law. The difference is important, since the former are typically defined by the procedural rules and practices that are applicable in the Western society home countries (the forum countries/forum states) in which the claims are brought, whereas the latter are likely to be defined by the rules of tort law that are applicable to the claims. Which rules apply in this respect is in the end determined by the scope of the applicable rules of tort law, as defined by the choice of law regimes of the home countries before which foreign direct liability claims are brought. According to the Rome II Regulation, for example, the law that is applicable to non-contractual obligations falling within its substantive scope governs, *inter alia*, the existence, nature and assessment of the damages or other remedies claimed, prescription or limitation periods, as well as certain aspects relating to the burden of proof.[31] This also means that other circumstances that are

28 See, generally on the role of theories of parent company liability in this context, for instance: Zerk 2006, pp. 234-237; Joseph 2004, pp. 129-143.

29 See section 3.1.

30 See, generally on the role of procedural and practical circumstances in this context: Enneking 2009, pp. 931-934; Stephens 2002. See also further *infra* sub-section 4.5.

31 See Article 15 Rome II Regulation, which provides that the applicable law shall govern in particular: "*(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them; (b) the grounds for exemption from liability, any limitation of liability and any division of liability; (c) the existence, the nature and the assessment of damage or the remedy claimed; (d) within the limits of powers*

relevant in this respect, such as for instance those relating to the collection of evidence, are governed in principle by the rules of the forum country or forum state.

4.1.3 Private international law and extraterritoriality

As has been mentioned before, the point of departure in today's international legal order of sovereign nation states remains that each state in principle has the supreme authority to prescribe and enforce rules and regulations with respect to actors and activities within its territory.[32] However, as a result of growing global interconnectedness, actors and activities are increasingly situated in transnational rather than domestic contexts and are thus potentially subject to the authority of more than one state.[33] The resulting competing claims to regulatory authority by different states with respect to those actors and activities raise questions of international jurisdiction; as is clear from what has been mentioned before, these questions may be subdivided into questions of: adjudicative jurisdiction (referring to a state's authority to have its courts adjudicate on disputes and render judgments in an international context); prescriptive jurisdiction (referring to a state's authority to apply its laws in an international context); and enforcement jurisdiction (referring to a state's authority to enforce compliance with its laws in an international context).[34]

In line with the idea that the contemporary international legal order is made up of different sovereign nation states each with exclusive authority over actors and activities within their territories, the jurisdiction of states to exercise any of these types of international jurisdiction over actors and activities outside their territory (extraterritorially) is limited. In theory, these limitations are defined either by the field of public international law where public law rights and obligations are concerned, or by the field of private international law where private law rights and obligations are concerned. These two fields of law are of a very different nature. Whereas the former justifies international jurisdiction in spatial terms with a strong focus on territoriality and state sovereignty, the latter focuses on connecting factors between the private actors and activities in question and the different states involved. Furthermore, the field of public international law revolves around state

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conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation; (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance; (f) persons entitled to compensation for damage sustained personally; (g) liability for the acts of another person; (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation". See also Article 22 Rome II Regulation on burden of proof.

32 See further sub-section 1.1. For more detail, see section 8.2.

33 This also means that as a result of globalization the traditional Westphalian model of state sovereignty is increasingly undermined. For more detail, see, for instance: Sassen 1996.

34 See *supra* sub-section 4.1.2 as well as, more elaborately, section 8.2. See also, for instance: Born & Rutledge 2007, p. 1.

interests and as such tends to be highly politicized, while the traditional and still popular basic assumption in the field of private international law, in Europe at least, is that this field of law is apolitical, due also to the fact that the domestic systems of private law that it is concerned with are assumed to be relatively free of state intervention and insulated from public interests.[35]

In practice, however, these two fields are also closely interconnected. The more blurred the boundary between public law and private law becomes, for instance where private law and civil disputes are given a more 'public' character because they are applied by the government and/or by private actors themselves to enforce public laws, promote public policies, protect public interests or facilitate societal change more generally, the more principles of public and private international law come together.[36] Thus, the question may be raised whether (the issues sought to be resolved through) the field of private international law may not under certain circumstances be rather 'public' in both character and consequences. Symeonides argues in this respect that:

> "[...] *the word 'private', which echoes the private-public law distinction prevalent in Europe, assumes that the cases that fall within the scope of this subject are garden-variety private-law disputes that implicate only the interests of the litigants and not the interests of the states having contacts with the case. If this were true, these cases would not differ from intra-state cases which are always governed by forum law. Precisely because of their multistate dimension, conflicts cases implicate the laws of more than one state, which may embody different objectives, values, or policies. Although these states are not the actual disputants as they would be in a public international law dispute, it is unrealistic to assume that they are wholly indifferent to the way these conflicts cases are resolved*".[37]

In fact, the idea of the field of private international law as an apolitical, neutral field of law that does not involve state interests has long been abandoned in the US (where, tellingly, this field of law is commonly referred to as conflict of laws), in favour of an approach that recognizes that the conflicting interests involved in this field go far beyond the interests of the parties directly involved in a transnational private law dispute and concern also societal, public and ultimately state interests.[38] Meanwhile, also in Europe there is a growing awareness of and sensitivity to the broader, more public implications of

35 Compare, for instance: Michaels 2005, who explains that this traditional view can be traced back to Von Savigny's conception that private law is apolitical and should as such be sharply distinguished from the field of public law. Michaels argues that this traditional conception of private international law as an essentially value-neutral, apolitical field of law as originally developed by Von Savigny cannot adequately deal with the contemporary challenges of globalization.

36 See also Zerk 2006, pp. 104-142.

37 Symeonides 2008a, p. 1785.

38 For a more detailed discussion, see Symeonides 2008a, pp. 1784-1794. See also *infra* sub-section 4.3.2.

the role of private international law in transnational private law disputes, even though the consideration of these implications remains much less overt than in the US.[39]

With respect to the future role of public interests in the field of private international law/ conflict of laws, Symeonides predicts that:

> *"As we proceed down the path of the twenty-first century, we can expect that states will, even more boldly, assert their interest in multistate private-law disputes".*[40]

The resulting confluence of public and private international law may result in complex issues that challenge existing paradigms in both fields of law.[41] An example is the growing reliance on civil procedures before domestic courts to address international crimes such as genocide, crimes against humanity, war crimes, torture, slavery and terrorism. This tendency has the potential of causing conflict with (the harmonization of) domestic civil procedural rules, and raises questions with respect to the lawful exercise universal (civil) jurisdiction where the domestic legal order in which the claim is brought has little or no connections to the actors or activities in question.[42] Dubinsky argues in this respect:

> "*In attempting to adjudicate claims arising out of severe and systematic human rights abuses, domestic courts are trying to fill an enforcement gap, a task for which they were not designed*".[43]

Foreign direct liability cases, due to their transnationality and distinct public interest nature, are a clear example of cases that lie at the plane of intersection between both areas of law. Accordingly, despite the fact that these cases are essentially concerned with private law disputes over the private interrelationships between the host country plaintiffs and the defendant (parent companies of) multinational corporations, they also tend to raise issues of international adjudicatory and prescriptive jurisdiction and extraterritoriality. After all, home country courts are typically asked in these cases to exercise authority over actors and activities that predominantly lie outside the territorial ambit of those home countries, by exercising jurisdiction over foreign direct liability claims and by, where

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39 Symeonides 2008a, pp. 1789-1793.

40 Symeonides 2008a, p. 1794.

41 For more detail on the confluence of public international law and private international law, see Mills 2009a.

42 For more detail, see Dubinsky 2005.

43 Dubinsky 2005, p. 302. Dubinsky suggests (pp. 312-317) that in order to tackle these issues, a set of common principles of procedural law (including private international law) should be develped that would be applicable to the adjudication of civil claims pertaining to grave human rights violations, no matter where those claims would be brought. In line with the focus of this part on the legal status quo, I will not further address this proposal here. However, I do want to note that in my view, as is also clear from my definition and delineation of foreign direct liability cases as discussed in chapter 3, the limitation of such common principles to claims involving grave human rights violations only would be hard to defend.

possible, determining them on the basis of home country tort standards. This may be controversial where this is perceived by the host countries involved as an "[...] *interference in their sovereign rights to regulate corporations within their own borders, and to pursue their own economic, social and cultural interests*".[44] In fact, issues of extraterritoriality have been raised in various foreign direct liability cases, like for instance the Bhopal litigation,[45] the *Cape* case[46] and the Apartheid litigation.[47]

This means that even though the exercise of jurisdiction by home country courts over foreign direct liability claims or the adjudication of those claims on the basis of home country tort principles may be firmly based on applicable rules of private international law, issues of extraterritoriality may remain. Zerk has noted in this context that:

> "[s]*uperficially, a court may only be deciding a dispute between private parties. In reality, though, judicial approaches to problems posed by multinationals in the private law sphere will reflect a set of principles and assumptions, conscious or unconscious, about the appropriate distribution of risk, reward and responsibilities between the different actors involved. But, as well as having a regulatory context, case law on matters of private international law also has regulatory consequences to the extent that it affects the balance of risks and rewards against which the investment decisions of multinationals are subsequently made. In this sense, even the act of deferring to the courts of another state, for whatever reason, is a 'regulatory' act*".

Accordingly, even where from a technical-juridical point of view it is the two private international law factors that will be discussed in the next two sections (jurisdiction and applicable law) that largely determine the legal feasibility of foreign direct liability cases, underlying issues of sovereignty and extraterritoriality play a prominent role in providing the socio-political context of these cases, as will be further discussed in section III (chapters 7 and 8) of this study.

4.2 Jurisdiction

4.2.1 Jurisdiction in US courts

Jurisdictional issues tend to play a pivotal role in US-based foreign direct liability claims especially. For a US court to be able to deal with a foreign direct liability claim that is brought before it, it must be established that the court has both personal jurisdiction over

44 EC Report (Augenstein) 2010, p. 12. See also sub-section 3.2.3.

45 *In re Union Carbide gas plant disaster at Bhopal, India in December 1984*, 634 F.Supp. 842 (S.D.N.Y. 1986), pp. 862-867. See also sub-section 3.2.2.

46 See, for instance, Morse 2002.

47 *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 276-286. See also sub-sections 3.2.2.

each of the defendants that are sought to be held liable and subject-matter jurisdiction over the claim itself.[48] When it comes to personal jurisdiction, US rules tend to be fairly liberal in the sense that the presence of the defendant within the US is generally sufficient for US courts to exercise jurisdiction over that defendant.[49] With respect to corporate defendants, the mere fact that a corporation is 'doing business' within the forum, meaning that it has substantial, ongoing business relations there, may provide US courts with personal jurisdiction over it.[50]

This, in combination with the fact that under some circumstances US courts may also assume personal jurisdiction over foreign parent companies of multinational corporations on the basis of the presence within the jurisdiction of local affiliates (for instance if those may be considered to be their parents' alter ego or agent) means that the jurisdictional reach of US courts in foreign direct liability cases over not only domestic but also foreign corporate defendants is potentially very broad.[51] After all, most large multinational corporations have some kind of presence in the US.[52] In the corporate ATS case of *Wiwa v. Shell*, for instance, the presence within the forum of an investor relations office and its manager, both part of a local Shell subsidiary, was found by the New York federal court involved to provide sufficient grounds for the exercise of personal jurisdiction over two of the multinational corporations' foreign parent companies, Royal Dutch Petroleum Company and Shell Transport and Trading Company, which were incorporated in the Netherlands and the UK, respectively.[53]

Whether US courts have subject-matter jurisdiction over a particular claim is dependent on the specific legal grounds upon which plaintiffs have based their case.[54] On the basis of the US Constitution, US federal courts have jurisdiction (so-called 'federal question jurisdiction' or 'original jurisdiction') over cases arising under the Constitution, US federal laws and treaties concluded by the US.[55] Accordingly, foreign direct liability cases brought on the basis of federal statutes such as the ATS are the province of the federal

48 See, in greater depth: Born & Rutledge 2007, pp. 1-217.

49 See, generally: Born & Rutledge 2007, pp. 75-217; IBA/EJ Report 2008, pp. 104-111. The constitutional threshold for the exercise of personal jurisdiction by a US court over a defendant is that of 'minimum contacts' of the defendant with the forum. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), 316: "[D]*ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice*'".

50 Born & Rutledge 2007, pp. 110-122; Joseph 2004, pp. 83-84.

51 Born & Rutledge 2007, pp. 164-192. See also Joseph 2004, p. 87, who notes however with respect to transnational human rights litigation against multinational corporations that notwithstanding "[…] *the lenient common law rules regarding the exercise of personal jurisdiction over non-resident aliens* […] *most of the salient cases have been pursued against corporate nationals*" (pp. 15-16, citations omitted).

52 See, for instance, Branson 2010, p. 2, who notes that of the 500 largest multinationals, "[a]*ll of those 500, nearly all, have a presence in the United States sufficient to support territorial jurisdiction over them*".

53 *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2nd Cir. 2000). See, for a more detailed discussion: Joseph 2004, pp. 84-86.

54 See, generally: Born & Rutledge 2007, pp. 1-74.

55 Born & Rutledge 2007, pp. 5-74.

courts, whereas foreign direct liability cases based on US state tort law are, in principle, for the state courts to decide.[56] At the same time, US federal courts may under certain circumstances also exercise subject-matter jurisdiction over cases that involve parties of 'diverse' citizenship, meaning that they are citizens of different US states or non-US citizens (on the basis of so-called 'diversity jurisdiction' or 'alienage jurisdiction').[57] Currently, one of the main legal questions concerning the scope and applicability of the ATS is whether the statute in fact grants federal courts subject-matter jurisdiction over civil claims arising out violations of norms of customary international law allegedly perpetrated by corporate defendants: in its *Kiobel* decision the Second Circuit Court of Appeals has held that it does not.[58] As has already been discussed, this is a highly significant decision that may potentially close the door to future ATS-based foreign direct liability cases, at least for now.[59]

At the same time, the relatively liberal US regime on personal jurisdiction is somewhat offset by the fact that US courts have rather broad discretionary powers to abstain (upon motion by the defendants) from exercising jurisdiction in cases involving foreign defendants, even if the tortious behaviour in question and/or its harmful effects occurred within the US.[60] On the basis of the common law doctrine of *forum non conveniens*, for example, US federal courts may dismiss a claim if an adequate alternative forum is available in which the case may more conveniently be tried.[61] The (in)convenience of trying the claim before the US forum seized of the matter is to be decided on the balance of a number of private interest factors (pertaining to the convenience of the litigations) and public interest factors (pertaining to the convenience of the court).[62] There will

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56 For more detail on the jurisdiction of US federal courts under the ATS, see Born & Rutledge 2007, pp. 31-58.

57 See, in more detail: Born & Rutledge 2007, pp. 20-28. See also, with a focus on the ATS: Childress 2011, pp. 10-16.

58 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. (N.Y.) 2010), reh. denied by 2011 WL 338048 (2nd Cir. (N.Y.) 2011) and reh. en banc denied by 2011 WL 338151 (2nd Cir. (N.Y.) Feb 04, 2011), and petition on certiorari filed (No. 10-1491, 10A1006, June 2011). See, more elaborately, sub-section 3.3.2.

59 See further sub-section 3.3.2 and see also section 6.1.

60 See, for instance: Childress 2011, pp. 21-26, who enumerates a number of procedural devices through which US federal courts in the various districts have begun to restrict corporate ATS cases, including: exhaustion of remedies requirements, the *forum non conveniens* doctrine, heightened pleading standards, and justiciability principles. See also, generally, the IBA/EJ Report 2008, pp. 104-111.

61 The *forum non conveniens* doctrine is a common law doctrine and therefore generally only associated with common law jurisdictions such as the US, Australia, Canada and England; its exact interpretation and effects vary with each jurisdiction. See generally, on the differences and similarities between the approaches to the *forum non conveniens* doctrine in those countries: Brand & Jablonski 2007, and see pp. 37-73 specifically on the development and the modern role of the *forum non conveniens* doctrine in the US. See also Whytock 2011, pp. 499-504.

62 *Gulf Oil Corp. v. Gilbert*, 330 US 501 (1947), pp. 508-509. The private interest factors involved comprise practical factors that make trial of a case easy, expeditious and inexpensive, such as the ease and costs of access to sources of proof, the costs of hearing witnesses, etc. The public interest factors involved include factors such as court congestion, the local interest in having localized controversies decided at home, the avoidance of unnecessary problems in conflict of laws or in the application of foreign law, etc.

usually be a strong presumption in favour of the plaintiffs' choice of forum, unless the plaintiffs are foreign, in which case their choice deserves less deference. Furthermore, the alternative forum is generally considered to be adequate unless the defendant is not amenable to process there, or, under exceptional circumstances, where "[...] *the remedy offered by the other forum is clearly unsatisfactory*"; the mere fact that the plaintiffs' chances of recovery are less favourable under the law applicable in the alternative forum does not automatically render that forum inadequate.[63]

The doctrine of *forum non conveniens* has been raised in many US-based foreign direct liability cases and has led to a significant number of dismissals of these cases in favour of host country fora.[64] A notable example is the Bhopal litigation, where the New York federal district court came to the conclusion, upon a balance of private and public interest factors, that the case should be tried in the Indian legal system, rather than in the US system, despite arguments to the contrary made by the Indian government representing the plaintiffs in this case.[65] Also in future foreign direct liability cases, the *forum non conveniens* doctrine is likely to remain an important obstacle to host country victims seeking to bring their claims before US federal courts, as the doctrine been applied more and more aggressively by these courts over the past three decades to dismiss transnational litigation.[66]

Analysis of transnational litigation before US federal courts suggests that important determinants for the probability of *forum non conveniens* dismissals are the involvement of foreign plaintiffs, foreign conduct and/or foreign injury in a transnational claim.[67] As is clear from what has been discussed before, most foreign direct liability cases will involve one or more of these determinants.[68] Interestingly, the nationality of the defendant does not seem to influence US federal courts in their decision whether or not to dismiss a case on the basis of *forum non conveniens*, which suggests that the chances for foreign corporate defendants to have foreign direct liability claims brought against them before US federal courts dismissed are not necessarily better than those of their US counterparts.[69] Another finding that may prove interesting in the context of foreign direct liability cases is that the probability of a dismissal on this basis is significantly higher in cases where the alternative foreign court is located in a liberal democracy than in cases where it is not, something that

63 *Piper Aircraft Co. v. Reyno*, 454 US 235 (1981), pp. 250-256.

64 See, for a more detailed discussion of the role of the *forum non conveniens* doctrine in transnational human rights litigation against corporations before US courts: Zerk 2006, pp. 120-124; Joseph 2004, pp. 87-99. See also, for instance: Childress 2011, pp. 23-24.

65 *In re Union Carbide gas plant disaster at Bhopal, India in December 1984*, 634 F.Supp. 842 (S.D.N.Y. 1986). See also sub-section 3.2.2.

66 Whytock 2011, pp. 498-504.

67 Compare Whytock 2011, pp. 517-528. Note that these findings were made with respect to 'alienage jurisdiction', which does not encompass ATS-based claims; still, there is nothing in principle to suggest that the findings made in Whytock's study on determinants of *forum non conveniens* decisions would not more or less similarly apply to *forum non conveniens* decisions in ATS-based foreign direct liability cases.

68 See section 3.2 for a more detailed analysis of the nature of foreign direct liability cases.

69 Whytock 2011, p. 524.

may prove favourable in foreign direct liability cases where the alternative forum is located in a host country with an authoritarian, unstable and/or corrupt regime.[70]

As well as the *forum non conveniens* doctrine, there are a number of other 'prudential' doctrines, requiring judicial discretion and/or deference in courts' exercise of jurisdiction over particular cases, on the basis of which US federal courts may refrain from hearing a case. Under the act of state doctrine, they may abstain from exercising jurisdiction if a case requires the court to adjudicate on claims relating to the validity of a foreign sovereign's public acts within its own territory.[71] The political question doctrine allows US federal courts to refrain from exercising jurisdiction over cases raising issues that are simply too political to be decided by a court of law, as to do so might force it to venture too far into the realm of the legislative and/or executive branches of government and as such be contrary to separation of powers principles.[72] Under the doctrine of international comity, a court may dismiss a case when it considers the exercise of jurisdiction over the case to be "*unreasonable in light of the connections to and interests of another affected state in the litigation*".[73]

These three closely related doctrines have proved to be especially relevant in US foreign direct liability cases that indirectly pertain to actions or policies of (the governments of) the host states involved, a circumstance that is likely to arise particularly in ATS-based foreign direct liability cases due to the fact that most norms of customary international law apply only in the context of governmental action.[74] And indeed, in a large number of these cases one or more of these doctrines have been invoked, which on various occasions has led to their dismissal. In fact, as has been noted before, the US Supreme Court has made clear in its *Sosa* decision that in controversial (corporate) ATS-based foreign direct liability cases such as the Apartheid litigation, there may be "*a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy*".[75] At the same time, however, there are also examples of foreign direct liability cases such as the Apartheid litigation where US courts – sometimes in defiance of intense pressure by, among others, the US executive branch – have refused to dismiss foreign direct liability cases on prudential grounds.[76]

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70 Whytock 2011, p. 525.

71 Joseph 2004, pp. 40-44. See also, for a more detailed discussion of the act of state doctrine and the related foreign sovereign compulsion doctrine: Born & Rutledge 2007, pp. 751-812, who note that there is substantial controversy as regards the exact interpretation of and underlying rationale for the doctrine.

72 Like the act of state doctrine, the political question doctrine is linked to the principle of the constitutional separation of powers and may apply especially where a case may interfere with US foreign policy; unlike the act of state doctrine, however, it may apply regardless of whether a foreign government's official act is involved. See, for instance: Born & Rutledge 2007, pp. 53-54, 764; Endicott 2010; Joseph 2004, pp. 44-46. See also, critically: Williams 2001.

73 Joseph 2004, pp. 46-47.

74 See Joseph 2004, pp. 33-39.

75 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), p. 733, footnote 21. See sub-sections 3.2.3.

76 *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 276-286.

In the end, much of the controversy over the ATS arises from the fact that its potentially broad jurisdictional grant may, in combination with the relatively liberal US rules on personal jurisdiction over defendants present within the US, result in US federal courts taking jurisdiction over cases that have very few connections with the US legal order. This raises questions of international prescriptive jurisdiction: to what extent do (and should) US federal laws apply extraterritorially? It also raises questions of international adjudicatory jurisdiction: to what extent can (and should) US federal courts adjudicate on cases in which the actors and activities involved are largely located abroad?[77] It is questions such as these that have over the past few years led US federal appellate courts in the various districts to adopt more restrictive approaches to the ATS in general and corporate ATS cases in particular. They have done so not only by questioning the amenability of corporate actors to suit under the ATS (as discussed in sub-section 3.3.2), but also through the prudential doctrines pertaining to jurisdiction and justiciability that have been discussed here, as well as through other procedural devices such as exhaustion of local remedies requirements and heightened pleading standards.[78] This has led some commentators to suggest that US state courts and domestic US state or host country principles of tort law are likely to take the place of ATS-based foreign direct liability claims in the near future. By thus turning to state courts and domestic principles of tort law, host country plaintiffs in future US foreign direct liability cases will be able to circumvent a number of the federal doctrines that have been used to limit these cases; at the same time, however, they will face a whole new set of obstacles, including, as will be discussed further in the next section, issues of choice of law.[79]

4.2.2 Jurisdiction in EU Member State courts

Jurisdiction under the Brussels I regime

Across the Atlantic, within the EU Member States, the jurisdiction of civil courts over foreign direct liability cases is largely determined by the EU's Brussels I regime, which lays down a mandatory regime of rules on the issue of jurisdiction in transboundary civil and commercial matters.[80] According to the Brussels I Regulation, which is binding and directly

77 Compare, for instance, Born & Rutledge 2007, pp. 31-66; IBA/EJ Report 2008, pp. 112-117. See also, for a detailed discussion of the conflict that may arise over this type of transnational litigation: Dubinsky 2005.

78 Childress 2011, pp. 21-32.

79 Childress 2011, pp. 32-54.

80 The Brussels I regime consists of: the Brussels Convention (Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1998 *O.J.* C 27/1 (26 January 1998)); the Lugano Convention (88/592/EEC Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters *O.J.* L 319/9 (16 September 1988)); and the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 *O.J.* L12/1 (16 January 2001)) (hereinafter: Brussels I Regulation). The Brussels I Regulation, which entered into force on 1 March 2002, largely supplants the two earlier conventions.

applicable within the EU Member States, "[...] *persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*".[81] It further stipulates that a company "[...] *is domiciled at the place where it has its (a) statutory seat, or (b) central administration, or (c) principal place of business*".[82] This means that the Brussels I regime in principle authoritatively establishes the jurisdiction of EU Member State courts over foreign direct liability claims that are brought before them against those parent companies (or other arms) of multinational corporations that have their statutory seat, central administration or principal place of business in the forum country.[83] However, there are circumstances under which the jurisdiction of EU Member State courts in foreign direct liability cases may be determined by rules other than those set out here.[84]

On the one hand, the Brussels I Regulation itself provides for some complementary grounds for jurisdiction that may, under certain circumstances, allow plaintiffs in foreign direct liability cases to sue an EU-based corporate defendant in another Member State than the one in which it is domiciled. This may be relevant where to do so would enhance the feasibility of bringing such claims, for instance if the procedural rules of the alternative forum allow the plaintiffs to bring a class action whereas the procedural rules of the original forum do not. A company domiciled in one Member State may be sued for a tort in the courts of another Member State for example if the harmful event giving rise to the claim can be said to have occurred there.[85] Similarly, an EU-based corporate defendant may be sued in the courts of another Member State if the claim is based on an act giving rise to criminal proceedings in the alternative forum and is brought in the courts seized of those proceedings (provided this is possible under the domestic rules on jurisdiction applicable in the alternative forum state).[86]

Foreign direct liability claims against EU-based corporate defendants may also be brought before courts in another EU Member State where the claim arises out of the operations of a branch, agency or other establishment of those corporate defendants that is based in the alternative forum.[87] Where foreign direct liability claims are targeted at multiple defendants domiciled in different EU Member States, the plaintiffs have a choice as to the forum in which to pursue their claims, provided there is a sufficiently close connection between the claims against the various defendants.[88] Furthermore, under the

81 Article 2 Brussels I Regulation.
82 Article 60 Brussels I Regulation.
83 See, for more detail: Wouters & Ryngaert 2009, pp. 944-948; Enneking 2009, pp. 915-919.
84 Compare, for instance: IBA/EJ Report 2008, pp. 92-95; Enneking 2009, p. 916.
85 Article 5(3) Brussels I Regulation. See, with respect to the interpretation of Article 5(3) the well-known *Mines de Potasse* case, in which the European Court of Justice determined that Article 5(3)'s 'place where the harmful event occurred' may encompass both the place where the damage occurred and the place of the event giving rise to it: *Handelskwekerij G.J. Bier BV v. Mines de Potasse d'Alsace SA*, European Court of Justice, Case 21-76 (30 November 1976), 1976 *European Court Reports* 01735.
86 Article 5(4) Brussels I Regulation.
87 Article 5(5) Brussels I Regulation.
88 Article 6(1) Brussels I Regulation.

Brussels I regime foreign direct liability claims may also be brought before courts in one of the EU Member States on the basis of a forum choice agreement between the parties involved in the dispute, provided one of the parties is domiciled in an EU Member State.[89] Moreover, EU Member State courts will have jurisdiction over foreign direct liability cases brought before them where the corporate defendants enter an appearance (and thus implicitly consent to the host country plaintiffs' choice of forum), except when this is done merely to contest such jurisdiction.[90]

On the other hand, in those cases that fall outside the scope of the Brussels I framework altogether, the courts' jurisdiction is determined by the domestic rules on international civil jurisdiction of the forum country.[91] This may be the case for example where foreign direct liability claims are filed before EU Member State courts against non-EU-based companies (in the sense of not domiciled in the forum state nor in another EU Member State). These may include local subsidiaries, business partners or sub-contractors from the (typically non-EU) host countries involved which, as has been discussed before, are sometimes sued as co-defendants in these cases alongside the parent companies of the multinational corporations involved.[92] These may also include parent companies that are domiciled not in the EU but in another Western society, such as the US. In many cases, the applicable domestic rules on international civil jurisdiction will contain rules on jurisdiction that are largely similar to the Brussels I Regulation, which means that jurisdiction would in principle not be assumed over foreign direct liability claims against multinational corporations' subsidiaries domiciled in host countries outside the EU.[93]

In some cases, however, these domestic rules on civil jurisdiction will deviate to a greater or lesser extent from the jurisdictional framework set out by the Brussels I Regulation and may lead to different results in foreign direct liability cases brought before domestic courts in Europe.[94] Under English common law rules, for example, it is possible much like in the US to bring claims before domestic courts against foreign corporate defendants that have a 'presence' in the jurisdiction, for instance through a local branch, local premises, a local agent or a local subsidiary.[95] Another example is the possibility that exists in many of the

89 Article 23 Brussels I Regulation. Note that if neither of the parties is domiciled in an EU Member State, the question whether the court seized of the matter has jurisdiction on the basis of forum choice falls outside the scope of the Brussels I Regulation and will thus be determined by the forum country's domestic rules in international jurisdiction. See, for instance: Strikwerda 2005, pp. 273-275.

90 Article 24 Brussels I Regulation. See, more elaborately: Strikwerda 2005, pp. 275-276.

91 The Brussels I Regulation stipulates that if the defendant is not domiciled in a Member State, "[...] *the jurisdiction of the courts of each Member State shall* [...] *be determined by the law of that Member State*": Article 4(1) Brussels I Regulation.

92 See further sub-section 3.2.3.

93 EC Report (Augenstein) 2010, pp. 68-69. See also, for a more detailed overview of available bases for 'residual jurisdiction' (*i.e.*, international civil jurisdiction based not on the Brussels I Regulation): EC Report (Nuys) 2007.

94 See further, with a focus on Dutch domestic rules on civil jurisdiction, section 5.2.

95 Zerk 2006, p. 118. See also, for a brief overview of English rules of jurisdiction in the context of foreign direct

EU Member States to bring suit before local courts against a defendant from a non-EU Member State as a co-defendant in proceedings brought against a locally based defendant where there is some kind of connection between the claims.[96] It is on this basis that the The Hague district court has assumed jurisdiction over the claims against Shell's Nigerian subsidiary in the Dutch Shell cases.[97]

Jurisdictional issues that have so far arisen in foreign direct liability cases brought before EU Member State courts have particularly concerned applications of domestic jurisdictional rules and doctrines. English courts, for instance, like their US counterparts, may also refuse to take jurisdiction over a transboundary civil claim on the basis of the common law doctrine of *forum non conveniens*.[98] As a consequence, questions over the dismissal of claims in favour of host country fora have played a major role in some of the earlier foreign direct liability claims brought there; in the *Cape* case and the case against Rio Tinto such jurisdictional issues even proceeded all the way to the House of Lords.[99] A 2005 judgment of the European Court of Justice has made clear, however, that the exhaustive and mandatory nature of the Brussels I regime does not leave any space for application of the *forum non conveniens* doctrine in civil cases that fall within the regime's ambit (as will typically be the case for foreign direct liability claims brought against EU-based parent companies of multinational corporations).[100] Accordingly, the *forum non conveniens* doctrine's role in foreign direct liability claims against EU-based corporate defendants seems to have become a thing of the past since the *Owusu* case.[101]

Other 'prudential' doctrines on the basis of which courts may refuse to hear cases, like those commonly invoked before US federal courts in foreign direct liability cases, have not played any role in EU-based foreign direct liability cases so far. This is unlikely to change in the near future at least for foreign direct liability claims against EU-based parent companies of the multinational corporations involved, as the Brussels I regime in principle does not leave any room for discretionary refusal of jurisdiction by EU Member State courts in cases falling within the regime's ambit. There are other jurisdictional issues,

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liability cases and further references: Joseph 2004, pp. 113-122. Compare also EC Report (Nuyts) 2007, pp. 36-37.

96 Compare EC Report (Nuyts) 2007, pp. 51-53.

97 See Article 7 Dutch Code of Civil Procedure. See also further sub-sections 3.2.2 and section 5.1.3.

98 See, for instance: Zerk 2006, pp. 124-126; Joseph 2004, pp. 115-119.

99 In both instances the Law Lords refused to dismiss the claims on this basis, however. For more detail on the issue of *forum non conveniens* with respect to these three UK-based foreign direct liability cases, see, for example: Zerk 2006, pp. 204-205; Muchlinski 2001. See also further *supra* sub-sections 3.1.3 and 3.2.3.

100 *Owusu v. Jackson*, C-281/02, 2005 *E.C.R.* I-1383, pp. 37-46.

101 It should be noted, however, that the UK government in the course of the currently ongoing revision of the Brussels I Regulation has proposed the introduction of a *forum non conveniens* provision into the Brussels I regime. In a reaction to this proposal, a number of UK-based civil society organisations have indicated that this would have an adverse impact on foreign direct liability cases: 'Review of the Brussels I Regulation (EC 44/2001), available at <http://corporate-responsibility.org/wp/wp-content/uploads/2010/01/owusu_submission2.pdf>.

however, that may potentially play a role in foreign direct liability cases brought before courts in the EU Member States, especially when it comes to claims against non-EU-based corporate defendants (local host country subsidiaries, etc.) that fall outside the Brussels I regime, as is exemplified for instance by the Dutch Shell cases.[102] Similarly, when it comes to foreign direct liability claims that are brought against non-EU-based parent companies or subsidiaries of multinational corporations and that as such fall outside the scope of the Brussels I regime, the *forum non conveniens* doctrine may still continue to play a role in those legal systems, such as the English one, that recognize this doctrine.[103]

All in all, on the basis of the Brussels I Regulation plaintiffs in foreign direct liability cases can be certain that the courts of the EU Member State in which a corporate defendant has its statutory seat, its central administration or its principal place of business will have jurisdiction over their claims against that defendant. The Brussels I regime does not leave the courts involved any leeway to refuse to exercise such jurisdiction where this would seem more prudent, for instance because trial of the claims before a non-EU host country forum is considered to be more convenient. Under some circumstances, a corporate defendant that has its statutory seat, its central administration or its principal place of business in one EU Member State may also be sued before the courts of another EU Member State, which gives the plaintiffs the option of choosing from among the available fora the one that is likely to be most favourable for the trial of their case.

The question whether and under what circumstances EU Member State courts may exercise jurisdiction over foreign direct liability claims against non-EU-based corporate defendants (*i.e.*, companies that do not have their statutory seat, their central administration or their principal place of business in one of the EU Member States) falls outside the scope of the Brussels I regime as it currently stands, and is determined by the domestic rules on international civil jurisdiction of the EU Member State where such claims are brought. As already indicated, there may be grounds for courts in some of the EU Member States to assume jurisdiction also over claims against 'foreign', non-EU-based corporate defendants. Thus, the particular circumstances under which foreign direct liability claims against non-EU-based parent companies or host country-based subsidiaries, business partners and/or sub-contractors may be brought before domestic courts in the EU Member States depends on the particular rules on international civil jurisdiction in place in each individual Member State. The circumstances under which

102 See further sub-sections 3.2.2 and 5.1.3.

103 See, for instance: EC Report (Augenstein) 2008, pp. 69-70, where it is noted that in common law jurisdictions such as England, Scotland and Ireland, "[f]orum non conveniens *continues to apply to cases outside the scope of the Brussels I Regulation, including claims for damages for human rights and environmental abuses committed by third-country subsidiaries of European corporations not domiciled in the European Union*". Note that according to the IBA/EJ Report 2008, even though the doctrine of *forum non conveniens* generally does not exist in civil law systems, Norway and Sweden have a general rule that the dispute must have sufficient connection with the jurisdiction that may lead to similar results as the *forum non conveniens* doctrine (p. 123).

Dutch courts will assume jurisdiction over foreign direct liability claims against EU-based and non-EU-based defendants will be explored further in sub-section 5.1.3.

Possible consequences of the revision of the Brussels I regime

Finally, it is important to note that the Brussels I regime is currently being revised, a process that may potentially bring with it significant changes to the jurisdictional regime applicable to foreign direct liability cases brought before EU Member State courts against EU-based corporate defendants.[104] Of the alterations proposed by the European Commission, the most relevant ones in this respect are those aimed at improving the Brussels I regime's functioning in the international legal order. To this end, it is proposed, *inter alia*, that the regime is made exhaustive by extending it to cover civil claims brought before EU Member State courts against non-EU-defendants.[105] It is also proposed that a discretionary *lis pendens* rule is introduced for disputes on the same subject matter and between the same parties which are pending before the courts in the EU and in a third country.[106] A final potential alteration that may be relevant in this context is the proposed introduction of a *forum necessitatis* provision, on the basis of which EU Member State courts will under certain circumstance be able to exercise jurisdiction "[...] *if no other forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned*".[107]

How these proposed changes will in practice affect the feasibility of future foreign direct liability cases that are brought before courts in the EU Member States is likely to differ from Member State to Member State, depending on the domestic regimes on civil jurisdiction they have in place.[108] In some areas the proposed new Brussels regime may turn out to be more liberal than the jurisdictional rules applicable to non-EU-based defendants in some of the EU Member States. An alteration that would potentially be of great significance for the feasibility of bringing foreign direct liability claims against non-EU-based corporate defendants before EU Member State courts is the proposed *forum necessitatis* provision. This provision holds that with respect to civil claims over which none of the EU Member State courts have jurisdiction under the (revised) Brussels I regime, the courts of a Member State may nonetheless exercise jurisdiction "[...] *if the right to a fair trial or the right to access to justice so requires*", albeit only on an exceptional basis and provided "[...] *the dispute has a sufficient connection with the Member State of the*

104 See 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)', COM(2010) 748 final (14 December 2010) (hereinafter: Revision Brussels I)

105 See Article 4(2) Revision Brussels I.

106 See Article 34 Revision Brussels I.

107 See Article 26 Revision Brussels I (quote p. 8).

108 See further, with a focus on the feasibility of bringing foreign direct liability cases before Dutch courts, section 5.1 and sub-section 6.4.1.

court seised". Particular situations in which courts may exercise jurisdiction on the basis of this provision include:

> "*(a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or (b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied*".

Considering the particular nature and background of foreign direct liability cases, as discussed in sub-section 3.2.3, each of these circumstances may very well be in order in foreign direct liability claims brought before EU Member State courts, as requiring the host country plaintiffs in these cases to bring their claims before host country fora will often in effect lead to a denial of justice to the plaintiffs and/or to enforceability issues. Of course, the question remains under what circumstances EU Member State courts would be willing to assume jurisdiction on this basis over foreign direct liability claims against non-EU-based defendants, such as host country subsidiaries, business partners and/or sub-contractors of EU-based multinational corporations, considering the connection that may be said to exist with the forum country through the links of ownership and control between the companies involved. Key issues in this respect will be the interpretation by EU Member State courts and/or the European Court of Justice of the notions "*sufficient connection*", "*reasonably*" and "*impossible*".

At the same time, however, it should be noted that there may also be areas in which the proposed new Brussels regime may turn out to be more restrictive than the jurisdictional regimes that are currently applicable to non-EU-based defendants in some of the EU Member States. After all, whereas the proposed new regime would also extend over civil claims against non-EU-based defendants brought before EU Member State courts, it introduces only a very limited number of new bases for the exercise of jurisdiction over such claims (*i.e.*, jurisdiction where the defendant has moveable assets in the forum state and the *forum necessitatis* provision). Thus, rather than an improvement of the current situation, the proposed introduction of a *forum necessitatis* clause, for instance, may be no more than a bare necessity in a regime that virtually excludes civil jurisdiction of EU Member State courts over civil claims against non-EU-based defendants.

On balance, and depending on the existing domestic regimes in the different Member States, it is in fact very possible that the new regime would have an adverse rather than a beneficial effect on the feasibility of foreign direct liability cases brought before EU Member State courts, in particular where the host country plaintiffs seek to bring claims not only against EU-based parent companies (or other arms) of multinational corporations, but also against foreign (non-EU-based) defendants such as their host country subsidiaries. It seems, for instance, that under the proposed new regime it will no longer be possible for English courts to exercise jurisdiction over civil claims against foreign corporate

defendants on the mere basis that they have a 'presence' in the jurisdiction for instance through a local agent or subsidiary. Similarly, the possibility that exists in many of the EU Member States, like the Netherlands, to bring foreign direct liability claims before local courts not only against local parent companies but also against their host country-based subsidiaries as co-defendants where the claims are sufficiently closely connected, will cease to exist under the proposed new Brussels I regime. Although the regime does provide for the consolidation of related claims against multiple defendants, it does so only where the (co-)defendants involved are (also) domiciled in an EU Member State, just like the original defendant.[109]

In the end, it remains to be seen whether and to what extent the alterations to the current Brussels I regime that have been proposed by the European Commission will eventually find their way into the updated version of the Regulation. So far, the proposal has found support from the European Economic and Social Committee.[110] It is currently under revision by the European Parliament, which seems less taken with the Commission proposals concerning the extension of the Brussels I regime to disputes involving defendants domiciled outside the EU. In a draft report it has indicated that:

> "[...] *the question whether the rules of the Regulation should be extended in this way requires wide-ranging consultation and political debate. At this juncture, it seems premature to introduce this concept into this Regulation*".[111]

Accordingly, it seems by no means carved in stone yet that the Brussels I Regulation will indeed eventually also come to apply to future foreign direct liability claims aimed (partly) at non-EU-based corporate defendants.

4.3 Applicable law

4.3.1 Some preliminary points

Rules of conduct and tort rules

Questions of applicable law in transnational civil disputes between private actors, which basically involve the determination and enforcement by domestic courts of their private rights and obligations vis-à-vis one another, are typically decided on the basis of the choice-

109 See Article 6(1) Revision Brussels I.

110 'Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM(2010) 748 final/2 – 2010/0383 (COD)', INT/566 (5 May 2011).

111 Draft report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (COM(2010)0748 – C7-0433/2010 – 2010/0383(COD)) (28 June 2011), p. 47.

of-law rules that apply in the forum country/forum state where the claims are brought. On the basis of those rules, the court will determine which of the different systems of private law (or, in tort cases, more specifically tort law) of the different states to which the dispute is connected, through the actors and activities involved, will govern the case. As mentioned, the outcome of this determination may be highly relevant for the outcome of the dispute, as the rules of private law/tort law that apply in the different countries involved may adopt very different yardsticks in determining whether the conduct in dispute is sub-standard or not, and may attach very different legal consequences to a finding that it is. Principles from the fields of private international law and public international law also tend to converge here. An example is the public policy exception that features in most choice-of-law systems which, as will be further discussed below, limits the application of foreign principles of private law to a dispute where those rules or the outcome of the dispute on the basis of those rules are manifestly incompatible with the public policy of the forum.[112]

The question of applicable law may be seen as encompassing two closely related aspects: which are the substantive (legal and non-legal) behavioural standards that are applicable to the conduct of the multinational corporations involved and against which the socio-legal permissibility of that conduct must be measured; and which are the applicable rules of tort law that determine the yardstick and the legal consequences of possible sub-standard behaviour in this respect? With respect to the ATS it has also been suggested that a distinction should be made between on the one hand the rules of conduct that are applicable in those cases, namely the norms of customary international law that are allegedly directly or indirectly violated, and on the other hand the rules governing the other aspects of ATS litigation, such as the remedies that are made available to foreign victims of such violations under domestic US tort law.[113]

One of the ways of looking at the tort system is to depict it as a legal enforcement mechanism that attaches legal consequences to non-compliance with substantive norms (rules of conduct) that derive both from external sources (for instance legal norms flowing from existing public law rules and regulations), and also from the tort system itself (mainly in the sense of tort precedents and codified tort standards such as strict liability for defective products).[114] As such, the substantive norms involved may be all types of norms; they may be unwritten, soft law and/or societal norms that are turned into judge-made legal standards by courts considering tort cases, or they may be written legal norms that are derived from home or host country domestic law or from regional (for instance EU) or international law. The legal consequences concerned pertain to the specific conditions under which the tort system allows those suffering harm as a result of

112 Compare, for instance: Zerk 2006, pp. 113-116.
113 Compare, for instance: Keitner 2008.
114 See further, on the rising popularity of more instrumental views of private law/tort law in general and the idea of private law/tort law as an enforcement mechanism, section 8.3.

sub-standard behaviour to shift the burden of their adversity onto those who can in law be held responsible for that sub-standard behaviour.[115]

It is important to note that the scope of the choice-of-law rules that determine the law that is to be applied to transnational civil claims is in principle limited to rules pertaining to and/or closely connected with the competing systems of private law. The scope of the applicable law under the Rome II Regulation (on the law applicable to non-contractual obligations), for example, encompasses in particular:

> "*(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them; (b) the grounds for exemption from liability, any limitation of liability and any division of liability; (c) the existence, the nature and the assessment of damage or the remedy claimed; (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation; (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance; (f) persons entitled to compensation for damage sustained personally; (g) liability for the acts of another person; (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation*".[116]

By contrast, the international scope of the behavioural norms laid down in a country's statutory rules of conduct usually depends on the contents of each particular rule and the intentions of the state promulgating it, and is subject in principle to the limitations on exercises of extraterritorial jurisdiction that are set by public international law. Where such norms (may potentially) have an international ambit, they are sometimes accompanied by scope-rules that unilaterally lay down the international scope of their application; these scope-rules must be distinguished from multilateral choice-of-law rules that refer a transnational legal relationship to the applicable tort rules of one of the multiple legal systems involved.[117]

Thus, regardless of the tort rules that are applied to any particular foreign direct liability case on the basis of the choice-of-law regime that is applicable in the home country where the case is brought, the applicability of any relevant rules of conduct remains largely determined by the geographical location of the actors and activities concerned at the time of the allegedly wrongful behaviour, and the international scope of the rules in question. Considering the fact that the activities in dispute in foreign direct liability cases tend to be located largely in the host countries involved, as well as the fact that in a world of sovereign nation states the point of departure is that a state's rules and regulations apply within its

115 For a more detailed discussion, see chapter 10.
116 Article 15 Rome II Regulation.
117 Compare for instance, Strikwerda 2005, pp. 28-30.

territory and not beyond, it will usually be host country rules of conduct framing the dispute rather than home country ones, although there may be exceptions here.[118]

'Horizontal' and 'vertical' choice of law issues

A closely related distinction is that between 'horizontal' choice-of-law issues on the one hand and issues pertaining to the 'vertical' interaction of laws on the other.[119] Whereas the former are generally determined by rules from the field of private international law (and choice of law more particularly), the latter tend to be governed by applicable rules of constitutional law that determine whether and under what circumstances norms of public international law can find application in the domestic legal order.[120] As is clear from what has been discussed, questions of applicable law in ATS-based foreign direct liability cases tend to revolve mainly around the vertical interaction between public international law and domestic (federal) law. Horizontal choice-of-law issues have played only a very marginal role in these cases:

> "*The most important thing to note, regarding choice of law under the ATCA, is that courts have not applied foreign laws so as to frustrate the purpose of ATCA, by for example applying a foreign law that grants immunity to the perpetrator of a gross human rights abuse, or that imposes a punishment that plainly fails to reflect the gravity of the offence*".[121]

Vertical choice-of-law issues, by contrast, are currently playing a highly significant role in the ATS debate, as they will eventually determine crucial issues with respect to corporate ATS cases; accordingly, these issues are likely to largely determine the (continued) feasibility in the future of ATS-based foreign direct liability cases.[122]

As has also become clear from two decades of ATS-based foreign direct liability cases, there are only very few norms of customary international law that are suitable for such direct application to private actors; the norms that do apply are typically limited to serious human rights abuses and international crimes and often require some kind of state action.[123] Furthermore, the Second Circuit Court of Appeals' *Kiobel* decision as already discussed raises a fundamental question as to whether these norms may be applied to

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118 See, for more detail on extraterritorial regulation, sub-section 8.2. Compare also *supra* sub-section 4.1.3. See, for instance, on the presumption against extraterritorial regulation in US law: *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244 (1991).

119 Compare, for instance: Murray, Kinley & Pitts 2011. See also Symeonides 2006, pp. 2-5, who distinguishes however between, on the one hand, vertical conflicts between federal law and state law and, on the other hand, horizontal conflicts between or among "(a) the laws of the states of the United States (interstate conflicts); or (b) between the laws of these states and the laws of foreign countries (international (state) conflicts); or (c) the laws of the United States and foreign countries (international (federal) conflicts).

120 See further, with a focus on the Dutch legal system, sub-section 5.3.2.

121 Joseph 2004, p. 55 (citations omitted). The ATS does raise issues of prescriptive and adjudicative jurisdiction, however; see Childress 2011, pp. 27-32.

122 See, in more detail: Murray, Kinley & Pitts 2011. See also further sub-section 3.3.2.

123 See further chapter 3.

corporate actors at all.[124] When it comes to treaty-based norms, the prevalence of norms and standards that may be suitable for direct application in the horizontal relationships between private parties, and as such form a direct basis for foreign direct liability claims, seems to be somewhat higher.[125] Here, however, account needs to be taken of the fact that the territorial application of treaty-based norms will generally be limited to activities taking place within the territories of those treaties' Member States.[126] The exception to this rule is formed by treaty-based norms that either lay down already existing norms of customary international law or that, over time, give rise to the subsequent development of such norms, especially where *ius cogens* norms are concerned (*i.e.*, peremptory norms of international law that have been or become accepted by the international community of states as norms from which no derogation is ever permitted), but, again, this range of norms is limited.[127]

By contrast, in non-ATS-based foreign direct liability cases, which are usually based primarily on domestic substantive legal norms, questions of applicable law are likely to revolve less around this 'vertical' interaction of laws. Substantive norms of public international law may also play a role in these cases, either indirectly where domestic norms are based on or implement substantive norms of public international law, or directly where these norms of public international law can be said to be directly applicable to the actors and activities in question. This latter option in particular, however, will generally be an exception. On the one hand, most legal systems do not or do only under certain conditions allow for the direct application, where possible, of norms of public international law in the domestic legal order.[128] On the other hand, even where norms

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124 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. (N.Y.) 2010), reh. denied by 2011 WL 338048 (2nd Cir. (N.Y.) 2011) and reh. en banc denied by 2011 WL 338151 (2nd Cir. (N.Y.) Feb 04, 2011), and petition on certiorari filed (No. 10-1491, 10A1006, June 2011). See further sub-section 3.3.2.

125 Examples are some provisions from the European Convention on Human Rights or from the International Covenant on Civil and Political Rights. See, more elaborately, for instance: Betlem & Nollkaemper 2003; Nollkaemper 2000. See also, more elaborately and with a focus on the Dutch legal system, sub-section 5.3.2.

126 Compare, for instance, with a focus on state responsibilities to extraterritorially protect human rights against corporate abuse under existing human rights treaties: UNHRC Report (Ruggie) 2007 Addendum, pp. 33-36, where it is found that although there is a tendency towards treaty bodies recommending that states influence the actions of business enterprises abroad, states are at this point under no obligations in this respect. See also, elaborately: Milanovic 2011.

127 Compare Zerk 2006, pp. 62-69.

128 Whereas some states allow for the direct effect of (certain norms of) public international law within their domestic legal orders, in others international law standards have to first be incorporated into domestic standards in order to take effect. The former is sometimes referred to as a monist approach, according to which international law and domestic law are part of one and the same legal order, as a result of which public international law will take automatic effect within a state's domestic legal order once it becomes binding upon that state. The latter approach is associated with dualism, according to which view the international legal order is strictly separated from states' domestic legal orders. For further detail, see Nollkaemper 2009, pp. 26-30; pp. 448-452. Note however that in many dualist systems a distinction is made in this respect between norms of customary international law and treaty norms in the sense that the former automatically form part of the domestic legal order even where the latter do not. In the English legal system, for instance, norms of customary international law are accepted as being part of English common law, but treaty norms

of public international law may be applied directly in the domestic legal order, they are unlikely to play a role of importance in these non-ATS-based foreign direct liability cases since such norms are typically aimed at state actors and will thus only rarely be suitable for direct application (without intervention by the domestic legislator) in the horizontal relationships between private actors. Accordingly, non-ATS-based foreign direct liability claims are much less likely than ATS-based foreign direct liability claims to be based directly on substantive norms of public international law, simply because alleged violations of public international law are not a necessary condition for feasibly bringing foreign direct liability claims on legal bases other than the ATS.[129]

Thus, rather than raising vertical choice-of-law issues, these cases, which as discussed are typically based on domestic (host country or home country) substantive legal norms and rules of tort law, are much more likely to raise horizontal choice-of-law issues involving the conflict between host country and home country laws.[130] Due to the North-South setting in which foreign direct liability cases typically take place and the accompanying issues of double standards that are raised in them, choice-of-law rules are likely to play a pivotal role in this type of transnational tort-based litigation.[131] After all, it is these rules that largely determine whether and to what extent the host country plaintiffs in these cases may benefit from higher home country tort standards and/or from more permissive remedial regimes (for instance in the sense of higher damages awards).[132]

4.3.2 Choice of law in US courts

When it comes to US-based foreign direct liability cases, the possible decline in the near future of the ATS's role in providing a basis for such claims may well lead to a surge of foreign direct liability claims brought before US state (and, possibly, federal) courts on the basis of US state law; such claims are likely to raise a number of 'new' issues, including issues of choice of law.[133] In principle, each US state has its own distinct (often judicially created) choice of law system that is applied by state courts in order to determine the applicable law in civil cases with international (but also interstate) aspects.[134] For a long time, the traditional point of departure in the 'American' law on tort conflicts, like in its continental European counterparts, was the *lex loci delicti*, the law of the place of the tort. In transboundary torts claims (claims in which the injurious conduct and the resulting

are not part of English law until they are incorporated through domestic legislation. See, for instance: Besseling & Wessels 2009, pp. 41-42; Joseph 2004, p. 115.

129 Similarly: Enneking 2009, pp. 921-926.

130 In more detail: Enneking 2009, pp. 926-931. Note, however, that as many of these cases are already dismissed in preliminary stages, the choice-of-law issue often does not get addressed.

131 See further sub-section 3.2.3.

132 Similarly: Enneking 2009, p. 928. See also: Childress 2011, pp. 40-45.

133 See, in greater depth: Childress 2011.

134 Symeonides 2006, pp. 3-5.

injury occur in different states, or: where *Handlungsort* and *Erfolgsort* can be said to lie in different countries), the applicable law was virtually always taken to be that of the place of injury. However, "[b]*eginning in the 1950s, American conflicts law underwent a virtual revolution, which attacked not only the* lex loci *rule as such, but also the very premises and goals of the established choice-of-law system*".[135]

The result has been a variety of different approaches to conflict of laws in the different US states, most of which tend to rely on multiple contacts, factors and policies rather than on a single, neutral, bright-line, strictly territorially based rule.[136] Accordingly, even though the approaches adopted by the different states vary widely, most US states today favour a flexible, policy-oriented approach to choice-of-law matters, meaning that the courts have a substantial amount of discretion in determining which law should be applied in any given case.[137] In doing so, the focus tends to be on material justice rather than conflicts justice, meaning that it is generally considered to be more important to reach the 'right' substantive result than to choose the 'right' state in the sense of the state that has the right factual contacts with the case.[138] At the same time, as has been mentioned before, modern American choice-of-law approaches specifically recognize that it is not only the interests of the private litigants directly involved in a transnational private law dispute that are at issue, but also broader public interests and, as a consequence, those of the different states involved to the extent that they have an interest in having their rules of private law applied to particular conduct.[139] As such, these approaches tend to be based on two premises:

> "*(1) that states have an 'interest' in the outcome of conflicts cases and (2) that these 'interests' must be taken into account, albeit together with other factors, in resolving these conflicts*".[140]

One of the considerations that US courts are likely to take into account when deciding which law to apply to a transnational tort case is whether the potentially applicable rules of tort law involved are primarily conduct-regulating, in the sense of aimed at governing conduct with a view to preventing injuries from occurring, or primarily loss-distributing, in the sense of aimed at assigning liability and providing reparation or compensation when injuries have occurred.[141] This distinction follows from the general view in the US

135 Symeonides 2008a, pp. 1745-1746.

136 This is of course a generalization. See, for an in-depth discussion of this matter: Symeonides 2006. See also: Symeonides 2008a, pp. 1743-1748 (quote pp. 1745-1746).

137 Depending on the specific approach taken in any particular state, courts may apply for instance the law of the jurisdiction that has the most significant relationship to the act or acts at issue, or the law of the site of the alleged wrong, or the law of the forum if it has an interest in the outcome of the case, etc. See, for instance: Childress 2011, pp. 40-45.

138 Symeonides 2008a, pp. 1743-1745 and in particular footnote 7. This distinction can alternatively be referred to as between 'content-oriented law selection' and 'jurisdiction-selection'. See Symeonides 2008b, p. 181.

139 For a more detailed discussion, see Symeonides 2008a, pp. 1784-1794, See also *supra* sub-section 4.1.3.

140 Symeonides 2008a, p. 1787.

141 Compare, for instance: Symeonides 2008a, pp. 1753-1754; Symeonides 2004, pp. 939-941. See also, famously:

on the tort system as having compensation and deterrence as its two primary purposes,[142] as well as from the above-mentioned focus in US conflicts law on the interests that states may have in having their rules of private law applied to particular types of conduct. When it comes to transnational tort claims that involve conflicting conduct regulation-rules, US courts tend to apply the law of the place of conduct if that law imposes a higher standard of conduct for the tortfeasor than the law of the place of injury.[143] More generally speaking, it has been found that in the majority of US cross-border tort cases, when faced with a choice between application of the law of the *Handlungsort* (country where the injurious conduct has taken place) or of the *Erfolgsort* (country where the damage has arisen), US courts choose to apply the law that is more favourable to the plaintiff.[144]

As mentioned before, foreign direct liability cases are often construed as transboundary tort claims in which the *Handlungsort* is located in the home country boardrooms from which the defendant parent companies (are supposed to) manage, supervise, control and/or coordinate their multinational groups' international operations, while the *Erfolgsort* is located in the host countries where those operations' detrimental effects on people and planet occur and result in harm.[145] In such cases, US courts, depending of course on the particular choice of law system applicable, may be inclined to apply home country provisions of tort law, which as discussed tend to be more favourable to the host country plaintiffs involved. US state choice-of-law rules may also provide other grounds for applying US state tort law rather than host country tort law to non-ATS-based foreign direct liability claims brought before US state or federal courts. The claim against Chevron for its alleged complicity in human rights abuses perpetrated by the Nigerian military and police vis-à-vis locals protesting against Chevron's environmental practices in the Niger delta, was adjudicated on the basis of Californian law, for instance (note that this did not prevent the jury in this case from finding for the defendants).[146] Nonetheless, it seems that in the end the point of departure of most state choice-of-law systems would be the application of foreign (host country) tort law to foreign direct liability cases brought before US state courts.[147]

In those cases where (application of) that foreign law is considered to conflict with public policy of the forum state, however, the court may choose not to apply host country tort law after all and turn to domestic principles of tort law instead.[148] In the *Unocal* state case, for example, the Californian Superior Court rejected the defendants' argument that Burmese law should govern the case, finding among other things that the law of Burma was

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Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963).

142 See, for instance: Symeonides 2008a, p. 1753.

143 See also: Symeonides 2008a, pp. 1745-1746, and, in more detail, Symeonides 2006, pp. 123-263.

144 Symeonides 2009, pp. 389-390.

145 See, for instance: Joseph 2004, pp. 75-76. See also sub-section 3.2.3.

146 *Bowoto v. Chevron Corp.*, 2006 WL 2604591 (N.D. Cal. 2006), aff'd by *Bowoto v. Chevron Corp.* 621 F.3d 1116 (9th Cir. (Cal.) 2010). For a more detailed discussion, see Childress 2011, p. 40.

147 Compare Childress 2011, pp. 40-45.

148 Joseph 2004, pp. 74-75.

"*radically indeterminate*" and that it was "*questionable whether Burma has a functioning judiciary actively interpreting statutes and establishing decisional law*". In addition, the court also found that public policy considerations barred the application, considering that the fact that Burmese law would not recognize the plaintiffs' tort claims on the basis of alleged forced labour practices was incompatible with public policy as well as recognized standards of morality.[149]

4.3.3 Choice of law in EU Member State courts

Contrary to their US counterparts, the choice-of-law regimes of the different European legal systems have by and large retained the *lex loci delicti* rule as the basic starting point in tort conflicts, albeit subject to various exceptions in the different systems.[150] Especially when it comes to rules pertaining to transboundary tort claims there is a great deal of variation, with some systems applying the law of the *Handlungsort* and other systems choosing to apply the law of the *Erfolgsort* or other different variants such as application of the law of the injured party's place of habitual residence, or a possibility for the injured party to choose the law that is most favourable to him.[151] In the Dutch Shell claims, for example, defendants have argued that on the basis of Dutch choice-of-law rules, which feature a *lex loci damni* rule for cross-border torts, Nigerian tort law should be applied to the claims, rather than Dutch tort law as had been the basic assumption of the plaintiffs. In its September 2011 decision, the The Hague district court has (provisionally) determined that on the basis of Dutch domestic choice-of-law rules the law governing these cases is Nigerian law, a decision that may have put the plaintiffs in these cases in somewhat of a tough spot, as they had based their claims on the assumption that they would be decided according to Dutch tort law.[152]

As has been mentioned, since January 2009 the choice-of-law rules that apply to transnational tort claims brought before EU Member State courts have been unified by the EU's Rome II Regulation, which for tort claims involving events giving rise to damages that have occurred since that date[153] provides a mandatory and exhaustive regime of

149 See the website of the Center for Constitutional Rights: 'CCR wins significant legal motion in Unocal case', available at <http://ccrjustice.org/newsroom/press-releases/ccr-wins-significant-legal-motion-unocal-case>, as well as Joseph 2004, p. 75.

150 Symeonides 2008a, pp. 1748-1751.

151 See, with further references: Enneking 2008a, pp. 295-296.

152 See, for instance: *Oguru et al. v. Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd.; Oguru et al. v. Shell Petroleum N.V. and The "Shell" Transport and Trading Company Limited*, Rechtbank 's-Gravenhage, case nos. 330891/HA ZA 09-0579 and 365498/HA ZA 10-1677 (14 September 2011), p. 7 and further (pertaining to oil spills in the village of Oruma). See also sub-section 3.2.2.

153 Note that there has been a measure of confusion concerning the Regulation's entry into force, date of application and application in time. See, for instance: Glöckner 2009; Bücken 2009. In response to preliminary questions raised on this matter, the European Court of Justice has held that the Rome II regulation applies only to events giving rise to damage which occurred on, or after, 11 January 2009. European Court of Justice,

conflicts rules that is directly applicable within the EU Member States.[154] Pursuant to its principal aim of realizing uniformity in the choice of law decisions by the courts of the EU Member States,[155] the Regulation provides a relatively neutral "*system of tightly written black-letter rules with relatively few escapes and little room for judicial discretion*" that is focused on jurisdiction-selection (conflicts justice) rather than content-oriented law selection (material justice).[156] It takes as its point of departure the applicability of the *lex loci damni,* a specification of the traditional *lex loci delicti* rule. Accordingly, it is the law of the country in which the damage occurs that in principle applies under the Regulation, "[...] *irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur*".[157] On the basis of this general rule, it is the tort law of the host country that will in principle be applicable in future foreign direct liability cases that are brought before EU Member State courts.[158]

There are only a few limited exceptions to this general rule.[159] Between them, these exceptions do however build a measure of flexibility into the Rome II Regulation's tort

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Case C-412/10 (6 September 2011).

154 'Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)', 2007 *O.J.* L 199/40 (31 July 2007). Note that the Regulation covers torts occurring within and outside the EU alike and may as such also lead to the application of the law of a non-EU Member State. See Article 3 Rome II Regulation, as well as Symeonides 2008b, p. 174.

155 See recital 6 Rome II Regulation: "*The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought*".

156 See, for a critical appraisal: Symeonides 2008b, pp. 178-186.

157 Article 4(1) Rome II Regulation. See, for a detailed and critical discussion: Symeonides 2008b, pp. 186-192. According to its drafters, this choice for the *lex loci damni* as the Regulation's starting point is justified by the concern for certainty in the law, as well as by the consideration that "[...] *the modern concept of the law of civil liability* [...] *is no longer* [...] *oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates*". Explanatory Memorandum to the 'Commission Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II")', COM(2003) 427, p. 12. It is further asserted that this rule "*strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability*" (recital 16 Rome II Regulation). See, critically: Symeonides 2008b, pp. 186-192, and, with a focus on foreign direct liability cases, Enneking 2008a, pp. 309-310.

158 See more elaborately: Enneking 2008a, pp. 299-300. According to Article 15 Rome II Regulation, the scope of the applicable law includes, *inter alia*: the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them; grounds for exemption from liability or any limitation or division of liability; the existence, nature and assessment of the damage or the remedy claimed; the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation; liability for the acts of another person; and the manner in which an obligation may be extinguished and rules of prescription and limitation.

159 These include, *inter alia*, a general escape clause providing for the application of the law of a state that has a "*manifestly closer connection*", and common rules providing for the application of overriding mandatory rules of the forum state, the taking into account of "*rules of safety and conduct which were in force at the place and time of the event giving rise to the liability*", and the possibility to refuse application of the applicable

conflicts regime and as such may attenuate to some extent the effects of that regime in foreign direct liability cases in which the application of the law of the host country, rather than that of the home country, would unduly prejudice the host country victims.[160] It might be argued, for instance, that certain home country policies with respect to the multinational corporations' behaviour under scrutiny could hypothetically constitute a manifestly closer connection and justify application of home country law.[161] Furthermore, if the home country's legal system features substantive norms that set mandatory standards with respect to the behaviour of multinational corporations at issue, those provisions remain applicable irrespective of the law otherwise applicable to the dispute.[162] Similarly, if any relevant home country substantive rules on safety and conduct are in place at the time of the allegedly tortious conduct by the multinational corporations involved, if and insofar as the behaviour under scrutiny can be said to have taken place in the home country, those rules will have to be taken into account by the home country courts in judging that conduct.[163] And finally, as in the US, the home country court may on the basis of the public policy rule refuse to apply a provision of the applicable host country law if and where its application would run counter to fundamental home country norms and principles.[164]

Furthermore, the Regulation contains a number of subject matter-specific exceptions or special rules, of which the rule on environmental damages is likely to be especially relevant in the context of foreign direct liability cases. According to this rule the victim is presented with the option of choosing the applicability of the law of the *Handlungsort* instead of that of the *Erfolgsort* in cases where the non-contractual obligation (tort) arises out of environmental damage or damage sustained by persons or property as a result of such damage.[165] In contrast to the Rome II Regulation's overall tendency towards norm and policy neutrality, the special rule on environmental damage has been inspired by objectives of environmental protection policy, in combination with the concern that "[...] *the exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries*".[166] Obviously, this rule will be of great significance for future foreign

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foreign law where such application is "*manifestly incompatible with the public order* [...] *of the forum state*". See Articles 4(3), 16, 17 and 26 of the Rome II Regulation, respectively.

160 See Enneking 2008a, pp. 303-307. See also, with respect to human rights (and in particular labour rights) cases: Van Hoek 2008, pp. 162-168.

161 Enneking 2008a, pp. 300-302.

162 Enneking 2008a, pp. 304-305.

163 Enneking 2008a, pp. 305-306.

164 Enneking 2008a, pp. 306-307.

165 Article 7 Rome II Regulation. According to recital 24 of the Rome II Regulation, environmental damage should be understood as meaning "[...] *adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms*".

166 Explanatory Memorandum to the 'Commission Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II")', COM(2003) 427, pp. 19-20. It was further considered: "*Considering the Union's more general objectives in environmental matters, the point*

direct liability cases, at least those foreign direct liability cases that involve transboundary tort claims as well as environmental damage as specified in the Regulation.[167]

As was mentioned before, European approaches to the field of private international law in general and the field of choice of law in particular do generally not explicitly refer to state interests that may be (indirectly) involved in the outcome of the choice-of-law decision in transnational private law disputes, as is common in the US.[168] Still, this does not mean that such considerations do not play a role in the drafting of choice-of-law regimes like the Rome II Regulation; the Regulation's special rule on environmental damage is in fact a good example of a rule that is concerned with promoting or protecting public interests (*i.e.*, a high level of environmental protection, the 'polluter pays' principle) next to or perhaps even more than private ones. Other examples of choice-of-law rules that allow for the consideration of public policies that may be affected by the way in which a transnational tort dispute is decided include the Rome II Regulation's rules on overriding mandatory provisions of the law of the forum state and on the public policy of the forum.[169]

The rule on overriding mandatory provisions allows the EU Member State court seized of a transnational tort claim to apply mandatory provisions of the law of the forum to the case, regardless of the rules of tort law applicable to that case. Such mandatory provisions, if available and applicable to the conduct in dispute, will typically involve domestic regulations of a (semi-)public law nature that intervene in private legal relationships in order to protect the public interest, such as anti-trust regulations, monetary regulations, labour regulations, environmental regulations and rules of criminal law.[170] The public policy exception allows the EU Member State court deciding a transnational tort dispute to refuse application of another country's tort rules if and where those are manifestly incompatible with the public order (*ordre public*) of the forum. This may be the case for instance where the application of such rules were to constitute a violation of fundamental human rights violations.[171]

A last example of a choice-of-law rule that may potentially allow for the consideration of public policies/state interests under the Rome II regime is its provision on rules of safety and conduct, which requires EU Member State courts seized of transnational tort disputes

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is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country's laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the 'polluter pays' principle".

167 Enneking 2008a, pp. 307-308.

168 See *supra* sub-sections 4.1.3 and 4.3.2.

169 Articles 7, 16 and 26 Rome II Regulation, respectively. See also Symeonides 2008a, pp. 1789-1793; Symeonides 2008b, pp. 183-184.

170 Compare, for instance: Van Hoek 2008, pp. 166-167. See also further sub-section 5.2.1.

171 Compare, for instance: Van Hoek 2008, pp. 167-168. See also further sub-section 5.2.1.

to, in assessing the conduct of the person claimed to be liable, take account of the rules of conduct in place at the place and time of the event giving rise to the liability.[172] What remains unclear, however, is exactly what type of rules are meant here. Does this provision refer exclusively to local public law rules of conduct that should as relevant facts be taken into account when determining the existence and extent of tortious liability, or may it also be understood as to include conduct-regulating rules of tort law? In the latter case, it would allow the courts involved to take cognizance of those rules of tort law applicable in the state of conduct that are specifically aimed at regulating the conduct in dispute, notwithstanding the fact that the law applicable to the case on the basis of the Rome II regime's other rules would be that of another state, in a way that somewhat resembles the US approach to conduct-regulating rules of tort law. The drafting and legislative history of the Rome II Regulation's provision on rules of safety and conduct, however, suggest that it should be interpreted in the more restrictive sense mentioned here.[173] Still, as will be discussed further in the next chapter, this rule does allow an EU Member State court seized of a transnational tort claim to take into account written or unwritten standards of conduct applicable at the place of conduct, even where the applicable rules of tort law are those of the place of injury.[174]

All in all, on the basis of the Rome II Regulation foreign direct liability claims brought before EU Member State courts will in most cases be decided on the basis of host country tort rules. This is likely to be different only if the special rule on environmental damage leads to application of home country rules of tort law where the home country can be said to have been the *Handlungsort*. Accordingly, this rule will only allow the host country victims to choose application of home country tort law where their claims involve allegations of tortious conduct perpetrated within the home country, and can as such likely only be invoked in foreign direct liability claims against home country-based parent companies whose acts or omissions in the home country have allegedly resulted in environmental damage in the host country that has detrimentally affected the host country plaintiffs involved. As follows from what has been discussed here, however, even where a foreign direct liability claim brought before an EU Member State court is to be decided on the basis of host country rules of tort law, there are a number of ways in which international or home country standards of conduct that relate to the conduct of home country-based corporate defendants may nevertheless find application. In the end, an EU Member State court deciding a foreign direct liability claim brought before it will have to take into account such rules of conduct, even if the legal consequences of that conduct are to be determined on the basis of host country rules of tort law.[175]

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172 Article 17 Rome II Regulation.
173 For a more detailed discussion, see Symeonides 2008a, pp. 211-215. See also further sub-section 5.2.1.
174 See further sub-section 5.2.1.
175 For more detail, see Enneking 2008a. See also further sub-sections 5.2.1, 5.3.1, 6.3.2 and 6.4.1.

4.4 Substantive legal basis

4.4.1 ATS-based foreign direct liability cases

As has been discussed before, the ATS, due to its particular nature and the modern-day interpretation of its scope and effects, may act as a basis for foreign direct liability claims against US-based (parent companies of) multinational corporations for their alleged direct or indirect involvement in international human rights violations and/or international crimes perpetrated abroad. However, the modern application of the ATS since its 'rediscovery' in the 1980s has also raised many complicated legal issues. This is not surprising, considering that it was adopted as far back as 1789, there is no reported discussion of the way it was intended to be used at the time of its adoption, and for two centuries after its adoption it was hardly used at all.[176] As is clear from what has been discussed before, one of the main matters of debate has been which types of tort claims are actionable under the ATS. Over time, different courts have adopted different standards in order to determine which norms of customary international law were suitable as a basis for ATS claims, although the overall approach has been that the norms involved had to be sufficiently definite, universal and obligatory.[177]

In its 2004 *Sosa* decision, 24 years since the modern 'rediscovery' of the ATS in the case of *Filártiga v. Peña-Irala*, the US Supreme Court for the first time interpreted major parts of the ATS.[178] As discussed, this decision has provided some answers to the many questions that had arisen with respect to the scope and interpretation of the ATS, but has also left many issues in need of further clarification.[179] The court indicated that the ATS is essentially a jurisdictional statute but that it does give US federal courts a limited authority to recognize new causes of action under current international norms, provided those norms have a specificity and universality that is equal to the historical paradigms which its drafters presumably had in mind, namely violation of safe conducts, infringement of the rights of ambassadors, and piracy.[180] In doing so, it left aside a further discussion of which particular norms of customary international law would actually clear this threshold; in effect, the decision (again) leaves it to the lower courts to determine which modern norms of customary international law may provide a basis for civil claims under the ATS, albeit subject to their 'vigilant doorkeeping'.[181]

176 Similarly: Koebele 2009, p. 18.
177 See, for more detail: Koebele 2009, pp. 17-51.
178 *Sosa v. Alvarez*-Machain, 542 U.S. 692 (2004).
179 See further sub-section 3.1.2.
180 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), pp. 724-725. For more detail, see, for instance: Murray, Kinley & Pitts 2011, pp. 5-10. See also sub-section 3.1.2.
181 See further sub-section 3.1.2.

This majority decision has attracted fierce criticism mainly due to the fact that it has done very little to remove the lack of clarity regarding the scope and limits of the ATS. See, for example, the dissenting judgment of Justice Scalia:

> "*We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained. This Court seems incapable of admitting that some matters – any matters – are none of its business.* […] *In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then – repeating the same formula the ambitious lower courts themselves have used – invites them to try again.* […] *American law – the law made by the people's democratically elected representatives – does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court. That simple principle is what today's decision should have announced.*"[182]

All in all, it seems that the *Sosa* decision has left intact most of the pre-existing case law on the actionability under the ATS of civil claims on the basis of particular norms of customary international law.[183] Civil claims that seem to be actionable under the ATS at this point include for instance those based on alleged violations of international criminal law, in particular the prohibition on genocide, crimes against humanity and war crimes[184] and universally recognized human rights, in particular civil and political rights such as the right to life and the prohibitions on torture and prolonged arbitrary detention.[185] With respect to other norms of customary international law outside the fields of international criminal law/international human rights law, the situation is less clear. Apart from the prohibition on forced labour, which is actionable under the ATS, US federal courts have been perceived to be reluctant to accept international standards with respect to labour norms (including even core labour standards such as the freedom to associate, the freedom from work-related discrimination, and freedom from the worst forms of child labour) and environmental norms as a basis for ATS claims.[186]

Due to the state-centred nature of the international legal order, most norms of international law that may give rise to an actionable ATS claim when violated require

182 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), pp. 750-751 (citations omitted).
183 Similarly: Koebele 2009, p. 51.
184 For more detail, see: Koebele 2009, pp. 53-87.
185 *Ibid.*, pp. 89-121.
186 *Ibid.*, pp. 123-149 (with respect to labour standards) and 151-191 (with respect to environmental destruction).

state action, in the sense that the primary perpetrator of the wrongdoing must be a state actor. As such, they can in principle only give rise to ATS-based civil liability claims against private actors such as private individuals or business enterprises where they can be said to have cooperated with the state actors that are the primary perpetrators.[187] Still, especially in the field of international criminal law there are some international norms that can be violated by everyone, regardless of whether the perpetrators are private or public (state) actors.[188] Norms that have in ATS litigation been identified as actionable regardless of whether there is state action or not include genocide, war crimes, forced labour and terrorist attacks.[189] As discussed, however, another complicating factor is that the corporate defendants (especially parent companies) in foreign direct liability cases are in reality often only indirectly involved in the norm violations in dispute. This means that even ATS-based civil liability claims against corporate actors that have been brought on the basis of international norms that can directly be violated by private actors have in practice often been based on accessory liability theories (for instance: conspiracy, command responsibility or aiding and abetting liability), as is evidenced for instance by the *Unocal* case (which pertained, *inter alia*, to allegations of corporate complicity in forced labour).[190]

As has been discussed in sub-section 3.3.2, a major point of contention in the ongoing debate on the interpretation and scope of the ATS remains under what circumstances private actors can be held liable under the ATS. This controversy has further been stirred up by the Supreme Court's decision in the *Sosa* case, where it asked the question whether private actors such as corporations or individuals can be sued on the basis of the ATS is determined by international law or not. In turn, this has given rise to 'vertical' choice-of-law debates on whether issues such as secondary liability and corporate liability under the ATS should be resolved on the basis of international law or on the basis of domestic law (federal common in particular). As discussed, recent decisions by the Court of Appeals of the Second Circuit in this respect have had a highly detrimental effect on the feasibility of ATS-based foreign direct liability cases brought before courts in that circuit. The upcoming decision of the Supreme Court in the *Kiobel* case is likely to bring more clarity to these issues. In its decision, the court is likely to provide clarity on the closely related questions concerning which standards (international or domestic) determine the issue of corporate liability under the ATS, and whether corporate actors can be held liable

187 *Ibid.*, pp. 211-244.

188 It is important to repeat here that also with respect to norms of public international law that are directly applicable to private actors, the problem remains that the prospects for their enforcement are very limited in the international arena, especially where those violating them are corporate actors. Thus, victims of violations of such norms by corporate actors remain dependent on domestic courts if they want to address and obtain redress for those violations. See also sub-sections 1.1.3 and 7.1.1.

189 Koebele 2009, pp. 245-251.

190 *Ibid.*, pp. 252-275.

under the ATS for (their complicity in) violations of international law on the basis of the applicable standards.[191]

4.4.2 Non-ATS-based foreign direct liability cases

As has been mentioned before, the Second Circuit Court of Appeals decision in the *Kiobel* case, which if upheld may completely rule out the further pursuit of ATS-based foreign direct liability cases, is in fact part of a wider tendency among federal courts to limit the feasibility of corporate ATS claims. As the prospects for ATS-based foreign direct liability cases diminish, questions as to the availability and feasibility of other legal bases for foreign direct liability claims, both within and outside the US, are gaining importance.[192] It has been noted in this respect that:

> "[...] *as federal case law progressively circumscribes the available causes of action under the ATS, plaintiffs may seek to file international law claims in state courts as claims for municipal torts – the very 'torts' that the First Congress sought to bring within federal jurisdiction because of their potential implications for international affairs*".[193]

As discussed, these non-ATS-based foreign direct liability claims are similar to ATS-based ones in various respects;[194] at the same time, however, there are also differences.

One of the main differences between ATS-based and non-ATS-based foreign direct liability cases is that the former are much more restricted in form and scope than the latter. Due to the highly limited number of norms of customary international law that may give rise to civil claims under the ATS against non-state actors, ATS-based foreign direct liability cases are necessarily restricted to claims pertaining to the involvement by the corporate defendants involved in the perpetration abroad of a limited number of egregious international human rights violations and/or international crimes. Depending also on the particular legal basis on which they are grounded, non-ATS-based claims tend to be much less restricted in scope in the sense that they may involve a much wider variety of substantive norms allegedly violated, including not only norms of public international law but also home country or host country domestic legal and societal norms, both written and unwritten. Unlike ATS-based claims, they may also concern for instance violations of internationally or locally applicable environmental norms, health and safety norms and labour norms, international or domestic soft law standards and/or guidelines on corporate social responsibility and accountability, as well as unwritten standards of proper societal

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191 For a detailed discussion, see Murray, Kinley & Pitts 2011. See also sub-section 3.3.2.

192 See, for example, with a focus on legal alternatives for this type of transnational civil litigation (dubbed 'international law litigation') before US state and federal courts: Childress 2011. See also sub-section 3.3.2.

193 Keitner & Randall 2007.

194 See *supra* sub-section 4.4.1.

conduct/due care. These cases potentially cover a much wider range of claims brought against (parent companies of) multinational corporations for damages caused as a result of the detrimental impacts of their activities on people- and planet-related interests in the host countries in which they operate.[195]

In practice, non-ATS-based foreign direct liability claims will in many cases be based not on direct violations of binding norms of public international law, but rather on alleged violations of unwritten standards of proper societal conduct/due care. These standards may partly be inspired on norms of public international law but will generally also incorporate other indicators of prudent corporate behaviour. After all, outside the particular context of the ATS and the way that US federal courts deal with the domestic application of international norms, the range of binding norms of public international law that is suitable to act as a direct basis for any type of transnational tort-based civil claim against corporate actors remains very limited. As has been discussed before, due to the international legal order's state-centric nature there are only few norms of public international law, if any, that are suitable to be applied directly to the conduct of private actors vis-à-vis other private actors. And even where such norms exist, most states only allow them to take direct effect within the domestic legal order under certain conditions; in some states international legal norms do not take effect at all until they have been transposed into domestic legal norms.[196]

At the same time, it will generally be easier to base such non-ATS-based foreign direct liability claims on the alleged violation of a standard of behaviour that is formulated on the basis of a combination of written and unwritten norms and general principles of tort law, than on the alleged violation of a specific statutory rule laying down norms for the corporate conduct in question. Due to the transboundary context and the North-South setting in which these cases and the issues giving rise to them typically occur, the range of domestic home and/or host country statutory norms which upon violation by the multinational corporations involved may provide an independent basis for a foreign direct liability claim is also likely to be limited. For various reasons, including a general reluctance to extraterritorially regulate conduct taking place abroad,[197] home countries are have so far imposed only a few (if any) mandatory legal rules and regulations addressing the activities abroad of the multinational corporations operating out of their territories.[198] Applicable host country standards, on the other hand, are also likely to be territorially

195 See also chapter 3.

196 See, in more detail: Nollkaemper 2009, pp. 447-483; Betlem & Nollkaemper 2003; Nollkaemper 2000. See also *supra* sub-section 4.2.1.

197 As has been mentioned before and as will be further discussed in part III, domestic legal rules and regulations are in principle territorially based, in the sense that they pertain only to actors and activities within the regulating state's national territory. In line with the international legal order as an assembly of equal and sovereign nation-states, extraterritorial regulation of actors and activities located outside the regulating state's territory is the exception, not the rule. See *supra* sub-section 4.1.3 and chapters 7 and 8.

198 See also, for instance: Joseph 2004, pp. 11-13 and see further chapter 7.

limited and may in addition set behavioural standards for local activities that fall far below those imposed on the multinational corporations involved with respect to similar activities in the Western societies in which they are based, often to the detriment of people and planet locally.[199] The result is a situation of double standards that raises a number of complicated moral and legal issues. By framing their claim as an alleged violation of unwritten standards of proper conduct/due care by the corporate actors involved, the host country plaintiffs can seek a judicial answer to the question whether the corporate actors involved should have taken better care so as not to cause harm to people and planet in the host countries involved, even where regulatory standards as imposed and enforced locally did not impose any obligations on them in this respect.

As discussed before, non-ATS-based foreign direct liability cases typically tend to rely on independent causes of action derived from more general principles of domestic tort law. Causes of action upon which these claims are based may range from the specific conduct and the specific harm that is at the root of the complaint, to the possibilities offered by the system of tort law that is applicable to the claims. A general distinction may be drawn in this respect, however, between common law systems and civil law systems.[200] In common law systems such as the US, England and Wales, Australia and Canada, where the majority of the foreign direct liability cases so far have been brought, a tort claim will have to be based on one of a limited number of existing, specific causes of action in tort that have typically evolved through case law.[201] Each of these different common law causes of action in tort in principle relates to specific factual situations, comes with its own requirements (liability for the allegedly tortious behaviour in question may for instance be strict, or may require intention, recklessness or negligence on the part of the tortfeasor) and, if proved, gives the injured party an entitlement to specific remedies, which traditionally involve not only compensatory damages but potentially also prohibitory and mandatory injunctions and, under certain circumstances, punitive or exemplary damages.[202] The range of common law causes of action that may act as a basis for foreign direct liability claims is potentially very broad. As mentioned, the complaint in the Unocal state case, for instance, included claims of wrongful death, battery, false imprisonment, assault, intentional and/or negligent infliction of emotional distress, negligence and recklessness, negligence per se, conversion, negligent hiring and negligent supervision.[203]

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199 See section 1.2 and sub-section 3.2.3.

200 See generally, for example: Van Dam 2006, pp. 119-122, who describes the main difference as that between common and codified law. See also, with a focus on foreign direct liability cases: Enneking 2009, pp. 921-926.

201 Similarly: Enneking 2009, pp. 921-923.

202 See, generally: Zwalve 2008, pp. 415-478. Note, with respect to US tort law, that although there is a general structure featuring some general, common elements, on the micro-level specific tort rules in the different states show "[...] *a perplexing variety*". See, on the characteristic traits of US tort law and on the differences with some European tort systems: Magnus 2010.

203 The complaint further included alleged violations of the California Business and Professions Code § 17200 (unfair business practices), violation of Art. 1 § 6 of the California Constitution (prohibition on slavery

As noted before, it is especially the common law tort of negligence, which allows plaintiffs to base their claims on alleged violations of a wide variety of unwritten legal norms pertaining to proper societal conduct, that provides an obvious legal basis for non-ATS-based foreign direct liability claims.[204] The main requirements for this tort are the existence of a duty of care between the tortfeasor and the victim, breach of that duty (meaning that the tortfeasor acted negligently, *i.e.*, did not exercise the care towards the plaintiff that could have reasonably been expected from him) and consequential damage.[205] As discussed, the plaintiffs in the *Cape* case, for instance, based their claims on the tort of negligence as they accused UK-based parent company Cape plc of having acted in breach of a duty of care it owed to them (in their capacity as workers employed by Cape's South African subsidiary and neighbours living in the vicinity of that subsidiary's business premises) in connection with its alleged knowledge of the health risks involved in its subsidiary's asbestos mining operations and the *de facto* control it exercised over those operations.[206] Prior to the *Cape* case, similar claims had already been brought on the basis of the tort of negligence against UK-based multinational Thor Chemicals for allegedly having set up and maintained factories in South Africa which it knew, or ought to have known, would be unsafe for the people working in them, as well as against UK-based multinational Rio Tinto (RTZ) for allegedly having failed to ensure that its Namibian subsidiary provided adequate work safety systems which would have protected its employees from the effects of uranium ore dust.[207]

Different from the piecemeal approach of specific, judicially created torts that characterizes the common law tort system, the continental European civil law systems of tort law are based on Grotius' natural law concept that *every* act that is contrary to that which people in general, or considering their special qualities, ought to do or ought not to do, and that causes damage, potentially gives rise to an obligation under civil law to compensate such damage. The ensuing generic, statutory provisions on tort have an ambit so broad as to potentially encompass any type of tortious behaviour, whether intentional, reckless or negligent.[208] As such, they may act, in principle, as the basis for a broad range of foreign direct liability claims against multinational corporations' parent companies and/or their local affiliates.[209] Although different types of remedies, such as injunctions and declaratory judgments, can usually be claimed on the basis of these generic provisions, the principal remedy is that of compensatory damages. Punitive or exemplary damages, with their focus

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and involuntary servitude) and unjust enrichment. See the state complaint on the website of Earthrights International, <www.earthrights.org/sites/default/files/legal/Unocal-state-complaint-2003.pdf> and see also sub-section 3.1.2.

204 See, for instance: Enneking 2009, pp. 923-924. See also sub-section 3.1.3 and *supra* sub-section 4.1.3.

205 See, for instance: Van Dam 2006, pp. 90-95, 189-190.

206 See further sub-section 3.2.2.

207 See further sub-section 3.1.3.

208 Zwalve 2008, pp. 411-427.

209 Similarly: Enneking 2009, pp. 921-926.

on punishing and/or deterring harmful behaviour rather than on providing compensation for the resulting harm, are generally not available in civil law tort systems.[210]

The Dutch Shell cases that are now pending before the The Hague district court are one of the first examples of foreign direct liability claims being brought in a civil law jurisdiction.[211] As discussed before and as will be discussed further in the next chapter with a focus on Dutch tort law, both parent company Royal Dutch Shell (RDS) and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria Ltd (SPDC) are sought to be held liable in these cases on the basis of Dutch (and/or Nigerian) tort law for allegedly having failed to live up to their duties to exercise due care (*zorgplichten*) with respect to local people- and planet-related interests in the course of their oil extraction operations in the Niger delta.[212] With respect to SPDC, the claims assert that in view of the risk inherent in oil extraction operations, the vulnerability of the Niger Delta's environment, and the historical pattern of oil spills occurring there, as well as SPDC's *de facto* influence and control over the local joint venture conducting the local oil extraction operations, SPDC had a duty of care vis-à-vis the plaintiffs, which it violated by not preventing the particular oil spills concerned from occurring through better maintenance beforehand and by not undertaking better damage control after the spills had occurred. With respect to RDS, the claims hold that the parent company, in view of its knowledge of both the local situation in the Niger delta and the risks and consequences of oil spills occurring there as well as in view of the possibilities it had to exert influence and control over its subsidiary's local oil extraction operations, had its own duty of care with respect to the local people- and planet-related interests affected by the oil spills, which it violated by having failed to use its authority and expertise to try to prevent oil spills in the Niger delta from occurring and/or to mitigate their consequences.[213]

Despite the theoretical differences between the tort systems in different societies, the way they operate in practice is often rather similar, although different standards, legal cultures and policy approaches may still make for different outcomes in similar cases.[214] Thus, regardless of whether they are brought in common law or in civil law legal systems, most of these non-ATS-based foreign direct liability claims are likely to revolve around alleged violations of unwritten norms pertaining to proper societal conduct, as reflected in the

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210 Zwalve 2008, pp. 414-415.

211 See, for a more detailed description of these cases, sub-section 3.2.2. Note that foreign direct liability cases have also been brought in Quebec and under Louisiana state jurisdiction; both are considered to be civil law jurisdictions. See also: Joseph 2004, p. 15 (footnote 104).

212 The Dutch tort system's general provision on tort law (*onrechtmatige daad*) holds, *inter alia*, that an act or omission violating a rule of unwritten law pertaining to proper social conduct constitutes an unlawful act that may give rise to a legal obligation to compensate the damages arising as a consequence. See Article 6:162(2) Burgerlijk Wetboek [*Dutch Civil Code*]. See also further section 6.4.

213 See further section 3.2.2.

214 Compare for instance, with a focus on the commonalities and differences between European tort systems: Van Dam 2007; Van Dam 2006, pp. 601-613.

duties of care allegedly violated by the corporate defendants. This is also closely connected to the aforementioned relative scarcity of international or domestic public law conduct-regulating rules that apply to the activities of the multinational corporations involved in this transnational context in such a way as to adequately protect people and planet in the host countries involved from the detrimental impact of those activities.

By reverting to such open-ended tort standards, plaintiffs in non-ATS-based foreign direct liability cases may avoid having to strain their claims so as to fit existing international and/or domestic substantive legal norms, which will usually be much more restricted in scope and/or in geographical applicability. Instead, they may thus rely on a variety of legal and societal norms, whether binding or non-binding and whether written or unwritten, that are relied on indirectly in constructing the applicable standards of proper societal conduct/due care that may be said to apply to the individual corporate defendants in each individual case. In the Dutch Shell cases, for instance, plaintiffs have indirectly relied on a wide variety of international, local (Nigerian) industry and company norms and standards in order to define the standards of due care that they claim RDS's and SPDC's behaviour ought to have lived up to but did not. These norms include, *inter alia*, the UN Global Compact Standards, the OECD Guidelines for Multinational Enterprises, the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria as well as the health, safety and environment policies of RDS/the Shell group itself, its Global Environmental Standards and its Global Business Principles.[215]

In the end, it is up to the Western society home country courts seized of these matters to do justice in each individual case on the basis of these open, abstract and standard-based general principles of domestic tort law, by striking the right balance in determining whether indeed the corporate defendants involved can be said to have acted in breach of a duty of care owed to the plaintiffs by failing to exercise the level of care that could reasonably have been expected from them.[216] In so doing, they will determine whether and to what extent the corporate defendants involved, on the basis of their particular expertise and capacities or, more objectively, of the expertise and capacities that could also have been expected from them in comparison with similarly placed corporate actors, could or should have been aware of the risks involved in the activities in question and could or should have tried to avoid those risks.[217] Their conduct is likely to be judged by retrospectively weighing up care and risk (or, at a more abstract level, freedom and

215 See for further information and documentation (including Dutch versions of the original complaints and an English version of the complaint in one of the three cases) the Milieudefensie website: <www.milieudefensie.nl/english/shell-in-nigeria/oil-leaks/documents-on-the-shell-legal-case>.

216 For a more detailed discussion of multinational corporations' duties of care in this respect, see Van Dam 2008, pp. 55-90. See also further, with a focus on Dutch tort law, section 5.4.

217 See, for instance: Van Dam 2006, pp. 214-233, who notes, *inter alia*, that the objective test of a defendant's knowledge and ability tends to be the general rule in tort law, and the subjective test the exception (pp. 219-222).

protection); relevant factors will be the probability that a harmful incident would happen in the course of the activities in question and the seriousness of the expected harm, as well as the character and the benefit of those activities and the burden of taking precautionary measures.[218]

How this balance will be struck in any particular foreign direct liability case is likely to differ from legal system to legal system. Common law courts, for example, will tend to focus more on facts and precedents than their civil law counterparts, although the latter are also, in this field of tort law, typically left with much leeway by the legislator to reach just results in individual cases and to respond to changing societal needs in this respect.[219] Still, differences in approach between the legal systems involved in these cases, as well as in legal cultures, policy approaches and the role of rights, may lead to different outcomes in similar cases.[220] It is important to note in this respect that each system of tort law has its own mechanisms through which liability in general and liability for negligent behaviour in particular can be limited, in order to prevent the field of tort law from developing in ways and directions that are considered to be socially undesirable.[221] In English law, for instance, it is the courts' decision to assume that a duty of care does or does not exist in a particular situation between particular parties that is typically used as a way of limiting the range of liability for negligence where such is deemed to be necessary.[222]

An example in point is the transnational tort-based civil case of *Sutradhar (FC) v. Natural Environment Research Council* (not a foreign direct liability case as such but one raising a number of similar issues), which revolved around a tort claim brought by a Bangladeshi plaintiff who asserted that a negligently written geological report by a UK-based research council had encouraged Bangladeshi health authorities to avoid taking measures to ensure that the local drinking water was not contaminated by arsenic, and who sought to hold the research council liable for the damages he (and many other Bangladeshi citizens) had sustained from arsenic poisoning as a result of drinking the contaminated water. The House of Lords upheld the Court of Appeal's summary dismissal of the claim, holding that the research council could not be said to owe the population of Bangladesh a duty of care in relation to the report written by it that allegedly contained negligent statements, as there was a lack of proximity between the defendant and the source of the danger ("[...] *in the sense of a measure of control over and responsibility for the*

218 See, for instance: Van Dam 2006, pp. 189-214. See also, with a focus on foreign direct liability claims: ICJ Report (Civil remedies) 2008; Van Dam 2008, pp. 55-63.

219 Van Dam 2006, pp. 119-122.

220 Van Dam 2006, pp. 122-131.

221 See, for instance, from a comparative perspective: Spier 1995.

222 In English law, a duty of care may generally be said to exist where the harm is reasonably foreseeable for the parent company, where there is proximity between the host country victims bringing the tort claim and the defendant parent company, and where it is deemed fair, just and reasonable to impose such a duty of care on the parent company. See, generally: Van Dam 2006, pp. 90-95.

potentially dangerous situation") and it was not considered to be fair, just and reasonable to impose such a duty.[223]

4.4.3 Theories of parent company liability

As is clear from the foregoing, foreign direct liability claims are typically primarily targeted at parent companies of multinational corporations.[224] Whereas some foreign direct liability claims revolve around the direct, active involvement of these parent companies in the norm violations giving rise to the host country plaintiffs' harm, many pertain to their more indirect involvement. In the majority of these cases, the activities in the host country are in practice carried out by local operators that are affiliated through links of contract and/or ownership to the corporate defendants involved. As discussed, it is typically the actions of these local subsidiaries, business partners and/or sub-contractors, undertaken in their capacity as operators of the local mines, factories, oil pipelines, etc., that will generally be most directly linked to the harm caused as a result of the multinational corporations' local activities and the damage suffered as a result by local third parties such as those working in the factories, mines and oil fields and/or those living in the vicinity of them. Instead of primarily targeting these local operators and/or their local business partners, however, foreign direct liability claims are typically principally directed at the Western society-based parent companies of the multinational corporations involved.

In all these cases, it is asserted that one way or another these parent companies can be held liable for the harm caused in the host countries concerned and resulting damages on the basis of their hierarchical, contractual and/or *de facto* connections with the local operators and their activities. What thus tends to be crucial in these cases, regardless of the specific legal foundations upon which the claims are based, is "*the presence of a 'control' relationship between parent and foreign affiliate (however related) that is sufficient to justify the imposition of liability on the parent in the particular case*"; whether this control relationship is based on links of contract or ownership is in the end largely irrelevant.[225] The often complicated group structures, interrelationships and chains of command involved in foreign direct liability cases are reflected in the way in which the claims in these cases are shaped.

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223 *Sutradhar (FC) v. Natural Environment Research Council*, House of Lords 5 July 2006, [2006] UKHL 33. See also, in a comparative perspective with a focus on Dutch tort law: Enneking 2008b, where it is asserted, *inter alia*: "*Rather than using the principle of proximity, as the House of Lords did, a Dutch court might instead use the elements of relativity and causation to find an easy way out of a tricky case too remote from existing case law and with too many potential repercussions*" (p. 511).

224 See further section 3.2.

225 Zerk 2006, pp. 234-235.

Direct (primary) liability

As discussed, non-ATS-based foreign direct liability cases are often construed as direct (or primary) liability claims in which the parent companies involved are sought to be held liable for their own actions and/or inactions through which they have allegedly violated their own legal responsibilities vis-à-vis people and planet in the host countries concerned. In fact, all of the non-ATS-based foreign direct liability cases that have been discussed in the case studies have been based in whole or in part on claims of primary/direct liability by the parent companies of the multinational corporations involved (namely the Bhopal litigation, the Unocal state case, the *Cape* case (as well as the foreign direct liability claims brought against Rio Tinto and Thor Chemicals), the Trafigura case and the Dutch Shell cases). Such 'primary' or direct liability claims will generally be based on allegations of negligence by the parent companies involved, although in some cases parent companies may be accused of having recklessly or even intentionally caused the harm to the host country victims.[226] In the end, recklessness or intention on the part of the parent company will obviously be more difficult to prove than mere negligence. Negligence, on the other hand, will not evoke the same measure of moral condemnation as intentional or reckless conduct.[227]

As is also clear from what has been discussed above, these parent companies' alleged liability is typically claimed to arise from the fact that, by failing to exercise reasonable care, they have acted in breach of a duty of care that they owed to certain host country third parties, such as employees of their local affiliates or those living in the vicinity of the local activities, and that this breach has resulted in reasonably foreseeable damages to the host country plaintiffs. Their negligence is typically said to lie in the fact that, in view of their knowledge of and involvement in and/or the influence and control over their groups' local host country activities (executed locally by local subsidiaries and/or business partners), they have failed to exercise the care that they could and reasonably should have exercised to prevent the harm to third parties that they could have reasonably foreseen might arise as a result of those activities. It should be noted in this respect that in these cases of direct/primary parent company liability the emphasis is on the parent company's control over the harmful activities in question (and, thus, its potential capacity to control or influence those activities so as to prevent them from causing harm to people and planet in the host countries involved), rather than on the parent company's control over its subsidiaries,

226 See, in more detail: ICJ Report (Civil remedies) 2008, pp. 12-17.

227 Joseph notes in this respect, with reference to US law: "*Courts have acknowledged this increased moral culpability by being more prepared to find that a defendant's intentional or reckless conduct has caused the alleged harm to a plaintiff, than to find causation entailed in a defendant's negligent conduct*". Joseph 2004, p. 67. See, generally on the role of intention in the French, German and English tort systems: Van Dam 2006, pp. 185-189. Note that many of the common law torts, including causes of action that are raised in foreign direct liability cases, such as assault, battery and intentional infliction of emotional distress, require intention on the part of the tortfeasor; *ibid*., pp. 96-102; 802-803.

which lies at the basis of some of the theories of indirect (or secondary, third party) parent company liability that will be discussed below.[228]

The alleged negligent behaviour of the parent companies of the multinational corporations involved can generally be constructed either as an act or as an omission. It should be noted in this respect, however, that there tends to be a general reluctance, particularly in common law systems, to hold actors liable for what they did not do (their omissions). After all, holding a private actor liable for his omissions (*i.e.*, for not acting, nonfeasance) involves the imposition on that actor of a duty to actively engage in a certain activity (an affirmative duty), which may be seen as involving a more drastic infringement of the defendant's freedom to act (or, rather, not to act) than does the imposition on that actor of a duty to refrain from doing something wrong while carrying out a certain activity (misfeasance).[229] In the context of foreign direct liability cases, this might result in the imposition ex post facto of an affirmative duty for parent companies of multinational corporations to actively exercise control and/or supervision over their local subsidiaries in order to prevent harm from occurring, which is more far-reaching than the imposition of a mere duty to exercise diligence when exercising such control and/or supervision.[230]

Accordingly, questions arise as to the feasibility of foreign direct liability claims seeking to hold the parent companies involved responsible for harm that has been caused not by their actions but rather by their inaction in light of risks created by local third parties (subsidiaries, business partners, sub-contractors or others), by nature, by the victims themselves and/or by the condition of an object.[231] The Dutch Shell cases are an interesting example in this respect, as they are partly based on such affirmative duties where they allege, as mentioned above, that parent company Royal Dutch Shell (RDS) has a duty to use its control and influence over its Nigerian subsidiary to prevent it from causing environmental harm locally. Furthermore, considering Shell's defence that the oil spills are caused by sabotage of the local pipelines involved, the further question may be raised whether and under what circumstances it might be possible to hold RDS liable for not preventing the actions of local saboteurs, also in light of the fact that historically sabotage has been a major (contributory) cause of environmental pollution in the Niger delta.[232]

As has been discussed before, due to a lack of legal precedent very little is known about the actual circumstances under which parent companies can be said to have a duty of care vis-à-vis third parties in the host countries in which their multinational groups operate, and under which circumstances such a duty may be said to have been breached.[233] However,

228 See Joseph 2004, pp. 134-138.
229 See, generally: Van Dam 2006, pp. 205-211.
230 Similarly: Joseph 2004, pp. 136-137.
231 See, generally on omissions: Van Dam 2006, pp. 205-211.
232 See further, with a focus on Dutch tort law, sub-sections 5.3.1 and 6.4.2.
233 See further sub-section 3.3.1.

there is some precedent in similar types of cases that may provide guidance in this respect on the potential outcomes of foreign direct liability cases that are brought on the basis of theories of direct parent company liability under the tort of negligence. An example is the April 2011 decision by the Queen's Bench Division of the English High Court in the case of *Chandler v. Cape plc*, a case that closely resembled the *Cape* case except for the fact that it played out in a domestic rather than a transnational setting. Put briefly, the *Chandler* case revolved around the question whether and under what circumstances a parent company of a corporate group may owe a duty of care to an employee of its wholly owned subsidiary who has suffered personal injuries (contracted asbestosis) due to exposure to asbestos in the course of his employment.[234]

The claimant in this case had been employed from 1959 to 1962 by a company that manufactured incombustible asbestos and he discovered in 2007 that he had contracted asbestosis as a consequence of his exposure to asbestos during this period of employment. As the company itself no longer existed (and had no insurance policy indemnifying it against claims for asbestosis), the claimant sought to hold its parent company liable for the harm he had suffered. The judge in this case basically held that it was possible under certain circumstances for a parent company of a corporate group to owe a duty of care to an employee of one of its subsidiaries. Interestingly, the judge (following the plaintiff's legal representative) cited the case of *Connelly v. R.T.Z. Corporation plc* as an illustration of how "[...] *injured workmen who suffer their injuries as a consequence of the negligent acts or omissions of more than one legally identifiable party*" may seek to hold the parent companies of their employers liable on the basis of an alleged breach of a duty of care owed to them by those parent companies.[235] As previously mentioned, the *Connelly* case involved a foreign direct liability claim brought against a UK-based parent company of a multinational corporation by a former employee of its Namibian subsidiary who had contracted cancer as a result of his work in the subsidiary's asbestos mines.[236]

In the *Chandler* case, in order to determine whether the parent company could be said to have owed a duty of care to the claimant, the judge turned to the three-stage test that under English law is be applied in determining whether or not a person owes a duty of care to another: foreseeability; proximity; and is it fair, just and reasonable to impose a duty of care. He determined on the basis of the evidence before him that the parent company had during the relevant period had actual knowledge of the claimant's working conditions and had been aware of the risk of asbestos-related disease from exposure to asbestos dust. The judge also found that policy in relation to health safety issues had been largely dictated by the parent company rather than by its subsidiaries, meaning that the defendant had retained responsibility for ensuring that the employees of its subsidiaries were not exposed to the risk of harm through exposure to asbestos, as it could have intervened in

234 *Chandler v Cape plc* [2011] EWHC 951 (QB) (14 April 2011).
235 *Chandler v Cape plc* [2011] EWHC 951 (QB) (14 April 2011), pp. 10-11.
236 *Connelly v R.T.Z. Corporation plc and Another* [1997] UKHL 30. See further sub-section 3.1.3.

its subsidiaries' practices in this respect at any time. Finally, the judge held that there was no reason to believe that it would not be fair, just and reasonable for a duty of care to exist on the part of the parent company. Accordingly, he decided that under the circumstances of the case the parent company could be said to have owed a duty of care to the employee of its subsidiary to protect him from harm as a result of his exposure to asbestos dust in the course of his employment and that the claimant succeeded in his claim.

This decision, in combination with the court's reference to the *Connelly* case, clearly shows that at least on the basis of English tort law, a parent company of a (multinational) corporate group may under certain circumstances owe a duty of care to third parties that are affected by activities undertaken by its (foreign) subsidiaries, such as (local) employees or neighbours. The decision makes clear that the existence of a duty of care between the employee and the subsidiary that employs him does not preclude the parent company from having a duty of care to that employee as well. Furthermore, the decision puts beyond all doubt that the fact that a parent company within a corporate group and its subsidiary are separate legal entities cannot preclude such a duty of care for the parent company from arising under certain circumstances, although it does not automatically arise from the mere fact that the employer is a (wholly-owned) subsidiary of the parent company and part of its corporate group. The judge correctly notes that this case is not concerned with piercing the corporate veil; instead, it is a pre-eminent example of what is described here as direct parent company liability on the basis of the tort of negligence.[237]

Indirect (secondary) liability

Next to claims of direct/primary parent company liability, foreign direct liability cases may involve and in some cases also have involved claims of indirect/secondary parent company liability, in which the defendant parent companies are held liable not for their own wrongful conduct but for the wrongful conduct of their local affiliates on a number of grounds.[238] It should be noted at the outset, however, that direct parent company liability is likely to remain the primary basis for non-ATS-based foreign direct liability claims, at least in the near future. One of the main reasons for this is that most of these theories of indirect parent company liability (except for accessory/accomplice liability) run counter to fundamental corporate law notions of separate legal personality and limited liability, albeit to varying degrees. After all, parent company liability is sought to be grounded on its institutional connection to its subsidiary and the control that it holds over that subsidiary, rather than on any wrongful acts or omissions that the parent company itself can be said to have committed. As such, these indirect bases of parent company liability

237 *Chandler v Cape plc* [2011] EWHC 951 (QB) (14 April 2011), p. 10.

238 See, for instance: Zerk 2006, pp. 215-234, who distinguishes four different types of parent company liability: 'primary' or direct liability, 'secondary' or accomplice liability, 'vicarious' or agency liability and enterprise liability. Similarly: Zerk 2010, pp. 166-172. See also, with a slightly different but comparable classification: Joseph 2004, pp. 129-143.

may be more controversial as a basis for foreign direct liability claims than theories of direct parent company liability, although it should be noted that courts may be more willing to pierce the corporate veil in some legal systems (*e.g.*, the US) than in others (*e.g.*, the Netherlands).[239] Another reason is that legislative interference may be needed for some of these theories to become operational, especially in civil law systems where tort causes of action are not developed through case law, but based on a statutory system. Still, indirect parent company liability may play a supplemental role, depending on the possibilities offered by the applicable rules on tort law as well as on the circumstances of each individual case; furthermore, it is possible that some of the theories discussed here may in the future, whether through judicial activism or legislative interference, develop into more mainstream legal bases for the type of transnational civil litigation under discussion here.

First of all, the defendant parent companies may be sought to be held liable for being complicit in or an accessory to (for instance, aiding and abetting) the wrongful behaviour of their local subsidiaries, business partners and/or sub-contractors; a type of liability that is well-established in criminal law but that may in some legal systems also be invoked in order to establish tortious liability.[240] Under this type of indirect parent company liability, it is not necessary to prove that the defendant parent companies themselves owed a duty of care to the plaintiffs, or even that their actions were the primary cause of the tort:

> "[i]*nstead, liability generally attaches to a material contribution, consciously made, to the commission of a tort by another – or, as the US courts have put it, a 'knowing and substantial contribution*'".[241]

Such contributions may be claimed to exist for instance where parent companies supply their local affiliates with the means (technology, resources) to commit those wrongs, by inducing or actively encouraging their affiliates to commit them and/or by authorizing their tortious behaviour afterwards, or by conspiring with them in the commission of those tortious acts (involving an agreement between the two parties and a 'common purpose' to commit the wrong).[242] As discussed, this type of indirect parent company liability has played an important role in ATS-based foreign direct liability cases. The Apartheid litigation, for example, basically seeks to hold those business enterprises that did business with the South African government during apartheid liable for having not only profited from the cheap labour supplied by the oppressive regime but having also supplied the

239 See, for instance: Joseph 2004, pp. 129-143. See further on piercing the corporate veil, in a comparative perspective: Vandekerckhove 2007.

240 See, for a more detailed discussion: Koebele 2009, pp. 256-275; Zerk 2006, pp. 225-228.

241 Zerk 2010, p. 169.

242 See, elaborately: ICJ Report (Facing the facts and charting a legal path) 2008. See also, for instance: Clapham & Jerbi 2001.

products used to promote and maintain the system (software, cars, oil, loans).[243] In foreign direct liability cases brought on the basis of domestic tort principles, secondary liability claims have so far played a far less significant role.

The exact requirements that will need to be fulfilled in order for foreign direct liability claims on the basis of such contributory or accomplice liability to succeed will vary with each legal system. Generally speaking, however, for such a claim to be feasible the plaintiffs will have to prove that the parent company involved has made a substantial contribution to the primary wrong committed by its foreign affiliate and that it was or should have been aware of the fact that its actions would contribute to the commission of the affiliate's wrongful acts. Furthermore, in some systems, intention on the part of the parent company with respect to the actual commission of the wrongful acts involved is required, meaning that it cannot be held liable for having knowingly contributed to its foreign affiliate's wrongful acts out of mere carelessness.[244] As discussed, the Second Circuit Court of Appeals for instance held in the ATS-based foreign direct liability case of *Presbyterian Church of Sudan v. Talisman Energy* that the standard for accomplice liability should be derived from customary international law, and that the customary international law standard for accomplice liability requires the plaintiffs to show that the defendant parent company has provided substantial assistance to the tortious acts perpetrated by the other, with the purpose of facilitating the offences.[245]

Another type of indirect parent company liability is vicarious (or agency) liability, meaning that the parent companies involved are held liable for the tortious acts of their local subsidiaries or business partners on the basis of the existence of particular relationships of authority and control between those parents and their foreign affiliates.[246] Vicarious liability generally concerns the liability of any third party that had the right, ability or duty to control the actions of the actual tortfeasor; it is a form of strict liability, meaning that the liable party need not (itself) have been involved in intentional or negligent conduct in dispute.[247] The basic idea behind vicarious liability is that it should be possible under some circumstances to hold a master/principal/employer liable for what its servant/agent/employee does when operating on its behalf and under its authority and control; the liable party is seen as 'acting through' the tortfeasor.[248] Thus, whereas direct (primary) parent company liability is based on the parent company's own tortious acts or omissions, and accessory liability on its active and knowing contribution to another's wrongs, vicarious liability is not based on any direct connection with, involvement in or contribution to the tortious behaviour in question on behalf of the parent companies involved. Rather, it is

243 For more detail, see Koebele 2009, pp. 269-274. See also sub-section 3.2.2.
244 Zerk 2006, pp. 225-228.
245 See further sub-section 3.3.2.
246 See, in more detail: Zerk 2006, pp. 223-225.
247 See, generally on strict liability: Van Dam 2006, pp. 255-265.
248 See, for instance: Zerk 2010, p. 172

based on the authority and control which the parent companies involved (were able to) exercise over the actual tortfeasors, their local affiliates, and thus *presumably* also over the local operations of those local affiliates in the course of which the wrongs are committed. This type of indirect parent company liability played a role in the Unocal state case, for instance, as well as in the Apartheid litigation.[249]

In the end, the particular types of control-based relationships that may give rise to a form of vicarious liability, whether statute-based or judge-made, vary from tort system to tort system but are generally limited in number and subject to fairly strict requirements.[250] As a result, it will generally only be possible in exceptional cases to hold a parent company liable *qualitate qua* for its affiliates' tortious acts or omissions; the mere fact that it directly or indirectly holds shares in the subsidiary in question does not in itself make it liable for the acts of that subsidiary. Vicarious liability may for instance be said to exist where the level of control of the parent company over the actual tortfeasor renders their relationship a master-servant relationship such as may exist between a principal and its agent, or between an employer and its employee. It has been noted that US federal courts have tended to be more liberal than their English counterparts in this respect:

> "[...] *the English courts remain generally unconvinced by the policy justifications in favour of more flexible use of vicarious liability concepts, preferring to limit their use to narrowly defined 'agency' situations.*"; "[...] *judicial pronouncements under ATCA so far suggest a rather more flexible approach to the question of 'agency' than that used by the English courts*".[251]

A further type of indirect parent company liability is that of piercing the corporate veil, where courts lift or pierce the corporate veil in order to hold a parent company liable for the acts of its subsidiary.[252] Other than under the specific circumstances discussed above, in which parent companies are held liable either for their own tortious behaviour or for another's tortious behaviour where they have actively contributed or where a particular control-based relationship exists between the parent company and the actual tortfeasor, parent companies of multinational corporations will in principle not be liable for the tortious acts and/or the debts of their subsidiaries or business partners.[253] This follows from the traditional corporate law notions of separate juridical personality and limited liability, on the basis of which a corporation is seen as an independent legal entity with its own assets and separated (by the so-called 'corporate veil') from its owners (its shareholders); conversely, its shareholders cannot be held liable for the corporation's debts

249 See further sub-section 3.2.2.
250 Zerk 2010, pp. 170-171; Zerk 2006, pp. 223-225.
251 Zerk 2006, pp. 224-225.
252 Compare, for instance: Zerk 2006, pp. 228-229; Joseph 2004, p. 139.
253 Similarly: Joseph 2004, p. 129.

beyond the amount of their investment.[254] In principle, these traditional corporate law notions apply regardless of whether the corporate creditors seeking to pierce through to the shareholders' assets are voluntary creditors, such as contractual parties, or involuntary creditors, such as victims of tortious behaviour committed by the subsidiary.

One exception to this strict separation between the assets and liabilities of corporations and those of their owners is the doctrine of piercing the corporate veil, on the basis of which courts may hold a shareholder legally accountable for the actions and/or debts of the company and allow a creditor to recover his dues from the shareholder's assets if the company's assets are for some reason insufficient to settle the debt. The circumstances under which courts may allow for piercing the veil between a subsidiary and its parent company vary from legal system to legal system, but in line with the fundamental corporate law principles of separate legal personality and limited liability its use is an exception.[255] After all,

> "[...] *to structure a group of companies with a view to minimising legal liability is not of itself regarded as a misuse of the corporate form*".[256]

Generally speaking, this measure is only applied in cases where there is an unusually large degree of domination and control by the parent company over its subsidiary, virtually to the extent that the two cannot be distinguished from one another any more. Joseph notes in this respect:

> "*To the extent that it is possible to generalise, it seems that a court will often be willing to pierce the corporate veil in circumstances where the shareholder/s exercise extreme control over the relevant company, and the considerations of justice and policy mandate that the shareholder/s should bear the burden of a wrong perpetrated by the company, rather than the person/s who have suffered from that wrong.*"[257]

With respect to this control, it should be pointed out that in cases of piercing the corporate veil, which belong more to the ambit of corporate law than tort law, the focus is on the control that the parent company exercises over its subsidiary. By contrast, in cases of

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254 See, for the basics: Armour, Hansmann & Kraakman 2009.

255 See, for an in-depth, comparative study on piercing the corporate veil (comparing veil piercing practices in Belgium, the Netherlands, France, Germany, the UK and the US): Vandekerckhove 2007. Note, however, that the scope of the notion of piercing the corporate veil adopted by Vandekerckhove is broader than the scope of that same notion adopted here. According to Vandekerckhove (p. 1): "*When the courts pierce the corporate veil, they disregard the separateness of the corporations and hold a shareholder responsible for the corporation's action as if it were the shareholder's own*". On the basis of this definition, she lumps together all the ways in which parent companies can be held liable for their subsidiaries' debts and/or activities, including for instance cases in which parent companies are held liable for the activities of their subsidiaries on the basis of what is referred to here as 'primary' or direct liability (pp. 12-13 and 27-94, especially pp. 72-74).

256 Zerk 2006, p. 228.

257 Joseph 2004, p. 130.

direct parent company liability, which are brought on the basis of tort law, the focus is primarily on the control that the parent company exercises over the causes of the tort, *i.e.*, the wrongful conduct that has given rise to damages.[258]

One of the veil-piercing doctrines that has played a (very limited) role as a basis for foreign direct liability claims brought under US federal as well as US state law is the 'alter ego' doctrine.[259] According to this doctrine, the parent company may be claimed to be liable for the actions and/or debts of its subsidiary on the basis that the unity of ownership and interest between them is such as to render the latter the alter ego (or a mere instrumentality) of the former, and that "[...] *to recognize them as separate entities would sanction fraud or lead to an inequitable result*".[260] This doctrine was raised as a basis for foreign direct liability claims for instance in the state case against Unocal, as well as in the Apartheid litigation; in neither case, however, were these claims based on the alter ego doctrine very successful.[261]

Closely related to the idea of parent company liability on the basis of piercing the corporate veil between subsidiaries and their parent companies, is the concept of (multinational) enterprise liability according to which, under certain circumstances, limited liability within highly integrated corporate groups is removed altogether.[262] Under this notion, the dominant system of entity liability, under which the different companies within a corporate group (including parent companies and their subsidiaries) are considered to be separate legal entities subject only to a very limited number of exceptions on the basis of which the corporate veil may be pierced, is replaced by a system in which the corporate group is considered to be a singular economic unit. Each corporate actor within this economic unit may in principle be held accountable for the actions of other group actors,

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258 Compare Joseph 2004, pp. 136.

259 Note that doctrines such as alter ego and agency have come up in foreign direct liability cases before US courts in the course of establishing those courts' personal jurisdiction over defendant parent companies that had no physical presence in the US save for a local (US) subsidiary or agent. In the case of *Wiwa v. Shell*, for example, the New York federal courts' personal jurisdiction over the two defendant parent companies, which were incorporated in the Netherlands and the UK, was based on a finding that a New York-based investor relations office and its manager were the defendants' agents. It is important to distinguish, however, between the use of these doctrines in tests for personal jurisdiction over the parent companies concerned and in tests for liability of those parent companies for their subsidiaries' tortious actions; the former are different from and easier to fulfil than the latter. See, more elaborately: Joseph 2004, pp. 83-87.

260 Vandekerckhove 2007, p. 83.

261 In the Unocal case, the claims on this basis survived a motion for summary judgment but it was subsequently held that plaintiffs could not rely on this doctrine to establish the liability of the Unocal parents as they had not proved that to disregard the corporate entities would sanction a fraud or promote an injustice: *Doe I et al. v. Unocal Corp. et al., John Roe II et al. v. Unocal Corp. et al.*, Ruling on Unocal defendants' motion for judgment, Superior Court of California, case nos. BC 237 980 and BC 237 679 (14 September 2004), pp. 2-3. In the Apartheid litigation, the alter ego (veil piercing) claims were dismissed for failure on the part of the plaintiffs to make sufficient allegations to make the case proceed on this basis against any of the defendants involved: *Khulumani v. Barclays National Bank Ltd.*, 617 F.Supp.2d 228 (SDNY 2009), pp. 271-272, 274.

262 See, for instance: Zerk 2006, pp. 229-233; Joseph 2004, pp. 138-142.

meaning for instance that parent companies within the group can be held liable for all the unpaid debts and acts of their subsidiaries on the basis of the economic and commercial integration between them.[263] In the context of multinational groups, it can be said to effectively entail a strict liability on the part of the parent company of a multinational corporation for the consequences of calamities that occur as a result of the activities of the multinational group, on the basis that it should vouch for the safety of those activities.[264]

The idea of (multinational) enterprise liability stems from the idea that the economic and legal realities of multinational corporations often do not correspond, allowing them to operate as a single business unit where this enhances profits and at the same time hide behind the corporate veil where financial and legal burdens are concerned.[265] It has received ample scholarly attention, especially from those questioning the continued viability of the traditional notions of separate legal personality and limited liability in light of the contemporary realities of corporate groups, as well as from those concerned over the potential difficulties for tort victims to work around the distribution of tort liability among members of corporate groups on the basis of this traditional framework.[266] So far, however, this concept has received very little judicial support.[267] The Bhopal litigation is an example of a case in which plaintiffs based their claims, *inter alia*, on multinational enterprise liability. The Union of India argued in this respect:

> "*Multinational corporations by virtue of their global purpose, structure, organization, technology, finances and resources have it within their power to make decisions and take actions that can result in industrial disasters of catastrophic proportion and magnitude. This is particularly true with respect to those activities of the multinationals which are ultrahazardous or inherently dangerous. Key management personnel of multinationals exercise a closely-held power which is neither restricted by national boundaries nor effectively controlled by international law. [...] Persons harmed by the acts of a multinational corporation are not in a position to isolate which unit of the enterprise caused the harm, yet it is evident that the multinational enterprise that caused the harm is liable for such harm. The multinational must necessarily assume this responsibility, for it alone has the resources to discover and guard against hazards and to provide warnings of potential hazards. This inherent duty of the multinational is the only effective way to promote safety and assure that information is shared with all sectors of its organization and with the nations in which it operates.*"[268]

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263 See for an in-depth, comparative study on these two concepts and their practical application in the US, the EU and the German legal systems: Antunes 1994. See also, for instance: Dearborn 2009; Blumberg 2001.

264 Compare Van Rooij 1990, p. 189.

265 See, in more detail, for instance: Lowenfeld 1996, pp. 80-108; Van Rooij 1990, pp. 177-195.

266 See, for instance and with further references: Eijsbouts 2011, pp. 54-55; Eijsbouts 2010, pp. 101-103; Dearborn 2009, pp. 199-200; Muchlinski 2007, pp. 317-326; Joseph 2004, pp. 138-142; Blumberg 2001; Antunes 1994; Hansmann & Kraakman 1991.

267 Joseph 2004, p. 140.

268 See, for instance, with further references: Baxi 2010, p. 37.

Whereas the notion was met with some approval by the Indian judges dealing with the case, it was never truly tested as the case was eventually settled out of court.[269]

A second case that is commonly referred to in this context is the transnational tort-based civil case against Standard Oil for the damages resulting from the oil spill caused by the grounding of the Amoco Cadiz off the coast of Brittany, France. In this case, which is not a foreign direct liability case as defined here but does bear some resemblance to these cases, it was held, *inter alia*, that:

> "[a]*s an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, Standard is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities, AIOC and Transport*".[270]

Whether the Illinois district court in so holding actually meant to hold Standard Oil liable on the basis of some sort of enterprise liability theory is unclear, however, as it in no way further substantiated its conclusions with reference to any authorities.[271]

Finally, the complaints in the Dutch Shell cases have been interpreted by some as constituting, *inter alia*, an appeal to notions of enterprise liability; this interpretation seems to be based on an incorrect reading of these claims, however.[272] It seems that the complaints' reference to the fact that parent company Royal Dutch Shell (RDS) sets terms with which the entire group must comply and according to which local subsidiaries conduct their business operations, has been interpreted as constituting an appeal to notions of enterprise liability. As discussed, however, rather than basing the parent company's alleged liability on theories of enterprise liability, the claimants in these cases seek to hold it directly liable for its own unlawful behaviour in having failed to properly supervise its Nigerian subsidiary's oil extraction activities. The statement of claim's reference to RDS's management structure, and the assertion that this structure allows it to exert influence and control over its Nigerian subsidiary's local activities, is merely meant to substantiate the claim that it has a duty of care vis-à-vis Nigerian locals who are detrimentally affected by those activities. It is possible that the confusion that this reference has seemingly caused is to blame for the fact that the claims seek to hold the parent company liable not for its acts, but rather for its omissions, and as such seek to impose on it a duty to act, something that, as was already mentioned, is not commonly accepted in most common law systems.[273]

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269 See, for instance: Muchlinski 2007, pp. 314-316; Joseph 2004, pp. 140-141; Van Rooij 1990, pp. 181-184. See also sub-section 3.2.2.

270 *In re oil spill by the Amoco Cadiz off the coast of France on March 16, 1978*, 1984 A.M.C. 2123, 2 Lloyd's Rep. 304 (N.D. Ill., 1984), p. 2194. See also: Van Rooij 1990, pp. 179-181.

271 See, for instance: Muchlinski 2007, pp. 310-311; Joseph 2004, p. 141.

272 See Zerk 2010, p. 171 and, similarly, EC Report (Augenstein) 2008, p. 63 (footnote 226).

273 See the original complaint in the Oruma case, available in English at the Milieudefensie website: <www1.milieudefensie.nl/globalisering/publicaties/infobladen/Scan%20dagvaarding%20Oruma%20Engels.pdf>.

4.5 Procedural and practical circumstances

4.5.1 Some circumstances pertaining to the field of substantive tort law

It should be stated at the outset that the way that the tort system itself and its function in society are viewed, in combination with the role of civil courts in adjudicating tort claims, may significantly affect the feasibility of foreign direct liability cases. This is due not only to the novelty of these claims but also to their public interest character, in the sense that the objectives sought to be pursued in these cases typically go beyond the private (financial) interests of the host country plaintiffs initiating them.[274] Generally speaking, it seems that the US tort system is relatively very well equipped in this sense to deal with this type of what may be characterized as transnational public interest litigation.[275] One of the reasons for this may be that the US tort system can be said to possess a creative ability to come up with innovative solutions to modern societal issues and developments. As will be further elaborated below, it is equipped to fulfil a range of societal tasks, including not only protection of private interests and compensation for damage but also punishment of undesirable conduct, protection of certain public interests, the filling of regulatory gaps, etc.[276] In the EU Member States, on the other hand, the emphasis tends to be above all on foreseeability, predictability and reliability in the law, and the tort system's function is considered to be, above all else, the provision of compensation for damage suffered.[277] The European Commission in fact recently stated that in its view the law of civil liability in Europe is not (any longer) oriented towards influencing socially undesirable behaviour, but rather towards compensation.[278] Similar ideas seem to lie behind recent proposals for a common European system of tort law.[279] At the same time, however, as will be explained below and as will be discussed further in chapter 9, European perceptions of the tort system and its role in society do in fact seem to be changing.

Despite these contemporary changes in perception, the traditional differences in approach to the tort system in the US and in Europe are currently still reflected to some extent in the remedies that are made available to plaintiffs in tort cases. As has been discussed before, in line with their public interest nature the range of remedies pursued in foreign direct liability cases tends to go far beyond mere compensatory damages for the harm suffered by the host country plaintiffs. This is clearly shown by cases such as the Apartheid litigation and the Dutch Shell cases, where plaintiffs have requested the courts involved to grant them a wide variety of non-financial remedies, some aimed at righting

274 See further sub-section 3.2.3.
275 See, for a more detailed discussion: *infra* sub-section 4.5.2.
276 See, for instance: Enneking 2009, pp. 931-934; Stephens 2002.
277 See, for instance: Magnus 2010, pp. 119-124. See also: Enneking 2009, p. 931.
278 See Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), COM(2003) 427 final (22 July 2003), p. 12.
279 Magnus 2010, pp. 123-124.

past wrongs (disgorgement of profits made in connection with the allegedly wrongful conduct, cleaning up of contaminated sites), others aimed at preventing future wrongs (the creation of affirmative action and educational programmes, the adoption of contingency plans to limit the risks of similar mistakes being made in the future and/or to limit the harmful consequences of them to people and planet locally).[280] In US-based foreign direct liability cases, punitive damages may also play an important role, as is exemplified by the ATS-based *Curaçao Drydock* case in which a US court awarded the plaintiffs not only $50 million in compensatory damages but also $30 million in punitive damages, which according to the court were meant to reflect international revulsion against the human rights violations in which the corporate defendant had been found to have been involved (international human trafficking and forced labour), and to act as a deterrent against such conduct.[281]

Generally speaking, where it comes to the tort system's role in society and the accompanying possibilities to claim remedies that go beyond mere compensatory damages, it seems that host country plaintiffs are better off bringing their cases before US courts and on the basis of US tort law. Both in the US and in Europe, the principal remedy in tort cases is that of compensatory damages; differences exist in the sense that US courts (both judges and juries) generally tend to be more generous when it comes to awarding compensatory damages than courts in the EU Member States, especially in personal injury cases.[282] Other remedies may include declaratory judgments and mandatory injunctions (orders of specific performance), prohibitive injunctions (orders to refrain from certain behaviour) or *quia timet* injunctions (aimed at preventing a threatened legal wrong that has not yet occurred).[283] In the US (and also, to a lesser extent, in the UK), a further addition to the remedies arsenal is punitive damages, which are designed to punish the tortfeasor rather than to compensate the victim and as such are dependent on the degree of fault on the part of the defendants rather than on the extent of the loss on the part of the plaintiffs.[284] This may potentially lead to damages awards many times higher than those based merely on compensatory damages. This may provide not only financial incentives for plaintiffs and their attorneys, but also punishment of the defendant corporations as well as strong

280 See further sub-section 3.2.2.

281 *Licea v. Curaçao Drydock Company, Inc.*, 584 F.Supp.2d 1355 (S.D. Fla., 2008), at 1366. See further sub-section 3.3.1.

282 Especially where it comes to awarding compensation for pain and suffering, European courts tend to be less generous in awarding compensatory damages in personal injury cases than US judges and juries. See, for example: Magnus 2010, p. 108.

283 See, in more detail and from a comparative perspective: Van Boom 2010.

284 See, for instance, with further references: Magnus 2010, pp. 104-107; Berch 2010, pp. 62-77. Both authors note, however, that in recent years there has been an increasing reluctance in the US with respect to punitive damages and a general tendency to limit their use and scope.

behavioural incentives for them, and for those similarly placed, to refrain from engaging in the type of wrongful conduct at issue.[285]

The idea of punitive damages is generally rejected in continental European systems, even though punitive aspects tend to creep in to some extent in these countries' tort systems.[286] In the English system, punitive or exemplary damages are awarded only very sparingly.[287] The overall resistance in Europe to US-style punitive damages awards is evidenced for instance by the proposals for a common European tort system that have been put forward, which reject the notion.[288] It is also evidenced by the fact that in the Rome II Regulation (on the law applicable to non-contractual obligations) it is specifically stated that:

> "*Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum.*"[289]

Similarly, the enforcement of US (or UK) judgments involving punitive damages awards against defendants located in the EU Member States may be highly problematic.[290]

A further factor that may partly ensue from substantive rules of tort law and that may affect the feasibility of foreign direct liability cases is the burden of proof. As foreign direct liability cases are characterized among other things by a lack of transparency and inequality of arms in the sense that the corporate defendants are usually in a much better position than the host country plaintiffs with respect to both information relevant to the case

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285 See, for instance: Brand 2005, pp. 121-131; Carrington 2004, pp. 1415-1428. See also further chapter 10.

286 See, in more detail and from a comparative perspective: Koziol & Wilcox 2009. See also: Berch 2010, pp. 81-83; Magnus 2010, p. 106; Rouhette 2007.

287 Concepts closely connected to that of punitive damages are those of aggravated damages (which focus on compensation of the victim's mental distress, where the tortfeasor's wrongful conduct has outraged or upset the victim) and exemplary damages (which focus more on deterrence than on punishment). See, for a more detailed discussion of the interpretation and application of these concepts in English tort law, The Law Commission, AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES, Item 2 of the Sixth Programme of Law Reform: Damages, 1997, available at <www.lawcom.gov.uk/docs/lc247.pdf>.

288 See, for instance: European Group on Tort Law 2005, pp. 150-151, where it is noted: "*The borderline between the aim of prevention and the aim of punishment may be sometimes difficult to draw. But it is clear that the Principles do not allow punitive damages which are apparently out of proportion to the actual loss of the victim and have only the goal to punish the wrongdoer by means of civil damages*" (citations omitted).

289 Recital 32 Rome II Regulation (recital 32).

290 See, generally: Berch 2010. Similarly, the Brussels I Regulation provides (Article 34) that a judgment shall not be recognized "*if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought*".

and finances, the question *who* is expected to prove *what* is particularly significant. This significance is further increased by the fact that due to the often indirect links between the defendant parent companies of the multinational corporations involved in these cases and the harmful host country activities, causal connections in these cases tend to be highly complex and difficult to establish.[291] Rules pertaining to the division of the burden of proof may ensue both from substantive rules of tort law and from rules of procedural law; to the extent that they ensue from the former, as will be the case for instance with rules pertaining to (the reversal of) the burden of proof, they are determined by the system of tort law that is applicable to the case on the basis of choice of law provisions.[292]

In legal systems around the world, the general rule of thumb as regards burden of proof is that both claimant and defendant in civil proceedings are to "[...] *prove those facts that form the minimally required factual content of the legal rule upon which the claim or defence is based*". If one of the parties fails to prove the facts that need to be proved on this basis, a *non liquet* situation arises in which the law will assume that (and proceed as if) those facts have not occurred. Exceptions to this general rule may be made, however; an important example is the (partial) reversal of the burden of proof, on the basis of which a defendant, for instance, may be entrusted with proving a certain element of the claim put forward by the plaintiffs. The burden of proof may thus be reversed where on the basis of legal policy and normative considerations this is considered to be justified, for instance to "[...] *improve the protection and the position of the victim of a certain act*".[293] Other exceptions to the general rule as regards burden of proof that may be relevant in the context of foreign direct liability cases include presumptions of fact (for instance on the basis of the *res ipsa loquitur* doctrine, *i.e.* the case speaks for itself) as well as the possibility of placing certain duties to provide information on the defendant.[294]

A final factor to be mentioned here is that of limitation periods, which may limit the period of time for which tort claims may be brought following a harmful event. Limitation periods will often play a role in those foreign direct liability cases that are brought pursuant to so-called 'historic injustices', meaning that the alleged tortious behaviour and resultant damages have occurred many years before the foreign direct liability claim is actually submitted.[295] In such cases, the time lapses between tort and lawsuit that are allowed by the applicable statutes of limitations may be decisive with respect to whether the suit can still be viably brought. An example of a foreign direct liability case pertaining to historic

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291 See further sub-section 3.2.3.

292 See, for an in-depth discussion of the role of private international law in evidentiary matters: Van het Kaar 2008.

293 See generally, with further references: Giesen 2009a, pp. 49-67 (quotes pp. 50 and 52). See more elaborately on the various reasons that may give rise to a reversal of the burden of proof: Giesen 2001, pp. 409-421, 447 and further.

294 More elaborately: Giesen 2009a, pp. 56-62.

295 Compare, for instance: Sarkin 2004.

injustices is the ATS case that was brought against the German multinational corporation Woermann Line for their alleged complicity in the atrocities committed by the German colonial regime in the early 20th century against the Herero people of South-West Africa (now Namibia); one of the main reasons for the dismissal of this case in 2006 was that according to the applicable statute of limitations the claim had expired.[296] Another foreign direct liability claim that turned out to be time-barred (and for that reason was not decided on the merits) was the aforementioned *Connelly* case, which was brought against R.T.Z. Corporation by a former worker at its Namibian uranium mines for asbestos-related personal injuries sustained while working at those mines, which had been operated by a local subsidiary.[297]

4.5.2 Culture, practice and procedure in the US

Generally speaking, the legal culture that is prevalent in the home country is likely to determine to a significant extent the attitude that not only home country courts but also policy makers, civil society actors and the general public will take towards the pursuit of this type of litigation. In the US, the long-prevalent legal culture of what has been termed 'adversarial legalism' has arguably resulted in a legal system that is unique when it comes to its openness to "[...] *new kinds of justice claims and political movements*", and as regards the flexibility and creativeness of its courts.[298] A tradition of public interest and impact litigation, in the sense that civil litigation has long been used as a way to promote societal change, has shaped the general idea that civil litigation may serve broader, more prospective aims.[299] Also more generally speaking, in the US legal system civil litigation is an accepted means through which not only private rights but also public regulations and policies can be privately enforced.[300] This particular legal culture is supported by socio-legal structures enabling this role of civil litigation in general and public interest litigation in particular.[301]

On the one hand, a litigation infrastructure has developed in the US that includes a wide variety of legal advocacy practice sites specifically geared to promoting, facilitating

296 See, for more information on this case and related claims, as well as further references, the Business & Human Rights Resources Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuits regulatoryaction/LawsuitsSelectedcases/GermancoslawsuitbyHereros>.

297 See *supra* sub-section 4.4.3 as well as sub-section 3.1.3. It should be noted here that many Western societies have special regimes on limitation periods with respect to claims arising from asbestos-related diseases; see, in greater depth: De Kezel 2012.

298 Kagan 2001, p. 3. Similarly: Magnus 2010, pp. 119-120, who emphasizes the ability of US tort law "[...] *to discover or invent innovative solutions*", as well as "[...] *the vivid creativity and rapid development of the US tort system*".

299 Stephens 2002, pp. 12-14.

300 See, for instance: Brand 2005, pp. 115-135; Carrington 2004; Chayes 1976.

301 See, for instance, with a focus on civil human rights litigation: Stephens 2002, pp. 6-17.

and/or initiating public interest claims on the basis of funds derived from both public and private sources. Examples include legal services lawyers, pro bono lawyers and law firm pro bono programmes, private public interest law firms, law school clinics and public interest legal organizations.[302] It has been noted in this respect that:

> "[t]*he United States has by far the world's largest cadre of special "cause lawyers" seeking to influence public policy and institutional practices by means of innovative litigation. In no other country are lawyers so entrepreneurial in seeking out new kinds of business, so eager to challenge authority, or so quick to propose new liability-expanding legal theories*".[303]

On the other hand, the US legal culture goes hand in hand with a system of civil litigation that, due to a unique combination of legal, procedural and practical features, is generally considered to be highly plaintiff-friendly.[304] First of all, the financial disincentives for prospective plaintiffs to initiate civil claims are limited by the fact that unsuccessful litigants are not, in principle, required to pay the victorious opponents' costs, in combination with the possibilities for claimants to enter into contingency fee arrangements with their legal representatives.[305] Such arrangements may enable even poor plaintiffs to afford the legal representation necessary to bring a lawsuit in the US, a circumstance of great importance in the context of foreign direct liability cases that are characterized by a significant inequality of arms between the host country plaintiffs and the defendant multinational corporations when it comes to financial matters.[306] At the same time, they may tempt "[...] *even private, for-profit law firms to participate in public interest cases*", provided at least that the cases involved have good prospects of succeeding and of resulting in substantial damages awards.[307]

Another factor of importance here is the possibility of bundling multiple claims and/or multiple defendants into one so-called class action, a feature that is characteristic of the US system of civil procedure. This has the effect of reducing costs and risks to those involved, as well as of incentivizing both victims and lawyers to pursue cases that in themselves would not be financially worthy of pursuit.[308] Two other distinctive features of the US civil system are its adversarial nature and the role of the jury in civil cases. In line with the former, US courts tend to act as arbitrators in the cases brought before them rather

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302 See, generally: Cummings & Rhode 2009.
303 Kagan 2001, pp. 8-9.
304 Compare, for instance: Stephens 2002.
305 See, for instance: Magnus 2010, pp. 112-114.
306 See further sub-section 3.2.3.
307 Stephens 2002, p. 15. See also, for example, Magnus 2010, pp. 113-115.
308 See, for instance, Magnus 2010, pp. 115-116. Note that there is a difference between class litigation, through which "[...] *one individual claim is asserted to represent a class of others, whose owners are bound by the result of the single claim unless they opt-out of the class and procedure*" and mass litigation, through which "[...] *a number of individual claims are brought and grouped together because of their similarity*"; Hodges 2008, pp. 2-3.

than as case managers that must actively pursue the truth; on the basis of the idea that "[...] *fair competition between the parties before the court is the best way to achieve the just outcome of a lawsuit*", the course and outcome of the lawsuit, including 'truth'-finding, is largely left up to the parties themselves. At the same time, the jury system has a significant influence in US tort litigation, as it is the jury which decides matters such as whether the alleged facts have been established, whether a duty of care has been breached, as well as the amount of damages to be awarded to the plaintiffs.[309]

A final feature of the US civil litigation system that is relevant in this context are the US rules on pre-trial discovery, which may be seen as a (necessary) corollary to the system's adversarial nature.[310] These rules are generally considered to be favourable to plaintiffs in civil cases, especially in combination with the fact that the initial statement of claim may be based upon mere skeleton allegations of the key facts and a reasonable belief in the allegations put forward, which need only be substantiated in a later phase of the proceedings. On the basis of these rules, defendants (and others as well) may be compelled to "[...] *disclose information in their possession that might be useful as evidence to prove the plaintiffs' case*" and as such enable the plaintiffs to investigate possible wrongdoing by the corporate defendants involved.[311] Considering the lack of transparency that typically exists with respect to the group and organizational structures of the multinational corporations involved, these liberal rules on discovery may play a pivotal role in foreign direct liability cases. In the Unocal case, for example, the evidence thus gathered included, among many other things, a communication by Total to Unocal (both partners in the joint venture running the Burmese gas pipeline project in the course of which human rights violations had allegedly been perpetrated) that could have turned out to be crucial evidence – had the case proceeded to trial instead of being settled – as to Unocal's alleged awareness of the human rights violations perpetrated by the Burmese military in furtherance of the project. It stated:

> "[...] *About forced labour used by the troops assigned to provide security on our pipeline project, let us admit between Unocal and Total that we might be in a grey zone*".[312]

In the end, there is no doubt that the particular combination of legal culture and procedural and practical circumstances mentioned here have made US courts uniquely favourable venues for the pursuit of the type of transnational tort-based civil litigation

309 See, for instance: Magnus 2010, pp. 110-111 (quote p. 110).

310 Magnus 2010, p. 117 (footnote 84).

311 Carrington 2004, p. 1416. See also, for instance, with further references: Stephens 2002, pp. 15-16; Magnus 2010, pp. 116-117.

312 *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. (Cal.) 2002), pp. 946-956. See pp. 937-942 for an overview of the evidence available at that stage on Unocal's knowledge that the Burmese military was providing security and other services for the project, and on Unocal's knowledge that the Burmese military was allegedly committing human rights abuses in connection with the project.

under discussion, and have contributed substantially to the great advance in the US of the socio-legal trend towards foreign direct liability cases.[313] In light of some of the typical features of these cases, in particular the inequality of arms between the host country plaintiffs and the corporate defendants involved when it comes to financial scope, the typical lack of transparency with respect to the group and operational structures of the multinational corporations concerned, and the relative novelty of this type of litigation and the (combination of) legal issues raised in these cases, these legal cultural, practical and civil procedural aspects of the US civil system tend to be highly advantageous for those seeking to pursue foreign direct liability claims.

4.5.3 Culture, practice and procedure in Europe

Litigation culture and procedural and practical circumstances

The fact that foreign direct liability cases have in comparison been far less prevalent outside the US so far is sometimes explained as resulting from the fact that the litigation cultures in other Western societies are generally less favourable for this type of litigation.[314] In the EU Member States, notwithstanding the fact that the European civil law systems, in particular, are often said to be converging, cultural differences and also differences in legal culture between the different countries remain quite pervasive.[315] This means that the extent to which legal cultural, practical and civil procedural aspects of civil litigation in European home countries are as conducive to the pursuit of foreign direct liability claims as the US civil litigation system varies between legal systems.[316] Generally speaking, however, the US legal culture of adversarial legalism and its tradition of public interest and impact litigation, accompanied by plaintiff-friendly rules of civil procedure and litigation practices, are unique to America and unlikely to be found anywhere else.[317] In fact, the US litigation culture is often depicted outside the US as being excessive and something to be avoided rather than welcomed. Disadvantages that are commonly perceived to be associated with it include: over-precaution, which may lead to high costs for potential tortfeasors, deterrence of economically valuable activities and restraints on innovation; abuse of civil procedures for unmeritorious claims, which may lead to high societal costs and so-called 'blackmail settlements'; insurance issues; and high transaction costs.[318]

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313 See, for instance: Stephens 2002, pp. 6-17, stating that "[t]*he successful series of U.S. federal court cases seeking civil damages for human rights abuses relies in part upon a series of procedures and practices rarely found outside the United States*". See also: Joseph 2004, pp. 16-17.

314 See, for instance: Stephens 2002, pp. 17-34.

315 For more detail on the interplay between cultural differences and legal differences, see Van Dam 2007, pp. 60-71.

316 See also: Enneking 2009, pp. 932-933.

317 See, in more detail: Stephens 2002, pp. 24-27.

318 Compare for instance: Kortmann 2009; Bauw, Van Dijk *et al.* 1999.

This also means that a public interest-related litigation infrastructure similar to the US model has failed to materialize in Europe, where public issues have tended to be addressed through societal dialogue and government intervention rather than through civil litigation, and where law firms specializing in public interest cases have remained exceptions.[319] One of the few law firms so far to have built up a body of expertise with respect to bringing this type of transnational tort-based civil litigation is the UK-based firm Leigh Day & Co, which was involved in the *Cape* case and the Trafigura case as well as in some other UK-based foreign direct liability cases.[320] Of the numerous European NGOs involved in issues of international corporate social responsibility and accountability, for instance, only very few have so far sought to address issues of corporate wrongdoing in this respect through litigation rather than through dialogue with businesses and governments. One of the first European NGOs to actually be actively involved in a foreign direct liability case is Friends of the Earth Netherlands (*Milieudefensie*), which in its capacity as an environmental interest organisation has joined the Nigerian plaintiffs in the Dutch Shell case in their claims against Shell.[321]

At the same time, the combination of procedural and practical features of civil litigation systems in the EU Member States tends to be less favourable to plaintiffs than is the case in the US. In most European countries, for example, the losing party to a lawsuit must bear the costs of the winning party, a circumstance that may restrain prospective plaintiffs from initiating novel or otherwise risky civil cases. Furthermore, contingency fee arrangements are generally not permitted in European civil law countries; instead, lawyers tend to charge fixed fees. This does bring with it the advantage, however, that lawyers are unlikely to refuse potential cases on the basis that they are unlikely to result in large damages awards. Also, as a counterbalance to the rule on litigation costs and the unavailability of contingency fees, European countries tend to provide legal aid to poor plaintiffs who need financial assistance in order to be able to bring their claims, at least where those claims have a reasonable prospect of success.[322] Financial factors such as these played an important role for instance in the *Cape* case as well as in the *Connelly* case.[323] In both cases the non-availability of legal aid and/or of possibilities to enter into conditional fee arrangements in the host countries involved (Namibia and South Africa, respectively)

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319 See also: Enneking 2009, pp. 931-932.

320 See website of Leigh Day & Co solicitors, <www.leighday.co.uk/our-expertise/international-claims>.

321 Enneking 2009, p. 932. See further sub-section 3.2.2.

322 See, for instance: Magnus 2010, pp. 112-115. See also: Stephens 2002, pp. 27-30; Enneking 2009, pp. 931-934. See, for a report (in Dutch, but with an English summary) on European practices regarding attorneys' fees: WODC Report (Faure, Hartlief & Philipsen) 2006. See, for an overview of legal aid practices in the EU Member States, the website of the European Commission: <http://ec.europa.eu/civiljustice/legal_aid/legal_aid_gen_en.htm>.

323 See further sub-section 3.1.3, 3.2.2 and 4.4.3.

played an important role in the English courts' refusal to stay the proceedings on grounds of *forum non conveniens*.[324]

Furthermore, corollaries to the US-type class action, in which a single procedure may represent a group of claims and/or defendants (if those can be said to form a class and to be affected in almost the same way) in such a way as to allow for a reduction of costs and risks and/or to provide incentives to pursue even those tort cases that involve such small amounts of damages that they would not be pursued separately, are generally unavailable in most European countries.[325] However, the possibilities for collective redress in Europe have expanded significantly in recent years. Most European legal systems now provide for some form of collective action, in the sense that representative organisations may pursue civil litigation on behalf of a group of persons or certain interests and/or in the sense that multiple claims and/or defendants may be bundled into one procedure.[326] In fact, the European Commission is currently looking into the possibilities for promoting or adopting collective redress mechanisms throughout the EU, with a view also to a more effective (private) enforcement of substantive EU regulations.[327] As foreign direct liability cases, especially those following toxic disasters such as the Bhopal case or extensive pollution such as the Trafigura case, may involve large groups of victims, these European developments with respect to the availability of mass, class or other types of collective actions are highly relevant.[328]

Finally, in contrast to the situation in the US (and, to a lesser extent, in the UK), civil procedures in European civil law systems tend to be of a more inquisitorial character and there seems to be an increasing tendency towards viewing courts as case managers that are expected to actively seek to ascertain the truth.[329] At the same time, decision making in civil procedures is largely and in tort cases entirely left to professional judges.[330] Furthermore, discovery rules in these European civil law systems generally do not offer plaintiffs the same broad possibilities for requesting information from the defendants as do the rules on pre-trial discovery in the US. A general procedural duty to present all documents that are requested by the other party on the basis of their potential relevance

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324 See, for a more in-depth discussion: Muchlinski 2001. See also: Morse 2002. In the *Cape* case, for example, it was submitted by the claimants that a stay of their claims before the English courts on grounds of *forum non conveniens* would violate Article 6, "[...] *since it would, because of the lack of funding and legal representation in South Africa, deny them a fair trial on terms of litigious equality with the defendant*": *Lubbe And Others v. Cape plc, Afrika And Others v. Same* [2000] 2 Lloyd's Rep. 383, p. 394. The Law Lords, however, did not further examine the merits of this argument as they had already decided, on other grounds, not to grant a stay of the proceedings on the basis of *forum non conveniens*.

325 See, for instance, with further references: Magnus 2010, pp. 115-116.

326 See, more detailed: Hodges 2008. See, for an elaborate comparison of class action-type instruments in the US and Europe: Tzankova 2007.

327 See the European Commission website for recent developments and related documents: <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm>.

328 See, more elaborately: Van der Heijden (forthcoming) 2011. See also further sub-sections 3.2.2 and 3.2.3.

329 See, in more detail and from a comparative perspective: Verkerk 2010.

330 See, for instance: Magnus 2010, pp. 110-111.

to the case does not exist; instead, parties may under certain conditions have a right to request disclosure of documents and courts may also order disclosure where considered necessary.[331] As mentioned before, requests made by the plaintiffs in the Dutch Shell cases for the disclosure by Shell of a range of key evidentiary documents, were rejected in September 2011 by the The Hague district court.[332]

All in all, none of the European countries is likely to feature a combination of legal culture and procedural and practical circumstances that is as conducive to the pursuit of foreign direct liability cases as the US civil litigation system. This does not necessarily mean, however, that the absence of a litigation culture that is as plaintiff-friendly and as conducive to this type of transnational tort-based civil litigation as the US model, renders the pursuit of such cases before European home country courts unfeasible altogether. Depending on the country in which any particular case is brought and on the further circumstances regarding the claim, European home country courts may offer opportunities when it comes to the pursuit of foreign direct liability cases. The UK especially seems to be a popular venue currently for those seeking to pursue this type of transnational tort-based litigation, as is evidenced by the recent claims brought there against Trafigura and Shell, among others, which both ended in out-of-court settlements.[333] Due also to the absence in European societies of a legal culture that is as geared towards public interest litigation as the US one, however, the number of foreign direct liability cases that will be brought before European domestic courts in the near future may not grow as explosively as has happened in the US over the past 15 years or so.

Developments at the EU level

The further development of the trend towards foreign direct liability cases before courts in the EU Member States will be dependent not only on current developments affecting the feasibility of this type of transnational tort-based litigation in the US, but also on contemporary developments affecting the role of tort litigation in European societies. It is important to note in this respect that at present some of the American views on the tort system and its function in society seem to be finding their way across the Atlantic. An important example is the increasing interest across Europe in the way that private law in general and the tort system in particular can act as enforcement mechanisms.[334] At the EU level especially, there is presently serious interest in the extent to which and the circumstances under which EU conduct-regulating rules in fields such as competition law and consumer law can be enforced by private parties through Member States' domestic systems of tort law. After all, the provision of private law remedies for infringements of EU rules and principles that have direct effect, meaning that they create obligations not only

331 See, with further references: Magnus 2010, pp. 116-117.
332 See further sub-section 3.3.2 as well as sub-section 5.5.2.
333 See further sub-section 3.2.2.
334 See, for instance: Engelhard, Giesen *et al.* 2009; Kortmann 2009.

for the Member States but also for individual citizens, is still largely a matter of domestic law.

In recent years, the European Commission has been actively exploring ways to remove any existing impediments from its Member States' domestic systems of private law and civil procedure that may stand in the way of the more instrumental application of damages claims against private actors that act in contravention of EU law.[335] In the field of antitrust, for example, the Commission has envisioned a role for tort law as:

> "[...] *a threat so formidable, that in the future companies will think twice before they engage in cartel conduct*".[336]

To this end, it has considered a number of ways in which domestic systems of tort law can be 'boosted' so as to perform this role effectively, among other things by abandoning their strict focus on *ex post* compensation for damage suffered. In a 2005 Green Paper, the Commission made some far-reaching proposals in this respect, including the introduction of aggravated damages ('double damages') in tort-based civil actions pertaining to infringements of EU antitrust rules.[337] The strong criticism that these proposals elicited resulted in a more moderate 2008 White Paper, which however still recommends the introduction of a range of measures to further enhance the enforcement through tort law of EU antitrust law.[338] These include, *inter alia*, the improvement of collective redress mechanisms, a minimum level of disclosure between the parties in antitrust damages claims, special (extended) limitation periods, and limitations to court fees in this particular type of claim.[339] Similar developments are taking place in the field of consumer law, where the Commission has focused its efforts on improving consumer collective redress across the EU Member States.[340]

Although these developments are taking place in different subject matter areas from the ones to which foreign direct liability cases pertain, they may have indirect consequences for the feasibility of bringing such cases before domestic courts in the EU Member States in the future. In a general sense, they promote a more instrumental approach to domestic systems of tort law as enforcement mechanisms. This novel (at least in Europe) way of looking at domestic systems of tort law may also be relevant for the foreign direct liability cases, which tend to have what is referred to as a public interest nature, in the sense that they often represent attempts to pursue objectives that go beyond obtaining compensation

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335 Compare, for instance: Engelhard 2009, pp. 19-21; Kortmann 2009, pp. 11-14.

336 Kortmann 2009, pp. 12-13.

337 European Commission, 'Green Paper on Damages Actions for Breach of the EC Antitrust Rules', COM(2005) 672 final (19 December 2005).

338 European Commission, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules', COM(2008) 165 final (2 April 2008).

339 For more detail, see, for instance: Freudenthal 2009; Kortmann 2009, pp. 11-14.

340 European Commission, 'Green Paper on Consumer Collective Redress', COM(2008) 794 final (27 November 2008).

for the damage suffered by the particular host country victims involved in the dispute. At the same time, many of these cases revolve around the enforcement by home country courts of international or domestic (home or host country) conduct-regulating rules where such rules are for some reason not adequately implemented and/or enforced locally.[341] Furthermore, it is conceivable that the EU-wide developments described here will also impact the feasibility of future foreign direct liability cases in a more direct manner, for instance if they were to lead to a further strengthening of collective redress mechanisms in Europe not only in the field of consumer law, but across the board.[342]

The role of Article 6 ECHR

Finally, it is important to point out the role that the right to a fair trial, that is protected by Article 6 of the European Convention on Human Rights (ECHR), may potentially play in this context, as it involves obligations on the ECHR Member States to ensure that civil trials within their territories are accessible, fair and speedy.[343] It obliges them for instance to ensure that (civil) litigants have a right of access to their courts that is both effective and practical. The European Court of Human Rights has stated in this respect:

> "*Article 6 §1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 §1 as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing*".[344]

Article 6 may act as a minimum threshold when it comes to the length (duration) of civil proceedings and when it comes to the costs involved. It has for instance been interpreted by the European Court of Human Rights to encompass an obligation, under certain circumstances, to enable plaintiffs in civil cases to acquire legal aid.[345] Furthermore, it also imposes duties on the ECHR Member States to make sure for instance that their domestic

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341 See further sub-section 3.2.3.

342 Note that the European Commission in 2011 held a consultation on collective redress, the main purpose of which was "[...] *to identify common legal principles on collective redress*" in order to "[...] *help examine how such common principles could fit into the EU legal system and into the legal orders of the 27 EU Member States*". See, for the latest state of affairs, the European Commission website: <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#cr>.

343 See in more detail on the impact of Article 6 ECHR on the Dutch civil procedure: Smits 2008. See also, with a focus on its role in foreign direct liability cases: Enneking 2009, pp. 919-920.

344 *Golder v. United Kingdom*, 18 *Eur. Ct. H.R.* (Ser. A) 1975.

345 See, for instance: *Airey v. Ireland*, 32 *Eur. Ct. H.R.* (Ser. A) 1979, p. 15, where it is held, *inter alia*, that "[a]*rticle 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case*".

rules on evidence do not in practice violate the equality of arms principle that ensues from Article 6.[346] It should be noted, however, that the Member States are left with a margin of appreciation as to how to achieve these results; for example, not all limitations to access to court or equality of arms are automatically incompatible with the Convention.[347]

It seems that Article 6 ECHR may potentially provide an important minimum guarantee to host country plaintiffs in foreign direct liability cases who find that certain features of the systems of civil procedure in the European home countries where they bring their claims seriously hamper their right to a fair trial. This may be the case for instance where excessively high litigation costs, the unavailability of affordable legal assistance or legal aid, or the evidentiary rules of the forum make it practically impossible for them to pursue their claims. These factors gain significance in light of the inequality of arms that typically exists between the host country plaintiffs in these cases and their corporate opponents with respect to both financial scope and access to information. Illustrative of the role that Article 6 ECHR may play in this respect is a UK defamation case between a multinational corporation and NGO campaigners, in which the European Court of Human Rights held that the state had a responsibility to ensure equality of arms between the parties to the dispute, and that in light of the disparity between the respective levels of legal assistance enjoyed by the parties to this particular case, the state's refusal to grant legal aid to the NGO campaigners imposed an unfair restriction on their ability to present an effective defence.[348]

Interesting questions arise where it comes to the application of Article 6 ECHR in transnational civil litigation. The question may be raised, for instance, as to what extent Article 6 of the European Convention on Human Rights applies also to foreign direct liability claims brought before European domestic courts, as these claims are typically brought by non-European plaintiffs and often pertain to alleged norm violations that have taken place in non-European host countries. Generally speaking, the ECHR's territorial scope is limited. It obliges its Member States to secure the human rights and freedoms as defined in the Convention to everyone within their jurisdiction, which means that the protective scope of the ECHR is limited in principle to persons inside the territory of its Member States. Furthermore, the obligation for ECHR Member States to provide remedies for violations of the ECHR's norms by private actors is also territorially limited, in the sense that it does not, in principle, extend to violations that have taken place

346 Compare *Dombo Beheer v. The Netherlands*, [1993] *E.C.H.R.* 49 14448/88 (27 October 1993), where it is held, *inter alia*: "[...] *as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent*" (par. 33).

347 Compare Enneking 2009, pp. 919-920.

348 *Steel and Morris v. United Kingdom*, European Court of Human Rights 15 February 2005, case no. 68416/01, par. 59-71.

outside the Member States' territories. Thus, the Convention does not, in principle, apply extraterritorially in private matters.[349]

This is different, however, when it comes to the protection offered by Article 6 ECHR, which confers procedural rights that are not just limited to claims pertaining to alleged violations of substantive ECHR rights and freedoms, but extend in principle over all types of civil (and criminal) claims brought before the ECHR Member State courts. According to the European Court of Human Rights, Article 6 in principle applies to any civil claim that is brought before a court in one of the ECHR Member States if the domestic law of the forum recognizes a right to bring an action and if the claim falls within the ambit of Article 6.[350] This means that at least in foreign direct liability claims brought on the basis of home country tort law against European parent companies of multinational corporations, these requirements for the applicability of Article 6 ECHR may be considered to have been met.[351]

The situation with respect to foreign direct liability claims that are brought before European domestic courts on the basis of host country tort law seems less clear, due to the requirement for applicability of Article 6 ECHR that *domestic* law recognizes a right to bring an action. After all, such claims do not arise under the domestic law of the forum (*i.e.*, home country tort law), although certain provisions of home country tort law may be applicable to them on the basis of private international law provisions on rules of safety and conduct, overriding mandatory rules or public policy. On the other hand, if the domestic law of the forum is interpreted as including also the rules of private international law applicable in the forum state, foreign direct liability claims brought on the basis of host country tort law would also fall within Article 6 ECHR's protective ambit.[352] At the same time, it seems illogical that claims that are determined by Dutch courts on the basis of foreign tort law should be treated differently from claims determined on the basis of Dutch tort law in this respect, as Article 6 ECHR in essence deals with procedural issues, which tend to fall outside the scope of choice-of-law rules and are governed in principle by Dutch law as the law of the forum anyway. All in all, it seems that future case law by the European Court of Human Rights will have to create more clarity with respect to the

349 See, for instance: Van Hoek 2008, pp. 156-158. See more elaborately on the extraterritorial application of human rights treaties: Milanovic 2011.

350 *Markovic v. Italy*, 44 *Eur. H.R. Rep.* 1045 (2007). The court held in this case: "*If civil proceedings are brought in the domestic courts, the State is required by Art. 1 of the Convention to secure in those proceedings respect for the rights protected by Art. 6.*". With respect to the question whether and to what extent Article 6 ECHR would apply in transnational civil proceedings, it held: "*Everything depends on the rights which may be claimed under the law of the State concerned. If the domestic law recognises a right to bring an action and if the right claimed is one which prima facie possesses the characteristics required by Art. 6 of the Convention, the Court sees no reason why such domestic proceedings should not be subjected to the same level of scrutiny as any other proceedings brought at the national level*" (p. 1066). See, more elaborately: Van Hoek 2008, pp. 156-162.

351 See also Enneking 2009, pp. 920-921.

352 See, in more detail: Van Hoek 2008, pp. 156-162.

reach of Article 6 ECHR's protection in transnational civil cases brought before European domestic courts.

4.6 Concluding remarks

In this chapter, the basic legal framework that determines the feasibility of foreign direct liability cases has been set out. The point of departure here has been relevant legal, procedural and practical circumstances in the US. These circumstances have been used as a basis for further reflection on corresponding legal, procedural and practical circumstances in European legal systems. The legal framework rendered here is by no means exhaustive. It has covered, however, the legal status quo with respect to what may be considered to be the four main factors determining the feasibility of these cases, namely: jurisdiction; applicable law; substantive legal basis; and procedural and practical circumstances.

Jurisdiction plays a major role as it determines the circumstances under which home country courts will agree to hear foreign direct liability cases brought before them. Under EU law, domestic courts in the EU Member States will in principle always have jurisdiction over foreign direct liability claims brought against EU-based corporate defendants. Where home country courts have jurisdiction to hear foreign direct liability cases brought before them, home country choice-of-law rules will in principle determine whether those cases are to be decided on the basis of host country or home country tort law. With respect to this factor, EU law determines that the applicable system of tort law will in principle be that of the host country. In cases pertaining to environmental damage the host country plaintiffs may under certain circumstances have a choice between the law of the host country and that of the home country. Questions of applicable law may also arise where the host country plaintiffs appeal to alleged violations of norms of public international law by the corporate defendants; the circumstances under which such norms may affect the private interrelationships between the host country victims and the corporate defendants will vary from legal system to legal system.

The substantive provisions on tortious liability of the applicable domestic systems of tort law will determine the way in which the claims are framed. Outside the US, the main legal basis for foreign direct liability claims is formed by general principles of tort law and the tort of negligence in particular. Theoretically speaking, there may be some alternative legal bases upon which foreign direct liability claims may be brought, but their use is limited in practice. Finally, procedural and practical circumstances in the home countries where these claims are brought have a substantial impact on the extent to which host country plaintiffs are practically enabled to pursue their claims. These factors also tend to vary from legal system to legal system, although it is possible that some degree of harmonization will take place in the EU Member States in the future. The European

Convention on Human Rights may provide certain minimum guarantees for a fair trial in foreign direct liability claims brought before domestic courts in Europe.

In the next chapter, the four factors set out in this chapter will be further explored from the perspective of the Dutch legal system, which means that the focus will be on foreign direct liability cases brought before civil courts in the Netherlands and on the basis of Dutch tort law.

5 The feasibility of Dutch foreign direct liability cases

5.1 Jurisdiction

5.1.1 Dutch courts as a venue for foreign direct liability claims: some preliminary remarks

The feasibility of any particular foreign direct liability claim is dependent on the way that the particular circumstances and set-up of the claim interact with, on the one hand, the relevant rules, requirements and circumstances that apply in the Western society home country where that claim is brought and, on the other hand, the relevant provisions of the applicable rules of tort law. As is clear from what has been discussed in the previous chapter, the four main factors determining the feasibility of foreign direct liability cases (jurisdiction, applicable law, substantive legal basis, procedural and practical circumstances) will work out differently in each legal system. The way that these factors work out in a particular system is likely to be a major consideration for host country plaintiffs and their legal counsel in prospective foreign direct liability cases, who will carefully weigh up the advantages and disadvantages associated with bringing this type of tort-based transnational civil litigation in any of the legal systems involved in order to determine the most promising venue for bringing their claims and the most promising way of framing those claims.

As has already been discussed, one of the main reasons for bringing foreign direct liability claims before Western society home country courts in the first place is the fact that for various reasons the host country plaintiffs are unable to get access to adequate remedies in the host countries where the activities of the multinational corporations involved have caused harm to people- and planet-related interests. At the same time, in some cases the host country plaintiffs may have a choice between various Western society courts, which means that the comparative advantages and disadvantages of bringing foreign direct liability claims before courts in each of those countries will also have to be considered. Examples are the ATS-based Shell claims that were brought before US courts rather than before courts in the UK and/or the Netherlands, where the Shell group's top holding was (and still is) located.[1] It is likely that the US was considered to be the more attractive venue for these claims due to the availability of the ATS as a legal basis and due to the plaintiff-friendly system of civil litigation there. In fact, the Second Circuit Court of Appeals refused to dismiss these cases on the basis of *forum non conveniens* in favour of an English or Dutch forum, taking into account, *inter alia*, that trial in the US would be likely

1 See further sub-section 3.2.2.

to be less expensive and burdensome for the plaintiffs.[2] Another example is the Trafigura case, in which a large number of Ivorians sought to pursue foreign direct liability claims against the Dutch company Trafigura Beheer BV before the High Court in London instead of before the Dutch courts.[3] Reasons for this may have been that the English provisions on collective actions would probably be more advantageous to the host country plaintiffs than the Dutch ones, and/or the fact that the host country plaintiffs were represented there (possibly on the basis of a conditional fee agreement) by a law firm with a track record in bringing foreign direct liability claims and similar transnational civil claims before English courts.

Still, the Dutch Shell cases, which are currently pending before the The Hague district court, demonstrate that under certain circumstances the Netherlands may be an attractive forum for the pursuit of foreign direct liability claims. In view of these recent developments and in line with the focus of this study, the situation in the Netherlands as regards the feasibility of bringing foreign direct liability cases before Dutch courts and possibly on the basis of Dutch tort law will be further elaborated here. It should be noted at the outset, however, that due to the scarcity so far of foreign direct liability cases initiated and litigated there (the Dutch Shell cases are the first and so far the only foreign direct liability claims to have been brought before Dutch courts) much remains uncertain as regards the actual feasibility of such cases. Because of the growing academic and socio-political attention being paid to this topic in the Netherlands, however, a development that is obviously also connected with the advent of the socio-legal trend towards foreign direct liability cases there, a substantial and growing body of knowledge is developing on the matter.[4] Moreover, this body of knowledge is likely to be considerably expanded by and in relation to the outcomes of the Dutch Shell cases.

It should be noted here that this section is not meant to provide an exhaustive and overly detailed treatment of all possible legal avenues in this respect, but rather to provide some insights into the circumstances that may determine the feasibility of foreign direct liability cases brought before Dutch courts, as well as a basis for further discussion (and, perhaps, in the future, further study where this would prove relevant). Furthermore, especially where private international law-related factors are involved (jurisdiction and applicable law), the feasibility of foreign direct liability cases is largely determined by the EU-based regulations that have been discussed in the previous chapter (the Brussels I and Rome II Regulations, respectively); which means that these factors will not be dealt with at length here. More generally speaking as well, a certain measure of restraint seems to be called for, considering the fact that many of the issues to be discussed here are currently

2 See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (C.A.2 (N.Y.) 2000), pp. 106-108, in particular footnote 15 with respect to dismissal in favour of trial in the Netherlands.

3 See further sub-section 3.2.2.

4 See, for instance: Enneking, Giesen *et al.* 2011; Van Der Heijden (forthcoming) 2011; DMEAFA Report (Castermans/Van Der Weide) 2009; Van Dam 2008; Enneking 2007.

sub judice and are thus likely to be decided in the near future by the Dutch courts dealing with the Dutch Shell cases.

5.1.2 Foreign direct liability claims against EU-based defendants

As is clear from what has been discussed before, Dutch courts, under the Brussels I Regulation's regime on international civil jurisdiction, will in principle have jurisdiction over foreign direct liability claims brought before them against corporate defendants that are domiciled in the Netherlands (*forum rei*), in the sense that they have their statutory seat, their central administration, or their principal place of business there. It is important to note that where Dutch courts have jurisdiction over a particular foreign direct liability claim on the basis of the Brussels I regime, the regime's mandatory and exhaustive nature does not leave any room for them to subsequently refuse to exercise such jurisdiction. Unlike US courts, Dutch courts are not at liberty to dismiss cases that fall within the Brussels I regime's ambit on prudential grounds (requiring judicial discretion and/or deference in courts' exercise of jurisdiction over particular cases), not even where the claim involved has only very few connections with the Dutch legal order in practice.[5]

Under certain circumstances, Dutch courts would also be competent to hear foreign direct liability claims against corporate defendants that are domiciled not in the Netherlands but in another EU Member State. Examples are situations where the harmful event giving rise to the claim occurred or may occur in the Netherlands, where the claim is based on an act that has given rise to criminal proceedings in the Netherlands, or where the claim arises out of the operations of a Netherlands-based branch, agency or other establishment of the corporate defendants involved.[6] Another example is the situation in which the claims against such an EU-based defendant are so closely to similar claims against a Netherlands-based defendant that it is expedient to have those claims heard and determined together by a Dutch court.[7] Furthermore, under the Brussels I regime Dutch courts may also have jurisdiction over foreign direct liability claims where those claims are brought before them on the basis of a forum choice agreement between the parties involved in the dispute, provided one of the parties is domiciled in an EU Member State. Closely related is the situation in which the foreign defendants implicitly consent to the

5 See further sub-section 4.2.2. See also: Enneking, Giesen *et al.* 2011, p. 552; DMEAFA Report (Castermans/Van Der Weide) 2009, pp. 44-45.

6 Articles 5(3) to 5(5) Brussels I Regulation. Note, however, that whereas the possibility of bringing a foreign direct liability claim against a parent company from another EU Member State before Dutch courts in connection with parallel criminal proceedings in the Netherlands may seem interesting in theory, it is not likely to be very relevant in practice. The reason for this is that in effect the civil claim would have to be brought before the criminal court dealing with the case, which will refuse to consider the merits of a complicated claim. See, for example: Strikwerda 2005, p. 263, as well as the Dutch Residual Jurisdiction Report (Laforce-Koppenol/Vermeulen), p. 13.

7 Article 6(1) Brussels I Regulation.

host country plaintiffs' choice for a Dutch forum by entering an appearance, except when this is merely done to contest such jurisdiction.[8] A lack of clarity remains with respect to the question whether for such an implicit choice of forum should also be honoured where none of the parties to the dispute is domiciled in an EU Member State.[9] It seems, however, that if neither of the parties is domiciled in an EU Member State, the question whether the court seized of the matter has jurisdiction on the basis of forum choice falls outside the scope of the Brussels I Regulation and will thus have to be determined by the Dutch domestic rules in international jurisdiction.[10]

In view of the differences in procedural and practical circumstances that exist in different EU Member States, also due to the absence of harmonization at the EU level on most subject matter areas in this respect, this potential choice for an alternative forum may in fact be very useful.[11] Of course, these options are only relevant where the prospects for a particular foreign direct liability case would be greatly improved if the case were to be brought in the Netherlands rather than in the alternative EU Member State forum; otherwise, the claims may just as well be brought in the latter. Whether host country plaintiffs in a particular foreign direct liability case would in fact make use of the possibility of bringing their case before a Dutch forum as an alternative to a forum in another EU Member State will in the end depend on the comparative advantages involved, also in light of the circumstances of the case. In the Trafigura case, for instance, foreign direct liability claims against the Dutch petroleum trader Trafigura Beheer BV were brought not before the Dutch courts but before the High Court in London, where Trafigura has its principal place of business.[12] Circumstances rendering the UK forum more attractive when compared with the Dutch one may presumably have included the fact that various similar claims had previously been brought there including for instance the *Cape* case and the foreign direct liability claims against Rio Tinto and Thor Chemical Holdings, the accompanying legal expertise in dealing with such claims on the part of the plaintiffs' UK-based lawyers, the possibilities for bringing group actions in the UK, etc.[13]

5.1.3 Foreign direct liability claims against non-EU-based defendants

The circumstances under which Dutch courts may exercise jurisdiction over foreign direct liability claims that are brought before them against non-EU-based corporate defendants

8 Articles 23 and 24 Brussels I Regulation. See, in more detail: Strikwerda 2005, pp. 273-276. See also sub-section 4.2.2.
9 Strikwerda 2005, p. 275.
10 See *infra* sub-section 5.1.3.
11 Similarly, for instance: Wouters & Chanet 2008, p 296. See also further section 4.5.
12 See further sub-section 3.2.2.
13 See, for a more detailed discussion of procedural and practical circumstances determining the feasibility of Dutch foreign direct liability cases, section 5.4 and sub-section 6.4.1.

(in the sense of not domiciled in an EU Member State) are largely determined by the domestic Dutch rules on civil procedure.[14] In principle, the Dutch domestic provisions on international civil jurisdiction are to be interpreted in accordance with the application and interpretation by the European Court of Justice of the parallel provisions in the Brussels I Regulation; Dutch courts may depart from this principle, however, where the particular aims of the Dutch provisions differ from those of the Brussels I regime.[15]

Under the Dutch domestic rules on international civil jurisdiction, Dutch courts will in principle have jurisdiction over foreign direct liability claims only if the defendant is domiciled or has its permanent address/habitual residence in the Netherlands (*forum rei*); according to Dutch law, a legal person is domiciled at the place where it has its statutory seat.[16] There are a number of additional grounds for international jurisdiction over transnational civil cases, however, on the basis of which Dutch courts may assert jurisdiction over civil claims against foreign (non-EU-based) defendants. Accordingly, like under the Brussels I regime, Dutch courts may under the rules of Dutch procedural law in a limited number of cases exercise jurisdiction over foreign direct liability claims against foreign (here in the sense of non-EU-based) corporate defendants such as host country subsidiaries.[17] Examples include claims where the matters in dispute pertain to the activities of Dutch offices or branches of those foreign defendants,[18] or where the harmful event giving rise to the claim can be said to have taken place in the Netherlands.[19]

Furthermore, Dutch courts may have jurisdiction over foreign direct liability claims against non-EU-based defendants where those claims are so closely connected with claims in the same case against other defendants over which the courts do have jurisdiction, that the joint adjudication of those claims is justified for efficiency reasons.[20] It was this particular provision on which the The Hague district court based its assumption of jurisdiction over the foreign direct liability claims brought against the Nigerian-based subsidiary of Anglo/Dutch Royal Dutch Shell in the Dutch Shell cases.[21] It should be noted

14 Article 4(1) Brussels I Regulation.

15 See, with further references: Dutch Residual Jurisdiction Report (Laforce-Koppenol/Vermeulen), p. 2.

16 Article 2 Dutch Code of Civil Procedure and Article 1:10(2) Dutch Civil Code. See also: Strikwerda 2005, p. 230.

17 See also Enneking, Giesen *et al.*, pp. 552-553; DMEAFA Report (Castermans/Van Der Weide) 2009, pp. 45-47.

18 Article 2 Dutch Code of Civil Procedure and Article 1:14 Dutch Civil Code. See also: Dutch Residual Jurisdiction Report (Laforce-Koppenol/Vermeulen), pp. 9, 13-14; Strikwerda 2005, p. 230.

19 Article 6(e) Dutch Code of Civil Procedure. See also: Dutch Residual Jurisdiction Report (Laforce-Koppenol/Vermeulen), p. 12; Strikwerda 2005, p. 232.

20 Article 7(1) Dutch Code of Civil Procedure. See also, for instance: Dutch Residual Jurisdiction Report (Laforce-Koppenol/Vermeulen), p. 22.

21 Rechtbank 's-Gravenhage 30 December 2009, LJN BK8616 (*Milieudefensie et al./Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*) (concerning oil spills near the Nigerian village of Oruma); Rechtbank 's-Gravenhage 24 February 2010, LJN BM1469 (*Milieudefensie et al./Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*,) (concerning oil spills near the Nigerian village of Ikot Ada Udo); Rechtbank 's-Gravenhage 24 February 2010, LJN BM1470 (*Milieudefensie et al./ Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*,) (concerning oil spills near the Nigerian village of Goi). See further sub-section 3.2.2

that in reaching its decision the court passed over the case law of the European Court of Justice on Brussel I's parallel provision on connected claims against multiple defendants (article 6(1)), considering that it was not directly applicable to the Dutch domestic provision on this matter.[22]

In addition, the Dutch courts may have jurisdiction over foreign direct liability claims against non-EU-based defendants on the basis of a forum choice agreement between the parties to the dispute, even where the dispute has only limited connections with the Dutch legal order; there does need to be a 'reasonable interest' in bringing a particular claim before the Dutch courts, however.[23] Similarly, they may assume jurisdiction over foreign direct liability claims where (tacit) choice of forum is implied by the fact that the non-EU-based defendants involved enter an appearance, unless they do so merely to object to the court's exercise of jurisdiction.[24] Here again, the requirement of a 'reasonable interest' applies.[25] It should be noted, however, that a lack of reasonable interest has remained only a theoretical possibility so far, as there are no reported cases of a refusal of jurisdiction by Dutch courts over a transnational civil dispute on this basis.[26]

Generally speaking, the Dutch domestic system of international civil jurisdiction, like the Brussels I regime, does not recognize a doctrine of *forum non conveniens* on the basis of which courts have a discretion to refuse to exercise jurisdiction over claims that have only limited connections with the legal order of the forum state.[27] The Dutch system does contain a *forum necessitatis* exception, however, on the basis of which Dutch courts may assert jurisdiction over foreign direct liability claims that would normally fall outside their jurisdiction if effective opportunities to bring those proceedings in foreign fora are absent.[28] Under certain circumstances, this exception provides a basis for the exercise of international civil jurisdiction over transnational civil claims that cannot feasibly or fairly be tried elsewhere.[29]

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22 See, for instance: Rechtbank 's-Gravenhage 30 December 2009, LJN BK8616, at 3.7.

23 Article 8(1) Dutch Code of Civil Procedure. See, in more detail: Strikwerda 2005, pp. 234-236.

24 Note that the Dutch courts have under exceptional circumstances passed over such a contestation of jurisdiction and maintained jurisdiction under art. 24 Brussels I Regulation: see HR 7 mei 2010, NJ 2010, 556.

25 Article 9(a) Dutch Code of Civil Procedure. For more detail, see Strikwerda 2005, pp. 236-237.

26 See the Dutch Residual Jurisdiction Report (Laforce-Koppenol/Vermeulen), p. 9.

27 Strikwerda 2005, pp. 244-245.

28 Article 9(b) and 9(c) Dutch Code of Civil Procedure. For further detail, see, for instance: Dutch Residual Jurisdiction Report (Laforce-Koppenol/Vermeulen), pp. 23-24; Strikwerda 2005, pp. 245-246. See also: Enneking, Giesen *et al.*, p. 553.

29 A well-known example of the application of this exception was the assumption of jurisdiction by a Dutch court over claims brought against Kuwait Airways Corporation by Iraqi pilots, who asserted that they would not receive a fair trial if forced to bring their claims before the courts in Kuwait: Kantongerecht Amsterdam 5 January 1996, NIPR 1996, 145. Note, however, that in subsequent cases the court refused to assume jurisdiction over similar claims, considering that those were insufficiently connected to the Dutch legal order; see, for instance, Kantongerecht Amsterdam 27 April 2000, NIPR 2000, 315. See also Ibili 2007, pp. 128-130.

The Dutch *forum necessitatis* provision is closely connected with the access to justice/access to court requirement that ensues from Article 6 of the European Convention on Human Rights. On the one hand, it allows Dutch courts to exercise jurisdiction over foreign direct liability claims if bringing those cases outside the Netherlands is altogether impossible, either legally, for instance where no foreign court exists that has jurisdiction to hear the claims, or factually, for instance due to natural disasters or acts of war locally.[30] On the other hand, it allows them to assume jurisdiction in foreign direct liability cases that have sufficient connections with the Dutch legal order if it would be unacceptable to require the host country plaintiffs to have their claims adjudicated by a foreign court, for instance where they cannot expect to receive a fair trial there due to discriminatory legal or societal rules and practices.[31] This second application of the Dutch *forum necessitatis* rule needs to be interpreted restrictively, however; financial impediments alone, for example, are not sufficient to warrant an exercise of jurisdiction on this basis.[32]

Finally, Dutch courts may have to stay foreign direct liability cases if the same claims are simultaneously litigated in a foreign court, for instance in the host country, until a judgment has been rendered in the latter. Where the foreign proceedings result in a judgment that is recognized (and possibly enforceable) in the Netherlands on the same matters as those that are raised in the claims brought in the Netherlands, the court seized of them will have to deny jurisdiction altogether.[33] Without such a final judgment, the decision whether or not to stay proceedings on this basis is a discretionary decision and it has been noted in this respect that:

> "*If the foreign victims of human rights violations have a reasonable interest in having their cases heard before the Dutch courts as well, for example because of unacceptable delays in the foreign proceedings, the Dutch court may decide to hear the case after all*".[34]

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30 Article 9(b) Dutch Code of Civil Procedure. See, for instance, Hof 's-Gravenhage 12 January 2011, LJN BP9606, in which the court of appeals considered that jurisdiction should have been assumed on the basis of art. 9(b) in a case in which the petitioner in an international family matter did not have an alternative forum for lack of information of the whereabouts of his child or the mother of his child (par. 10). See also Hof 's-Gravenhage 21 December 2005, LJN AU9650, where the court of appeals considered that jurisdiction should be assumed on the basis of art. 9(b) over a divorce case, as Maltese laws prevented the alternative court in Malta from granting a divorce under any circumstances (par. 10).

31 Article 9(c) Dutch Code of Civil Procedure. See, for instance, Rechtbank 's-Gravenhage 16 February 2011, LJN BP5387, in which an appeal was made to this provision by a Turkish air travel company with respect to a dispute with the Cameroon government; the The Hague district court refused to exercise jurisdiction on the basis of article 9(c), considering that the case had no connection to the Dutch legal order (par. 3.10). See also Hof 's-Gravenhage 30 November 2010, LJN BO6529, where the court of appeals approved an assumption of jurisdiction on the basis of art. 9(c), considering that at the time the claim was initiated in the first instance, the Dutch plaintiff in the dispute could not have been expected to turn to the courts in Iraq (par. 4.6-4.9).

32 Compare: Kamerstukken II 1999/2000, 26 855, nr. 3, pp. 41-43. For a more detailed discussion, see Ibili 2007, pp. 107-135. See also, for instance: Rechtbank Zutphen 16 January 2008, LJN BC9336, in which an appeal to art. 9(c) on the basis of an assertion that the litigation costs in the alternative forum (Jersey) would be prohibitively high, was turned down (par. 4.10).

33 Article 12 Dutch Code of Civil Procedure. See also: Strikwerda 2005, pp. 246-247.

34 DMEAFA Report (Castermans/Van Der Weide) 2009, p. 47.

Clearly, this may be an important factor in foreign direct liability cases, as legal systems in developing host countries will often not be able to deal with the complex issues involved adequately and in a timely fashion.[35] As discussed, this lis pendens issue was raised in one of the Dutch Shell cases but the The Hague district court refused to grant a stay on this basis. It held that what was known of the parties, subject matter and proceedings in the ongoing case in Nigeria did not lead it to assume that the case was sufficiently similar to that brought in the Netherlands as to require it to await any decision.[36]

All in all, Dutch courts may under the Dutch domestic rules on international civil jurisdiction under some circumstances also exercise jurisdiction over foreign direct liability claims aimed at non-EU based foreign corporate defendants. This makes it possible for example to bring foreign direct liability claims against multinational corporations' parent companies that are domiciled in non-EU Western societies like the US before Dutch courts where the matters in dispute pertain to Dutch offices or branches of those non-EU-based parent companies, or where the harmful events giving rise to those claims can somehow be said to have taken place in the Netherlands. As is evidenced by the Dutch Shell cases, the Dutch domestic rules of international civil jurisdiction also make it possible for example to bring claims against multinational corporations' host country subsidiaries before Dutch courts where those claims can be said to be so closely connected with claims in the same case against other defendants over which the Dutch courts do have jurisdiction that the joint adjudication of those claims is justified for efficiency reasons.[37] In theory, this latter construction may potentially open the door to abuse of procedural law, for instance where a futile foreign direct liability claim against a Netherlands-based parent company is used to make Dutch courts also assume jurisdiction over a connected and possibly more feasible claim against a host country subsidiary.[38] In practice, however, abuse of procedural law will only be accepted under exceptional circumstances. This was confirmed also by the The Hague district court in the Dutch Shell cases, which rejected Shell's arguments to this effect holding, *inter alia*, that plaintiffs' claims against Anglo/Dutch parent company Royal Dutch Shell could not be said to be absolutely unsound and/or unfeasible.[39]

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35 See further sub-section 3.2.2.

36 See Rechtbank 's-Gravenhage 1 December 2010, LJN BU 3512 (*Akpan et al./Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*).

37 See, for instance: DMEAFA Report (Castermans/Van Der Weide), pp. 46-47, which notes that whether a sufficient connection exists between the claims to warrant their joint treatment for reasons of efficiency, depends "[...] *first on the facts of the case and, second, on whether both claims serve the same purpose. The parent/subsidiary relationship, the identical nature of the claims (compensation) and the common basis (involvement in violation of fundamental, internationally recognised rights) are relevant factors in this connection*".

38 Similarly: Enneking 2010; DMEAFA Report (Castermans/Van Der Weide), p. 47.

39 Rechtbank 's-Gravenhage 30 December 2009, LJN BK8616 (*Milieudefensie et al./Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*) (concerning oil spills near the Nigerian village of Oruma); Rechtbank 's-Gravenhage 24 February 2010, LJN BM1469 (*Milieudefensie et al./Royal Dutch Shell*

Furthermore, under both the Brussels I regime and the Dutch domestic rules on international civil jurisdiction, Dutch courts have jurisdiction over foreign direct liability claims that are brought before them on the basis of an express forum choice agreement between the host country plaintiffs and the defendant multinational corporations. Under the Brussels I regime, one of the parties to the foreign direct liability claim needs to be domiciled in an EU Member State for the Dutch courts to be able to assume jurisdiction on this basis. Arguably, it seems possible in theory that jurisdiction could thus be had over foreign direct liability claims even against non-EU-based defendants where the case is brought by an EU-based NGO acting in concert with or on behalf of the host country plaintiffs, provided of course that the defendants involved (explicitly) consent to the fact that the case is litigated in the Netherlands. Under the Dutch domestic rules on international civil jurisdiction, there needs to be a 'reasonable interest' in bringing the foreign direct liability claim before the Dutch courts. How this limitation should be interpreted is unclear; what is clear, however, is that it does not mean that the parties to the foreign direct liability case or their claims should somehow be connected with the Dutch legal order.[40] Consequently, it may be possible for host country plaintiffs to bring their foreign direct liability claims before Dutch courts on the basis of choice of forum agreements with the corporate defendants involved, even where those defendants are, like the plaintiffs, non-EU-based, such as multinational corporations' parent companies that are domiciled in non-EU Western societies like the US or multinational corporations' host country subsidiaries.

The question may be raised, however, how likely explicit forum choice agreements are in this context. In fact, as has already been mentioned and as is evidenced by almost all of the foreign direct liability cases discussed here, corporate defendants in foreign direct liability cases have tended to fiercely oppose the jurisdiction of the home country fora before which host country plaintiffs initiate their claims. After all, if the reason for the host country plaintiffs to bring their claims before any particular home country forum is that it is likely to be more favourable than any alternative host country (or, where applicable, home country) forum, it is unlikely that the corporate defendants involved will agree with the plaintiffs' choice of forum. Instead, the multinational corporations involved in foreign direct liability cases will generally seek, where possible, to avoid jurisdiction by Western society home country courts over such transnational tort-based civil claims against them altogether. Where necessary, they are likely to seek to have those cases referred to host country courts (for instance on the basis of *forum non conveniens*) as the latter may hold certain comparative advantages for them when compared with the former, mirroring the

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Plc. and Shell Petroleum Development Company of Nigeria Ltd.) (concerning oil spills near the Nigerian village of Ikot Ada Udo); Rechtbank 's-Gravenhage 24 February 2010, LJN BM1470 (*Milieudefensie et al./ Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*) (concerning oil spills near the Nigerian village of Goi). See further sub-section 3.2.2.

40 Compare Strikwerda 2005, pp. 234-235.

host country plaintiffs' reasons for bringing those claims before home country fora. As discussed, these may include, for instance, circumstances relating to access to justice, levels of damages awards and/or enforceability of judgments.[41] For these same reasons, it seems unlikely that the corporate defendants involved in these cases would become subject to the Dutch courts' jurisdiction on the basis of an implicit choice of forum.

5.2 Applicable law

5.2.1 'Horizontal' conflicts of domestic systems of tort law

Applicable law under the Rome II Regulation

As a general rule, the applicable law in foreign direct liability cases that are brought before Dutch courts and that fall under the regime of the Rome II Regulation (which has been applied in EU Member State courts since 1 January 2009 and pertains to events giving rise to damages that have occurred since that date) will not be Dutch law but rather the law of the host country as the country where the damage has typically occurred in these cases (the *lex loci damni*). This rule also applies where the tort in question is constructed as a transboundary tort (which, as discussed, is quite common in non-ATS-based foreign direct liability cases), in the sense that the event giving rise to the damage arising in the host county is said to have taken place in the Netherlands as the country where the defendant parent companies through their actions or omissions have breached a duty of care vis-à-vis the host country plaintiffs, resulting in their harm.

The law that is applicable to a foreign direct liability claim on the basis of the Rome II Regulation's rules does not only govern the basis and the extent of liability, but also other related matters. These include the grounds for exemption from liability, the measures that a court may take to prevent or terminate injury or damage or to ensure the provision of compensation, liability for the acts of another person, rules of prescription and limitation, and the existence, the nature and the assessment of damage or the remedy claimed. In addition, where the law that is applicable to a claim under the Rome II Regulation contains rules with respect to the burden of proof or presumptions of law, those will also be applicable.[42]

There are a limited number of exceptions to the Rome II Regulation's general rule of applicability of the *lex loci damni*, on the basis of which foreign direct liability claims brought before Dutch courts may under some circumstances be decided not on the basis of host country law but on the basis of Dutch tort law. First of all, the Rome II Regulation leaves open the possibility that the parties to a foreign direct liability case that is brought

41 See *supra* sub-section 4.5.
42 See further section 4.3.3.

before a Dutch court jointly designate the law that is to be applied to the claims on the basis of an agreement.[43] As with the Brussels I regime, however, the chances that parties to a foreign direct liability case will agree on the law that is to be applied to the case seem slim, especially where circumstances such as the level of protection of the victims and the level of damages will vary widely according to the law that is applied to the case, as will often be the case in this context.[44]

Nonetheless, there may be reasons on the basis of which the applicability of Dutch law to the case might be in the interest of both parties. One such reason may be the fact that the application of foreign law is not reviewable before the Dutch Supreme Court, meaning that there would be one less instance for review of substantive matters.[45] At the same time, as is arguably also evidenced by the many settlements in foreign direct liability cases that have so far been brought outside the Netherlands, to the corporate defendants involved the application of foreign law by Dutch courts may carry with it the additional benefit that any verdict in favour of the plaintiffs would not create binding and/or useful precedent.[46]

Furthermore, on the basis of the Regulation's general escape clause, for example, it would be possible to apply Dutch tort law to a claim if it would be clear from all the circumstances of a foreign direct liability case that the tort in question is more closely connected with the Netherlands than with the host country involved.[47] If and when such a closer connection might be said to exist in foreign direct liability cases is unclear, however.[48] The Regulation's example in this respect of a pre-existing contractual relationship between the parties seems unlikely to arise in foreign direct liability cases.[49] At the same time, it seems that the scope of this general escape clause does not go so far as to warrant a US-style policy approach to choice of law, on the basis of which Dutch tort law could for instance be applied to a foreign direct liability case where this could be justified by possible policies of deterrence that might be said to underlie Dutch tort law, or with a view to the consequences of applying Dutch tort law instead of the law of the host country.[50] In line with the Regulation's general aim of providing for certainty as to the applicable law and predictability concerning the outcome of litigation, and the apparent assumption in this regard by its drafters that these aims will be best served by a functional, seemingly

43 Article 14(1) Rome II Regulation. See, in more detail: Symeonides 2008b, pp. 215-216.
44 See also *supra* sub-section 5.1.3.
45 Article 79 Judicial Organization Act. See, for a more detailed discussion: Geeroms 2004, pp. 349-357. See also: Betlem 2000, p. 290.
46 See further sub-sections 3.3.2 and 4.3.3.
47 Article 4(3) Rome II Regulation.
48 Similarly: Enneking 2008a, p. 307. See also Van den Eeckhout 2010, however, who comes up with the example of secondment within an international group of companies (p. 18).
49 See Explanatory Memorandum to the 'Commission Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II")', COM(2003) 427, pp. 12-13 (hereinafter: Explanatory Memorandum Rome II). See also: Enneking 2008a, pp. 300-301.
50 Enneking 2008a, pp. 301-302. See more generally: Symeonides 2008b, pp. 179-183.

neutral selection of the applicable law on the basis of geographically-based rules, it seems that the general escape clause should be interpreted and applied restrictively.[51]

The Rome II Regulation's environmental damage rule is likely to be a more relevant exception to its main rule of applicability of the *lex loci damni* when it comes to foreign direct liability cases that are brought before Dutch courts.[52] According to the Regulation, environmental damage in this sense should be understood as meaning:

> "[...] *adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms*".[53]

On the basis of this rule, the host country plaintiffs will have the option of choosing Dutch law as the applicable law to foreign direct liability claims that pertain to environmental damage if and when the Netherlands can be said to have been the *Handlungsort* (the country where the defendant parent companies' allegedly tortious conduct has taken place).[54] In contrast to the Rome II Regulation's overall neutral, geographically-based approach to choice of law, the rule on environmental damage is based on considerations of environmental protection policy, in line with the philosophy underlying European substantive law on the environment and the 'polluter pays' principle.[55]

The environmental damage rule's aim is to raise the general level of environmental protection by giving the victim of environmental harm the opportunity to choose the most favourable law, also in view of the fact that the tortfeasor in environmental damage cases will generally derive an economic benefit from the harmful activities concerned. As such, it is arguably very relevant in the context of foreign direct liability cases.[56] Considering their typical background of double standards as well as the fact that the Western society home country system of tort law will in these cases generally be more favourable to the host country plaintiffs than the host country system of tort law where it comes to levels of protection and levels of damages, this environmental damage rule is likely to play an important role in future foreign direct liability cases pertaining to harm to planet-related

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51 Compare Enneking 2009, p. 302. See also: Symeonides 2008b, pp. 196-204. See, however, more favourably as regards the potential role of this general escape clause in the context of foreign direct liability cases: Van den Eeckhout 2010, pp. 15-19.

52 Article 7 Rome II Regulation. See also, however: Van den Eeckhout 2010, pp. 17-18, who notes that under certain circumstances plaintiffs might be better off with an appeal to the general escape clause.

53 Recital 24 Rome II Regulation. See also Explanatory Memorandum Rome II, p. 19, where it is noted that "[...] *the rule covers both damage to property and persons and damage to the ecology itself, provided it is the result of human activity*".

54 See also: Enneking 2008a, pp. 302-303.

55 See Explanatory Memorandum Rome II, pp. 19-20. For more detail, see also: Symeonides 2008b, pp. 209-211.

56 See similarly and with further references: Van den Eeckhout 2010, pp. 11-15. See also Enneking, Giesen *et al.* 2011, p. 553.

interests that are brought before the Dutch courts (or before courts in other EU Member States, for that matter).[57]

The question has been raised in this respect, however, whether the environmental damage rule would indeed be applicable to these particular types of claims, or whether its scope is limited to more 'classic' cases of transboundary environmental damage such as may arise for instance from river pollution or an explosion at a nuclear power station.[58] The real issue here seems to be whether this rule pertains only to situations of local conduct that result in transboundary environmental damage which is felt in a neighbouring country, or also to situations of transboundary conduct that result in local environmental damage in some far away (non-EU) country. Or, do non-EU environmental interests also fall under the scope of Rome II's environmental policies? Although the Commission proposal does indeed speak of 'neighbouring countries', there is nothing in the text of the provision itself that supports this narrow interpretation. In fact, such a narrow interpretation does not seem to be in line with the Rome II Regulation's universal application and emphasis on legal certainty, nor on the environmental damage rule's main aim of raising the overall level of environmental protection and of making the polluter pay.[59]

In the end, the question remains whether and under what circumstances the actions or inactions of the Dutch parent company of a multinational corporation that (indirectly) result in environmental harm in a host country can be qualified as an environmental tort in the sense of article 7 of the Rome II Regulation. Under the Rome II Regulation, classification issues are to be solved through autonomous interpretation, which means that the European Court of Justice will have final say over this matter.[60] Although there is no European case law on this matter, yet, it seems that a broad interpretation of the *Handlungsort* within the scope of article 7 would be in line with its rationale and objectives.[61]

A further question is where such a tort should be localised, which may be a tricky matter especially where the allegedly tortious conduct in question is framed not as an act but as an omission (for instance, a failure on behalf of the parent to adequately supervise

57 See also: Enneking 2008a, pp. 307-308.

58 See DMEAFA Report (Castermans/Van Der Weide) 2009, p. 53, which states in this respect (without further references) that the applicability of the environmental damage rule in these cases would "[...] *be at odds with the nature of the provision, which appears primarily intended to deal with the classic cases of environmental damage cases in which the actual act (e.g. the discharge of the potassium waste or the explosion of a nuclear power station) occurs in one country and the harmful consequences (salinisation of the spraying water or radioactive fallout) in another country*".

59 See Articles 3 and 7 Rome II Regulation and Explanatory Memorandum Rome II, pp. 9-10, 19-20. See also Symeonides 2008b, who notes that "[...] *the* reason *for which Article 7 gives the victim a choice is not to benefit the victim* as such. *Rather, the reason is to promote the interests of the respective countries and of the Union as a whole in deterring pollution Applying whichever of the two laws subjects the polluter to a higher standard promotes this interest. Giving the victim a choice is simply the* vehicle *for ensuring this result*" (pp. 205-206).

60 See Recital 11 Rome II Regulation. Compare also Van Hoek 2008, p. 150.

61 Similarly: Van Den Eeckhout 2010, pp. 11-15.

the activities of its foreign subsidiaries). Dutch case law (unrelated to the Rome II regime) suggests that in such a case the *locus delicti* is the place where the activity that failed to take place should have taken place.[62] This still leaves questions, however, as it may not always be easy to identify the specific place where the parent company should have acted so as to prevent host country activities by the multinational group from causing environmental harm locally.[63] On the other hand, when it comes to tort claims revolving around the alleged failure by the parent company to live up to a duty of care owed to third parties in the host country, tortious acts and omissions are really two sides of the same coin, which suggests that the localisation of such claims should lead to similar outcomes regardless of whether they are framed as omissions, or not.[64]

All in all, it seems that in future foreign direct liability cases that are brought before Dutch courts and like the Dutch Shell cases (to which the Regulation does not yet apply, though) pertain to planet-related harm, the host country plaintiffs may indeed, under certain circumstances, have the option of choosing Dutch law as the law governing their claims.[65] In virtually all other cases, the applicable law under the Rome II regime will be that of the host country. Nonetheless, there are various ways in which Dutch legal rules and standards that are relevant to the issue in dispute may find application even in foreign direct liability cases that are decided on the basis of host country rules of tort law.

First of all, under the Rome II Regulation there is the possibility for the Dutch courts involved to apply so-called overriding mandatory rules (or public order legislation, *règles d'application immédiate*) in foreign direct liability cases, irrespective of the law that governs the claim, at least to the extent that Dutch law (as the law of the forum country) can be said to feature such rules with respect to the subject-matter at issue in any particular case.[66] Such overriding mandatory rules typically include domestic regulations,

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62 See HR 12 October 2001, NJ 2002, 255 (*Diner/Igielko*).

63 Compare, for instance, European Court of Justice Case C-256/00 (19 February 2002), where the court held with respect to contractual obligations under the Brussels I regime that a contractual obligation not to do something that is applicable without any geographical limit (and must therefore be honoured throughout the world), "[...] *is not capable of being identified with a specific place or linked to a court which would be particularly suited to hear and determine the dispute relating to that obligation*" (par. 49).

64 See further *infra* sub-section 5.3.1.

65 It should be noted, however, that issues of dépeçage may arise in such cases. After all, whereas with respect to the claims against the parent company it may successfully be claimed that the Netherlands is the *Handlungsort*, the same cannot be said of the claims against the host country subsidiary. This means that even where with respect to the former claims the plaintiffs may choose Dutch tort law as the applicable law, this option may not be open to them with respect to the latter claims. See, for a more detailed discussion of the matter of dépeçage under the Rome II Regime: Symeonides 2008b, pp. 184-186, who notes, *inter alia*: "[...] *some of Rome II's articles speak of the law applicable to the 'obligation' arising out of a tort or delict, rather than to the tort or delict as a whole. This* [...] *will enable courts to engage in a more individualized evaluation of the multiple obligations that may arise from the same events*" (p. 185); the rule on environmental damage (Article 7 Rome II Regulation) likewise refers to "[t]*he law applicable to a non-contractual obligation arising out of environmental damage* [...]".

66 Article 16 Rome II Regulation. See also Enneking 2009, pp. 304-305. According to the European Court

usually of a (semi-)public law nature, that intervene in private legal relationships in order to protect the public interest, such as anti-trust regulations, monetary regulations, labour regulations, environmental regulations and rules of criminal law.[67] Examples of mandatory rules that may under certain circumstances take precedent over the otherwise applicable law in transnational civil claims brought before Dutch courts include the rule that employers need to apply for a dismissal permit before laying off employees, as well as Dutch provisions on working hours and on working conditions.[68]

The extent to which existing Dutch mandatory rules will be applicable in foreign direct liability claims cases brought before Dutch courts remains to be seen. After all, in line with the contemporary international legal order's state-centred and territorially-based nature, mandatory (public law) regulation of actors and/or activities outside a state's territory remains an exception.[69] Still, if the Dutch legislature were to impose, for example, statutory duties on Dutch parent companies of multinational corporations with respect to the people- and planet-related impacts of their activities in host countries, such duties would be applicable in foreign direct liability cases brought before Dutch courts.[70] In the sense that the provision of overriding mandatory rules may thus create an opportunity for the application of Dutch rules of conduct in such cases even where the applicable law is that of the host country, it does seem to hold promise for host country plaintiffs seeking to bring their foreign direct liability claims before Dutch courts, especially since home country rules of conduct tend to be more strict than host country ones in this context.[71]

Furthermore, under the Rome II Regulation, Dutch courts dealing with foreign direct liability cases on the basis of host country tort law would be required, when assessing the conduct of the corporate actors involved, to take account of the rules of safety and

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of Justice in *Arblade*, Cases C-369/96 and C-376/96 [1999] ECR I-8453 (23 November 1999), overriding mandatory rules can be defined as "[...] *national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State*".

67 Compare, for instance: Strikwerda 2005, pp. 68-75; Van Hoek 2008, pp. 166-167.

68 Note that these rules will only be applied as overriding mandatory provisions in cases pertaining to labour relations that are closely related to the Dutch legal order and to the interests of the Dutch labour market in particular. See, for instance, with respect to the need for a dismissal permit (pursuant to articles 6 and 9 Buitengewoon Besluit Arbeidsverhoudingen): HR 23 October 1987, NJ 1988, 842.

69 Similarly: Enneking 2008a, p. 304. See also: DMEAFA Report (Castermans/Van Der Weide) 2009, p. 53 and EC Report (Augenstein) 2010, p. 72, where it is noted that "[...] *these provisions generally require a connecting factor between the claimant and the State exercising jurisdiction, which considerably limits their scope of application in relation to corporate human rights and environmental abuses committed outside the European Union*" (citations omitted).

70 Compare Van Hoek 2008, pp. 165-166, who also notes: "*Some statutes may not stop at prescribing an extraterritorial duty of care, but may stipulate that violation of that duty will lead to civil liability towards the victims, in which case the civil law liability will be based on a mandatory overriding provision as well. But not all statutes may be this inclusive in which case the civil law consequences of a breach of a statutory duty may – in part or in whole – be derived from the* lex causae *(the law applicable to the tort ex Article 4)*" (footnote 89).

71 Similarly: Van den Eeckhout, pp. 20-22. See also Muir Watt 2008.

conduct that were in place at the time and the place of the event giving rise to the liability.[72] Accordingly, where in a foreign direct liability claim against a Netherlands-based parent company of a multinational corporation (or other Netherlands-based corporate actor) the event giving rise to the liability can be said to be localised in the Netherlands, the court will have to take into account relevant Dutch rules of safety and conduct. Examples of such rules of safety and conduct include local traffic regulations or, more relevant in the context of foreign direct liability cases, rules on safety and hygiene in the workplace.[73]

It should be noted in this respect that taking account of home country rules of safety and conduct is not the same as applying them; accordingly, home country rules on safety and hygiene in the workplace are not applied as such, but for instance used to determine an employer's duty of care vis-à-vis his employees.[74] Similarly, it seems that the provision on rules of safety and conduct does not create an opportunity to replace the applicable rules on tort law of the *lex loci damni* with any (strict) liability rules applicable at the place where the events giving rise to the damage occurred that pertain specifically to the conduct in dispute. Van Hoek notes in this respect that:

> "[...] *it seems clear that Article 17 should not be construed in such a way as to contain a special rules on the tortiousness of the behaviour based on the* lex locus actus [*i.e.*, home country tort law]. *Such* depeçage *would run counter to Article 15 of the Regulation which provides that all major elements of tortious liability* [...] *are covered by the law applicable on the basis of Article 4 et seq*".[75]

Most of the existing Dutch case law on the application of rules of safety and conduct pertains to international skiing accidents; it does show, however, that rules of safety and conduct that may be taken into account are not limited to statutory rules laying down traffic norms, product safety norms, or the like, but may also encompass private or self-imposed regulatory schemes.[76] Obviously, this raises interesting prospects also in the

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72 Article 17 Rome II Regulation. This provision is "[...] *based on the fact that the perpetrator must abide by the rules of safety and conduct in force in the country in which he operates, irrespective of the law applicable to the civil consequences of his action, and that these rules must also be taken into consideration when ascertaining liability*": Explanatory Memorandum Rome II, p. 25.

73 Van Hoek 2008, p. 166. According to recital 34 Rome II Regulation, "[t]*he term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident*".

74 See Explanatory Memorandum Rome II, p. 25.A question that has been raised with respect to this provision, however, is whether those rules of safety and conduct are in fact meant to be applied in situations where they would favour the victim, not the tortfeasor; see Symeonides 2004, pp. 935-954. Another question is whether the Commission in drafting this provision actually had in mind the situation where foreign law is the applicable law and the rules of conduct and safety to be taken into account were those of the forum country; see Explanatory Memorandum Rome II, p. 25, where the Commission speaks of "[t]*aking account of foreign law* [...]".

75 Van Hoek 2008, p. 164.

76 Compare, for instance, Rechtbank Amsterdam 15 November 2000, NIPR 2002, 250, where the answer to the question of tortious liability was based largely on the rules for the conduct of skiers and snowboarders as

context of foreign direct liability cases, in which, as will be further discussed in chapters 7 and 8, growing numbers of international guidelines, soft law instruments and private regulatory schemes are being advanced aimed at regulating the transnational activities of multinational corporations.[77] Thus, it seems that Dutch courts, when determining the liability of Netherlands-based corporate actors on the basis of host country tort law, will on the basis of this provision have to take into account both statutory and non-statutory rules of safety and conduct that are applicable in the Netherlands to the conduct in question.

Arguably, such rules may include not only international soft law standards like the OECD Guidelines for Multinational Enterprises or privately established codes of conduct, but also unwritten standards of due care.[78] More generally speaking, the fact that a Dutch court may need to determine the liability of a Netherlands-based corporate actor on the basis of host country rules of tort law does not mean that it cannot and will not take account of unwritten home country standards of conduct when assessing the appropriateness of its activities carried out and decisions taken in the Netherlands. In the end, when determining the contents of open norms such as due care in a particular foreign direct liability case before it, a Dutch court will (and should) take into account Dutch societal notions of proper societal conduct when assessing the conduct of a Netherlands-based parent company, even where the applicable rules of tort law are those of the host country.[79]

In any case, Rome II's provision on rules of safety and conduct also seems to open the door to a potential role, albeit a modest one, for Dutch standards of conduct in foreign direct liability claims against Netherlands-based corporate defendants brought before Dutch courts. This role is of particular relevance where those rules impose higher standards of conduct than the applicable host country provisions do, which will often be the case in this context.[80] It should be noted here that in the reverse situation in which Dutch tort law is the law that applies to the foreign direct liability claims concerned, for instance on the basis of the environmental damage rule, Dutch courts will on this basis also have to take account of relevant host country rules governing the operator's conduct and the safety rules with which he is required to comply locally, as well as the fact that the corporate defendants' local activities may have been in compliance with those (generally less demanding) standards.[81] Also here, however, the foreign standards need to be taken

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determined by the International Ski Federation.

77 See in particular sub-sections 7.2.2 and 8.1.3.

78 Compare Enneking 2008a, pp. 305-307.

79 Compare Jessurun D'Oliveira 1985, who speaks of crypto-private international law when referring to the reverse situation that a Dutch court will often almost automatically take into account foreign customs and foreign standards of conduct when interpreting open norms in cases governed by Dutch law but with international elements.

80 Compare Van den Eeckhout, pp. 20-21. See also: Symeonides 2004, pp. 935-954, where he notes that this provision could prove very useful "[...] *if courts were allowed to employ it in* [...] *cross-border torts in which the tortfeasor violates the higher standards of the state of conduct, but not the lower standards of the state of injury*". Similarly: Symeonides 2008b, pp. 211-215.

81 See Explanatory Memorandum Rome II, p. 20.

into account rather than applied, which means that conduct that is in accordance with local standards may still be considered to be wrongful, for instance because of a lack of care on the side of the corporate defendant.

Finally, under the Rome II regime Dutch courts may by way of exception refuse to apply a provision of host country law in foreign direct liability cases brought before them, where the application of the provision in question would be manifestly incompatible with fundamental principles and values of the Dutch legal order (*ordre public*).[82] This may provide an important minimum guarantee (or 'emergency brake')[83] in foreign direct liability cases that are brought before Dutch courts but governed by host country law, especially considering the fact that fundamental human rights principles, whether ensuing from international or domestic law, may be considered to be part of the public policy of the forum.[84] As such, it is conceivable that, under this provision, Dutch courts might for example refuse to apply provisions of host country law that would condone child labour, or might turn to Dutch law where the applicable host country law lacked provisions concerning liability for gross human rights violations altogether.[85] It has been suggested in this respect that:

> "[i]*n this way the Dutch courts could then also possibly make use of provisions from human rights or environmental conventions to which the Netherlands is party or of rights whose violation carries criminal penalties under provisions having extraterritorial effect, as in the case of the International Crimes Act*".[86]

What the actual extent could be of this role for the public policy exception in foreign direct liability cases brought before Dutch courts remains to be seen, however. Where it comes to the norms ensuing from international human rights conventions, for example, account needs to be taken of the fact that international conventions in principle apply only within the territories of their Member States; whether they could be applied 'extraterritorially' to actors and/or activities in non-Member States is disputable. The question arises, therefore, as to what role for instance the substantive human rights norms laid down in the European Convention on Human Rights would play in relation to the determination of the applicable law in foreign direct liability cases brought before Dutch courts that pertain to human rights violations perpetrated in non-European host countries. Van Hoek asserts in this respect that:

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82 Article 26 Rome II Regulation.

83 DMEAFA Report (Castermans/Van Der Weide) 2009, p. 54.

84 See, for more detail and with further references: EC Report (Augenstein) 2010, pp. 72-73. See also: Van Hoek 2008, pp. 167-168.

85 For more detail, see, for instance: DMEAFA Report (Castermans/Van Der Weide) 2009, pp. 53-55; Van den Eeckhout 2010, pp. 21-23.

86 DMEAFA Report (Castermans/Van Der Weide) 2009, p. 55.

> "[...] *when the application of foreign law leads to a result which is unacceptable if measured against the standards (rather than the rules) of the ECHR, the public policy exception intervenes and* lex fori *is applied instead. If the applicable foreign law does not provide a remedy for gross violations of human rights taking place within the territory, this would be a violation of such a Convention standard*".[87]

Another question that may be raised is whether Dutch law can under all circumstances be applied as the surrogate law in situations where Dutch courts refuse to apply host country provisions or where relevant host country provisions simply do not exist.[88] At the same time, the use of the public policy exception is meant to remain exceptional; its application in a particular case may be subject to review by the European Court of Justice. The fact that in the eyes of the court seized of the matter, the applicable rules of the host country are wrong as to their substance and conclusion, is not a sufficient reason for invoking public policy, not even if the incorrectness is manifest: there has to be a conflict with fundamental legal principles for the court seized of the matter to be allowed to refuse to apply a host country regulation on the basis of the public policy exception, and apply its own law instead.[89] With respect to the right to strike, for instance, Dutch courts have held that the mere fact that a strike that would have been considered lawful under Dutch law was considered unlawful under the applicable rules of foreign law, did not provide a sufficient reason for refusing application of those rules on the basis of the public policy exception.[90]

Still, in the particular context of foreign direct liability cases, where application of host country law may lead to fundamentally different outcomes with respect to standards of care and protections of people- and planet-related concerns, including fundamental human rights, the public policy exception may well prove instrumental.

Applicable law under the domestic Dutch choice-of-law regime

Foreign direct liability cases that are brought before Dutch courts and that fall outside the scope of the Rome II regime will in principle be governed by the Dutch domestic choice-of-law regime for non-contractual obligations (torts). As of 1 January 2012, this domestic regime is laid down in titles 1 (articles 1-17) and 14 (articles 157-159) of book 10 of the Dutch Civil Code. This regime replaces the old(er) Dutch domestic choice-of-law regime for non-contractual obligations that since June 2001 had been laid down in the Dutch

87 Compare Van Hoek 2008, pp. 167-168 (quote p. 168).

88 Van den Eeckhout 2010, pp. 21-23.

89 See Enneking 2008a, pp. 306-307.

90 HR 16 December 1983, NJ 1985, 311 (*Saudi Independence*). See, in more detail: Dorssemont & Van Hoek 2010, pp. 248-250; Enneking 2007, pp. 92-93. See also sub-section 6.4.1. Similarly, the circumstance that a foreign employer is allowed under foreign law to dismiss an employee at will, something that is manifestly incompatible with the Dutch rule that employers need to apply for a dismissal permit before laying off employees, does not necessarily imply a manifest incompatibility with Dutch public policy; HR 23 October 1987, NJ 1988, 842.

Private International Law (Torts) Act (the *Wet Conflictenrecht Onrechtmatige Daad*). The new regime applies to disputes involving non-contractual obligations that are brought before the Dutch courts after January 2012 and that do not fall within the material scope of the Rome II Regulation or its scope in time (in the sense that they pertain to events giving rise to damage that have occurred before January 2009); it provides, however, that the Rome II Regime's provisions will also be applicable to these disputes.[91]

Tort-based non-contractual liability claims falling outside the Rome II Regime's material or temporal scope that have been brought before Dutch courts before January 2012 will remain to be determined by the regime of the Dutch Private International Law (Torts) Act. Like the Rome II regime, this regime takes as its general rule the applicability of the *lex loci damni*. In other respects too, it is very similar to the Rome II regime, with the exception that it does not feature a rule on environmental damage, as the Rome II Regulation does, on the basis of which victims of foreign direct liability cases resulting in environmental damage may have the option of choosing Dutch law as the applicable law. With the enactment of the Rome II Regulation, the relevance of the domestic Dutch regime on choice of law in international tort cases for foreign direct liability cases is decreasing and will eventually fade away altogether due to the fact that more and more and, eventually, all of these cases will in principle fall under the Rome II regime. For this reason, a detailed discussion of this regime will not be undertaken.[92]

What should be noted here, however, is that where foreign direct liability cases are brought before Dutch courts not on the basis of tort law but on other legal bases, such as for instance theories on piercing the corporate veil, they may fall under different choice-of-law regimes. Provided they fall outside the ambit of the Rome II Regulation (under which the term 'non-contractual obligation' is understood as an autonomous concept that also covers non-contractual obligations arising out of strict liability, for instance[93]), the claims involved will in principle be categorized on the basis of Dutch law (the *lex fori*).[94] As has already been discussed, however, foreign direct liability cases in general and, as will be discussed in the next sub-section, those brought before Dutch courts in particular, are far more likely to be brought on the basis of general principles of tort law than on the basis of theories on piercing the corporate veil or other alternative causes of action.[95] For this reason, no further discussion of alternative choice-of-law regimes that may apply to foreign direct liability cases that are brought before Dutch courts on alternative legal bases will take place here.[96]

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91 Article 10:159 Dutch Civil Code. See also Zilinsky 2010, pp. 579-580.

92 See, for a more detailed discussion and a comparison with the Rome II regime: Enneking 2007, pp. 80-94. See also, more generally: Strikwerda 2005, pp. 187-198. See also further sub-section 6.4.1

93 Recital 11 Rome II Regulation.

94 See, for example: Strikwerda 2005, pp. 43-47.

95 See further sub-sections 4.1.1 and 4.4.2.

96 See, however, for a discussion of the Dutch domestic choice of law regimes that may be applicable to liabilities in intra-group relations on different legal bases: Lennarts 1999, pp. 289-367.

5.2.2 'Vertical' interaction between public international law and domestic tort law

As discussed, the question of applicable law in foreign direct liability cases may not only pertain to the 'horizontal' conflict of laws between domestic (home and host country) legal systems but also the 'vertical' interaction between international and domestic legal systems. This type of conflict may play a role where foreign direct liability claims are based directly or indirectly on norms of public international law. Although, as discussed, norms of public international law have played far more of a background role in foreign direct liability cases brought on the basis of general principles of tort law than in ATS-based cases, these norms may theoretically be relied on outside the ATS context.[97] In view of this, some further attention will be paid here to the way in which substantive international legal rules may take effect within the Dutch legal order in general and in foreign direct liability cases in particular.

Generally speaking, the Dutch legal system is a (moderate) monist system, in the sense that norms of public international law may under certain circumstances apply directly (*i.e.*, without having been transposed into Dutch law) within the Dutch domestic legal order.[98] Norms of public international law that have direct effect in this sense may directly grant rights and/or impose obligations on legal subjects within the Dutch legal order, and as such may be legally enforced by or against them for instance through the tort system. At the same time, norms of public international law may under certain circumstances also have indirect effect within the Dutch legal order, in the sense that they may be relied upon, where relevant, to interpret open norms and concepts within the Dutch legal system, like the concept of due care, for instance.[99]

Direct effect of international rules of conduct

On the basis of the Dutch constitution, treaty provisions and resolutions of international organizations have direct effect if they "[...] *may be binding on all persons by virtue of their contents*", and after they have been officially proclaimed.[100] Whether norms of public international law of this type may on the basis of their contents be applied directly within the Dutch legal order is judged on the basis of the intent of the parties involved in their realization and their suitability for functioning objectively (that is, without any further legislative intervention) within the domestic legal order.[101] In order for such norms to be applicable not only to the vertical legal relationships between public and private actors

97 See further sub-section 4.3.1.

98 Compare HR 3 March 1919, NJ 1919, 317 (*Grenstractaat Aken*). See, for a detailed discussion of the Dutch constitutional framework on the effect within the Dutch legal order of norms of public international law: Besselink & Wessel 2009, pp. 37-76; Nollkaemper 2009, p. 461.

99 See also: Nollkaemper 2009, pp. 447-483; Enneking 2007, pp. 44-45.

100 Article 93 Dutch Constitution.

101 Similarly: Nollkaemper 2000, p. 270. See also: Enneking 2007, pp. 45-46.

(or the state and its citizens), but also in the horizontal legal relationships between private actors, they need to have both direct effect and horizontal effect. Whether they do:

> "[...] *depends primarily on the intention and text of a provision, but courts have much leeway* [...] *to determine that although a norm may only have been written with regard to the relationships between a state and an individual, or even between two states, it is also relevant in the relationship between two private parties*".[102]

In the fields of international criminal law and international human rights law in particular, there are some norms ensuing from treaty provisions and resolutions of international organizations that may potentially be relevant in the context of foreign direct liability cases and that may pass these tests. Dutch courts have accepted the direct and horizontal effect of certain provisions of the European Convention on Human Rights (privacy) and the International Covenant on Civil and Political Rights (non-discrimination), for example, and it seems that there are also other norms in these fields that could pass the test. In the field of labour law, the European Social Charter's right to strike has been accepted as an international norm that may have direct and horizontal effect, but many other provisions from the European Social Charter and the International Covenant on Economic, Social and Cultural Rights do not have direct effect. Similarly, many of the existing international norms in the field of environmental law do not have direct effect.[103] In this field especially, however, there are a number of international conventions that do seek to target private actors and their transnational activities more directly with respect to specific subject matter areas, for example the Basel Convention (pertaining to transboundary movements of hazardous wastes and their disposal); some of these conventions have in turn found their way into EU law. All the same, in practice the number of treaty provisions and resolutions of international organizations that Dutch courts have so far found to be suitable for direct application in the horizontal legal relationships between private parties is very limited.

This is even more true when it comes to unwritten norms of public international law, such as norms of customary international law (which, as discussed, form the primary substantive basis for ATS-based foreign direct liability cases) and general principles of international law that have not been laid down in treaty provisions and/or resolutions of international organizations. In theory, these norms may also find direct application within the Dutch legal order provided they are binding on the Netherlands and suitable for such direct application when it comes to their nature and contents. In practice, however, there is very little case law on the circumstances under which Dutch courts will allow such unwritten norms of public international law to take direct effect in the Dutch legal order in general and within the horizontal legal relationships between private parties in

102 Nollkaemper 2000, p. 271.
103 *Ibid.*, pp. 271-274.

particular.[104] A rare example of a case where an unwritten norm of public international law was applied in such a way is the well-known *Mines de Potasse* case, a transboundary tort case concerning the pollution of the river Rhine by chlorides.[105] In this case, the Rotterdam district court directly applied the general principle of international law that no state can use its territory for activities that cause harm in another state (*sic utere tuo ut alienum non laedas*) to a tort claim brought by Dutch horticulturists against a French mining company that allegedly polluted the water of the Rhine, causing damages to the Dutch downstream users of the water. This decision was overturned on appeal however, as the The Hague Court of Appeal held that the principle in question did not have direct effect since it exclusively addressed states and could thus not be applied in the horizontal legal relationship between the private parties involved in the dispute.[106]

Indirect effect of international rules of conduct

A further way in which written or unwritten norms of public international law may take effect in the horizontal legal relationships between private parties and as such through the mechanism of tort law in foreign direct liability cases that are brought before Dutch courts, is via the doctrine of indirect effect (or consistent interpretation). On this basis, international norms may be applied by Dutch courts not as an autonomous or independent substantive basis for a decision (as with the principle of direct effect) but as a way to construe open norms of domestic law, such as good faith or due care, in light of international law.[107] A particularly relevant case in this context relates to an inquiry into the affairs of the company Batco Nederland following a dispute between the company and the labour unions over the company's decision to close one of its factories.[108] The Enterprise Division of the Amsterdam Court of Appeal came to the decision that there had been mismanagement by Batco in this respect since the company had failed to properly take into account its employees' interests. One of the court's considerations in so deciding was that the company had expressly accepted the OECD Guidelines for Multinational Enterprises as a guideline for its policies in these matters but had subsequently failed to live up to its obligations under those guidelines to consult with the unions and the work council.[109] Furthermore, Dutch courts have for example relied on the principle of equal remuneration for work of equal value as laid down in Article 7 of the International Covenant on Economic, Social and Cultural Rights for the interpretation of the concept

104 See, for instance: Enneking 2007, pp. 54-55.

105 Rechtbank Rotterdam 8 January 1979, NJ 1979, 113 (*Handelskwekerij G.J. Bier BV/Mines de Potasse d'Alsace SA (MDPA)*) and Rechtbank Rotterdam 16 December 1983, NJ 1984, 341 (*Handelskwekerij G.J. Bier BV/Mines de Potasse d'Alsace SA (MDPA)*), overturned on appeal by Hof 's-Gravenhage 10 September 1986, 19 *Netherlands Yearbook of International Law* 496 (1988) (*Mines de Potasse d'Alsace SA (MDPA) v. Onroerend Goed Maatschappij Bier BV*). See also: HR 23 September 1988, NJ 1989, 743 (*Mines de Potasse*), par. 5.3.

106 See, in more detail: Nollkaemper 2000, pp. 273-274; Enneking 2007, pp. 55-56.

107 See, for instance: Betlem & Nollkaemper 2003, pp. 571-572.

108 *Batco Nederland BV*, Hof Amsterdam (Ondernemingskamer) 21 June 1979, NJ 1980, 71.

109 For more detail, see: Nollkaemper 2000, pp. 274-276.

of good employment practices, despite the fact that the Article in question has been held to lack direct effect.[110]

Still, the indirect application by Dutch courts of norms of public international law in the horizontal legal relationships between private parties, for instance to flesh out the standard of care in a tort case, may be controversial where it comes to norms that are primarily aimed at state actors and as such cannot be given direct effect. After all, to rely on those norms as an indirect source of law would be to indirectly give them some kind of direct effect after all, something that may run counter to the principle of legal certainty, according to which private actors should not be faced with additional legal obligations that they could not have foreseen. At the same time, such indirect application of not-directly-applicable international norms may raise issues of separation of powers, since it might be seen as the judicial creation of sources of law and of (indirect) obligations for private parties.[111]

All in all, the number of written and/or unwritten norms of public international law that have so far been found by Dutch courts to be applicable directly in the horizontal legal relationships between private parties and that as such may through the mechanism of tort law provide a direct substantive basis for foreign direct liability cases brought before Dutch courts, is limited.[112] At the same time, the indirect application in foreign direct liability cases of not-directly-applicable norms of public international law may cause controversy. Despite these restrictions, however, the Dutch legal system, due to its moderately monist nature, does in theory offer various opportunities for the enforcement through the tort law mechanism of suitable substantive norms of public international law by host country plaintiffs against defendant multinational corporations in foreign direct liability cases. It has been noted in this respect that:

> "[...] *the limitations in judicial application of public international law in transnational litigation are not caused by the legal techniques of giving effect to public international law in national courts, but by objective, structure and contents of the rules of public international law at issue*".[113]

Accordingly, the feasibility of basing foreign direct liability cases brought before Dutch courts directly or indirectly on norms of public international law is largely determined by the availability of international norms that pertain to internationally operating business enterprises and that are suitable for direct and horizontal application in a state's domestic legal order. Whereas the number of international norms ensuing from treaty provisions, resolutions of international organizations and/or customary international law that may be

110 See, in more detail and with further references: Enneking 2007, pp. 53-54.
111 Compare Betlem & Nollkaemper 2003, pp. 578-582.
112 Similarly: Enneking 2007, pp. 44-58.
113 Nollkaemper 2000, p. 281.

relevant in this context may be still limited at this point, it is likely to grow in view of the increasing attention being paid to the issues of international corporate social responsibility and accountability.

In the meantime, non-binding international guidelines that contain 'soft' rather than 'hard' law but that do directly address multinational enterprises, such as the OECD Guidelines for Multinational Enterprises for example, come to mind. These do already seem to have the potential to play an indirect role in foreign direct liability cases brought before Dutch courts, in addition to the wide range of other factors and circumstances that the courts may take into account when determining whether the corporate defendants in these cases have exercised due care vis-à-vis host country people- and planet-related interests. In fact, the OECD Guidelines are only one example of the wide variety of international, local (Nigerian) industry and company norms and standards that the plaintiffs in the Dutch Shell cases have relied on in order to construct the applicable standards of proper societal conduct/due care that they claim are applicable to the behaviour of Dutch parent company Royal Dutch Shell and/or its Nigerian subsidiary.[114]

5.3 Substantive legal basis

5.3.1 Parent company liability on the basis of the Dutch general provision on tort

As discussed in the previous sub-section, there are circumstances under which foreign direct liability cases brought before Dutch courts will be governed by Dutch law. The most probable basis for the applicability of Dutch tort law to such claims is the Rome II regime's environmental damage rule, on the basis of which the host country plaintiffs may choose Dutch tort law as the applicable law in cases where the *Handlungsort* (*i.e.*, the country where the corporate defendants' allegedly tortious conduct has taken place) can be said to be the Netherlands. This may be an option in foreign direct liability claims aimed at the Netherlands-based parent companies of multinational corporations where it can be said that it is the decisions made or the policies set out by those parent companies in their Dutch boardrooms, or the lack of supervision exercised from those boardrooms, that have ultimately resulted in the people- and planet-related harm caused in the host country and the damage suffered by the host country plaintiffs in connection therewith.[115]

The most obvious legal basis for a foreign direct liability claim that is brought before Dutch courts on the basis of Dutch tort law is the Dutch Civil Code's general provision on tort/delict (*onrechtmatige daad*), on the basis of which anyone:

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114 See *supra* sub-section 4.4.2.

115 See, for a comprehensive discussion of this matter: Enneking 2007, pp. 43-114.

> "[...] *who commits a tort against another which is attributable to him, must repair the damage suffered by the other in consequence thereof.*[116]

This provision lays down a rule of fault liability on the basis of which both natural and legal persons can be held liable for their own intentional or negligent conduct. The requirements for tortious liability (and the accompanying obligation on the tortfeasor to repair the damage done) on this basis include a wrongful act or omission, imputability, causation, 'relativity' (requiring that the standard breached served to protect against damage such as that suffered by the person sustaining the loss), and damage. The wrongful conduct may consist of the violation of a right and/or an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.[117]

Violations of written norms

Breach of a statutory duty in this context may include conduct in violation not only of Dutch rules and regulations, but also of directly applicable norms of public international law.[118] This means that it would be possible in theory to base foreign direct liability claims directly on an alleged violation of written norms that may also be applicable to the defendant parent companies, provided (as will briefly discussed further below) that those norms serve to protect against people- and planet-related harm such as that suffered by the host country plaintiffs. As has been discussed, however, due to the transboundary nature of the issues involved, including the disputed conduct of the defendant parent companies, the territorially-based nature of domestic legal orders and the state-based nature of public international law, in practice the number of written legal norms that may be applicable in this context is very limited.[119] There are only very few Dutch statutory norms that impose binding obligations on Netherlands-based parent companies of multinational corporations with respect to their activities abroad and that as such would be directly enforceable through the tort law mechanism in foreign direct liability cases. One of the few examples of Dutch statutory norms that may play a role in this context are the international crimes laid down in the Dutch International Crime Act (*Wet Internationale Misdrijven*), which applies to individuals as well as corporate actors and has a (limited) extraterritorial scope.[120] Similarly, as has been set out in the previous sub-section, the number of norms

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116 Article 6:162(1) Dutch Civil Code, translation by Thomas & Warendorf 2008.

117 Articles 6:162 and 6:163 Dutch Civil Code. For an extensive explanation, see: Asser/Hartkamp & Sieburgh 6-IV* 2008, pp. 35-143.

118 Asser/Hartkamp & Sieburgh 6-IV* 2008, p. 43; Van Dam 2000, pp. 219-230. Note that the claim may also be based directly on the direct infringement of one of a limited catalogue of subjective rights, which primarily encompass personality rights such as bodily integrity, privacy, reputation and freedom of movement, and proprietary rights such as ownership and intellectual property rights. See further: Asser/Hartkamp & Sieburgh 6-IV* 2008, pp. 45-47; Van Dam 2000, pp. 231-243.

119 See further sub-sections 3.2.3 and 4.4.2.

120 Note that this Act implements the international criminal offences of the Rome Statute of the International Criminal Court, but also goes further in the sense that it pertains not only to individuals but also to corporate

of public international law that have been held to be directly applicable in the horizontal legal relationships between private parties and that might as such potentially provide a direct basis through the tort law mechanism for parent company liability in foreign direct liability cases brought before Dutch courts, is also relatively limited at this point.

A further question that may be raised in this particular context, is whether conduct in violation of written norms of foreign law may also be considered a breach of a statutory duty under the Dutch general provision on tort/delict. This question comes into play in particular if the Dutch courts in a foreign direct liability case are (also) asked to determine a foreign direct liability claim against a host country subsidiary, and where they are asked to do so on the basis of Dutch tort law (for instance because the parties to the case have chosen Dutch law as the applicable law). It may be relevant particularly in situations where (reasonably) adequate statutory rules governing the local business activities in dispute are available in the host country, but it is not possible, for whatever reason, for them to be enforced properly before local courts. In the Dutch Shell cases, for example, the claims against the local Nigerian Shell subsidiary are based (among many other things) on the assertion that it has violated Nigerian safety regulations that are applicable to oil extraction activities. It should be pointed out in this respect, however, that the The Hague district court has (provisionally) decided that these cases should be decided on the basis of Nigerian rather than Dutch tort law, which means that these cases will not be likely to provide further insight on the question as to whether a violation of foreign statutory norms can be considered a breach of statutory duty under Dutch tort law in transnational civil litigation.[121]

There are some commentators who, on the basis of Dutch case law, claim that Dutch courts will also consider a breach of foreign law to constitute a breach of statutory duty in this sense.[122] Support for this contention both in literature and in case law is so sparse, however, that it seems that the question as to whether the violation of host country conduct-regulating rules may on this basis give rise to an obligation to compensate the resulting harm under Dutch tort law, by providing a direct basis of liability in this context, remains unsolved for now. In the end, however, the lack of clarity on this point will not, in practice, pose any major issues, since it will virtually always be possible to phrase an alleged violation of statutory norms as a violation of a duty of care. In that case, the local (host country) public law norms would possibly have to be taken into account by the court

violators, whereas the jurisdiction of the International Criminal Court itself is limited to individuals. See, for instance: Van Dam 2008, pp. 26-27. See, for a comprehensive discussion of corporate liability in international criminal law: Stoitchkova 2010.

121 See further sub-sections 3.2.2 and 3.3.2.

122 See the 2010 International Commission of Jurists report 'Access to justice: Human rights abuses involving corporations – The Netherlands', available at <www.icj.org/dwn/img_prd/A2J-Netherlands.pdf>, p. 10 and Betlem 2000, pp. 292-294, both referring to HR 24 November 1989, NJ 1992, 404 (*Interlas*).

deciding the case anyway as locally applicable rules of safety and conduct; as discussed, however, this is not the same as directly applying those norms.[123]

It should be mentioned here that, especially in tort claims pertaining to alleged violations of written norms, the element of relativity may play an important limiting role in Dutch tort law.[124] By allowing only those whose interests were sought to be protected by the violated norm in question to claim compensation for the resulting damages, it effectively functions as one of the correction mechanisms through which an overly far-reaching system of tortious liability is limited in practice.[125] A relevant subject matter area in this respect is that of the liability of supervisory bodies, in which the Dutch Supreme Court has turned to the element of relativity to limit the liability of the state for damages caused to third parties by actors falling under the oversight of state-related supervisory bodies.[126] Due to the fact that in the transboundary context of foreign direct liability cases the number of relevant written norms, whether domestic or international, that seek to regulate the behaviour of the corporate actors in question with a view to the protection of foreign people- and planet-related interests is very limited, the element of relativity is likely to play a limited role in these cases. In foreign direct liability cases where the claims are based on unwritten rather than written norms conduct-regulating norms, the role of the element of relativity will generally be less conspicuous, as it is likely to be incorporated in the allegedly breached duty of care that the corporate defendants involved are claimed to owe the host country plaintiffs in these cases.[127] At the same time, even where the breach of a written norm cannot form a direct basis for a foreign direct liability claim as the interests sought to be legally protected by the norm are not those of the plaintiffs, it can play an indirect role in foreign direct liability claims based on unwritten norms of due care pertaining to proper societal conduct, as it may contribute to the court's decision that the behaviour in dispute was not up to standard.[128]

Violations of unwritten norms pertaining to proper societal conduct / due care

All in all, as in the majority of non-ATS-based foreign direct liability cases, in foreign direct liability claims that are brought on the basis of Dutch tort law the alleged tortious conduct by the defendant parent companies is most likely to be constructed as a violation

123 See *supra* sub-section 5.2.1.

124 Article 6:163 Dutch Civil Code.

125 See, in more detail: Asser/Hartkamp & Sieburgh 6-IV* 2008, pp. 122-143. For a comprehensive discussion of the different 'correction mechanisms' that keep the Dutch tort system within bounds, see also Spier 1996, pp. 93-126.

126 Compare, for instance: HR 7 May 2004, NJ 2006, 281 (Duwbak Linda); HR 13 April 2007, NJ 2008, 576 (*Iranese vluchteling*); HR 13 October 2006, NJ 2008, 527 (*Vie d'Or*). For more detail, see T. Hartlief, ANNO 2010, deLex, 2009, pp. 61-65. See also: Giesen 2005a.

127 Compare Asser/Hartkamp & Sieburgh 6-IV* 2008, pp. 130-131.

128 Compare HR 17 January 1958, NJ 1961, 568 (Tandartsen), and, more recently, HR 10 November 2006, NJ 2008, 491 (*Astrazeneca/Menzis*). See also: Asser/Hartkamp & Sieburgh 6-IV* 2008, pp. 132-133.

of unwritten norms pertaining to proper societal conduct.[129] This is also true for example of the claims against Royal Dutch Shell, the defendant parent company in the Dutch Shell cases, which is alleged to have violated its duty of care vis-à-vis the Nigerian host country plaintiffs by failing to use its authority and expertise to try to prevent oil spills in the Niger delta from occurring and/or to mitigate their consequences. The determination in a foreign direct liability case as to whether a particular course of conduct by the defendant parent company can be said to have been in violation of unwritten norms pertaining to proper social conduct boils down to an assessment of whether that parent company has exercised due care towards the foreseeable and legally protected interests of the host country plaintiffs, in light of the potential risks inherent in the multinational corporation's host country activities.[130]

Whether the parent company has taken sufficient care in light of the potential risks inherent in the multinational corporation's host country activities is considered on the balance of four factors: the probability that the risk will materialize; the seriousness of the expected damage; the character and benefit of the activities in question; and the burden of taking precautionary measures.[131] In fact, this balance between care and risk is rather pragmatic as it revolves around the aim of avoiding or mitigating the risk of harm on the one hand and the means (time, money, effort) by which to achieve this on the other.[132] The larger the risks inherent in the multinational corporation's host country activities, the more may be expected from the parent company by way of precautionary measures. Dutch case law suggests that special care is required when it comes to activities that are typical of the modern industrialized and motorized society, especially where the expected harm consists of personal injury or property damage as opposed to pure financial loss.[133]

As the risk becomes more serious, the duty on the parent company to take precautionary measures shifts from best practicable means to best technical means, in the sense that business-economic considerations will become less and less important in view of the aim of avoiding widespread and/or serious people- and planet-related harm. Slowly but surely, the obligation on the parent company to perform to the best of its ability in view

129 For a more comprehensive discussion of the general subject of tortious liability on this basis, see Asser/Hartkamp & Sieburgh 6-IV* 2008, pp. 57-88; Van Dam 2000, pp. 173-219. See, for an elaborate discussion of the possibilities of bringing foreign direct liability cases before Dutch courts on the basis of an alleged violation of an unwritten norm pertaining to proper societal conduct under Dutch tort law: Enneking 2007, pp. 58-78.

130 The elements of wrongfulness, imputability and relativity are typically closely connected in tort cases brought on the basis of the Dutch general provision on tort/delict that revolve around alleged violations of unwritten norms pertaining to proper societal conduct. See, in more detail: Van Dam 2000, pp. 163-172. See also: Enneking, 2007, pp. 58-60.

131 The standard case in this respect is: HR 5 November 1965, NJ 1966, 136 (Kelderluik). See particularly on this case Van Maanen, Townend & Teffera 2008 and generally on the element of wrongfulness in the Dutch general provision on tort/delict: Van Dam 2000, pp. 173-219. See, for an elaboration of the possible role and interpretation of these for factors in foreign direct liability cases: Enneking 2007, pp. 68-78.

132 Compare Van Dam 2008, pp. 60-61.

133 See, for instance, with further references: Van Dam 2000, pp. 191-192.

of the costs involved shifts in the direction of an obligation to perform to the best of its ability regardless of the costs and possibly even beyond, in the direction of an obligation to achieve (or, in this sense, rather avoid) a particular result and stricter forms of liability.[134] Worth mentioning in this respect is a development in the Dutch Supreme Court's case law in the direction of what has been termed 'effective care', on the basis of which increasing significance is attached in certain areas, including where activities create certain foreseeable risks of personal injury for third parties (*gevaarzetting*), to the obligation to take effective precautionary measures.[135] Actual physical measures by the party creating the risk are preferred in this respect over mere warnings to those who may be at risk; in those situations where warnings are the designated type of precautionary measures, they too need to be effective in order for the party creating the risk to escape liability if that risk materializes.[136] In the Dutch Shell cases, such physical measures may conceivably include duties to maintain the local pipelines properly so as to prevent corrosion, and/or duties to protect those pipelines against local acts of sabotage by providing for better pipeline security, for instance.[137] However, in the absence of relevant (Dutch) case law, it is hard to predict what the court would expect from the corporate defendants in these cases on the basis of Dutch principles of tort law.[138]

At the same time, for the parent company to be held liable for the harm caused by the wrongful behaviour in question on the basis of the Dutch general provision of tort/delict, that behaviour needs to be imputable to it, usually on the basis of *culpa*. This means that the risk involved in the multinational corporation's host country activities must have been both foreseeable and avoidable, in the sense that a reasonably acting parent company could have known and foreseen it and could have taken steps to prevent the risk from materializing and/or to mitigate its harmful consequences.[139] Accordingly, in the claims against Royal Dutch Shell the focus in establishing what steps the Anglo/Dutch parent company could and should have taken in order to prevent the particular oil spills in dispute from occurring and/or to mitigate their consequences is, on the one hand, on the knowledge that the parent company had or could have had of the multinational group's local oil extraction operations in the Niger delta and of the particular risks of harm to local

134 For more detail, see Enneking 2007, pp. 71-73. See generally, on the blurred borders between fault and strict liability: Van Dam 2006, pp. 255-265. See also further sub-section 5.3.2.

135 See, for instance: Hartlief 2009, pp. 60-61.

136 Compare, for instance: HR 28 May 2004, NJ 2005, 105 (Jetblast). For a comprehensive discussion of this matter, see Giesen 2005b and see also Van Maanen, Townend & Teffera 2008, pp. 874-876.

137 See further sub-section 3.2.2.

138 See further sub-section 6.4.2.

139 See, generally on the element of imputability in the Dutch general provision on tort/delict: Van Dam 2000, pp. 247-286. See also generally on the imputability of knowledge: R.P.J.L. Tjittes, Toerekening van kennis, Kluwer, 2001, and more specifically on the imputability of knowledge in a corporate context in cases of nonfeasance (see below): Verbunt & Van den Heuvel 2007, Kluwer, 2007, pp. 211-230.

people- and planet-related interests involved in those activities and, on the other hand, on its capacity to exert influence and control over those operations.[140]

Expectations as to the knowledge and capacities of the defendant parent companies, which will generally be subjected to a rather objective test, are likely to be reasonably high, in line with the complex business operations they are engaged in; after all, any societal actor may be expected to have the knowledge and capacities necessary to properly perform the societal activities it engages in.[141] Furthermore, Dutch case law suggests that business actors may be expected, with a view to the interests of others, to be organized in such a way as to ensure the availability and use of the necessary knowledge and capacities throughout the organization.[142] Dutch case law also shows that, especially with respect to activities in violation of unwritten (and/or written) rules of conduct and safety that seek to protect others against personal injury, Dutch courts will be quick to hold the actor liable for the resulting damages, even where the risk inherent in the activity and/or the harmful results were difficult to foresee.[143] At the same time, the parent company will be expected to actively look for any unknown health and safety risks that the multinational corporation's activities may entail.[144] It should be mentioned here that, especially with respect to risks related to society today, such as those pertaining to climate change, new occupational diseases, radiation and/or food supply, the so-called precautionary principle is becoming increasingly relevant, on the basis of which even further-reaching duties may exist for those in a position to reduce those risks.[145]

Multiple tortfeasors

As has been discussed before, a duty of care of the parent company vis-à-vis the interests of particular host country third parties such as local employees, neighbours or communities, may exist not only with respect to its own activities, but also with respect to activities that are ultimately carried out by others with which it is closely connected, such as subsidiaries, business partners and/or sub-contractors.[146] Accordingly, depending on the circumstances,

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140 See further sub-section 3.2.2. Compare also: ICJ Report (Civil Remedies) 2008.

141 See, in more detail: Van Dam 2000, pp. 258-266, and, in a comparative perspective: Van Dam 2006, pp. 219-225, where it is noted: "*If the court applies an* objective test *it takes a normative approach and decides what the defendant ought to have known about the risk and what he ought to have done about it. A* subjective test *implies that the court takes the tortfeasor as it finds him: it establishes whether the defendant personally knew the risk and whether he was personally able to avoid it*" (p. 219, citations omitted). When applying an objective test, the court will make use of a standard of reference, such as the *reasonable man* or the *bonus pater familias*, or, in this context, a reasonably acting parent company.

142 See generally, with further references: Van Dam 2000, pp. 266-275. For a more detailed discussion of the role that this requirement of proper knowledge management may play in corporate groups: Lennarts 2002. See also, with a focus on foreign direct liability cases: Enneking 2007, pp. 67-68.

143 Compare for instance HR 29 November 2002, NJ 2003, 549 (*Legionellabesmetting Westfriese flora*). See also Enneking 2007, p. 69.

144 See Enneking 2007, pp. 64-67.

145 See, for instance, with further references: Hartlief 2009, pp. 96-97.

146 See, for instance: Van Dam 2008, pp. 55-63.

the parent company may for example be under a legally enforceable obligation to exercise due care in light of the potential human rights violations that may occur in the course of host country operations conducted by a local subsidiary or a local joint venture. Similarly, the parent company may be expected to exercise due care with respect to the risk of human rights violations perpetrated in relation to services it makes use of locally (for instance security services) or provides locally (for instance informational, logistical, technological or financial services), or for products it purchases locally (for instance clothing and shoes) or sells locally (for instance chemicals).[147] Similar obligations may exist for the parent company with respect to potential risks of other types of people- and planet-related harm that are inherent in the multinational corporation's worldwide activities. In a case like the Trafigura case, for example, questions would arise as to whether Trafigura was or could have been aware of the toxic qualities of the shipping waste involved and of the fact that the local waste disposal company to which it had handed over the chemicals was unable to dispose of the waste properly and that this might result in people- and planet-related harm locally, as well as whether and at what cost Trafigura could have acted differently so as to avoid that outcome.[148]

The fact that the parent company can only be held liable with respect to risks that it could have foreseen and that it had the capacity to prevent and/or mitigate means that for the parent to be held liable for harm caused by activities that are ultimately carried out by local operators such as subsidiaries, business partners and/or sub-contractors, it must have been able to exercise some kind of control over the local activities involved.[149] Such *de facto* control may result from a combination of a wide variety of circumstances that may typify the particular relationship between the parent company and the local operator. In relationships between a parent company and its foreign subsidiary, circumstances that may be relevant for establishing the existence of a controlling relationship may include: shareholding by the parent; *de facto* influence on the daily activities of the subsidiary by the parent; the existence and contents of group policies for example on health, safety and environmental matters and their monitoring and enforcement; the existence of a common brand; the need for 'parental' approval for certain business or policy decisions by the subsidiary; the appointment of parent company staff in key management functions within the subsidiary; and financial dependency of the subsidiary on the parent. Whether the intensity of these connections is such as to be able to speak of a controlling relationship that gives rise to a duty of care on the part of the defendant parent company vis-à-vis the host country plaintiffs with respect to the local activities of its local subsidiary is

147 See, for a more detailed discussion of these different factual situations in which multinational corporations' parent companies may be under such duties of care vis-à-vis host country third parties: Van Dam 2008, pp. 63-90.

148 Compare also: Van Dam 2008, pp. 85-88. See further sub-section 3.2.2.

149 See also Joseph 2004, p. 136, who notes that "[...] *the relevant 'control test' focuses on the extent to which a parent is somehow in control of the causes of the tort, which will be linked to, but will not be the same as, the issue of a parent's control over its subsidiary*". See also further sub-section 4.4.3.

dependent on the particular circumstances of each individual case; generally speaking, the mere fact of shareholding by the parent is not sufficient to assume that such a controlling relationship exists.[150]

A relevant line of Dutch case law in this respect includes a number of cases in which parent companies have been held liable on the basis of the Dutch general provision on tort for breaching a duty of care owed to their subsidiaries' creditors. In all these cases, this duty of care was assumed to exist due to the insight into and control over the harmful activities concerned that these parents were said to have in relation to their intensive involvement in the management of those subsidiaries.[151] It should be noted, however, that these cases are set in a financial/business context that is very different from the typical transboundary, 'North-South' setting of foreign direct liability cases. Other differences include the fact that these cases pertain to instances of pure financial loss whereas foreign direct liability claims usually revolve around personal injury or property damage; the fact that they typically pertain to duties of care vis-à-vis third parties that are in a contractual relationship with the subsidiaries in question, something that is not always the case in foreign direct liability cases (only where the host country plaintiffs are employees of the local subsidiary as in the *Cape* case for instance); and the fact that foreign direct liability cases, in contrast to the cases mentioned here, often pertain to large groups of (potential) plaintiffs.

Despite the differences between this particular line of case law and foreign direct liability cases, it is possible to draw some inferences on the feasibility of parent company liability in the latter context too. These cases do prove that, according to Dutch courts, it is possible for duties of care to arise for parent companies vis-à-vis third parties that are somehow connected to their subsidiaries, in relation to their knowledge of, involvement with and control over the activities of those subsidiaries. They also show that those parent companies may be held liable for the harm that may result if they fail to exercise sufficient care towards the interests of those third parties, for instance by failing to warn those third parties of the (financial) risks involved in the contractual relationship that they have with the subsidiary and/or to intervene on their behalf in the subsidiary's activities.[152] It is clear that some of these findings could under certain circumstances be transposed to the context of foreign direct liability cases. In fact, in those cases courts should even more readily be prepared to assume (breach of) a duty of care of the parent companies involved vis-à-vis host country victims of the people- and planet-related impacts of their corporate groups' transnational activities. In the end, the threshold for a finding of liability tends

150 For a more comprehensive discussion, see Van Rooij 1990.

151 Well-known cases include: HR 25 September 1981, NJ 1982, 443 (*Osby/LVM*); HR 19 February 1988, NJ 1988, 487 (*Albada Jelgersma II*); HR 12 June 1998, NJ 1998, 727 (*Coral/Stalt*); HR 11 September 2009, JOR 2009, 309 (*Comsys*). See, for further discussion of this line of case law: Asser/Hartkamp & Sieburgh 6-IV* 2008, pp. 68-70; Lennarts 1999, pp. 185-213.

152 Compare, for instance: DMEAFA Report (Castermans/Van Der Weide) 2009, pp. 36-38; Enneking 2007, pp. 61-62.

to be significantly lower under Dutch tort law in cases involving personal injuries and involuntary creditors than in tort cases in a more commercial sphere.[153]

Acts and omissions

A question that may arise in this respect is whether it makes a difference if it is not an act of the parent company, in the sense of a policy set out or a decision taken by the parent, that has led to the plaintiffs' harm, but rather an omission, in the sense of an intentional or negligent failure to exercise control over the subsidiary's harmful activities in question. Generally speaking, tortious acts and omissions are very closely connected; problems generally do not arise where the omission is part of an activity (misfeasance), but where it is not part of an activity (nonfeasance). After all, liability for nonfeasance in this sense implies a more serious infringement of the tortfeasor's freedom of action, as it imposes on him a duty to act (an affirmative duty) with respect to risks that have not been created by himself but for instance by the victim, by a third party, or by nature.[154] Also in foreign direct liability cases, the question may arise as to whether the parent company can be held liable for not responding to risks that have been created by its local subsidiaries, by nature, or even by local third parties. In the Dutch Shell cases, for example, the corporate defendants have argued that the oil spills in dispute have been caused by local acts of sabotage; would parent company Royal Dutch Shell (as well as its local Nigerian subsidiary) be cleared of all responsibility if it were able to prove that such was the case? And would the same happen if it turned out that the creation of the risk of oil spills such as the one at issue can only be attributed to its local subsidiary?

On the basis of the Dutch general provision on tort an omission can in principle be as unlawful as an act.[155] However, Dutch case law suggests that in situations of nonfeasance (*zuiver nalaten*), a duty to act (affirmative duty) will only be assumed to exist if there was a (pre-existing) special relationship between the tortfeasor and the victim or between the tortfeasor and the person, object or venue creating the risk. Without such a special relationship, a legal duty to remove an observed risk or to warn others about it where one has no responsibility for its coming into being, can only be assumed where 'the gravity of the danger that this situation poses to others has sunk into the mind of the observer' (which in effect is a subjective test of foreseeability).[156]

In foreign direct liability claims, the issue of parent company liability will usually arise in connection with situations in which the parent company already had some type of pre-existing involvement in its subsidiary's activities, due also to the fact that for any wrongful conduct to be imputable to the parent it must have been able to foresee the

153 Compare, for example: Van Dam 2008, p. 67. See also further sub-section 6.4.2.

154 See, for example: Van Dam 2006, pp. 205-211. See also, in detail: Kortmann 2005.

155 See, generally on the Dutch system of tortious liability for omissions, in a comparative perspective: Van Dam 2000, pp. 439-452 and Van Dam 1995. See also: Giesen 2004.

156 HR 22 November 1974, NJ 1975, 149 (*Struikelende broodbezorger*).

risk and to prevent it from materializing. On this basis, it is possible that even where the parent company cannot be said to be responsible for the creation of the risk itself, it may nevertheless be under an obligation to intervene in the host country activities on the basis of a special relationship it has with, for instance, the object or venue creating the risk, such as a local system of oil pipelines (compare the Dutch Shell cases), a local factory (compare the Bhopal litigation) or local business premises (compare the *Cape* case), and/or with the (legal) person creating the risk, usually its local subsidiary (but possibly also local business partners and/or sub-contractors). The extent of the duty to act that, on the basis of these special relationships, may be imposed on the parent is determined again by the probability that the risk will materialize and by the seriousness of the expected damage on the one hand, and the burden of taking precautionary measures on the other. Where no special relationship exists, the parent may still have an obligation to intervene in the host country activities, for instance where it is aware of or is informed of an existing emergency situation or imminent threat pertaining to the host country activities in which the multinational corporation is involved. Generally speaking, the imposition of an affirmative duty on the parent will in such a case only be justified where there is (a tangible threat of) severe damage, where the burden on the parent of taking (precautionary) measures is justified by the expected effects of such measures, and where it can be said that on the basis of its superior knowledge and capacities the parent is in a far better position to neutralize the particular risk than the (potential) host country victims themselves.[157]

The question at what point a duty comes into existence for the parent company to actively involve itself in its subsidiary's activities so as to prevent those activities from causing harm to people and planet in host countries, is a highly interesting and relevant one in foreign direct liability cases. It has been observed with respect to the previously mentioned line of case law on parent company liability vis-à-vis subsidiaries' creditors, that the fact that a parent company (directly or indirectly) holds its subsidiary's shares or plays an formal role in the subsidiary's management or supervisory board may not in itself be sufficient for a duty to act to arise in a corporate context. Additional circumstances need to exist, such as an already existing intensive policy intervention by the parent in the affairs of its subsidiary.[158] However, the threshold in this respect is likely to be lower under Dutch tort law in the context of foreign direct liability cases, which take place outside a purely commercial context and typically involve personal injuries and involuntary creditors rather than pure financial loss and contractual creditors (of the subsidiary).[159]

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157 Compare Van Dam 1995, pp. 51-105.

158 W.J.M. Van Andel, 'Aansprakelijkheid voor nalaten in het ondernemingsrecht', 16 *Ondernemingsrecht* 50 (2006). See also, on the imputability of knowledge in a corporate context in cases of nonfeasance: B.E.L.J.C. Verbunt, R.F. Van den Heuvel, 'De rol van toerekening van wetnschap bij aansprakelijkheid voor zuiver nalaten in het rechtspersonenrecht', in: M. Holtzer *et al.* (eds.), Geschriften vanwege de vereniging corporate litigation 2006-2007, Kluwer, 2007, pp. 211-230.

159 See also further sub-section 6.4.2.

Interest balancing

The decision in a foreign direct liability case as to whether a multinational corporation's parent company can be held liable for damage suffered by host country plaintiffs is ultimately a matter of balancing interests. The bottom line will be that anyone acting in pursuit of his own interests will also have to take into account the interests of others to the extent that such may reasonably expected of him on the basis of societal norms and practices. The result of this judicial balancing act is a normative judgment based on the applicable standard of care with respect to the behaviour at issue in any particular case. In determining this standard, the court will seek to link up as much as possible with objective standards reflecting the written and unwritten legal and societal norms that are applicable to the subject matter of the particular case. Examples include, for instance, existing treaty or statutory provisions pertaining to behaviour that is related to the behaviour in dispute, general legal principles and convictions, existing norms of (self-regulatory) practices in the societal sector, industry or branch involved, and existing case law in related disputes.[160]

Accordingly, in order to establish the appropriate standard of care in a foreign direct liability case that is brought on the basis of the Dutch general provision on tort/delict's open norm of a violation of unwritten norms pertaining to proper societal conduct, Dutch courts may look to available case law that may be relevant, as well as to societal norms and standards and relevant customs and practices. Relevant starting points may be found, depending on the particular issues in dispute, in Dutch case law on liability in tort and duties of care in similar subject matter areas, such as personal injury cases in general and cases pertaining to liability for asbestos-related diseases, for example, in particular, cases pertaining to employer's liability, product liability, environmental liability and/or the liability of supervisory bodies, as well as the previously discussed line of case law concerning the liability of parent companies towards their subsidiaries' creditors.[161] Insight may also be gained for instance from case law on parent company liability generated by foreign direct liability claims brought before other Western society home country courts. Furthermore, relevant clues may be found in societal norms and standards pertaining to corporate social responsibility and accountability as laid down in international instruments such as the UN 'Protect, Respect and Remedy' policy framework for business and human rights, the International Declaration on Human Rights, the OECD Guidelines for Multinational Enterprises, the UN Global Compact principles, the ISO 26000 guideline on corporate social responsibility, as well as more sector-specific instruments such as the Voluntary Principles for Security and Human Rights.[162] Similarly, written or unwritten hard law norms of public international law may, as has already been discussed, play a role in this context, even where the norms concerned are not suitable for direct application in

160 See, for instance: Asser/Hartkamp & Sieburgh 6-IV* 2008, pp. 79-83; Van Dam 2000, pp. 175-179, 189-191, 243-245, 284-286.

161 For further detail, see Enneking 2007, pp. 58-78.

162 Compare, for instance: Enneking, Giesen *et al.* 2011, p. 549.

the horizontal legal relationships between multinational corporations' parent companies and host country plaintiffs.[163]

Causation

In the end, it is up to the Dutch courts determining foreign direct liability claims brought before them to decide whether the defendant parent companies, on the basis of their knowledge of the risks of people- and planet-related harm involved in the multinational corporations' host country activities and of their actual potential to remove or mitigate the risks concerned, had a duty of care vis-à-vis the host country plaintiffs and whether they have lived up to this duty. If the court decides that the corporate defendants involved could and should have exercised better care with respect to the host country plaintiffs' legally protected interests, it can hold them liable for the resulting damage, provided a causal link can be established between the parent company's conduct and the harm suffered by the plaintiffs (primary causation). Due to the fact that the parent companies in these cases are typically only indirectly involved in the host country activities that have resulted in harm to people- and planet-related interests in the host country, establishing a causal link may be difficult in this context. After all, many other actors and events typically lie along the causal chain that connects these parent companies' wrongful acts or omissions to the actual damage suffered by the host country plaintiffs.[164]

Dutch tort law (or, in fact, the Dutch law of damages more generally) applies a two-stage causation test. The first stage requires that the wrongful acts or omissions in dispute have somehow contributed to the creation, enlargement or alteration of the damage involved (primary or factual causation). The criterion is that of *conditio sine qua non*; was the event, activity or conduct in dispute a necessary condition for the occurrence of the damage? It does not necessarily need to be the exclusive or the only relevant cause of the damage, as every consequence tends to be the result of a sequence of factors without which it would not have occurred as such. Furthermore, for factual causation to be established the event, activity or conduct in dispute also does not necessarily need to be the most proximate cause of the damage.[165] Although the existence of multiple causes for the damage in dispute does not alter the fact that those responsible for any one of those causes may be held liable, it may raise questions with respect to the attribution of liability among multiple tortfeasors (including the victim himself if the damage is in part a result of his own fault), and the possibility of mutual recourse; a further discussion of these matters goes beyond the scope of this study, however.[166]

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163 See further sub-section 5.2.2.

164 See, for instance: Van Dam 2008, pp. 62-63.

165 For more detail, see, for instance: Asser/Hartkamp & Sieburgh 6-II* 2009, par. 47-52, 85-97. See also Winiger, Koziol *et al.* 2007, pp. 32-35, 119-122, 292-295, and, in a comparative perspective, Van Dam 2006, pp. 266-300.

166 See, for a more detailed discussion and further references: Asser/Hartkamp & Sieburgh 6-II* 2009, par. 85-90. See also, for an in-depth discussion of the matter of recourse, Engelhard 2003. Note that Article 6:99

If the *conditio sine qua non* test is met, an imputation test is applied to determine the extent of the defendant's legal obligation to make compensation for the damage that is a result of his wrongful acts or omissions (secondary or legal causation). The question to be answered at this stage is whether and to what extent the damage in dispute can reasonably be imputed on the tortfeasor in view of the connection between his tortious behaviour and the resulting damage, considering also the nature of both the tort and the resulting damage.[167] Various factors may in practice play a role at this stage, including, *inter alia*, the foreseeability of the resulting damage, its remoteness (both geographically and in time), its extent and nature (personal injuries or other), and the question whether the wrongful in dispute was intentional or negligent. Point of departure is whether the damage that has arisen could have reasonably been expected by the tortfeasor to be the consequence of his actions. However, Dutch courts tend to stretch the limits of causation at this stage very far in cases involving violations of written or unwritten rules of safety and conduct that seek to protect against bodily harm. Furthermore, especially in cases where the wrongful conduct can be said to have been engaged in intentionally rather than merely negligently, Dutch courts will be likely to impute to it more remote and improbable harmful consequences of its activities as well. As for the nature of the damage, imputation is likely to be more liberal in cases involving personal injuries than in cases involving purely economic loss.[168]

Whether and to what extent matters of primary or secondary causation are likely to be an issue in foreign direct liability claims remains hard to say, considering the fact that only in very few of these cases a decision has been reached on the merits of the claim. Notwithstanding this lack of relevant case law, however, it is obvious that the long and complex causational chains in these cases, which typically involve a variety of potential causes and potential tortfeasors and are often further complicated by a context of industrial accidents involving hazardous substances, may make it very difficult for the host country victims involved to substantiate their claims in this respect. Examples that come to mind are the Dutch Shell cases (in which one of the issues in dispute remains whether the oil leaks have been caused by lack of maintenance or by sabotage), the Trafigura case (in which one of the issues in dispute was whether the waste that was caused could indeed have caused the personal injuries complained of), and the Bhopal litigation (in which the actual circumstances leading up to the release of the poisonous gas cloud have to day not been resolved).[169] Although Dutch case law in related contexts, such as liability for asbestos-related damage and liability for damage caused by defective products, may offer

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Dutch Code of Civil Procedure determines that if the damage may be a consequence of the actions of any one of a number of potential tortfeasors and is for certain a result of the actions of (at least) one of them, each of these potential tortfeasors can be held liable, unless he proves that the damage was not a consequence of his actions. See, in more detail and with further references to case law: Asser/Hartkamp & Sieburgh 6-II* 2009, par. 91-97

167 Article 6:98 Dutch Civil Code. See, for instance: Asser/Hartkamp & Sieburgh 6-II* 2009, par. 53-62; Winiger, Koziol *et al.* 2007, p. 601; Van Dam 2008, p. 63.

168 See, with further references to case law: Asser/Hartkamp & Sieburgh 6-II* 2009, par. 63-75.

169 See also further sub-sections 3.2.2 and 3.2.3.

some guidance for dealing with the complex causational issues that may arise in these cases,[170] issues of causation are likely to remain a significant stumbling block in foreign direct liability cases, also under Dutch provisions of tort law.

Burden of proof

The problems that may arise for host country victims seeking to bring foreign direct liability claims against Dutch parent companies of multinational corporations particularly where it comes to issues of causation demonstrate the significance in this context of the way in which the burden of proof is distributed between these plaintiffs and the corporate defendants in such disputes. One of the main principles of the Dutch law of evidence is that the plaintiff in a civil procedure before a Dutch court will have to furnish and where necessary prove the legal and factual circumstances underlying his claim.[171] Accordingly, in any foreign direct liability case that is brought before Dutch courts on the basis of Dutch tort law, the burden of proof with respect to the minimally required factual content of the legal rule upon which the claim is based will in principle be on the host country plaintiffs. Meeting this burden of proof may be particularly problematic for these plaintiffs, however, due to the lack of transparency that typically exists with respect to the internal control structures and transnational activities of the multinational corporations involved and the inequality of arms that often characterizes the relations between these plaintiffs and their corporate opponents.[172]

Therefore, it is important to note that, at various points, Dutch substantive tort law allows for (partial) reversals of the burden of proof, assumptions of fact, or increased obligations for defendants to provide grounds, which together may in effect considerably lighten the host country plaintiffs' burden in these cases when it comes to furnishing and proving the necessary facts. Whereas the actual reversal of the burden of proof is relatively controversial and therefore also relatively rare, assumptions of fact and increased obligations for defendants to provide grounds are generally considered to be less drastic. A relevant example is the assumption of wrongfulness in tort cases pertaining to personal injury, where the fact that personal injury has arisen as a result of the defendant's activities may lead courts to assume, subject to proof to the contrary, that the defendant has failed to exercise due care. Also, when it comes to proof regarding the defendant's knowledge of the risk involved in a particular activity and his capacity to prevent the risk from materializing (fault), the burden of proof is generally assumed to lie with the defendant rather than the plaintiffs.[173]

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170 Similarly, and with (some) further references, Enneking, Giesen *et al.* 2011, p. 550.

171 Article 150 Dutch Code of Civil Procedure.

172 See further sub-section 3.2.3.

173 For further detail on this matter, see, in a comparative perspective: Giesen 2001. See also: Giesen 2009a; Asser/Hartkamp & Sieburgh 6-IV* 2008, pp. 103-105; Van Dam 2000, pp. 189-191, 243-245, 284-286.

As for proof of causation, difficulties may arise where the host country plaintiffs need to prove the existence of a *conditio sine qua non* connection between the allegedly wrongful activities by the corporate defendant(s) and the harm suffered. Also when it comes to primary causation, the burden of proof is in principle on the plaintiffs; in practice, however, Dutch courts may under some circumstances alleviate the burden of proof in this context.[174] It is generally accepted in Dutch case law, for example, that if the tortious acts or omissions create a certain risk of harm through violation of written or unwritten norms of safety and conduct and if this risk materializes, a causal connection between conduct and harm is in principle, subject to proof to the contrary, assumed to be present.[175] At the same time, Dutch courts have in various contexts come up with creative ways to deal with situations in which it is impossible to establish with certainty whether and to what extent a norm violation has resulted in damage, and/or whether the harm suffered has been caused by the norm violation in dispute.[176] Secondary causation, on the other hand, is not a matter of fact but a matter of law and will thus be determined by the court on the basis of what has been established in the course of the procedure. Consequently, the burden of proof in relation to any assertion by the tortfeasor that the damage as a whole or particular types of loss are not sufficiently connected to the tortious conduct in dispute to be imputed on him, is much less important given that this involves a legal and not a factual determination.[177]

All in all, it is likely that these circumstances that determine the division of the burden of proof between the host country plaintiffs and the corporate defendants in foreign direct liability cases brought before Dutch courts on the basis of the Dutch general provision on tort, will play a paramount role in determining the feasibility of such cases.[178]

5.3.2 A brief discussion of some related legal bases for parent company liability under Dutch law

As has been discussed, foreign direct liability cases that are brought before Dutch courts on the basis of Dutch tort law are most likely to be constructed, like most non-ATS-based foreign direct liability cases that have been brought before Western society home country courts so far, as tort claims relating to alleged violations of unwritten norms pertaining to proper societal conduct. There is also the possibility of basing such claims on written norms of domestic law or public international law. Due to the scarcity of relevant written

174 See, for a more detailed discussion and further references to case law: Asser/Hartkamp & Sieburgh 6-II* 2009, par. 76-82.

175 For more detail on the way in which this so-called 'reversal-rule' has over time been applied in Dutch case law, see Giesen 2009c.

176 See, with further references to case law: Asser/Hartkamp & Sieburgh 6-II* 2009, par. 79-81.

177 See, for instance: Asser/Hartkamp & Sieburgh 6-II* 2009, par. 82.

178 See also: Enneking, Giesen *et al.* 2011, pp. 554-555.

norms in this context, especially international hard law norms, this option is less obvious, however. At the same time, any claims pertaining to alleged violations of statutory or treaty norms can in principle also be accommodated by the Dutch provision on tortious liability for violations of unwritten norms pertaining to proper societal conduct/due care.[179]

There are a number of related legal bases that could in theory also be used to hold multinational corporations' parent companies liable for harm caused to people- and planet-related interests as a result of the activities of those multinational corporations in host countries. It should be noted, however, that the question as to whether any of these alternative legal bases could be of potential use in this particular context is at this point a hypothetical one. After all, as has been discussed before, foreign direct liability cases have so far typically been based on tort law causes of action in general and (at least outside the US) the tort of negligence in particular.[180] At the same time, the potential use of these alternative legal bases is also highly dependent on the specific circumstances that are at issue in each individual case. Therefore, and also with an eye to the fact that a elaborate discussion would go beyond this study's focus on foreign direct liability cases and tort law more generally, the discussion of these alternative legal bases will be brief and limited to what may arguably be considered to be the most relevant alternatives under the contemporary legal status quo.

Strict(er) liability

First of all, next to the general provision on tort, which is in essence a provision of fault-based liability, the Dutch civil code features a number of provisions that impose strict liabilities in particular subject-matter areas. The two main categories are strict liability for damage caused by the tortious acts of (other) persons, such as employees, independent contractors and agents, and strict liability for damage caused by objects, such as dangerous substances or defective products.[181] Generally speaking, strict liability does not require fault in the sense of intentional or negligent conduct on the part of the defendant, meaning that liability is in effect linked to the materialization of a risk that is inherent in a particular activity or situation and as such disconnected from the defendant's conduct and whether or not he exercised due care. In reality, however, strict liability may come in many forms and shapes and the exact line between fault liability and strict liability is far from clear.[182]

Strict liability is introduced in subject-matter areas where provisions of fault liability do not lead to satisfactory results. There may be various possible reasons for introducing a rule of strict(er) liability in a specific subject-matter area. One of the main reasons may be to make it easier to hold societal actors liable with respect to certain objects or activities within their power that pose a higher than average risk to others, such as motor

179 See *supra* sub-section 5.4.1.
180 See further sub-section 4.1.1.
181 For more detail, see Asser/Hartkamp & Sieburgh 6-IV* 2008, pp. 159-189 and 191-260.
182 See, for instance: Van Dam 2006, pp. 255-265; Van Dam 2000, pp. 287-294.

vehicles, animals or defective products. Rules of strict liability will in such cases make it easier for those suffering damage as a result of the materialization of those risks to claim compensation, as they are not required to prove negligent conduct in order to establish liability on the part of the defendant; this may be particularly relevant if the defendant is a complex (and thus opaque) organisation. Further arguments that may support the introduction of strict liability with respect to a particular activity may include the idea that a particular societal actor, such as a manufacturer, is better able than others to redistribute the societal costs that are inherent in his activities, or that since he is the one to benefit from those activities, he should also be the one to foot the bill.[183]

When it comes to strict liability rules, a distinction may be made between negligence liability with an extra (strictly liable) debtor, strict liability for a defective object and strict liability with a limited defence.[184] Examples of provisions of negligence liability with an extra (strictly liable) debtor in the Dutch civil code that may be relevant in the context of foreign direct liability cases are the liability of employers for the faults of their employees and the liability of principals for the faults of their independent contractors or agents.[185] The Dutch civil code's rules on product liability provide a potentially relevant example of strict liability for a defective object.[186] Examples of strict liability with a limited defence that may potentially be relevant in this context are the provision on liability for dangerous substances, the provision on liability for environmental damage caused by dumping sites, and the provision on liability for damage caused by mining operations.[187]

Generally speaking, these types of strict liability will only in exceptional cases provide a legal basis for foreign direct liability claims brought under Dutch tort law. After all, the defendant parent companies in these cases are typically only indirectly linked with the harmful host country activities in question, which are usually carried out locally by subsidiaries, business partners and/or sub-contractors, and therefore also only indirectly linked with the host country plaintiffs. As these local operators are usually separate legal entities, it will generally not be possible to designate them or their staff members as employees, independent contractors or agents of the home country-based parent companies. Similarly, it will not be possible in most cases to designate those parent companies as the operators of any host country-based dumping sites or mines, or as the commercial users of any dangerous substances used in the course of the local business operations.[188] Another statutory provision that the host country plaintiffs will usually not be able to rely on is that on the duty of care of the employer for the health and safety of his employees, which has given rise to a line of case law introducing what some claim is a

183 Van Dam 2006, pp. 256-258.
184 Van Dam 2006, pp. 258-260.
185 Articles 6:170, 6:171 and 6:172 Dutch Civil Code.
186 Articles 6:185-6:192 Dutch Civil Code.
187 Articles 6:175, 6:176, 6:177 and 6:181 Dutch Civil Code.
188 See also: Enneking, Giesen *et al.* 2011, p. 550.

pseudo-strict liability for employers in this respect vis-à-vis their employees.[189] After all, in those foreign direct liability cases where the host country plaintiffs have suffered harm in the course of their employment, they are typically employees of a local subsidiary, not of the parent company itself.[190]

Accordingly, in the end the host country plaintiffs in foreign direct liability cases brought on the basis of Dutch tort law will, in the majority of cases, have to revert to the Dutch general provision on tort, which as discussed is fault-based. Still, it is very possible that a Dutch court determining a foreign direct liability claim brought on the basis of the general Dutch provision on tort law will take into account the existence and underlying rationales of these strict(er) rules on liability when determining the standard of care in a situation that resembles the situations for which these liabilities have been created.[191] At the same time, it is interesting to note that, at the time of their introduction in the early 1990s, the rules on strict liability with respect to dangerous substances and to pollution of water, air and soil gave rise to suggestions of introducing enterprise liabilities. It was argued by some that the activities of different legal entities within one corporate group should, for the purposes of these types of strict liability, be viewed as the activities of one enterprise if a sufficient degree of technical, functional or organizational unity between those entities could be said to exist. The idea behind this suggestion was that these types of strict liability would become meaningless if such groups were to be allowed to evade them by having hazardous activities carried out by financially weaker group members. This suggested broad interpretation was rejected at the time however by the then Minister of Justice.[192] Still, as is clear from what has been discussed in the previous chapter, in the context of foreign direct liability cases such enterprise liability theories remain very relevant also today.[193]

Piercing the corporate veil

As discussed before, foreign direct liability cases in which it is sought to hold parent companies liable in tort for their own tortious acts or omissions in relation to host country activities that are conducted by their foreign subsidiaries, are to be distinguished

189 Article 7:658 Dutch Civil Code. See, for instance: Hartlief 2009, pp. 34-47, who notes that this line of case law, which has a strong focus on victim protection and is quick to assume a violation of a duty to guarantee a safe working environment on the side of the employer, has in effect transformed this article into a pseudo-strict liability, even though the Dutch Supreme Court has always focused on the requirement of a failure on the side of the employer to live up to his duties as a precondition for liability under Article 7:658 Dutch Civil Code. Hartlief also notes that under Article 7:611 Dutch Civil Code the employer may have an obligation to ensure that his employees are properly insured against real risks related to their daily job (especially risks pertaining to job-related traffic accidents).

190 See further sub-section 3.2.3.

191 See, in more detail: Enneking 2007, pp. 74-76. Compare also Enneking, Giesen *et al.* 2011, p. 550 and see *supra* sub-section 5.3.1.

192 See TK 1991-1992, 21 202, nr. 8, p. 4 and TK 1991-1992, 21 202, nr. 9, p. 8. See also, for further detail and with further references: Enneking 2007.

193 See further sub-section 4.4.3.

from cases in which parent companies are held liable for the debts of their subsidiaries on the basis of the corporate law notion of piercing the corporate veil (*doorbraak van aansprakelijkheid*).[194] On the basis of this notion, courts may in exceptional cases disregard both the fact that parent companies and their subsidiaries are separate legal entities and the fact that a shareholder's liability is usually limited to the amount of its investment in a (limited liability) company, and hold parent companies liable for the debts of their subsidiaries.[195] Claims to pierce the corporate veil occur especially in situations where creditors of an insolvent corporation who cannot recover their money from their original debtor turn to the shareholders of that corporation (in corporate groups this may be a parent company) to obtain satisfaction. The creditors involved may also include tort creditors that have a financial claim against the original debtor as a result of a putative or legally established obligation to pay compensation for damage that has arisen out of a wrongful act or omission by the now-insolvent company.[196] Apart from the fact that this alternative basis for parent company liability, as will be discussed below, has a different point of departure, applies a completely different test and has different outcomes from parent company liability that is based on general tort principles, it may also lead to the applicability of different rules of private international law; for this reason a sharp distinction should be made between these two very different legal bases.[197]

Confusion between these two very different legal bases for parent company liability may arise due to the fact that they may lead to the same result, namely parent company liability for damage suffered by third parties as a result of activities undertaken by (other legal entities within) a corporate group. At the same time, in both types of procedures the measure of control that a parent company has over (the activities of) its subsidiaries or other entities within the corporate group tends to play an important role.[198] The already existing confusion is exacerbated by the fact that, in Dutch legal literature, cases in which parent companies are held liable in tort for their own tortious behaviour are sometimes referred to as cases pertaining to indirect piercing of the corporate veil (*indirecte doorbraak van aansprakelijkheid*).[199] Also with respect to foreign direct liability cases, it is sometimes suggested that claims of parent company liability in this context are examples of piercing

194 See further sub-section 4.4.3.

195 See, for instance: Vandekerckhove 2007, pp. 3-6, who notes that whereas the notion of limited liability is typical of certain corporations (in particular limited liability corporations), the notion of separate legal personality may concern any natural person or corporate entity.

196 See generally on piercing the corporate veil in a comparative perspective: Vandekerckhove 2007.

197 For a comprehensive discussion of private international law rules applicable to different forms of parent company liability: Vandekerckhove 2007, pp. 557-706; Lennarts 1999, pp. 291-367. Note that the qualification of civil claims brought before Dutch courts as tort claims (or other types of claims) will in principle take place on the basis of Dutch law as the law of the forum. See Strikwerda 2005, pp. 43-47.

198 See, however, on the difference between the control test applied in the context of parent company liability on the basis of general principles of tort law and that applied in the context of parent company liability on the basis of piercing the veil: Joseph 2004, p. 136. See also sub-section 4.4.3.

199 See, for instance: Asser/Maeijer/Van Solinghe & Nieuwe Weme 2-II 2009*, pp. 1064, 1069.

the veil.[200] As has already been discussed, however, foreign direct liability cases are generally not based on doctrines of piercing the corporate veil, although such doctrines have played a limited role in US-based foreign direct liability cases, where they have primarily been resorted to in order to get US courts to assume personal jurisdiction over foreign parent companies of multinational corporations through their US-based subsidiaries.[201]

In reality, these two legal bases for parent company liability offer two very different starting points for two very different routes only to come to more or less the same outcome. The main difference between the two is that in cases of direct (or primary) parent company liability (*i.e.*, tortious liability of the parent company for its own wrongful acts or omissions) the corporate veil is in fact left intact.[202] Another difference is that the particular requirements for parent company liability on the basis of doctrines of piercing the veil are very different from those for parent company liability on the basis of general principles of tort law. Under Dutch (corporate) law, for example, the main judicial doctrine on the basis of which courts may be prepared to pierce the veil between a parent and its subsidiary for the benefit of the subsidiary's creditors is that of identification (*vereenzelviging*).[203] On the basis of this doctrine, courts may under certain circumstances pass over the separate identities of parent company and subsidiary and consider them as one, attributing the acts and liabilities of the one corporation to the other, which may lead to the liability of the parent company for the debts of its subsidiary.[204] Generally speaking, they will only do so by way of exception, as piercing the corporate veil is considered to be an *ultimum remedium* that is to be used only in cases where liability in tort cannot lead to a reasonable result (for example in cases involving fraudulent use of separate legal personality or commingling of assets).[205]

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200 See, for instance: Vandekerckhove 2007, pp. 73-74, 658-662.

201 See, in more detail: Joseph 2004, pp. 84-87, who notes *inter alia*: "*It is important to distinguish the tests for* jurisdiction *over a corporation based on alter ego/agency from the tests for* liability *over a corporation based on alter ego/agency. The former establishes a connection between the corporation and the forum such that a case against the corporation can proceed within the forum.* [...] *The latter relates to whether the corporation can actually be held liable for the actions of its alter egos/agents.* [...] *The test for alter ego/agency jurisdiction is easier than the test for alter ego/agency liability*" (p. 87, citations omitted).

202 See similarly, for instance: Asser/Maeijer/Van Solinghe & Nieuwe Weme 2-II 2009*, p. 1069. See also: Enneking, Giesen *et al.* 2011, p. 547, Lennarts 2003.

203 For a more detailed discussion, see Van Dongen 1995.

204 See, in more detail: Vandekerckhove 2007, pp. 36-38, who notes: "*Whether in a particular case several (legal) persons may be identified depends on the factual circumstances of the case. From the case law on the matter different factors may be deduced, that, mostly in combination with each other, may give rise to identification. Such factors are, among others, dominance of one corporation over another, intensive involvement in the management of a corporation, the creation of expectations* vis-à-vis *third parties, commingling of assets, close intermingling (consisting of, for instance, identity of shareholders and/or directors, identity of addresses, use of the same letterhead, etc.). In general, a court may decide to identify affiliated corporations when recognizing that the formal separate existence of both would lead to consequences that would be contrary to good faith*" (p. 37, citations omitted). See also: Lennarts 1999, pp. 234-243.

205 See, for instance: HR 13 October 2000, NJ 2000, 698 (*Rainbow*), where the Dutch Supreme Court indicated that identification of legal persons is justified only under highly exceptional circumstances (§ 5.3). See also, for example: Lennarts 1999, pp. 234-243; DMEAFA Report (Castermans/Van Der Weide) 2009, pp. 35-36.

A further difference between claims of parent company liability on the basis of general principles of tort law and claims of parent company liability on the basis of piercing the veil is their outcome. After all, parent company liability on the former basis in principle leads to an obligation for the parent to compensate damage that can be said to have been caused by its own wrongful acts and omissions (*conditio sine qua non*) and that can reasonably be imputed to it, in line with the general rules for tortious liability and (secondary) causation. Parent company liability on the latter basis, however, leads to a potentially much wider obligation for the parent to settle its subsidiary's debts, as it enables the creditor to recover his entire claim against the subsidiary from the parent company, irrespective of whether it was actually involved in the coming into being of that claim. The potentially far-reaching consequences of this legal doctrine provide an additional reason for the restraint that tends to be exercised by Dutch courts where its application is concerned.[206] As is clear from what has been discussed in the previous sub-section, similar restraint will not exist in foreign direct liability cases based on Dutch general provisions of tort law.

Criminal liability

A final potential alternative legal basis for parent company liability in this context that needs to be mentioned here is that of criminal liability. It is important to note that although the fields of criminal law and tort law do share some common ground, there are also important differences between the two. Criminal law on the one hand seeks to maintain a country's legal order with a view to protecting society and its public interests and pertains to the vertical legal relationships between private actors and the government as the organ representing society's general interest. Tort law on the other hand seeks to remedy any disturbances in the balance between one party's freedom to act and the protection of another party's interests and pertains to the horizontal legal relationships between private actors among themselves. Whereas both fields of law deal with alleged norm violations, criminal law sanctions, which are primarily aimed at punishing the norm violator, are typically much more severe than the predominantly financial sanctions provided for in the field of tort law, which are primarily aimed at compensating those suffering harm as a result of another's norm violation. In line with the principle of legality (*nulla poena sine lege*), the field of criminal law deals only with violations of a limited number of well-defined statutory norms; in contrast, the field of tort law, as discussed, deals with the harmful consequences of violations of a wide variety of written and unwritten, domestic and international legal norms.[207]

Generally speaking, the idea of holding corporations liable before Dutch courts and on the basis of Dutch and/or international criminal law for people- and planet-related harm caused abroad is still in its infancy. This is even more true for the idea of holding parent

206 Compare Lennarts 1999, pp. 242-243, who speaks of the 'filleting knife' of tortious liability versus the 'blunt ax' of piercing the corporate veil. See also Enneking, Giesen *et al.* 2011, p. 547.

207 See, for instance: Asser/Hartkamp & Sieburgh 6-IV* 2008, pp. 5-10.

companies criminally liable with respect to harm caused abroad by their multinational groups. After all, the criminal law principle of legality in combination with the fact that in today's international legal order domestic conduct-regulating rules are in principle territorially based result in the fact that the mechanism of domestic criminal law can only exceptionally be put into action with respect to foreign actors and/or activities that have taken place abroad.[208] Still, there do seem to be some possibilities for holding multinational corporations' parent companies liable for violations of people- and planet-related interests abroad on the basis of existing principles of Dutch criminal law.[209] At the same time, however, the question may be raised as to what extent it will be considered opportune to apply criminal law to the extraterritorial issues that may arise in this context.[210] The importance of this question is not to be underestimated, as criminal liability claims against multinational corporations' parent companies for violations of host country people- and planet-related interests cannot be initiated by host country victims suffering harm as a result, but are initiated by the Dutch public prosecutor, who will only do so where this is perceived to be in the general interest of Dutch society as a whole.

A case such as the Trafigura case demonstrates that domestic as well as international provisions of criminal law and Dutch criminal courts may play a role in the context of foreign direct liability cases.[211] At the same time, however, it also shows the limitations of the criminal law mechanism in this respect, for instance in the sense that the criminal liability claims in this case relate only to offences perpetrated in the Netherlands, and not to those (allegedly) perpetrated in the Ivory Coast. An official complaint by Greenpeace against the Dutch public prosecutor's decision not to prosecute Trafigura for the alleged dumping of illegal substances abroad was rejected by the The Hague Court of Appeals.[212] Furthermore, it should be noted that under the Dutch rules on criminal procedure a request to join a civil claim will generally be rejected if the civil matter is too complicated to be handled by a criminal court, which is likely to be the case with respect to most contested civil claims.[213] Accordingly, it is unlikely that the option of joining claims for civil damages to ongoing criminal procedures will play a role in the context of foreign direct liability cases, as is also evidenced by the early rejection of a civil party seeking to join the

208 Note that domestic criminal law may also encompass norms of international criminal law; an example is the aforementioned Dutch International Crime Act (*Wet Internationale Misdrijven*), which implements the international criminal offences of the Rome Statute of the International Criminal Court. When it comes to alleged corporate involvement in international crimes, domestic criminal courts remain the principal enforcement mechanisms, as only limited enforcement mechanisms exist at the international level, and those that do exist, such as the International Criminal Court, do not generally have jurisdiction over corporate violators. For a comprehensive treatise of corporate criminal liability under international law: Stoitchkova 2010.

209 For a detailed discussion of this matter, see Kristen 2010, pp. 121-189.

210 Kristen 2010, pp. 174-183.

211 See further sub-section 3.2.2.

212 Hof Den Haag 12 April 2011, LJN BQ 1012. Greenpeace made its request for review of the public prosecutor's decision not to prosecute on the basis of Article 12 Dutch Code of Criminal Procedure.

213 Article 163 (3) Dutch Code of Criminal Procedure. See, for instance, Reijntjes 2009, pp. 88-89.

criminal case against Trafigura. Still, irrespective of its limitations in this context, the field of criminal law does seem to have some potential when it comes to holding multinational corporations' parent companies accountable before Dutch courts for violations of people- and planet-related interests in host countries, both as an alternative and as an addition to tort-based transnational civil litigation in this context, something that may need to be further explored in the future.[214]

5.4 Procedural and practical circumstances

5.4.1 The role of tort-based civil litigation in Dutch society

As has been discussed, it may be possible under certain circumstances to bring foreign direct liability cases before Dutch courts on the basis of Dutch tort law. A factor that may affect the feasibility of such cases is the role that tort-based civil litigation plays in Dutch society and, closely related to this, the remedies that under the Dutch tort system may be claimed by the host country victims.[215]

Generally speaking, the primary function of the Dutch system of tort law is still perceived to be its role as a compensatory mechanism, as most tort cases can be said to revolve around the question as to whether a particular plaintiff has a legal claim to compensation for any damage suffered by him as a result of a particular infringement of his legally protected interests. At the same time, however, the past decade has seen a development in the Netherlands not only among legal practitioners and legal scholars but also among policymakers in the direction of a more instrumental view of the tort system. Attention to the Dutch tort system's potential additional roles as a behavioural mechanism, providing behavioural incentives that may prevent future tortious conduct, and/or as an enforcement mechanism, giving legal effect to both internally and externally generated conduct-regulating rules, is on the rise. This development has been accompanied and reinforced by similar developments throughout Europe and at the EU-level in particular, all of which have ultimately been inspired by US perceptions of the role of the tort system in society.[216]

As a result, the Dutch tort system is increasingly sought to be brought into action in order to influence and/or direct behavioural patterns of private actors in society. This intended new role for the tort system in Dutch society is by no means uncontroversial,

214 See further Kristen 2010.

215 Note that both under the regime of the Rome II Regulation and under that of the Dutch Private International Law (Torts) Act, the question as to the type of remedies that may be claimed in a tort case is determined in principle by the substantive rules of tort law that are applied to the case. See further section 4.3 and *supra* section 5.2.

216 See, generally on these developments, with a focus on the Dutch tort system and with further references: Hartlief 2009. See also, for more detail on the role of tort law in society, chapter 9.

however.[217] The question arises as to how suitable the tort system is, with its inherent focus on balancing the individual interests of the private parties involved in any particular dispute and on *ex post* compensation of damage suffered, for the 'new' tasks it is asked to perform, especially in comparison with other mechanisms for behavioural regulation and enforcement of conduct-regulating norms. Similarly, the question arises whether and to what extent Dutch courts are equipped (and democratically legitimized) to realize in practice the new and increasing expectations that are placed on the Dutch tort system in this respect. Especially in subject-matter areas where alternative regulatory and enforcement mechanisms have shortcomings, however, the question arises as to whether the parameters of the Dutch tort system should be adapted so as to better allow it to play its regulatory and/or enforcement role, for instance by introducing the concept of punitive damages or by better enabling those suffering harm as a result of another's violation of conduct-regulating norms to initiate tort-based civil procedures.[218]

These developments towards a reinvention of the Dutch tort system as a mechanism that not only provides victims of tortious behaviour with compensation, but may also be brought into action to prevent such behaviour and/or enforce different types of conduct-regulating norms, have been somewhat dampened down by a deeply rooted concern in the Netherlands about the US-style litigation culture. The Dutch government and the Dutch liability insurance industry have pointed out that the introduction into the Netherlands of the American state of affairs in this respect (popularly referred to as '*Amerikaanse toestanden*', which may be loosely translated as the US civil litigation 'circus') would be an undesirable development as it might result in a further juridification of society, an overburdening of the judicial system, rising societal costs, and insurability issues.[219] In line with this point of view, Dutch governmental policies have, over the past decade, reflected the general idea that the tort system should maintain its status quo, in the sense that its development and its use should be kept within limits. It is in this light that the rejection by the government of various proposals to consider the introduction of outcome-related fee systems for lawyers can be seen, for example.[220] The same is true of the general unwillingness to consider the introduction to the Dutch civil system of private law remedies aimed at influencing the tortfeasor's behaviour rather than compensating the victim's damage, such as punitive or exemplary damages.[221]

Still, notwithstanding these concerns over introducing a US-style litigation culture, societal changes have over the past decade inexorably led to changing and increasing demands being made on the Dutch tort system, demands that seem to be meeting with

217 See, for instance: Kortmann 2009.
218 See, generally: T. Hartlief, Anno 2010, deLex, 2009, pp. 49-71, 113-123. See also, for instance: Van Boom 2006.
219 See Kamerstukken II 1998-1999, 26 630, nr. 1.
220 Hartlief 2009, pp. 4-5.
221 See, for instance: Kortmann 2009. Compare also, with further references, Hartlief 2005, pp. 2-4.

increasing response from the Dutch judiciary.[222] It is interesting to note in this respect that the Dutch Supreme Court itself has embarked on a mission to strengthen its role as developer of the law.[223] One of the fields in which commentators have predicted it may come to play an important role in the future is that of the internationalisation of law, in particular when it comes to the assessment of foreign direct liability claims.[224] The changes in the societal role of the Dutch tort system are further encouraged by the increasing emphasis at the EU-level on the role that domestic private law mechanisms in general and domestic tort law mechanisms specifically may play in facilitating private enforcement of conduct-regulating rules in subject-matter areas such as competition law and consumer law.[225] As mentioned, the European Commission has alluded in this respect to the possibility of introducing aggravated damages across Europe in order to strengthen the regulatory/enforcement role of the Member States' tort systems.[226] At the same time, it is currently looking into the options for strengthening existing collective redress mechanisms and/or introducing new collective redress mechanisms in the EU Member States and/or at EU-level.[227]

For now, however, the principal remedy to be claimed on the basis of Dutch tort law remains that of compensatory damages. In determining the amount of damages to be awarded, one of the main guiding principles of the Dutch tort system is that of *restitutio in integrum* (restoration to original condition), which means that financial compensation is awarded to the extent necessary to put the victim in the position he would have been in had it not been for the tortious act or omission.[228] As such, the host country plaintiffs in foreign direct liability claims brought on the basis of Dutch tort law can in principle claim compensation for all of the damage they have sustained as a result of the tortious act or omission, at least to the extent that that damage is compensatable in the sense of being reducible to a monetary amount. Under Dutch law, compensatable damage includes primarily material damage suffered by the plaintiffs as a result of the tortious behaviour at issue (both losses suffered and profits lost) but may also, to the extent provided for by law, encompass other types of damage such as non-material damage. In personal injury cases, for example, victims may claim compensation for the costs of their recovery as well

222 See, for instance: Hartlief 2009, pp. 1-6.

223 See, in more detail on these developments: Hol, Giesen & Kristen 2011.

224 Vranken 2011, pp. 41-44.

225 For more detail on the rise of the instrumentalist view in Europe, see, for instance: Kortmann 2009, pp. 11-14.

226 See, for instance: European Commission, 'White Paper on Damages actions for breach of the EC antitrust rules', COM(2008) 165 final (2 April 2008); European Commission, 'Green Paper on Consumer Collective Redress', COM(2008) 794 final (27 November 2008). See also further sub-section 6.3.2.

227 It is currently conducting a consultation on collective redress, the main purpose of which is "[...] *to identify common legal principles on collective redress*" in order to "[...] *help examine how such common principles could fit into the EU legal system and into the legal orders of the 27 EU Member States*". See, for the latest state of affairs, the European Commission website: <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#cr>.

228 Compare, for instance: Van Dam 2006, pp. 301-302, 316-318.

as for other material and non-material damage resulting from their injury, including pain and suffering.[229]

Examples of other financial remedies that may be claimed by the host country plaintiffs in foreign direct liability cases include surrender of profits in cases where the corporate defendants can be proved to have earned profits as a result of the tortious act or omission in dispute.[230] Generally speaking, however, Dutch law does not at present allow for damages claims that are aimed primarily at punishing the tortfeasor rather than compensating the victim or providing deterrence, such as claims for punitive or exemplary damages. There is some debate on the desirability of introducing such civil law penalties, especially with a view to the Dutch tort system's newly developing role as a mechanism for the regulation of behaviour and/or the enforcement of conduct-regulating rules.[231] It is true too that similar debates are taking place in many of the continental European civil law countries, as well as at EU-level. Still, this does not necessarily mean that the introduction of punitive damages into the Dutch system of tort law or any of the other continental European civil law systems is near, as the concept in the end is foreign to the tort law systems in these countries. Alternative solutions may exist, however, for example in the form of a reinterpretation of existing provisions on unjust enrichment or through the introduction of other types of what Van Boom refers to as 'post-facto incentive damages'.[232] It should be noted here that the already existing right to compensation for pain and suffering may also come to play a role in this respect.[233] All in all, it seems likely that punitive and preventive elements will somehow strengthen their position in the Dutch law of obligations and law of damages, as they seem to be doing in other European civil law systems.[234]

Next to the possibility of claiming compensatory damages, the Dutch system of civil law also allows tort claimants to claim certain non-financial remedies, which may be resorted to not only after the tortious conduct in dispute has resulted in detriment to the plaintiffs (*ex post facto*), but also in cases where the tortious act or omission in question has not yet taken place.[235] These non-financial remedies, which include possibilities of claiming injunctive or declaratory relief, are instrumental particularly where it is also sought to use the tort system as a behavioural and/or enforcement mechanism.[236] On this basis, host country plaintiffs in foreign direct liability cases may for instance ask the court to order the corporate defendants to honour any legally enforceable obligations they may have towards the plaintiffs by imposing mandatory or prohibitive injunctions, or ask the court

229 See in particular Articles 6:95, 6:96, 6:107 and 6:108 Dutch Civil Code. For a more comprehensive discussion, see Asser/Hartkamp & Sieburgh 6-II* 2009, pp. 1-36, 116-146.
230 Article 6:104 Dutch Civil Code.
231 See, for instance: Hartlief 2009, pp. 65-69; Van Boom 2006; Schirmeister 2003, pp. 139-159.
232 See Van Boom 2006a. See also, for instance: Koziol 2009, pp. 275-308.
233 See, for instance: Van Boom 2007b, p. 987; Hartlief 2003, pp. 119-137.
234 Compare, for instance: Koziol 2009.
235 Articles 3:296 and 3:302 Dutch Civil Code. Note, however, that the plaintiffs, in all cases, do need to have a sufficient interest to institute such claims (Article 3:303 Dutch Civil Code).
236 Compare, for instance: Ogus & Visscher 2010; Van Boom 2006, pp. 35-49.

to render a declaratory judgment.[237] This allows them to bring the tort system into action with respect to multinational corporations' host country operations that may potentially be harmful to people- and planet-related interests locally even before actual harm has occurred, as they may for instance, depending on the circumstances of the particular case, ask the court to restrain the corporate defendants involved from continuing their activities or to impose certain restrictions or obligations on them with respect to those activities. At the same time, it extends their arsenal of sanctions in cases where the wrongful conduct in question has in fact already resulted in such harm but is part of a broader pattern of similar types of harm caused in the host country by the same corporate defendants. How the Dutch courts will deal with these types of claims in foreign direct liability cases that are brought on the basis of Dutch tort law remains to be seen. Depending on whether they are determined on the basis of Dutch tort law or host country tort law, the Dutch Shell cases may prove instructive in this respect.[238]

5.4.2 Practical and procedural impediments to the pursuit of foreign direct liability claims before Dutch courts

The main procedural and practical circumstances that are likely to determine the feasibility for host country plaintiffs of bringing their foreign direct liability claims before Dutch courts, no matter whether this is done on the basis of host country tort law or Dutch tort law, are likely to be related to the costs involved, the possibilities for acquiring the necessary evidence and the possibilities for bringing collective actions. These factors are of particular importance in foreign direct liability cases due to the inequality of arms that typically exists in these cases between the host country plaintiffs and their corporate opponents when it comes to financial scope, organization and the necessary knowledge/information.[239] The relevance of these particular factors is also evidenced by the fact that all three of them have, in some form, played a role in or in relation to the Dutch Shell cases that are currently pending before the The Hague district court. Consequently, it seems that the future proceedings in these cases are likely to provide some important clues as to the extent to which these three circumstances may indeed prove to have a restrictive effect on the possibilities for bringing foreign direct liability claims before Dutch courts.

Costs

Generally speaking, the costs of civil litigation in the Netherlands may act as a barrier to bringing civil claims, and are to a certain extent also meant to do so in light of the

237 In matters requiring urgency, there is also the possibility of proceedings before a district court in which the judge gives a provisional judgment and may grant certain interim injunctions/orders. See articles 254-260 Dutch Code of Civil Procedure.

238 See further sub-section 3.2.2.

239 See further sub-section 3.2.3.

potential overburdening of the justice system and societal costs that may result from the unrestricted pursuit of (potentially frivolous) civil claims.[240] The costs of pursuing civil litigation in the Netherlands encompass court and bailiffs' fees, legal counsel's fees and other expenses such as the costs of hearing witnesses.[241] In fact, civil litigation before Dutch courts is likely to get even more expensive, as the Dutch government intends to cut back on its expenditure on the Dutch judiciary system by raising bailiffs' fees so as to make them cost-effective.[242] It should be noted that these government plans, which seek to leave the costs of civil procedures almost completely to those private parties seeking to have their disputes settled through the court system, have received strong criticism for their potentially drastic detrimental effects on access to courts in the Netherlands.[243]

Due to their complexity and transnational nature, the costs of pursuing foreign direct liability claims before Dutch courts are likely to be particularly substantial and in many cases prohibitive. Adequate legal representation will be mandatory in these cases[244] and essential in light of their complexity and the fact that the host country plaintiffs are likely to be unfamiliar with the Dutch legal system. As mentioned before, lawyers' fees in the Netherlands may not be based on any outcome-related fee system like 'no win no fee' and will generally be calculated on an hourly basis.[245] Furthermore, the fact that essential evidence, including witnesses, is likely to be located to a large extent in the host country and not in the Netherlands where the claims are brought, will only increase those costs. Another factor that is of importance here is that the losing party in a civil lawsuit brought before a Dutch court is usually ordered to bear the costs of the winning party, which includes part of the costs made by the other party on legal assistance.[246] And finally, these cases run the risk of becoming drawn-out affairs, because the corporate defendants involved are also likely to vigorously contest the claims to prevent the establishment of unfavourable precedent.

This cost-related bar to civil litigation in the Netherlands is counterbalanced to some extent by the fact that civil proceedings in the Netherlands are relatively compact.[247] As

240 See, for a more concrete overview of the costs of litigating in the Netherlands, in a comparative perspective, WODC Report (Faure & Moerland) 2006, from which it can be gleaned that litigants in the Netherlands are faced with court fees that are significantly higher than those in other European countries (see in particular pp. 54-56); it should be noted that these outcomes reflect the situation even before the recent plans by the Dutch government to raise bailiffs' fees.

241 Compare, for instance: DMEAFA Report (Castermans/Van Der Weide), pp. 68-69. See also, for instance, the International Commission of Jurists' 2010 report 'Access to Justice: Human rights abuses involving corporations' on the Netherlands, available at <www.icj.org/dwn/img_prd/A2J-Netherlands.pdf>, pp. 31-32.

242 See Wetsvoorstel Kostendekkende Griffierechten, TK 2010-2011, 33071, nr. 3.

243 See, for instance: Bauw, Van Dijk & Van Tulder 2010.

244 Article 79(2) Dutch Code of Civil Procedure.

245 See, for an overview of the Dutch *status quo* on lawyers' fees and the Dutch socio-political debate on the desirability of introducing a outcome-related fee system for lawyers: WODC Report (Faure, Hartlief & Philipsen) 2006, pp. 25-36.

246 Article 237 Dutch Code of Civil Procedure. See also: Enneking, Giesen *et al.* 2011, p. 556.

247 See, for instance, the International Commission of Jurists' 2010 report 'Access to Justice: Human rights abuses involving corporations' on the Netherlands, available at <www.icj.org/dwn/img_prd/A2J-Netherlands.pdf>, p. 31.

a result, foreign direct liability cases brought before Dutch courts are likely to be a lot less lengthy than those that have so far been brought before US courts, some of which have been pending for years without even having reached trial. Another counterbalance to the potentially prohibitive level of costs involved in civil litigation in the Netherlands is the availability of legal aid for plaintiffs of limited means who seek to conduct legal proceedings.[248] As legal aid is in principle only granted in the Netherlands for legal interests that are situated within the Dutch legal sphere, however, the question has arisen whether it would also be available to host country plaintiffs in foreign direct liability cases.[249] It is in this context that suggestions were made by the Dutch Parliament that a legal aid fund should be introduced for victims of corporate violations of people- and planet-related interests abroad, which should financially assist host country plaintiffs in foreign direct liability cases.[250]

In response, the Dutch government has indicated, however, that it will not introduce such a legal aid fund, in light of the fact that research has indicated that the provision of legal aid to host country plaintiffs in foreign direct liability cases is not altogether impossible under the current system and is in fact used in practice. For example, the Nigerian plaintiffs in the Dutch Shell cases have in fact successfully applied for legal aid. In the same response, the Dutch government indicated that, also in light of budget restrictions, this type of civil claim should not be treated differently from other types of civil claims, and that there is no need for alternative initiatives in this respect, such as the introduction of specific subsidies or private funds in order to make sure host country plaintiffs in foreign direct liability cases have access to Dutch courts. According to the Dutch government, any efforts made should instead be directed at improving access to justice for these victims in the host countries involved.[251]

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248 See Article 18(2) Dutch Constitution, which is given effect through the Legal Aid Act 1994.

249 Article 12(1) Legal Aid Act. Other impediments in this respect may include the fact that legal aid will not be provided if the plaintiffs' chances of winning the case are very slim or if the expected costs are not in reasonable proportion to the importance of the case, and the fact that legal aid is not available to any legal person that has been established in order to litigate the case. See in more detail on the limitations of the Dutch system of legal aid, the International Commission of Jurists' 2010 report 'Access to Justice: Human rights abuses involving corporations' on the Netherlands, available at <www.icj.org/dwn/img_prd/A2J-Netherlands.pdf>, pp. 33-35. Note that a different regime is applicable to EU-based plaintiffs bringing their claims before Dutch courts; as the host country plaintiffs will usually not be EU citizens, however, this regime will not be further discussed here. See further the aforementioned ICJ report, pp. 34-35.

250 See Motie Voordewind, 13 April 2010, Kamerstukken II, 2009-2010, 26 485, nr. 91.

251 Brief van de Staatssecretaris van Economische Zaken, Landbouw en Innovatie, 23 March 2011, Kamerstukken II, 2010-2011, 26 485, nr. 105. The research that is mentioned involves a report of some exploratory consultations: J.P. De Poorter, D. Van den Brule (MMG Advies), 'Een Nederlands rechtsbijstandsfonds voor vermeende gedupeerden van milieu- en mensenrechtenschendingen' (25 February 2011), and is included as an addendum to the Secretary of State's letter.

Evidence

Another factor that is likely to significantly affect the feasibility of foreign direct liability claims brought in the Netherlands is the likelihood of the host country plaintiffs bringing such claims being able to gather the evidence necessary to substantiate their claims. As already mentioned, under Dutch procedural law the party appealing to the legal consequences of certain facts and/or rights is the one to prove the existence and content of those facts and/or rights, unless there are reasons for a different division of the evidentiary burden, as may result from substantive rules of tort law, for example.[252] A *non liquet* situation will arise if the host country plaintiffs are not able to meet their evidentiary burden, which means that the law will assume that (and proceed as if) the facts and circumstances in question do not exist.[253]

This means that it is essential for the host country victims in foreign direct liability cases and their legal representatives to be able to gather the necessary information on the corporate defendants, their often complex group structures, their internal policies and their transnational business practices, an exercise that may be significantly hampered by the lack of transparency that typically exists in this context.[254] Still, some of the relevant information on the corporate defendants in foreign direct liability cases may in fact already be publicly available on the basis of certain obligations of transparency under the applicable regimes of company law.[255] On the basis of the EU Modernisation Directive as implemented in Dutch company law, for example, Dutch parent companies of multinational corporations can be required to report annually on non-financial key performance indicators, including environmental and personnel matters and including those that are related to their worldwide activities.[256] Similarly, annual reporting requirements under Dutch company law may also create a measure of transparency on the legal and factual relationships between the different companies within the group.[257] The extent to which there is any information publicly available on any host country-based subsidiaries, business partners and/or sub-contractors that are involved in foreign

252 Article 150 Dutch Code of Civil Procedure. See also *supra* sub-section 5.3.1. To the extent that such evidentiary rules ensue from substantive provisions on tort law, as is the case for instance with rules pertaining to (the reversal of) the burden of proof, they are determined by the system of tort law that is applicable to the case on the basis of choice of law provisions. See, for a comprehensive treatise on the role of private international law in evidentiary matters: Van het Kaar 2008.

253 See also Enneking, Giesen *et al.* 2011, p. 554.

254 See further sub-section 3.2.3.

255 Compare Enneking, Giesen *et al.* 2011, pp. 545-546. See, for a more detailed discussion of the way in which annual reporting requirements under Dutch company law can provide transparency on multinational corporations' CSR-practices both at home and abroad: Lambooy 2010, pp. 147-169.

256 Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 [...] on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, as implemented in Article 2:391(1) Dutch Civil Code. For a more detailed discussion, see Lambooy 2010, pp. 147-159

257 See, in more detail: Enneking, Giesen *et al.* 2011, pp. 545-546.

direct liability cases brought before Dutch courts is largely dependent on the transparency requirements of the applicable host country rules of company law.[258]

At the same time, the Dutch system of civil procedure provides certain procedural devices that the plaintiffs in foreign direct liability cases may rely on in order to gain access to that information which is not publicly available. They may for instance demand that others, including the corporate defendants, provide them with (a copy of/access to) documents (and other types of data such as films, photos and digital files) that are relevant for the legal evaluation of the tort-based legal relationship to which both the host country plaintiffs (or their legal predecessors) and the corporate defendants are a party.[259] This obligation to provide exhibits is restricted both by the requirement that the plaintiffs need to have a legitimate interest in doing so, and by the requirement that they need to specify the documents in question. These requirements are meant to prevent so-called 'fishing expeditions', *i.e.*, speculative demands for information without any real expectation about the outcome of the demand or its relevance to the litigation, as may occur for instance under US discovery rules.[260] Other limitations may follow from the existence of a duty of confidentiality on the part of the addressee, where there are (other) compelling reasons why the addressee does not have to provide the requested data, or where provision of the requested data is not necessary for a proper administration of justice.[261]

Further evidence in foreign direct liability cases may be obtained through witness testimonies and expert opinions.[262] The court may order witnesses to be heard either on its own motion or upon request by (one of) the parties. A complicating factor in foreign direct liability cases is that due to the transboundary nature of these cases at least some of the witnesses are likely to be located in the host country and will therefore have to be examined by host country courts, something that may not always be possible.[263] Furthermore, especially in personal injury cases, expert opinions may be crucial, but procedural rules pertaining to the issuing of expert opinions, in particular opinions of medical experts, are cumbersome. As is evidenced by the Trafigura case, for instance, the transboundary nature of foreign direct liability cases is likely to complicate matters even further with respect to expert opinions in these cases.[264] At the same time, the calling in evidence of witnesses and/or experts by the host country plaintiffs will raise even further the costs of bringing foreign direct claims before Dutch courts and, as discussed, the costs

258 Enneking, Giesen *et al.* 2011, p. 546.
259 Article 843a Dutch Code of Civil Procedure.
260 See, for instance: Sijmonsma 2007, pp. 27-29.
261 See, for comprehensive treatises on the obligation to provide exhibits under Dutch law: Ekelmans 2010; Sijmonsma 2010.
262 Articles 163 and 194 Dutch Code of Civil Procedure, respectively. See also DMEAFA Report (Castermans/Van Der Weide) 2009, p. 66.
263 Article 176 Dutch Code of Civil Procedure.
264 See further sub-section 3.2.2.

are substantial to begin with, and such calling in evidence is likely to be a time-consuming matter as well.

As has been mentioned before, the plaintiffs in the Dutch Shell cases requested the The Hague district court to order Shell to provide exhibits of a range of key evidentiary documents pertaining to, amongst others, the condition of the oil pipelines involved and the Shell group's internal policies and operational practices. The court has denied their requests, however, holding that, with respect to most of the documents requested, the plaintiffs lack a legitimate interest in requesting exhibition as their claims are insufficiently substantiated. According to the court, this is the case both with respect to the claims against parent company Royal Dutch Shell and the claims against its subsidiary Shell Petroleum Development Company of Nigeria. Regarding the former, the plaintiffs have not, in the court's opinion, sufficiently substantiated that the parent company can be held liable for the damage caused on the basis of Nigerian tort law, which in the court's opinion is the applicable law. In respect of the latter, the court holds that the plaintiffs have not sufficiently substantiated that the damage caused is a result of equipment failure, rather than of sabotage as is claimed by Shell. Accordingly, on the basis of the limitations inherent in Dutch law on the obligation to provide exhibits, limitations that ensue from the absence in Dutch civil procedural law of a general duty on the parties to a dispute to provide information and documents, as well as from the need to prevent (US-style) fishing expeditions, the court has denied the plaintiffs' requests.[265]

This decision provides a clear indication that the Dutch system on evidence gathering in civil procedures may in practice pose significant restrictions to the feasibility of foreign direct liability cases being brought before Dutch courts, considering in particular the structural lack of transparency that characterizes these cases and automatically puts the plaintiffs at a crucial disadvantage vis-à-vis their corporate opponents. An interesting question that arises is whether the limitations inherent in the Dutch system, which apparently do not allow for the resolution of this inherent disadvantage by allowing the plaintiffs access to information and documents of their corporate opponents, may under certain circumstances involve a violation of the equality of arms principle that flows from Article 6 ECHR. According to the The Hague district court, the limitations inherent in the Dutch system are generally in line with this principle, except when special circumstances arise; the court does not consider such special circumstances to arise in the Dutch Shell cases, however.

A more general question that may be raised in this context is whether and to what extent establishing 'the truth' is or should be one of the aims of the (Dutch) civil law

265 See, for instance: *Oguru et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.; Oguru et al. v. Shell Petroleum N.V. and The "Shell" Transport and Trading Company Limited*, Rechtbank 's-Gravenhage, case nos. 330891/HA ZA 09-0579 and 365498/HA ZA 10-1677 (14 September 2011). See further sub-section 3.3.2.

system and what this means for the interpretation of the equality of arms principle in this context.[266] Since 2001 the Dutch Code of Civil Procedure has included a general obligation on parties in civil claims to bring forward fully and truthfully any facts that are relevant to the dispute.[267] In line with this general obligation, the court may at any time order (one of) the parties to a foreign direct liability case to throw light on certain submissions and/or to submit particular documents that it deems relevant to the case. A refusal to do so is only considered to be justified if the party or parties involved can convince the court that there are compelling reasons why they cannot comply with its order.[268] Also relevant, in view of the fact that the defendants in foreign direct liability cases are corporate actors, is the fact that the court may at any time order the parties to the dispute, either of its own motion or upon request, to make available for inspection any books, papers and documents that they are required by law to keep, make or save. With respect to Dutch parent companies of multinational corporations, these data may include for example an accurate account of the rights and obligations of the company at any given time.[269] When it comes to corporate defendants in foreign direct liability cases that are subject to a foreign regime of company law, such as host country subsidiaries, the data that the court may order to be made available on this basis are dependent on the relevant requirements that are set by the applicable local regime of company law.

Collective actions

A final factor that may substantially affect the feasibility of foreign direct liability claims being brought before Dutch courts are the Dutch civil procedural provisions on collective actions, a notion that may encompass both representative actions (where "[...] *a single claim represents a group of others*") and group actions (where "[...] *a number of individual claims are brought and grouped together because of their similarity*").[270] The possibilities that Dutch civil procedural law offers in this respect may be very important in foreign direct liability cases brought before Dutch courts, as those cases may pertain to host country violations of people- and planet-related interests that have caused harm to many different individuals and thus to liability claims by many different host country plaintiffs, as was the case for instance in the Bhopal case and the Trafigura case. In such cases, collective procedures may significantly reduce the costs for individual plaintiffs participating in these group actions of bringing such claims before Dutch courts.[271] At the same time, there may be situations in which it may be desirable for claims to be instigated by

266 See, for a comprehensive treatise on the role of fact-finding/truth-finding in Dutch civil procedure: De Bock 2011.

267 Article 21 Dutch Code of Civil Procedure. See further, for instance: Sijmonsma 2007, pp. 25-27.

268 Article 22 Dutch Code of Civil Procedure. See further, for instance: Sijmonsma 2007, pp. 25-27.

269 Article 162(1) Dutch Code of Civil Procedure and Article 2:10 Dutch Civil Code. See also: DMEAFA Report (Castermans/Van Der Weide) 2009, pp. 65-66.

270 Compare for instance: Hodges 2008, pp. 2-3.

271 For a comprehensive discussion and a comparative perspective on access to justice in cases of mass damages, see Tzankova 2007.

representative organisations like NGOs on behalf of certain more collective interests, such as environmental interests, that may not easily be reducible to (feasible) foreign direct liability claims by individual plaintiffs.[272] In the Dutch Shell cases, for example, the Dutch NGO Milieudefensie acts as a plaintiff, alongside the Nigerian farmers, on behalf of the interests of others who may have suffered harm as a result of the particular instances of oil spills in dispute and the environmental interests involved more generally.

The Dutch system of civil litigation in essence features two different but related mechanisms for such collective claims. On the one hand, it allows foundations and/or associations to bring representative actions under certain conditions, while on the other hand it provides a procedure under which settlements in multi-party cases can be pronounced binding on others with similar claims.[273] Under the first mechanism, foundations or associations with full legal capacity are allowed to bring civil claims that serve to defend the analogous interests of others, provided that these organisations have been established, according to their constitutions, for the purpose of representing such interests.[274] Under this provision, claims can be brought by representative organisations for declaratory and/or injunctive relief, for instance, but not for monetary compensation.[275] A judgment obtained on this basis can, however, have third party effects: a declaratory judgment holding the parent company of a multinational corporation liable for people- and planet-related harm caused in a host country, while formally only binding between the representative organisation and the parent company, may for instance act as a basis for further tort proceedings by the individual host country victims involved in which they claim monetary compensation on their own behalf.[276] It should be noted here that another requirement of the Dutch provision on representative actions is that the representative organisation may only file a claim after having attempted to resolve the matter through consultation.[277] This requirement gains importance in light of the fact that Dutch law provides for a mechanism under which settlements in multi-party cases can be pronounced binding on others, as will be discussed below.

The interests that may be sought to be protected through this representative action mechanism may be financial interests, but may also be more idealistic ones; at the same time, the 'others' whose interests are sought to be protected need not be sharply defined. This means that claims may also be brought under this provision for more collective, idealistic interests such as the protection of the right to a clean environment,

272 Compare also Enneking, Giesen *et al.* 2011, p. 555.
273 See generally: Van Der Heijden 2010.
274 Article 3:305a Dutch Civil Code. See, in further detail: Van Der Heijden 2010, pp. 202-204. See also: Enneking, Giesen *et al.* 2011, p. 555; DMEAFA Report (Castermans/Van Der Weide) 2009, pp. 61-62.
275 Article 3:305a(3) Dutch Civil Code. Compare Kamerstukken II, 1991-1992, 22 486, nr. 3, pp. 24-26.
276 Compare Kamerstukken II, 1991-1992, 22 486, nr. 3, pp. 26-27. See also: DMEAFA Report (Castermans/Van Der Weide) 2009, p. 62.
277 Article 3:305a(2) Dutch Civil Code. See also: DMEAFA Report (Castermans/Van Der Weide) 2009, p. 62.

for instance.[278] Nonetheless, the protected interests involved may not be too abstract, and the representative organisations need to be able to show that they are actively engaged in the protection of those interests in practice.[279] Interesting questions that may arise with respect to the application of this representative action mechanism in the context of foreign direct liability cases are, first, to what extent this provision also applies to foreign NGOs seeking to bring representative actions before Dutch courts and, secondly, to what extent this provision allows representative actions that are exclusively aimed at protecting interests that are completely or partially situated outside Dutch society, such as local host country environmental interests, to be brought before Dutch courts.[280]

As to the first question, it seems that the scope for foreign organizations seeking to protect foreign interests is limited under this regime to particular organizations in the field of consumer protection.[281] With respect to the second question, the The Hague district court's September 2011 decisions in the Dutch Shell cases make clear that Dutch organizations, such as Milieudefensie, may indeed bring representative claims pertaining to interests that lie outside the Dutch legal sphere altogether, such as protection of the environment in the Niger Delta. Furthermore, the court has also held, *inter alia*, that the Dutch provision on representative actions is part of Dutch civil procedural law and thus applicable to transnational civil cases brought before Dutch courts regardless of the system of tort law on the basis of which those claims are decided. In so holding, the court contradicts Shell's assertions that Milieudefensie would not have standing to bring claims independently, alongside the host country plaintiffs, on behalf of other local victims and the local environment more generally. Its decisions make clear that Dutch civil procedural law does not seem to pose any major challenges to NGOs seeking to bring representative actions on behalf of groups of host country victims or broader, more public people- and planet-related interests, such as protection of the local environment in the host country. Of course, it should (again) be noted that the Dutch provision on representative actions only allows claims for declaratory or injunctive relief, not monetary relief.[282]

Closely connected to the Dutch representative action mechanism is the Dutch mechanism on collective settlements in multi-party claims.[283] On the basis of this mechanism, it is possible for a representative organisation and one or more other parties to a dispute that have reached a settlement agreement regarding compensation of harm resulting from the same or similar events, to apply to the Amsterdam Court of Appeals to have that agreement declared universally binding. The result of such a declaration is that all of those who have

278 Compare Kamerstukken II, 1991-1992, 22 486, nr. 3, pp. 21-23.
279 Compare Kamerstukken II, 1991-1992, 22 486, nr. 3, pp. 20-21 and nr. 5, p. 9. See also: Castermans, p. 61.
280 See also Enneking, Giesen *et al.* 2011, p. 555.
281 Compare Article 3:305c(1) Dutch Civil Code. See also Van Der Heijden 2010, p. 202.
282 Compare also: Van Der Heijden 2010, p. 201.
283 Collective Action (Financial Settlement) Act, as laid down in Articles 7:907-7:909 Dutch Civil Code. For more detail, see Van Der Heijden 2010, pp. 204-207, 208-213; Hodges 2008, pp. 70-76.

been injured by the event and have been made aware of the settlement agreement are bound by it, unless they have notified the court that they do not wish to be bound by it (opted out).[284] This mechanism may also play a role in transnational civil litigation such as foreign direct liability cases, as the Amsterdam Court of Appeals' declaration may also pertain to settlements of transnational civil disputes.[285] Accordingly, the effects of such a declaration may also extend to the rights and interests of foreign parties that have been affected by the harmful events forming the basis of the dispute, although it should be noted that the application in an international context of this unique and relatively new Dutch civil procedural mechanism does raise a number of complicated issues, such as for instance with respect to the notification of foreign interested parties that are unknown or have unknown addresses.[286]

Despite these issues, it seems that in foreign direct liability cases where a settlement agreement is reached between a representative organization representing the people- and planet-related interests of the host country plaintiffs on the one hand and the corporate defendants on the other, that agreement could under certain circumstances be declared binding on all those in the host country who have suffered damage as a result of the same event or similar events (unless they opt out, that is).[287] The 'closure' that this may provide may prove to be a strong incentive, especially for the defendant companies involved, to settle such cases out of court and have the settlement declared universally binding. The importance of such closure is evidenced for instance by the Trafigura case, where even after settlement agreements have been reached between Trafigura and the Ivorian government (the revenue of which was allegedly also meant as compensation to the local victims) and between Trafigura and the plaintiffs in the foreign direct liability claim brought before the English High Court, the question may still be raised as to whether Ivorian victims could also pursue civil actions in the Netherlands as a result of the Probo Koala incident.[288] In turn, this extra incentive for the corporate defendants in foreign direct liability cases brought before Dutch courts to reach a settlement agreement with the host country plaintiffs bringing those cases is likely to be beneficial for the latter as well. After all, a settlement will provide them with (a measure of) compensation for their damage, while saving them the substantial trouble of further pursuing their foreign direct liability claims, which as discussed are likely to be complex, lengthy, costly and stressful and the outcome of which will generally be highly uncertain at best.

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284 See, in more detail: Van Der Heijden 2010, pp. 199-200.

285 Examples of transnational civil dispute in which the Dutch Collective Settlements Act has been applied include: *Shell Petroleum N.V. and the Shell Transport and Trading Comp. Ltd. et al. v. Dexia Bank Nederland N.V. et al*, Amsterdam Court of Appeals 29 May 2009, LJN BI5744; Amsterdam Court of Appeals 15 July 2009, LJN BJ2691 (*Vedior*).

286 For a comprehensive treatise of the functioning of this mechanism in an international context, see Van Lith 2011. See also: Van Der Heijden 2010, pp. 208-211.

287 See also: Castermans, pp. 62-64.

288 See further sub-section 3.2.2.

5.5 Concluding remarks

In this chapter, the legal status quo has been set out with respect to foreign direct liability cases that are brought before Dutch courts and, where possible, on the basis of Dutch tort law. This has been done on the basis of the four factors that were identified in chapter four as the main factors determining the feasibility of foreign direct liability cases: jurisdiction; applicable law; substantive legal basis; and procedural and practical circumstances.

From what has been discussed in this chapter, it is clear that there are ample opportunities in principle for bringing foreign direct liability cases before Dutch courts, especially where the defendant is domiciled in the Netherlands. Possibilities for bringing foreign direct liability claims against non-EU-based defendants such as host country subsidiaries before Dutch courts are more limited. However, even here there are opportunities, for instance where the claims to the foreign subsidiary are closely connected with similar claims against a Netherlands-based parent company, or where the plaintiffs are wholly or relatively unable to get access to justice elsewhere.

In future foreign direct liability cases, Dutch tort law may be the applicable law to claims pertaining to environmental damage. The Dutch provision of tortious liability for violations of unwritten rules pertaining to proper societal conduct/due care seems to offer sufficient prospects for establishing parent company liability in this context. It allows for the taking into account of a wide range of conduct-regulating rules that may flow from international, domestic and/or private sources in the determination of what is the level of care that multinational corporations' parent companies are required to exercise vis-à-vis third parties in countries in which their corporate groups operate.

The main limitations when it comes to the feasibility of foreign direct liability cases brought in the Dutch legal order are likely to flow from the procedural and practical circumstances pertaining to cases brought before Dutch courts. Litigation costs are very high and likely to rise even more in the near future, while the possibilities for bringing collective actions in order to reduce the costs per plaintiff are limited. At the same time, a recent judgment in the Dutch Shell cases has indicated that the Dutch rules on evidence gathering are too restricted in view of the significant inequality of arms that is likely to exist in these cases.

In the next chapter, the findings of this chapter as well as of the preceding two chapters will be further discussed.

6 Discussion

6.1 A durable trend?

6.1.1 The end of ATS-based foreign direct liability cases?

One of the main questions raised by the socio-legal developments under discussion in this study is whether the trend towards foreign direct liability cases is likely to persist in the near and more distant future. This question is particularly relevant in view of recent developments in US-based foreign direct liability claims, where significant controversy currently exists over the feasibility of corporate liability under the Alien Tort Statute, which has until now formed the main legal basis for foreign direct liability claims around the world.[1] The question arises as to what would happen if the route to corporate ATS claims were to be rendered still more cumbersome or even definitively cut off in the near future. Are there viable legal alternatives that may be used by prospective host country plaintiffs seeking to address harm they have suffered as a result of multinational corporations' local operations? Or will the contemporary advance of foreign direct liability cases come to an end without the legal and moral backing of the Alien Tort Statute?

One of the distinguishing features of the type of transnational tort-based civil litigation under discussion here is that these cases build on existing jurisdictional and legal bases in the domestic legal systems of the home and host countries involved in novel and unprecedented ways. As such, they tend to seek out and push back the boundaries of existing law, legal precedent and even legal doctrine in various ways. This, in combination with the fact that the socio-legal trend under discussion here is a relatively 'new' one that has so far established precedent only to a very limited extent, mainly due to the high rate of early dismissals and out-of-court settlements in these cases, renders it very difficult to predict its future course at this point. As is also exemplified for instance by the Second Circuit Court of Appeals' September 2010 judgment in the *Kiobel* case, which has been discussed in sub-section 3.3.2, any court decision in any one of these cases has the potential of creating precedents that may turn out to be of crucial importance for the continued feasibility of this type of litigation.[2]

At the same time, making predictions in this context is further complicated by the fact that these cases and the possibility of their further proliferation in the future remain controversial both legally and socio-politically, as will be further explored in part III.

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1 See further sub-section 3.3.2.

2 See similarly, with a focus on the Dutch Shell cases and the current position of Dutch law: Enneking 2010.

As has been mentioned, US federal courts in various circuits have recently shown a tendency towards narrowing the window of opportunity for the ATS's contemporary use against non-state actors in general and corporate actors in particular.[3] Within the Second Circuit, the door to corporate ATS cases seems to have been slammed shut, at least pending review by the Supreme Court, following the *Kiobel* ruling in September 2010.[4] This decision has delivered a painful blow to those propagating ATS-based civil litigation as a way to hold corporate actors accountable for their direct or indirect involvement in violations of norms of public international law perpetrated abroad, and has already led commentators to query whether the end of the Alien Tort Statute may be near, at least when it comes to corporate ATS claims.[5] In fact, the *Kiobel* decision has already found some following also outside the Second Circuit.[6] At the same time, however, a number of appeals and district courts in other circuits have rejected the Second Circuit's reading on corporate liability under the ATS.[7] In fact, the influential DC Circuit Court of Appeals in July 2011 delivered a decision in a foreign direct liability case against the US-based multinational Exxon Mobil Corporation (dealing with its alleged complicity in human rights violations in the Aceh province of Indonesia) that is diametrically opposed to the Second Circuit's holding that it is not possible to hold corporations liable under the ATS.[8]

In October 2011, the US Supreme Court agreed to review the Second Circuit Court of Appeals' decision on corporate liability in the *Kiobel* case.[9] Accordingly, nothing seems to be carved in stone in this respect until the Supreme Court delivers its decision on the matter of corporate liability under the ATS, presumably around June 2012.[10] If the Supreme Court were to confirm the Second Circuit Court of Appeals' finding that civil liability claims against corporate actors fall outside the ATS's subject matter jurisdiction, however, this will effectively ring the death knell for corporate ATS litigation in the other circuits as well. Still, as has already been noted in the Apartheid litigation (with respect to the purposefulness standard in customary international law that was recognized to govern corporate accomplice liability), "[i]*nternational law, like our domestic law, can change, and*

3 See further sub-section 3.3.2.

4 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. (N.Y.) 2010) certiorari granted by 2011 WL 4905479 (U.S. 2011).

5 See, for instance: Keitner 2010; Anderson 2010; Ku 2010; Childress 2010b.

6 That the line set out by the Second Circuit Court of Appeals has already found a following, outside the Second Circuit as well, is evidenced for example by a judgment rendered on 5 October 2010 by the US District Court for the Southern District of Indiana, in which a corporate ATS-based claim in a case against Firestone Natural Rubber Company, seeking to hold it liable for one of its subsidiaries' involvement in child labour practices, was judged in line with the *Kiobe*l judgment not to be legally cognizable "[...] *because no corporate liability exists under the ATS*". *Flomo et al. v. Firestone Natural Rubber Company*, case 1:06-cv-00627-JMS-TAB (S.D.Ind. 2010), p. 12. See also Murray, Kinley & Pitts 2011, pp. 32-33.

7 Similarly: Blitt 2011, pp. 19-20.

8 *John Doe II, et al. v. Exxon Mobil Corporation, et al.* (D.C. Cir. 2011), available at <www.cadc.uscourts.gov/internet/opinions.nsf/567B411C56CD7A6F852578C700513FC8/$file/09-7125-1317431.pdf>. See for instance, with further reference: Requejo 2011.

9 *Kiobel v. Royal Dutch Petroleum Co.*, 2011 WL 4905479 (U.S. 2011).

10 See further sub-section 3.3.2.

the ATCA was intended to change along with it".[11] In this respect, it is important to note that the majority opinion in *Kiobel* is based on the perceived absence in customary international law at this point of notions of corporate liability, a circumstance that may well change in the future.[12] Notwithstanding these ifs and buts, however, all in all the future for the ATS as a way to address the involvement of internationally operating business enterprises in violations of public international law perpetrated abroad, is looking somewhat bleak just now. After all, as has been mentioned before, the corporate liability issue is just one of the restrictions that are currently being imposed by US federal courts on the ATS's use as a basis for transboundary tort claims against private actors for human rights violations perpetrated abroad.

At the same time, as has already been pointed out by various commentators, even a potential end to the possibility of bringing corporate ATS claims before US federal courts in the near future would not (necessarily) spell the end of this type of transnational litigation against multinational corporations for damage caused in host countries, as there are alternative legal avenues available. First of all, there is still the possibility of suing individual defendants, rather than corporations as a whole, an option that remains open as the possibility of ATS claims against private individuals is not in dispute.[13] Furthermore, there also remain ample opportunities for bringing foreign direct liability claims before US federal and/or state courts on the basis of domestic legal principles, which may be derived either from US state law or from the law of the host countries involved, depending also on the choice of law rules applicable in the forum where each individual claim is brought.[14] In addition, as is evidenced by the fact that the trend towards bringing civil liability claims against (parent companies of) multinational corporations for damage caused in host countries has not remained confined to the US, similar claims can be brought before courts in other Western societies.[15]

It has been suggested that with the deteriorating prospect of using the ATS as a legal basis for this type of litigation, these and other alternative legal avenues are likely to be further explored in the near future by (the legal representatives of) those who have suffered harm as a result of multinational corporations' detrimental impacts on people and planet in host countries.[16] However, no doubt largely due to the popularity of the ATS

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11 *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2nd Cir. (N.Y.) 2007), p. 277 (concurring opinion Judge Katzmann).

12 It should also be noted in this respect that Judge Leval in his separate opinion takes a different stand by holding that the absence of sources of customary international law addressing corporate liability merely leads to the conclusion that international law takes no position on the question of corporate civil liability and as such leaves it for states to decide for themselves. *Kiobel v. Royal Dutch Petroleum Co.*, 2010 WL 3611392 (2nd Cir. (N.Y.) 2010), separate opinion Judge Leval, pp. 46-51.

13 Anderson 2010.

14 See, for an elaborate discussion of this option: Childress 2011.

15 See further chapters 4 and 5.

16 See, for example: Goldhaber 2011 and Childress 2011, who convincingly argue that we may be "[...] *about to*

as a legal basis for transnational civil claims against (parent companies of) multinational corporations for damage caused in host countries up until now, these alternative legal avenues have so far remained relatively untried. Clear and reliable legal precedent in this respect is thus even more scarce than it is with respect to the ATS and its use against corporate actors.[17] What is clear is that few if any of these legal alternatives are likely to be as controversial as corporate ATS claims, despite the fact that some of the policy considerations underlying the current reluctance of US federal courts in this context may also play a role in foreign direct liability cases brought outside the US and/or on alternative (more mainstream) legal bases.[18]

Still, as is also evidenced by the discussion in this part of the feasibility of foreign direct liability cases in general, this does not mean that these alternatives to ATS-based foreign direct liability claims may not still face significant legal, procedural and practical barriers.[19] The feasibility of ATS-based claims against private individuals such as corporate officers and directors, for example, is likely to be detrimentally affected by some of the same barriers that have recently complicated the pursuit of corporate ATS-based cases in various US federal circuits.[20] Foreign direct liability claims that are based not on the ATS but on other legal bases, such as general principles of tort law, sidestep the limited and controversial nature of the ATS but may at the same time raise a whole number of other issues.

Transnational human rights claims against multinational corporations that are brought before US federal or state courts on the basis of state law or foreign law, for instance, while avoiding "[...] *many of the substantive questions associated with pleading international law under the ATS*", do face a range of other obstacles, including issues of removal, choice of law and due process, pre-emption and extraterritoriality, as well as issues of federalism.[21] With respect to the feasibility of bringing ATS-like claims before non-US Western society courts, it has been noted that the type of transnational civil human rights litigation that is brought before US federal courts on the basis of the ATS does not translate literally to non-US legal systems, especially those systems lacking the systematic procedural advantages and the tradition of public interest and impact litigation that are characteristic features of the US system of civil procedure and legal culture.[22] As is also clear from what has been discussed here, however, this does not mean that the pursuit of foreign direct liability claims before courts in other Western societies, such as Canada, Australia, the UK and the Netherlands, is rendered infeasible altogether.[23]

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witness a new wave of human rights litigation not based on the ATS but based on state law or even foreign law" (p. 34).

17 See further sub-section 3.3.1.

18 Compare Murray, Kinley & Pitts 2011, pp. 33-37. See further *infra* section 6.2

19 For more detail see chapters 4 and 5.

20 See, for example: Childress 2011, pp. 33-34.

21 Childress 2011, pp. 32-54 (quote p. 34).

22 Stephens 2002. See also sub-sections 4.5 and 5.4.

23 See generally, on the way in which this type of litigation is increasingly finding its way into European

6.1.2 The prospects for non-ATS-based foreign direct liability cases

Of course, the question may be raised as to whether non-ATS-based claims can ever really provide a substitute for ATS-based claims. Due to the fact that ATS-based claims against multinational corporations are typically brought on the basis of universal norms pertaining to international crimes and other egregious international human rights violations, they tend to command a very strong level of moral condemnation. It has been argued that this "[...] *currency of human rights language*" that is so typical of corporate ATS claims is devaluated where this type of civil litigation is initiated on a different legal basis, such as general principles of domestic tort law.[24] After all, as any concern for life, health and property may ultimately be formulated as a private interest that is worthy of legal protection through private law mechanisms, foreign direct liability claims on the basis of general principles of domestic tort law (alleging for instance infringements of rights to life, health, a clean and healthy environment, etc.) run the risk of merely being countered by competing rights-based claims by the corporate defendants in these cases (rights to property, freedom of action, etc.) and may as such lose much of their significance and added value.[25] It has been noted in this respect:

> "[…] *looking to domestic tort law to provide the cause of action mutes the grave international law aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort. This is not merely a question of formalism or even of the amount or type of damages available; rather it concerns the proper characterization of the kind of wrongs meant to be addressed under the Alien Tort Claims Act: those perpetrated by* hosti humanis generi *('enemies of all human kind') in contravention of* jus cogens *(peremptory norms of human rights law). In this light, municipal tort is an inadequate placeholder for such values*".[26]

Thus, the fact that such non-ATS-based civil claims against multinational corporations will often revolve around alleged violations of domestic (home or host country) legal norms rather than around alleged violations of international norms has been said to involve the risk of surrendering the "[...] *signaling value that is offered when bringing suit against a corporation for alleged violations of international law*".[27] There may be some truth to this, especially considering the fact that in essence civil procedures are primarily aimed at resolving *ex post facto* particular disputes that have arisen between private actors with conflicting private interests and as such do not offer much room for more 'public interest'-related considerations. The extent to which the courts adjudicating such disputes will be

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domestic courts: Enneking 2009. See also further chapters 4 and 5.

24 Joseph 2004, pp. 76-77.

25 Compare Smits 2006.

26 Judge Woodlock in the ATS-case of *Xuncax v. Gramajo*, 886 F. Supp. 162 (D.C. Mass. 1995), p. 183.

27 Childress 2011, p. 19.

willing and able to also address the underlying broader societal or policy issues will differ from legal system to legal system (and perhaps even from court to court).[28] Furthermore, non-ATS-based foreign direct liability cases will tend to revolve more around conflicting domestic standards and requirements with respect to the corporate behaviour at issue, and may as such not engender the moral outcry that tends to be generated by alleged violations of universally accepted fundamental human rights norms.

Still, despite the rhetoric, ATS-based foreign direct liability cases just like non-ATS-based ones revolve in the end around the application of existing legal principles to a particular issue in dispute; regardless of personal opinions, political pressure or societal outcry, courts are ultimately expected to function as neutral arbiters and not as policymakers.[29] And in fact, the question may be raised as to whether (the current narrow interpretation of) the ATS does not lead those seeking remedies for corporate-induced harm to people and planet abroad to frame what is essentially serious and structural corporate disregard for local private and public interests as international crimes.[30] At the same time, outside the courtroom non-ATS-based foreign direct liability cases may raise just as much moral condemnation and socio-political controversy as those brought on the basis of the ATS, as is exemplified for instance by the Trafigura case. Obviously, the media play a major role in this respect.[31] In the end, even cases like the Dutch Shell cases, which do not revolve around fancy human rights claims but rather around allegations of corporate negligence concerning the risk of environmental pollution, are likely to raise public and political awareness in the home countries in which they are brought on the substantial detrimental impacts that the transnational activities of home country-based multinational corporations may potentially have on people and planet in host countries.

Bringing foreign direct liability cases on another legal basis than the ATS may also have certain comparative advantages. Not only are these alternative legal avenues, such as for instance the tort of negligence, less controversial than the ATS, they are also likely to be far less impeded by the many restrictions that are inherent in or have over the years been imposed with respect to (corporate) ATS claims.[32] One major advantage in this respect is the fact that the range of claims that may be brought against (parent companies of) multinational corporations for damage caused in host countries is far wider when such claims are brought on the basis of general principles of domestic tort law than when they are based on the ATS. After all, the subject-matter of ATS-based claims is restricted to the

28 Compare, for instance: Van Dam 2006, pp. 122-131.

29 See, however, on the 'deeper policy rationales' underlying the Second Circuit Court of Appeals' decision in *Kiobel*: Murray, Kinley & Pitts 2011, pp. 33-37.

30 See Anderson 2010.

31 See, with respect to Dutch media coverage of the Probo Koala incident that was the reason for the Trafigura case, critically: Vink 2011. See also *infra* sub-section 6.2.2.

32 See, for instance, on the benefits of pleading state or foreign law rather than international law under the ATS: Childress 2011, pp. 34-36.

alleged involvement by the corporate actors concerned in violations of a range of norms of customary international law that is limited, as has also been made clear by the Supreme Court's words of caution in the *Sosa* case.[33]

The impact of this limitation becomes obvious when dealing for example with environmental abuse, an issue that is very relevant in this context of transnational civil litigation addressing the detrimental impact of the activities of internationally operating business enterprises not only on people but also on planet in the host countries in which they operate.[34] Even before the Supreme Court's decision in *Sosa*, US federal courts had been unwilling to allow ATS claims that were based directly on violations of customary international law norms pertaining to the environment, finding time and again that those rules are generally unfit to act as a cause of action under the ATS.[35] An ATS claim brought on behalf of the Amungme people of West Papua against Freeport McMoran, for instance, alleging *inter alia* that the multinational copper and gold mining corporation's operations in West Papua had caused severe degradation to the Amungme's environment and habitat, was dismissed by the Louisiana district court on the basis that the environmental and human rights abuses alleged by Beanal were not violations of the law of nations.[36] With respect to the status quo post *Sosa*, it has been noted:

> "*Undoubtedly, international environmental law has been developing fast in the last decades. However, the preponderance of soft law, general principles, and declarations render the enforcement of environmental claims under ATS difficult since the Supreme Court in* Sosa *only allows those international wrongs which enjoy an elevated specificity and consensus to be actionable under the ATS*".[37]

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33 According to the IBA/EJ Report 2008, pp. 113-115: "*Norms that have been held to pass the* Sosa *threshold include: state-sponsored torture, crimes against humanity, forced labour, child labour, genocide, prolonged arbitrary detention, violations of the rights of ambassadors, and extrajudicial killing. In addition courts have held that claims of aiding and abetting violation of international law are actionable under the ATS.*" The report also gives an overview of norms that have been held to fall below the *Sosa* threshold. See also sub-section 4.4.1.

34 See, for instance: Koebele 2009, p. 190.

35 See, for instance: Koebele 2009, pp. 151-191; Romero 2005; Joseph 2004, pp. 28-30.

36 *Beanal v Freeport McMoran, Inc.*, 969 F. Supp. 362 (E.D. La., 1997), pp. 382-384, aff'd by 197 F.3d 161 (5th Cir. (La.) 1999). See for the case history and further references the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/Freeport-McMoRanlawsuitsreWestPapua>. Similarly, the New York district court considered with respect to two group actions brought by Ecuadorian citizens and Peruvian citizens against Texaco (now Chevron) on the basis of the ATS, alleging that the oil multinational had polluted rain forests and rivers in those two countries and by doing so had caused widespread environmental damage and personal injuries, that these claims involving violations of international environmental norms lacked precedential support and were extremely unlikely to survive a motion to dismiss. *Aguinda v. Texaco, Jota v. Texaco*, 142 F. Supp. 2d 534 (S.D.N.Y., 2001), pp. 552-553, aff'd as modified by 303 F. 3d. 470 (2nd Cir. (N.Y.) 2002). The claims were dismissed on the basis of *forum non conveniens* and were subsequently filed in Ecuador. See, for the case history and further references on this case that is still ongoing today, the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador>.

37 Koebele 2009, p. 190.

In fact, it may even be argued that because of the federal courts' persistence in holding that international environmental norms are not suitable as a basis for corporate ATS claims, many of these claims have become framed as claims addressing corporate complicity in alleged violations of international human rights law or international crimes, even where the issues actually underlying them are (also) issues of environmental pollution and environmental degradation.[38] A good example in this respect are the two cases against Shell that have been brought before US federal courts on the basis of the ATS; in both cases, the human rights violations in which Shell was allegedly (indirectly) involved were perpetrated against locals protesting over environmental pollution of the Niger delta as a result of Shell's operations there.[39] As has also been argued before, these cases in the end revolve around the same underlying issue of serious and widespread degradation of the local environment in the Niger Delta as a result of oil exploration activities there, as do the foreign direct liability cases that have been brought against Shell in the Netherlands and in the UK.[40]

All in all, it seems clear that even if the ATS route towards holding corporate actors accountable before US federal courts for their involvement in violations of customary international law perpetrated abroad were to be definitively cut off, this would not necessarily be the end of the contemporary socio-legal trend towards foreign direct liability cases. A variety of alternative legal bases and alternative legal fora are available to host country plaintiffs seeking to hold multinational corporations civilly liable before home country courts for the detrimental impacts of their transnational activities on people and planet in host countries, not only within the US but also in other Western societies such as Canada, Australia, the UK and the Netherlands. Whereas these legal alternatives all involve their own particular legal issues and procedural and practical impediments and may not engender the same level of moral condemnation that corporate ATS claims do, they may potentially, under some circumstances, offer host country plaintiffs even broader opportunities for bringing foreign direct liability claims than the ATS does.[41]

In the end, the persistence of the contemporary socio-legal trend under discussion here in the near and more distant future is dependent on a variety of factors, both technical legal factors such as the ones that have been explored here and more socio-political and normative factors as will be explored in the next part, which renders it very difficult to make any long-term predictions in this respect. Still, as long as prospective host country plaintiffs remain incentivized to turn to Western society home country courts to address the detrimental impacts on people and planet of multinational corporations' host country

38 See Anderson 2010.

39 See, for case histories and further references, the website of the Business & Human Rights Resources Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria>.

40 See further the Introduction to part I and sub-section 3.2.2.

41 See further chapters 4 and 5 as well as *infra* section 6.3.

activities and to obtain redress for the harm they have suffered as a result, the stream of civil liability claims against (parent companies of) multinational corporations is likely to continue. Of course, the further proliferation of this type of transnational civil litigation is strongly dependent on the feasibility of actually bringing these claims before Western society courts, a factor that, as has been discussed, is determined by the legal, procedural and practical opportunities and impediments that exist in this respect at any given time in the Western societies in which prospective plaintiffs seek to bring their cases.[42] At the same time, as will be further explored in the next part, the persistence of this trend is closely connected to the availability of any adequate legal or non-legal alternatives through which similar results can be reached, whether in the host countries where the detrimental impacts of the operations of the multinational corporations involved occur, in the home countries from which those multinational corporations coordinate and control their worldwide operations, or internationally.[43]

Of course, factors such as these are subject to change over time. In the short run, however, the fact that this type of transnational civil litigation against (parent companies of) multinational corporations for damage caused in host countries is set against the background of the broad and evolving socio-political debates on international corporate social responsibility and accountability and on international business regulation in a globalizing world, is likely to prove conducive to a durable and perhaps even increasing role for home country systems of civil law in general and tort law in particular in addressing the issues that arise in this context.[44] This means that, at least for now, it seems likely that the genie that has been let out of the bottle with the increasing use over the past 15 years of the ATS as a mechanism to hold multinational corporations accountable before US federal courts for their involvement in international human rights violations/international crimes, will not be put back in anytime soon. Foreign direct liability cases are fast becoming an established part of the existing legal landscape in a growing number of Western societies, and are likely to stay just that as long as the socio-political issues giving rise to this type of tort-based transnational civil litigation remain in place.

6.2 A desirable trend?

6.2.1 The debate on the desirability of ATS-based foreign direct liability cases

The fact that the socio-legal trend towards foreign direct liability cases is here to stay raises the question whether this development is considered to be a desirable one. After all, even though these cases are brought on the basis of existing tort-based mechanisms featured

42 See further chapter 4.
43 See further chapters 7 and 8.
44 See further sub-section 1.2 as well as chapter 7.

by home country legal systems, their feasibility as discussed is dependent on a range of factors. Wherever the preconditions for the pursuit of this type of transnational tort-based civil liability claim are changed, the feasibility of bringing such claims is also affected, whether favourably or adversely. Accordingly, legal changes brought about by home country judiciaries and/or legislators in relevant subject-matter areas such as international jurisdiction, choice of law, substantive tort law, civil procedural law, litigation practice, corporate law, etc. may have intended or unintended consequences for the feasibility of bringing foreign direct liability claims before the domestic courts of those countries. The same is true with respect to changes brought about in any supranational and/or international legal regimes that are applicable to the legal orders of these home countries. This means that even though the pursuit of such claims is not necessarily dependent on the introduction within the legal orders of the home countries involved of any specific statutory provision such as the Alien Tort Statute, their feasibility is dependent on the willingness of home country courts and home country legislators to endorse or at least not counteract this type of litigation, and to take account of the ripple effects that any legal changes in relevant subject matter areas may have in this respect.[45]

This willingness is of course dependent in turn on the socio-political perceptions in each of these societies with respect to the desirability of the trend towards this type of transnational tort-based civil litigation. Generally speaking, the desirability of this trend towards foreign direct liability cases has not remained undisputed. In particular, the Alien Tort Statute and the way it has been used to hold US-based (parent companies of) multinational corporations accountable before US federal courts for their alleged direct or indirect involvement in human rights violations/international crimes perpetrated abroad, have been matters not only of extensive judicial and scholarly debate, but also of vigorous socio-political debate.[46] On the one hand, there are those who see the ATS and its modern-day use as a way of addressing the involvement of internationally operating business enterprises in violations of public international law perpetrated abroad as a legal marvel that "[...] *offers to provide a significant new aspect to human rights law and enforcement efforts by holding private actors accountable for violations*".[47] On the other hand, however, there are those who see the contemporary use of the ATS against (predominantly) corporate wrongdoers as an undesirable development. The main objections include the statute's extraterritorial nature (in the sense that Western society courts are asked to pass judgment on actors and activities that are largely located abroad), as well as the potential adverse impacts of corporate ATS cases on the international competitiveness of US-based

45 See for instance: EC Report (Augenstein) 2010, which includes a number of recommendations for legislative change at the EU level. The report notes with respect to the potential impact of the revision of the Brussels I Regulation in this context, for example, that "[a]*ll proposals to reform the Brussels I Regulation should be scrutinised for their impact on access to justice for third-country victims of human rights and environmental abuses by European parent corporations and/or their third country subsidiaries*" (p. 76).

46 See, with further references, Childress 2011. See also Slawotsky 2011 and Shamir 2004, pp. 650-655.

47 Collingsworth 2008, p. 188.

multinational corporations, on foreign direct investments in developing host countries, and on US foreign relations.[48]

Similar objections have been raised against non-ATS-based claims, also outside the US, although the controversy raised over these cases has been much less fierce than that raised over ATS-based foreign direct liability cases. At the same time, it seems that contemporary socio-political debates on international corporate social responsibility and accountability, both within the home country societies concerned and at the international level, are generating greater understanding and acceptance of this type of transnational tort-based civil litigation. Still, due to the popularity of ATS-based foreign direct liability cases and due also to the fact that the judicial opinions in these cases have been rather explicit in addressing the policy rationales behind the decisions rendered as well, the judicial and socio-political debate surrounding corporate ATS litigation provides good insight into especially the controversy that foreign direct liability cases may raise.

Supporters

Among human rights protagonists in particular, the ATS is seen as one of the contemporary world's most promising avenues for the enforcement of international human rights norms against private actors in general and against corporate actors in particular, a view that has received a fair measure of support from legal scholars. After all, corporate accountability for international human rights violations may be an issue in an economically globalized world where the enforcement of international human rights norms (and other relevant norms of public international law) against internationally operating business enterprises is dependent on the ability and willingness of individual nation-states to implement and enforce such norms within their territories. In the developing world especially, where the potential protection provided by these fundamental international norms against people- and planet-related harm caused by the local operations of multinational corporations is arguably most needed, the necessary ability and willingness to adequately guarantee that the local business activities of corporate actors do not violate the fundamental human rights of local host country citizens and/or other local people- and planet-related interests may be absent, however. The possibility for host country victims of international human rights violations of bringing ATS-based civil lawsuits against the US-based arms (usually the parent companies) of multinational corporations that have directly or indirectly been involved in those violations, is seen by most proponents of ATS-based foreign direct liability claims as an indispensable legal tool in the human rights enforcement armoury.[49]

ATS-based foreign direct liability cases offer access to remedies to host country citizens who are detrimentally affected by the host country activities of multinational corporations, both financial remedies where it allows them to obtain compensation for

48 See, for example: Hufbauer & Mitrokostas 2003.

49 See, among many others: Kerr, Janda & Pitts 2009, pp. 426-433; Herz 2008; Collingsworth 2008; Joseph 2004; Stephens 2002. See also further sub-sections 3.1.1, 3.1.2 and 3.2.3.

damage suffered but also non-tangible remedies where it gives them a platform to tell the world about their plight. At the same time, however, the effect of this specific type of transnational tort-based civil litigation goes beyond the private interests of the host country plaintiffs bringing these cases. After all, ATS-based enforcement of international human rights norms by those who have suffered harm as a result of violations of those norms is raising public awareness around the world of the potential human rights impacts of multinational corporations' transnational activities. More importantly, multinational corporations themselves are made aware of the potential impacts that their host country activities or those of their local business partners may have on local people- and planet-related interests, as well as of the fact that they may have certain responsibilities to limit the detrimental effects of those activities as much as possible even where the applicable legal standards do not expressly require them to do so. For those multinational corporations that are not inclined to assume their responsibilities voluntarily in this respect, the risk of being held both legally and publicly accountable for the harmful consequences of their socially irresponsible behaviour may provide a strong incentive to make sure that socially responsible business practices are used throughout their organization as well as throughout the organizations of those within their sphere of influence.[50] And finally, many human rights activists hope that the pursuit of ATS-based foreign direct liability cases will eventually lead to clear and binding international standards on international corporate social responsibility and accountability.[51]

Opponents

There are others, however, who are much less impressed by the fact that ATS-based foreign direct liability cases provide an accountability mechanism for corporate violations of international human rights standards around the world, and who instead point out the potentially unfavourable side-effects of this type of transnational tort-based litigation. Predictably perhaps, the main opposition to the ATS and its use against corporate defendants has come from the international business community and their representatives.[52] They found themselves strongly supported by the Bush administration which, out of a concern that ATS-based corporate litigation might compromise the US business community's ability to "[...] *expand operations, generate profit, and bring new products to foreign markets*",[53] pursued a policy both of seeking to have individual ATS-based claims against multinational corporations dismissed, whilst also lobbying to have the statute amended or repealed altogether.[54] A strong counter-lobby by human rights advocates effectively prevented any serious Congressional steps being taken against the

50 Compare, for instance: Janda, Kerr & Pitts 2009, pp. 426-433.
51 See, for instance: McBarnet & Schmidt 2007, pp. 148-176 (in particular pp. 174-176).
52 See, in more detail: Carter 2007; Shamir 2004, pp. 650-655.
53 Carter 2007, p. 639.
54 See, for instance: Stephens 2008; Carter 2007.

ATS, however.[55] The resistance by the US government to corporate ATS-based claims has significantly subsided under the Obama administration; President Obama seems to be much more willing to endorse the Alien Tort Statute and ATS-based claims against multinational corporations, or is at least much less strongly opposed to them than his predecessor.[56]

One of the principal objections to the ATS and its contemporary application lies in its inherently extraterritorial nature and/or implications. The fact that the ATS is what may be termed a 'geoambiguous law'[57] that enables foreign (non-US) plaintiffs to bring claims before US (federal) courts against corporate defendants that in some cases have only tenuous connections to the US and the US legal order for violations of international norms perpetrated abroad, has raised many questions.[58] After all, in the contemporary international legal order the point of departure remains that jurisdiction over international activities, events, issues and/or actors, both when it comes to prescribing norms (prescriptive jurisdiction) and when it comes to judicially monitoring the compliance with those norms (adjudicative jurisdiction) and/or their enforcement (enforcement jurisdiction) is territorially based.[59] It has been noted in this respect that:

> "[t]*here is a growing awareness and growing debate regarding the appropriateness of using US courts to extraterritorially enforce supposedly internationally accepted norms and impose liability for violations of such norms by overseas actors, in overseas venues, and otherwise subject to overseas laws and regulations*".[60]

In fact, (corporate) ATS cases have on various occasions raised international accusations of judicial imperialism by the host countries involved. Notable in this respect is the Apartheid litigation, in the course of which various statements opposing these lawsuits have been filed by the United States government, as well as by the South African government under President Mbeki.[61] In September 2009, however, the new South African

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55 A bill seeking to amend the ATS introduced in October 2005 by Senator Feinstein was withdrawn within a week of its introduction following a storm of protest from human rights advocates. For more detail, see, for example: Carter 2007, pp. 645-648.

56 See, for instance: 'A $16 billion problem', *Newsweek*, online version (25 July 2008), available at <www.newsweek.com/2008/07/25a-16-billion-problem.html>, in which it is noted, *inter alia*, that Obama in 2006, when he was still a senator, in fact co-wrote a letter urging the US administration to permit the Ecuadorian plaintiffs in an ATS-based claim against Texaco/Chevron to have their day in court.

57 See Meyer 2010, who defines 'geoambiguous laws' as "[...] *laws that proscribe or regulate conduct but that remain silent about whether they apply to acts that occur outside of the United States*" (citations omitted).

58 See, for example: Childress 2011, pp. 7, 26-32, who notes that concerns over the ATS's inherent extraterritoriality may have been one of the reasons for the US federal courts' recent tendency towards limitation of the ATS. See also, interestingly: Anderson Berry 2009.

59 See also sub-sections 1.2.1, 4.1.3 and section 8.2.

60 Kochan 2003, p. 109.

61 See, for an overview of some of the most relevant submissions and statements in this respect: *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 276-280. See further sub-section 3.2.2.

government under President Zuma filed a new brief stating it now supported the lawsuit;[62] similarly, the US government under President Obama has revoked the previously hostile stance on the litigation that was adopted by the Bush administration and has argued that the litigation should be allowed to continue.[63] Similar objections might be raised by the home countries of the corporate defendants involved in cases where ATS claims target multinational corporations that do have contacts with the US but that do not have their place of incorporation and/or principal place of business there. When explaining the denial of panel rehearing in the *Kiobel* case, Chief Judge Jacobs of the Second Circuit Court of Appeals stated in this respect:

> "*I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them – and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees*".[64]

Related to these concerns over the ATS's inherently extraterritorial nature and implications are concerns over the implications that corporate ATS cases may have on US foreign relations.[65] Contrary to criminal liability claims, which are initiated by a public prosecutor who, with a view to protecting and promoting the public interest, may decide to pursue some claims but not others, ATS-based civil liability claims are initiated by (non-US) private individuals in search of protection for their private interests. This entails a risk that the pursuit of some of these claims may run counter to the US Executive Branch's foreign policy strategies with respect to the host countries involved. This issue has arisen for instance with respect to the Apartheid litigation, which at one point was the subject of opposition by both the US and the South African governments. As mentioned, the US Supreme Court, in a footnote to its *Sosa* decision, has suggested that in ATS cases with strong foreign policy implications such as the Apartheid litigation, a "*policy of case-specific deference to the political branches* [of the US government]" might be in order, meaning that the courts should give "*serious weight to the Executive Branch's view of the case's impact on foreign policy*".[66]

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62 See the letter to the New York district court by the South African Minister of Justice and Constitutional Development Note, available at <www.khulumani.net/attachments/343_RSA.Min.Justice_letter_J.Scheindlin_09.01.09.PDF>.

63 See the brief by the US Attorney for the United States as *amicus curiae* supporting appellees with respect to the defendants' appeal to the Court of Appeal for the Second Circuit, No. 09-2778-cv (30 November 2009) arguing that the appeal should be dismissed. See also, with further references, a note on the *The view from LL2* blog, available at <http://viewfromll2.com/2009/12/09/the-alien-tort-statute-under-the-obama-administration-executive-suggestions-vs-explicit-requests/>.

64 *Kiobel v. Royal Dutch Petroleum Co.*, 2011 WL 338048 (2nd Cir. (N.Y.) 2011), p. 2. See, critically: Murray, Kinley & Pitts 2011, pp. 33-37.

65 Compare Murray, Kinley & Pitts 2011, pp. 35-36.

66 *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), footnote 21, p. 733. See also further sub-section 3.2.3.

Due to their potential foreign policy implications, some of these cases have raised concerns with respect to the separation of powers and the proper distribution of competences between the legislative, executive and judiciary branches of the US government. Such concerns have, in a variety of ATS-based foreign direct liability cases, led to dismissals on the basis of 'prudential' doctrines requiring judicial discretion and/or deference in courts' exercise of jurisdiction over particular cases, such as the *forum non conveniens* doctrine or the political question doctrine.[67] However, as is exemplified by the Apartheid litigation for instance, the fact that ATS-based foreign direct liability cases due to their transnational character and public interest nature tend to raise issues in this respect, will not necessarily provide a bar to their pursuit before US federal courts.[68] It should be noted, however, that separation-of-powers concerns may also play a role in court decisions on more substantive matters in these cases. As has been noted with respect to the *Talisman* case that was discussed in sub-section 3.3.2:

> "*Essentially, the point of imposing the higher (non-customary international law) 'purpose' standard for aiding and abetting in* Talisman *was to foreclose suits such as the one before the court, not so much for failure of pleadings or evidence, but because the court considered that it would amount to impermissible interference with the government's power over foreign affairs and amount to a form of judicial imperialism and, perhaps most importantly, would be a seemingly unjustifiable restraint on legitimate commerce*".[69]

Accordingly, the concerns relating to the extraterritorial nature and resultant (foreign) policy implications of the ATS's contemporary application are closely linked to objections pertaining to the potentially detrimental impacts that corporate ATS cases may have on the foreign direct investments and international competitiveness of US-based multinational corporations.[70] In a 2003 study by the Institute for International Economics, the main sources of collateral damage from (continued) ATS-based litigation against corporate defendants were stated to be: damage to US trade (both imports and exports) with the host countries involved in these cases (the 'target countries'); damage to future (outbound) foreign direct investments in potential target countries; damage to future (inbound) foreign direct investments in the US as some multinational corporations may decide to disinvest not (only) in the target countries but in the US as the 'source country' of this type of litigation; and damage to the target countries involved as their trade and investment opportunities and access to international capital markets are curtailed.[71]

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67 For more detail, see, for instance: Endicott 2010; Williams 2001. See also sub-sections 3.1.2 and 4.2.1.

68 *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), pp. 280-281. See also further sub-section 3.2.3.

69 Murray, Kinley & Pitts 2011, p. 35.

70 See, for example: Carter 2007, p. 640; Bornstein 2007, pp. 1079, 1088-1090.

71 Hufbauer & Mitrokostas 2003, pp. 37-43.

In an *amicus curiae* brief addressed to the US Supreme Court in the *Sosa* case, a number of high-profile US and international organizations representing business interests raised similar concerns.[72] They argued, *inter alia*, that the risk of economic harm posed by corporate ATS cases would put companies with a US presence at a unique and unfair competitive disadvantage, pointing out not only the investment risk created by the mere existence of ATS litigation, but also the enormous uncertainty faced by these companies regarding the scope of potential claims under the statute.[73] According to them:

> "[t]*he threat of ATS lawsuits can result in higher insurance costs, difficulties accessing capital markets, and negative effects on shareholder confidence and stock prices. The foreseeable result is less investment and trade with developing countries, and less international trade overall.* […] *Abusive ATS litigation ultimately deters investment by the very companies that are most likely to adhere to high standards of responsible conduct in their operations*".[74]

Thus, they contend that instead of encouraging the use of consistent best practices by multinational corporations in their worldwide business operations, foreign direct liability cases may discourage the adoption of standards that go beyond what is required locally.[75]

As well as the objections to corporate ATS litigation that have already been discussed here, concerns have been raised in this particular context over forum shopping, floodgates being opened to similar types of claims brought before US courts, and so-called 'blackmail settlements'. Forum shopping and floodgates concerns arise out of the fact that at present the ATS and the opportunities it offers for transnational civil human rights litigation against multinational corporations are not to be found anywhere else in the world, although, as has been discussed and as will be further elaborated below, similar results can be reached in other Western societies as well. However, in combination with the fact that the US civil litigation system is extremely plaintiff-friendly, due *inter alia* to liberal rules of discovery, the possibility of trying a case before a jury, relatively high damages awards, the possibility of claiming punitive damages, class action litigation, and the possibility of entering into contingency fee arrangements with legal representatives, US federal courts hold a great

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72 See Brief for the National Foreign Trade Council *et al.* as *Amici Curiae* in Support of Petitioner (23 January 2004), 2004 WL 162760 (US); the organizations on behalf of which this brief was submitted include the National Foreign Trade Council, USA Engage, the Chamber of Commerce of the United States of America, the United States Council for International Business, the International Chamber of Commerce, the Organization for International Investment, the Business Roundtable, the American Petroleum Institute and the US-ASEAN Business Council.

73 Brief for the National Foreign Trade Council *et al.* as *Amici Curiae* in Support of Petitioner (23 January 2004), 2004 WL 162760 (US), pp. 10-13.

74 Brief for the National Foreign Trade Council *et al.* as *Amici Curiae* in Support of Petitioner (23 January 2004), 2004 WL 162760 (US), pp. 11-12 (citations omitted).

75 Compare section 7.1.

attraction for prospective host country plaintiffs seeking to address the detrimental impacts of US-based multinational corporations on people and planet locally.[76]

Furthermore, in June 2010 the US Chamber Institute for Legal Reform released an elaborate critique of the alleged out-of-court tactics employed by plaintiffs, their lawyers and their advocates in transnational tort cases brought in the US on the basis of the ATS as well as on other, more traditional legal bases.[77] The report distinguishes a number of patterns in the out-of-court tactics of the plaintiffs in these cases and of their advocates, through which they are allegedly:

> "[...] *seeking to obtain advantages in litigation through negative publicity and other external pressures on corporate defendants, and sometimes in foreign legal systems that maintain a fragile hold on consistency and fairness. In some cases, litigation may serve as a tactic itself, part of a larger corporate campaign intended to pressure companies to pursue desired changes*".[78]

The report, which is highly critical of the tactics observed, concludes that the trend towards this type of litigation, in combination with the highly aggressive litigation tactics used against corporate defendants in these cases, is likely to continue and even grow as a result of successes in some of these cases and the "[...] *continuing prospect of massive recoveries for plaintiffs and the attorneys bringing these actions*". It suggests that corporate defendants as well as the judiciary should particularly scrutinize these transnational tort cases, and that legislative amendments on state or federal levels may be warranted to "[...] *help ensure the integrity of the United States legal system*". In addition:

> "[...] *multinational companies seeking to invest in or enter emerging markets must be conscious that a perceived failure to adhere to certain social expectations – sometimes regardless of local legal requirements – can lead to a high-profile lawsuit seeking a large damage award, and with it an accompanying set of aggressive tactics aimed at hurting the company's image*".[79]

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76 See, for instance: Childress 2011, pp. 16-17.

77 See Drimmer 2010. According to the authors of the report, there are four different groups of tactics that can be discerned in these cases: 1. media tactics, including internet campaigns, news articles, television/radio broadcasts, films, documentaries and mini-documentaries, and other media publicity such as through press conferences, reports and seminars; 2. community organizing tactics, including partnering with like-minded organizations, protests and consumer boycotts; 3. investment related tactics, including plaintiffs' attendance at annual and shareholder meetings, introducing resolutions at shareholder meetings, and pressuring shareholders to divest stock in defendant companies; and 4. political tactics, including congressional hearings and other political pressure. The report further notes a number of instances of alleged fraudulent misconduct of plaintiffs and/or their representatives in these cases. See also Drimmer & Lamoree 2011.

78 Drimmer 2010, p. 14. See also Drimmer & Lamoree 2011.

79 Drimmer 2010, pp. 81-82. See also Drimmer & Lamoree 2011.

It should be noted that concerns over the fact that ATS-based foreign direct liability cases may constitute an abuse of US courts may partly explain the increasing restrictions that have recently been imposed by the federal courts with respect to the pursuit of corporate ATS cases. It has been suggested that concerns of this nature may also have played a role in the controversial September 2010 decision by the Second Circuit Court of Appeals in the *Kiobel* case, where the idea of corporate liability under the ATS was rejected altogether.[80] This suggestion seems to be supported by the opinion of Chief Judge Jacobs in the decision on the plaintiffs' request for panel rehearing of the September 2010 judgment, which was denied:

> "*American discovery in* [corporate ATS] *cases uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets. I cannot think that other nations rely with confidence on the tender mercies of American courts and the American tort bar. These coercive pressures, combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff's likelihood of success on the merits is zero. Courts should take care that they do not become instruments of abuse and extortion. If there is a threshold ground for dismissal – and Kiobel is it – it should be considered and used*".[81]

All in all, it will be very interesting to see whether and to what extent the US Supreme Court in its upcoming review of the *Kiobel* case will address these abuse-of-court concerns as well as (some of) the other concerns that, as discussed here, have been raised with respect to ATS-based foreign direct liability cases (*i.e.*, their extraterritorial, foreign policy and competitiveness implications).

6.2.2 Debate on the desirability of foreign direct liability cases outside the US

Outside the US, this type of transnational tort-based civil litigation before Western society courts against (parent companies of) multinational corporations for damage caused in host countries has similarly attracted attention and debate, although the controversy surrounding these non-ATS-based foreign direct liability cases has been far less fierce than that surrounding corporate ATS cases. This is likely to be due partly to the lower incidence of these non-ATS-based cases so far, and partly also to the less disputed nature of their legal basis, which, as discussed, is typically found in general principles of domestic tort law, rather than in an ancient and obscure statute such as the ATS. Still, complaints by defendant multinational corporations in these cases of being subjected to frivolous

80 Compare Murray, Kinley & Pitts 2011, pp. 36-37.
81 *Kiobel v. Royal Dutch Petroleum Co.*, 2011 WL 338048 (2nd Cir. (N.Y.) 2011), p. 3.

test cases with no objective on the part of the plaintiffs other than to extort favourable settlements from them, and of being tried by the media instead of by the courts, have on various occasions also been heard with respect to foreign direct liability cases brought before non-US courts.

One case that brought about a true media frenzy was the class action against petroleum trader Trafigura that was brought in the UK by some 30,000 Ivorians following the Probo Koala incident.[82] Following the case's out-of-court settlement in 2009, which included a joint statement by the parties to the case, this media frenzy led the judge presiding in the case to remark:

> "[...] *I have been following what has been happening in the media, both in the newspapers and on television and radio. I have myself witnessed how wildly inaccurate some of the statements have been.* [...] *my concern as I read the media reports in recent times was that I knew from my reading of the papers that the experts were quite clear. The slops could not give rise to the sort of symptoms and illness which was being claimed in some of the press reports. I hope that the media will take account of the joint statement and put things right and put things in perspective*".[83]

On the other hand, the high-handed tactics of Trafigura's legal representatives, seemingly aimed at keeping press coverage of the incident and its aftermath to a minimum, which at one point went as far as super-injunctions barring newspapers from covering remarks made in the UK Parliament, have also raised eyebrows and have even triggered parliamentary debate in the UK over whether the use of such 'gagging orders' had prevented the British media from fully reporting on the legal proceedings involving Trafigura.[84] At the same time, these non-ATS-based foreign direct liability cases, just like their ATS-based counterparts, raise issues of extraterritoriality, international economic competitiveness, and separation of powers between a state's executive, legislative and judicial branches. However, due to the fact that the Brussels I regime, which as discussed provides a closed system on international jurisdiction with respect to civil claims against EU-based defendants, does not leave room for dismissal of foreign direct liability cases against EU-based corporate defendants on discretionary ('prudential') grounds (*e.g.*, *forum non conveniens*, political question), these issues have so far not hampered the pursuit of such claims before domestic courts in the EU Member States.[85]

The socio-legal trend towards foreign direct liability cases has raised more normative questions, however, such as whether and under what circumstances domestic European

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82 See for instance, with respect to reports by the Dutch media on the Probo Koala incident that was the reason for the claims against Trafigura, critically: Vink 2011. See also *supra* sub-sections 3.2.2 and 3.2.3.

83 See the transcript of a hearing in the High Court of Justice, Queen's Bench Division before Judge MacDuff on 23 September 2009, as reproduced on the Trafigura website: <www.trafigura.com/PDF/Official%20TRANSCRIPT%20of%20MacDuff%20hearing%20of%2023.09.09%20OPEN%20SESSION.PDF>.

84 See, for instance: Milmo 2010.

85 Compare sub-section 4.4.2.

courts should provide the host country victims in these cases with access to justice, even in the absence of strong connecting factors with the forum state, in cases where local corporate accountability mechanisms are absent or dysfunctional.[86] In a recent study of the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union, recommendations have been made to improve the access to justice of host country victims of human rights and environmental abuses committed by host country subsidiaries of EU-based multinational corporations. These recommendations include, *inter alia*, the suggestion that the Brussels I Regulation (which is currently being revised) should be extended so as also to provide jurisdiction with respect to transnational civil claims against non-EU-based corporate defendants under certain circumstances, for instance on the basis of *forum necessitatis* or where those claims are closely connected with similar claims against EU-based corporate defendants.[87] It should be noted in this respect that the Commission Proposal for the revised Brussels I regime does indeed include a provision on *forum necessitatis*.[88]

On the other hand, there are others who do not think that this type of transnational tort-based civil litigation against multinational corporations before Western society courts should be supported. An argument often heard in this context is that these types of claims should be resolved locally by courts in the host countries in which they have arisen, rather than in Western society home country courts that have feeble connections at best with the actors and activities concerned. When asked to comment on the civil claims against Shell that are currently pending before the The Hague district court at a Dutch Parliamentary hearing regarding Shell's activities in the Niger Delta in early 2011, Shell Netherlands' CEO stated that legal action in the Netherlands was not the best way of achieving change, and that it should be left to the Nigerian courts instead to ensure that the country's laws are enforced.[89] The same argument was advanced by the Dutch government when explaining its position that there is no need for the introduction in the Netherlands of a legal aid fund or of other initiatives aimed at financially assisting host country plaintiffs who seek to bring foreign direct liability claims before Dutch courts.[90]

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86 See, for instance: Van Hoek 2008, pp. 154-162. See further sub-sections 4.3.1 and 4.5.3.

87 EC Report (Augenstein) 2010, pp. 75-76.

88 Article 26 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), COM(2010) 748 final (14 December 2010). See further sub-section 4.2.2.

89 See, for instance: 'Dutch lawmakers grill Shell on Nigerian operations', *Daily Republic*, online version (26 January 2011), <www.dailyrepublic.com/archives/dutch-lawmakers-grill-shell-on-nigerian-operations/>. Note that the author participated in this parliamentary roundtable meeting as a legal expert.

90 Brief van de Staatssecretaris van Economische Zaken, Landbouw en Innovatie, 23 March 2011, Kamerstukken II, 2010-2011, 26 485, nr. 105; DMEA Report (De Poorter/Van Den Brule) 2011.

6.2.3 An assessment

Increasingly, the question whether and to what extent the socio-legal trend towards foreign direct liability cases, both within and outside the US, is a desirable one, is put in the broader perspective of the ever more pervasive contemporary socio-political debates on international corporate social responsibility and accountability, and of the challenges of global business regulation in this respect.[91] This tendency has been reinforced by the positive reception of the authoritative UN 'Protect, Respect and Remedy' policy framework for business and human rights.[92] At the same time, the transparency that exists in Western societies with respect to the potential impacts on people and planet of the business practices of internationally operating business enterprises in the host countries in which they operate is on the increase. This in turn triggers attention among consumers, investors, policymakers and the general public in those societies, as well as among the business community itself, for the challenges faced by internationally operating business enterprises working in developing host countries, emerging economies and/or failed states. With this attention comes the realization that next to all the stories of corporate good practices in this context, there are stories of corporate malpractices that have the potential to significantly harm people and planet in the host countries concerned but which for various reasons often go unaddressed there.[93]

As is also clear from what has been discussed here, the potential detrimental impacts of foreign direct liability cases on the international relations, economic affairs and judicial systems of the Western societies where these cases are brought, remain issues of continuing socio-political and academic concern as well as judicial scrutiny. This is especially true in the US where most of these cases have been brought so far and where courts have directly and indirectly addressed some of these issues in cases brought before them. The impending review by the US Supreme Court of the Second Circuit Court of Appeals decision in the *Kiobel* case, which has effectively closed the door to corporate ATS claims at least within that circuit, is likely to provide insight into the views of the Supreme Court Justices on the desirability of this type of litigation and determine the future of ATS-based foreign direct liability claims.[94] Outside the US, where the number of foreign direct liability claims brought against (parent companies of) multinational corporations has been much lower so far and where the legal bases upon which these claims have been brought (*i.e.*, general principles of tort law) have generally been much less contested, the debate has mainly taken place at the policymaking level.

Overall, support for this type of transnational tort-based civil litigation seems to be growing slowly but surely in Western societies. Particularly since the promulgation of

91 See further chapters 1 and 7.
92 See further sub-sections 1.2.4, 7.3.3 and 7.3.4.
93 See further sections 1.1, 1.2, 7.1 and 7.2.
94 See further sub-section 3.3.2 and *supra* sub-section 6.2.1.

the UN policy framework on business and human rights and its accompanying Guiding Principles, the focus of the debates on the socio-legal trend towards foreign direct liability cases seems to be shifting from whether this trend should be allowed to continue, to whether (and if so, how) the pursuit of this type of litigation should be better facilitated.[95] In my opinion, the continued existence and further expansion of the contemporary socio-legal trend towards foreign direct liability cases is not only an inescapable, but also a desirable development. It is true that these cases may potentially have a number of detrimental side-effects but those do not outweigh, at least not at this point, the important role(s) that these cases may play in promoting international corporate social responsibility and facilitating corporate accountability for corporate impacts on people- and planet-related interests in developing host countries. Through these cases, Western society home country courts are mobilized to let domestic systems of tort law do what they do best: put the bill for harmful societal activities where it belongs.[96]

When it comes in particular to the perceived detrimental impact of these cases on the economic interests of the multinational corporations involved as well as of the home and host countries in which they are based, it should be noted that these perceptions have not (yet) been substantiated with concrete facts and figures. Furthermore, the more normative question may be raised whether and if so, to what extent, companies and/or states should be allowed to reap economic benefits at the expense of people and planet in the host countries involved.[97] It is important to point out in this respect that these transnational tort-based civil liability claims do not involve some sort of discretionary redistribution of funds from the corporate defendants to the host country plaintiffs. Instead, they all pertain to alleged instances of corporate wrongdoing, whether intentionally or negligently, that have resulted in real and often substantial harm to the host country victims involved. At the same time, they are all pursued on the basis of existing legal grounds, albeit some more controversial than others. Their legal merits are determined through safeguarded procedures before independent and neutral Western society courts, which will in each case carefully balance the freedom of the corporate actors involved to undertake activities in the pursuit of their economic interests against the legal right of the host country citizens involved to have their people- and planet-related interests protected from the detrimental impacts of those activities.[98]

As for the perceived detrimental impacts of these cases on the international relations between the home and the host countries involved, it should be mentioned that these cases, despite their public interest nature, essentially remain civil claims by private parties in furtherance of their private interests. As will be discussed further in part III, this means

95 See further sub-sections 7.3.3 and 7.3.4.
96 See further sub-section 9.3.
97 See further sub-sections 1.1 and 1.2.
98 See further sub-sections 4.4 and 5.3.

that their potential for infringing the sovereignty of the host countries involved is far smaller than that of home country public law measures taken with a view to regulating foreign actors and/or activities abroad. Especially where home country courts adjudicating these cases base their decisions on jurisdiction and applicable law on accepted principles of private international law that take due account of the existence of connecting factors linking the actors, activities and/or interests in dispute to the home country legal sphere, the extraterritorial nature of the home country involvement will be minimal.[99] With respect to the measure of extraterritoriality that some claim is inherent especially in ATS-based foreign direct liability cases, it should be noted that even if these claims can be said to be extraterritorial in nature, which is doubtful if they are aimed at corporate defendants with more than tenuous links with the forum state such as locally incorporated parent companies, this extraterritoriality is inherent not in the ATS itself but in the rules on personal jurisdiction that apply in the US.[100]

Furthermore, the separation-of-powers issues that foreign direct liability cases are said to raise are directly connected with the particular role that courts play in the legal systems of the home countries involved, and their freedom and inclination to deal with more than just the private interests and legal aspects involved in the civil disputes that are brought before them. As such, these issues are not directly related to foreign direct liability cases, but rather to broader perceptions of the societal role of courts and civil procedures in the home countries involved.[101] The same is generally true of abuse-of-court concerns. With respect to the concerns raised on this matter by Chief Justice Jacobs in the *Kiobel* case, it has been noted that:

> "*These are criticisms of American litigation generally; they are not concerns unique to* ATS *suits. For example, the burden of discovery and the pressure to settle, even where the likelihood of success is marginal, can be just as great in antitrust class actions – if not more so* [...] *That the supposed vices of American litigation are being used to justify a rule baring an entire category of defendant from suit under the* ATS *should give the Supreme Court pause if it comes to review the majority decision in* Kiobel".[102]

This also means that these abuse-of-court concerns are less likely to raise serious issues in foreign direct liability cases brought outside the US, for instance before domestic courts in Europe, as the US plaintiff-friendly culture of adversarial legalism is, just like the ATS, a uniquely American phenomenon.[103]

Of course, if the socio-legal trend towards foreign direct liability cases is to expand in the future, it is important to be mindful of attempts at abuse of procedural law, unmeritorious

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99 See further sections 8.2 and 8.3.
100 See further sub-sections 4.1.3 and 4.2.1.
101 See further section 8.3.
102 Murray, Kinley & Pitts 2011, p. 37. See also *supra* sub-section 6.2.1.
103 See further sub-sections 5.4.2, 5.4.3 and 10.1.4.

claims and/or floods of foreign direct liability claims being drawn to home country legal fora. Although it seems doubtful that it will indeed come to that, bearing in mind that the pursuit of these claims will always remains a complex, costly and cumbersome exercise, all of the legal systems involved are likely to have their own procedural and substantive legal devices through which real excesses in this respect may effectively be dealt with.[104] In the end, the real legal and socio-political challenges in this context are likely to arise not with respect to the continued pursuit of foreign direct liability cases on the basis of existing legal avenues, but with respect to the question whether and especially where and how legal frontiers should be pushed back so as to better facilitate the pursuit of this type of transnational tort-based litigation. In order to answer this question, it is necessary to explore first what it is exactly that is sought to be achieved by promoting the role that foreign direct liability cases and home country systems of tort law more generally can play in promoting international corporate social responsibility and accountability. It is this particular question that will be further explored in part III.

6.3 Crossing the Atlantic? The feasibility of foreign direct liability cases before domestic courts in Europe

6.3.1 Preliminary remarks

Since the 'rediscovery' over three decades ago of the Alien Tort Statute as a civil redress mechanism for violations of norms of customary international law perpetrated abroad and its subsequent creative application to corporate actors involved in extraterritorial international crimes/international human rights violations, US federal courts have formed the primary venue for foreign direct liability claims and the ATS their primary legal basis. Around the same time that the socio-legal trend towards ATS-based foreign direct liability cases was making its entry in the mid-1990s in US federal courts, similar transnational tort-based civil claims against multinational corporations were being brought before home country courts in other Western societies such as Australia, Canada and the UK, albeit on the basis of general principles of domestic tort law rather than on the basis of some specific statute such as the ATS. Due, however, both to the strong support of the international human rights community, and also to the overwhelming popularity of the ATS as a legal basis and of the US as a venue for this type of transnational tort-based civil liability claim, the focus of debates not only on the future and the desirability of foreign direct liability cases but also on their feasibility has, over the past decades, largely been on ATS-based claims against (parent companies of) multinational corporations.

Now, with the general tendency among US federal courts increasingly to restrict the ATS's application to corporate actors and the particular controversy surrounding

104 Compare, for instance: Spier 1995a.

corporate liability under the ATS, in combination with the ongoing socio-political debate on the desirability of ATS-based foreign direct liability cases, attention is likely to turn increasingly to non-ATS-based foreign direct liability cases and their feasibility. This raises the question as to what extent transnational tort-based civil claims, that are brought on the basis of general principles of tort law not only before US state courts but also before domestic courts in other Western society home countries of multinational corporations, are able to provide adequate alternatives to ATS-based foreign direct liability claims. Accordingly, the attention in this study so far has been on the factors determining the feasibility of bringing foreign direct liability claims not only in the US but also across the Atlantic, before domestic courts in the EU Member States in general and before Dutch courts in particular. As discussed, several foreign direct liability cases have so far been brought in the UK, and the first examples of this type of transnational tort-based civil litigation have now also come up before courts in the Netherlands.

As is clear from the foregoing, the contemporary socio-legal trend towards foreign direct liability cases is not only an objective reality, but in my opinion also a desirable one. Current developments in Western society debates on global business regulation and international corporate social responsibility and accountability suggest that this opinion is increasingly shared not only by the NGOs supporting these claims, but also by the general public and policymakers in these societies. At the same time, this trend and its societal (global) value have over the past few years been given a firm socio-political and scholarly basis internationally through the development and broad acceptance of the UN policy framework on business and human rights. Among other things, this framework calls on states to provide victims of corporate human rights abuse with adequate remedies, and to address any legal, procedural or practical obstacles that may deny these victims access to justice, also in a transnational setting.[105]

In view of these developments, the question that arises is how the socio-legal trend towards foreign direct liability cases can be supported by adequately embedding it within the legal systems of the home countries where these claims are brought, and by removing obstacles to its continued existence where necessary. In the preceding chapters, the main legal, procedural and practical factors that determine the feasibility of the cases making up this trend have been traced. The point of departure in doing so has been the experience in the US with this type of transnational tort-based civil litigation, considering the fact that up to now the largest number by far of foreign direct liability claims have been pursued in the US legal system. However, the socio-legal trend towards these cases seems to be spreading to other Western societies too. This is an important development in view of the legal controversy that currently surrounds the very statute that has provided the initial impetus to and main legal basis for the proliferation of foreign direct liability cases in the

105 See further chapter 7.

US. Considering the fact that a large number of multinational corporations are based in or have offices in Europe, it is not surprising that (those supporting) host country victims seeking to address people- and planet-related harm caused as a result of the local activities of transnationally operating corporate groups seem to have identified European domestic courts as an appropriate alternative venue for the pursuit of foreign direct liability claims.[106]

Accordingly, (some of) the scholarly and socio-political focus in this context is now shifting to the feasibility of bringing foreign direct liability claims in Europe. In recognition of this, the preceding chapters have contrasted the legal status quo in Europe on the four main factors determining the feasibility of foreign direct liability cases (jurisdiction, applicable law, substantive legal basis, procedural and practical circumstances) with that in the US. The intention in doing so has not been to provide a full legal comparison between the US legal system and European legal systems on this point, as that would be impossible considering the wide range of subject matter areas involved. At the same time, it would also go beyond the objective of this exercise: identifying the main opportunities and bottlenecks for foreign direct liability cases that are sought to be brought before domestic courts in Europe, with a specific focus on the Netherlands.[107]

Some of the findings made will be discussed further in this section and the next. Again, the point in doing so is not to suggest that European legal systems should copy the US circumstances that have jump-started the socio-legal trend towards foreign direct liability cases, for instance by introducing European equivalents of the ATS or by moving in the direction of a legal culture of what has been called 'adversarial legalism' such as exists in the US. Considering the vast legal, procedural, practical and cultural differences between the systems involved this would be an impossible, useless and also undesirable exercise. Rather, the idea is to single out a number of areas in which there may be room for further improvement of the contemporary legal status quo pertaining to the feasibility of bringing foreign direct liability cases before domestic courts in Europe.

Of course, the next question that arises is which particular subject matter areas should be the focus of attempts to improve the legal, procedural and practical framework that determines the feasibility of European foreign direct liability cases. The answer to this question is dependent in the end on what it is exactly that is sought to be achieved by opening up Western society home country courts and tort systems to host country citizens suffering the detrimental impacts of the transnational activities of European multinational corporations. Accordingly, part III will further explore the socio-political field in which foreign direct liability cases play out, as well as the role that Western society tort systems may play in promoting international corporate social responsibility and accountability

106 Note that a recent report by global aid organisation ActionAid has indicated that, except for the US state of Delaware, the Netherlands is the main tax haven in the world for the 100 biggest multinational corporations that are listed on the London Stock Exchange, which means that most of these internationally operating business enterprises will have offices or branches located in the Netherlands. See, for instance: De Waard 2011.

107 See further chapters 4 and 5, respectively.

more generally.[108] On that basis, it will be possible to make recommendations on what the legal and policy agenda in this context should look like with an eye to the future.[109]

6.3.2 Foreign direct liability cases and the EU

EU policy discourse on foreign direct liability cases

At the EU level, attention has increasingly been paid to the socio-legal trend towards foreign direct liability cases.[110] In 2004, the European Commission submitted an *amicus* brief on the occasion of the review by the US Supreme Court of the pivotal *Sosa* case, in which the Supreme Court for the first time took the opportunity to elaborate on the interpretation and scope of the ATS (leaving aside, however, the issue of corporate liability).[111] In its brief, the Commission commented on the ATS's limits and also, in passing, on corporate liability under the ATS. It essentially urged the Court to interpret the statute in such a way as to limit both its substantive reach and its international reach, with a view to the fact that:

> "[t]*he statute is sometimes applied to reach conduct undertaken outside the United States by nationals of Member States of the European Community and legal entities organized under the laws of Member States of the European Community*".[112]

In its brief, the Commission argued firstly that the substantive standards imposed by the Alien Tort Statute should be defined by reference to well-established norms of customary international law only, and that these norms should also be looked at in order to determine the range of actors that may be liable under the statute for their alleged (complicity in) violations of such norms. According to the Commission, US courts applying the ATS should do so in recognition of the fact that:

> [...] *only a subset of norms recognized as customary international law applies to non-state actors, such as corporations, and hence only that subset may form the basis of liability against such actors.* [...] *United States courts must also apply international law to determine the circumstances in which a non-state actor may be held liable for a violation of a standard not directly applicable to that actor on the ground that the non-state actor was complicit in a violation of that norm by state actors*".[113]

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108 See further chapters 7, 8 and 9.
109 See further chapter 10.
110 See, in more detail: Wouters & Chanet 2008; Enneking 2009, pp. 910-913.
111 See further sub-sections 3.1.2 and 4.4.1.
112 Brief for European Commission as Amicus Curiae supporting neither party, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), 2004 WL 177036 (U.S.), p. 2.
113 *Ibid.*, pp. 10-11.

It further argued that the subject matter actionable under the statute should be limited to those activities over which the US has prescriptive jurisdiction under international law, and that the statute should not be interpreted as allowing US courts to exercise unlimited universal civil jurisdiction.[114]

It is likely that the European Commission will again file an *amicus curiae* brief in anticipation of the Supreme Court review of the *Kiobel* case, especially since this case revolves around claims against, *inter alia*, the Anglo/Dutch parent company of the multinational Shell group. Considering as well the fact that the number of corporate ATS cases that have been brought before US federal courts, also against other EU-based multinational corporations such as Nestlé, Woermann Line, Daimler and Rheinmetall Group, has substantially increased in the eight years since the Commission's *amicus curiae* brief in the *Sosa* case, it will be very interesting to see what the Commission will have to say on the legal aspects of corporate ATS claims. A Commission brief on this point may provide important clues to the Commission's current position on the desirability of foreign direct liability cases more generally, a subject that has remained unclear up to now despite the many developments that have taken place over the past decade in this context both at the EU level and within the EU Member States.

In 1999, the European Parliament called on the Commission "[...] *to develop the right legal basis for establishing a European multilateral framework governing companies operating worldwide*".[115] In this context, it has pointed out in a number of CSR-related resolutions the fact that the Brussels Convention and its successor, the Brussels I Regulation, provide the necessary jurisdictional basis for the pursuit of foreign direct liability cases before courts in the EU Member States.[116] In 2007, it called on the Commission to "[...] *implement a mechanism by which victims, including third-country nationals, can seek redress against European companies in the national courts of the Member States*", as well as to "[...] *organise and promote awareness campaigns and monitor the implementation of the application of foreign direct liability according to the Brussels Convention*". It further encouraged the Commission to "[...] *develop, in particular, mechanisms that ensure that communities affected by European companies are entitled to a fair and accessible process of justice*".[117]

Probably in response to the pressure inflicted by the European Parliament and also by the UN through the developing UN policy framework on business and human rights, in 2009 the Commission indicated that the existing knowledge on the nature and scope of the current EU legal framework applicable to European companies operating in third

114 *Ibid.*, pp. 12-26.

115 'Resolution on EU standards for European enterprises operating in developing countries: Towards a European Code of Conduct', 1999 *O.J.* C 104/180 (14 April 1999).

116 See, with further references: Wouters & Chanet 2008, pp. 294-295; Enneking 2009, p. 911.

117 European Parliament Resolution on Corporate Social Responsibility: A new partnership, 2007 *O.J.* (C 301 E) 45, pp. 52-53.

countries needed to be further expanded.[118] This led the European Commission's Enterprise and Industry Directorate General to commission a study of the legal framework on human rights and the environment applicable to European enterprises operating outside the EU, which was completed in 2010. The study deals with the possibility of human rights and environmental protection in this context being safeguarded through the fields of criminal law, corporate law and private international law, but does not directly address tort-based mechanisms of corporate accountability, as the field of substantive tort law falls outside the EU's competences and thus outside the current EU legal framework on this matter.[119]

Still, the study does make a number of recommendations, especially with respect to the fields of corporate law and of private international law, that could substantially improve the feasibility of bringing foreign direct liability cases before domestic courts in the EU Member States.[120] Whether and to what extent the Commission intends to act upon those recommendations remains to be seen, however. In October 2011, the Commission published a new strategy on corporate social responsibility, in which it states its intention to publish a report, by the end of 2012, on its priorities in implementing the UN policy framework on business and human rights and to issue periodic progress reports thereafter. It has indicated that the study of the legal framework on human rights and the environment applicable to European enterprises operating outside the EU will be considered in this context.[121] The Commission's 2012 report is likely to provide further clarity on the Commission's willingness to pursue legal changes at the EU level in response to the state duty to provide victims of corporate human rights abuse with access to effective remedies that ensues from the UN policy framework. As has been mentioned before, this duty also encompasses the duty on states to consider ways to reduce legal, procedural and practical barriers that could lead to a denial of such access to effective remedies.[122]

The impact of substantive EU law

As is clear from what has been discussed in this part, the feasibility of foreign direct liability cases is in fact determined by a wide variety of factors, which may roughly be classified in four areas: jurisdiction, applicable law, legal basis and procedural and practical circumstances. Some of these factors attach to the venue where a foreign direct liability case is brought, in the sense that they are determined by the law and practices of the forum country, while others attach to the law that applies to the case, in the sense that they are determined by the system of tort law that the applicable choice of law regime designates as the law that governs the case. At the same time, however, it should be noted that there

118 Enneking 2009, pp. 911-913.
119 EC Report (Augenstein) 2010.
120 See *supra* sub-section 6.2.2.
121 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011), p. 14 (footnote 24).
122 See further sub-sections 7.3.3 and 7.3.4.

is yet another factor at play here, which is formed by the prescriptive rules of conduct and behavioural standards that apply to the corporate actors and activities at issue in these cases. It is these rules and standards, which may flow from written norms of public international law, domestic host country law and/or domestic home country law as well as from universally or locally applicable unwritten norms of proper societal conduct, that in the end determine the standards on the basis of which the allegedly wrongful behaviour of the multinational corporations in question is judged.[123] EU law may potentially have an impact in this context both through some of its rules of conduct and through the impact of its rules and regulations on the four factors determining the feasibility of foreign direct liability cases.

Generally speaking, the EU has broad but limited competences within its supranational legal order: the legal instruments it adopts must have a legal basis in its foundational treaties and its competences must be exercised in line with the principle of subsidiarity, according to which it should only exercise those tasks that cannot be performed effectively at the Member State level. Over the course of the EU's existence, its policy agenda has been directed predominantly at the (commercial) interests of the EU and its Member States and at actors located and activities taking effect within the EU. This means that regulating the behaviour of EU-based business enterprises with a view to protecting people- and planet-related interests outside the EU has not been at the top of the EU policy agenda in recent years. With the entry into force of the Treaty of Lisbon in December 2009, however, the Treaty on European Union now makes clear that the overreaching objectives of the EU are the promotion of: peace; the EU's values; and the well-being of its people. Economic objectives are considered to be just as important as social, cultural, environmental and humanitarian objectives. One of the more specific objectives of the EU is the confirmation and promotion of EU values worldwide: the Treaty of Lisbon "[...] *expressly confirms the commitment of the EU to the eradication of world poverty and the protection of human rights worldwide*".[124]

Obviously, this provides perspectives for EU legislative or policy action in the field of international corporate social responsibility and accountability. At this point, there are a number of subject matter areas in which the EU may have duties and/or competences to regulate, or require its Member States to regulate, the activities of EU-based multinational corporations outside the EU with a view to protecting people and planet abroad.[125] The previously mentioned study of the legal framework on human rights and the environment applicable to European enterprises operating outside the EU identifies a number of ways

123 For a more detailed discussion see further chapter 4.

124 See generally on the values and objectives of the EU and the competences of the EU: Kaczorowska 2011, pp. 39-58 and 78-108, respectively (quote p. 57). See also on the role of human rights within the EU: *Ibid.*, pp. 234-255. Note that a further elaboration of the EU competences with respect to CSR-related subject matter areas is a comprehensive matter that goes beyond the scope of this study.

125 EC Report (Augenstein) 2010.

in which EU law, policies and practices directly or indirectly impose duties on EU-based multinational corporations to refrain from infringing human rights and the environment outside the EU. In the field of environmental law in particular, for instance, there are some EU legal instruments that impose and/or require the EU Member States to impose and enforce rules of conduct that also apply to EU-based (corporate) activities causing environmental harm outside the EU, usually as part of the implementation of particular international environmental treaties.[126] An example is the EU Regulation on shipments of waste which, pursuant to the Basel Convention, has as its primary objective environmental protection through the control of transboundary movements of hazardous wastes and their disposal, not only within the EU but also in third states.[127] This regulation plays a significant role in, for example, the Dutch criminal case against the international shipping company Trafigura on the occasion of the Probo Koala incident in which hazardous wastes generated by the Probo Koala, a ship that was chartered by Trafigura, were dumped in Ivory Coast, causing personal injuries and environmental damage locally.[128] Other examples include corporate reporting requirements under EU law on human rights and environmental impacts also outside the EU.[129]

It is possible that the range of rules of conduct provided by EU law that seek to minimize the impacts of the activities of EU-based multinational corporations on people- and planet-related interests outside the EU will be broadened in the future. In the field of human rights in particular, pressure to extraterritorially regulate the activities of multinational corporations with a view to limiting their detrimental impacts on people- and planet-related interests in host countries is on the increase, mainly as a result of the promulgation of the UN policy framework on business and human rights.[130] It should be noted in this respect that with the adoption of the EU Charter of Fundamental Rights (which has binding legal effect on the EU as well as its Member States) and the EU's planned accession to the European Convention on Human Rights, issues pertaining to the extraterritorial protection of non-European human rights-related interests may now also arise under EU law. The study suggests that although "[t]*he European Court of Justice (ECJ) has not yet pronounced on the application of EU fundamental rights in relation to European corporations operating outside the European Union*", "[...] *it appears not unlikely that the ECJ will come to consider such cases in the future*".[131]

All in all, EU law at this point plays only a limited role when it comes to providing rules of conduct that pertain to the activities of EU-based multinational corporations in non-

126 EC Report (Augenstein) 2010, pp. 25-31.
127 Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, *OJ* L 190/1 (12 July 2006). See also: EC Report (Augenstein) 2010, pp. 26-28.
128 See further sub-section 3.2.2.
129 EC Report (Augenstein) 2010, pp. 65-67.
130 See further sub-sections 7.3.3 and 7.3.4.
131 Compare EC Report (Augenstein) 2010, pp. 18-19 (citations omitted).

EU host countries. However, via its private international law regimes on jurisdiction in international civil cases (Brussels I) and on the law applicable to non-contractual obligations in international civil cases (Rome II), it does have a significant impact on the extent to which rules of conduct from other sources may be enforced through foreign direct liability claims that are brought before domestic courts in the EU Member States.

Jurisdiction: the Brussels I regime

As has also been pointed out by the European Parliament, the Brussels I Regulation in principle offers host country plaintiffs ample opportunities to bring foreign direct liability cases against EU-based corporate defendants before EU Member States' courts. Under certain circumstances courts in more than one of the EU Member States may be competent to hear such a case, for instance where an EU-based multinational corporation has a branch in another EU Member State which has also somehow been involved in the activities giving rise to a foreign direct liability case, or if the harmful event giving rise to the claim can be said to have occurred there. In such cases, the host country plaintiffs have a choice between the available EU fora, something that may be very useful in light of the fact that procedural and practical circumstances, which are in principle determined by the laws and practices that apply in the forum country, can vary between the different Member States.[132]

It has been suggested that the Brussels I regime acts as a European Alien Tort Statute and is in fact more generous, among other things because it is not limited to claims brought by aliens and because it does not allow for dismissal, on the basis of *forum non conveniens*, of cases that fall under its regime.[133] The latter fact in particular is highly significant in this context, as ATS-based foreign direct liability cases brought before US federal courts face a real chance of being dismissed by those courts on the basis of *forum non conveniens* where host country courts or other foreign courts are deemed to be more suitable to hear the claims. In reality, however, the Brussels I regime cannot be compared to the Alien Tort Statute, as the latter provides US federal courts with *subject matter* jurisdiction to hear a specific category of transnational tort-based civil claims that are brought before them on the basis of alleged violations of customary international law.[134]

If anything, the impact of the Brussels I regime on the feasibility of foreign direct liability cases brought before domestic courts in the EU Member States should be contrasted with the US rules on *personal* jurisdiction. Although a full-blown comparison

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132 Similarly: Wouters & Chanet 2008, pp. 294-295; Enneking 2009, pp. 295-296. See also further sub-section 4.2.2.

133 See De Schutter 2005, pp. 262-282.

134 See further sub-section 4.2.1. Note that the 'alien' requirement in the Alien Tort Statute is not very likely to cause many difficulties in ATS-based foreign direct liability cases, as the host country plaintiffs bringing those claims will generally not be US citizens anyway; similarly, the plaintiffs in foreign direct liability cases brought before EU Member State courts are also not likely to be EU citizens. See, for instance: De Schutter 2005, pp. 266-267.

on this matter goes beyond the scope of this study, what can be said is that the competences of US courts to hear foreign direct liability claims (no matter what their legal basis is) against US-based defendants are in a sense wider in certain respects than those of EU Member State courts under the Brussels I regime. After all, US courts may under certain circumstances assert jurisdiction over non-resident enterprises that are 'doing business' in the forum state; in an ATS-based foreign direct liability case against Shell, for instance, the presence of an investors' relations office within the forum state that had nothing to do with the activities in dispute was sufficient for the courts to assume jurisdiction. At the same time, the 'minimum contacts' that are required for US courts to take personal jurisdiction over non-resident enterprises may also be generated by the presence in the forum of foreign defendants' local subsidiaries. Such minimal contacts would generally be insufficient however for a company to be considered to be based within the EU for the purposes of the Brussels I regime.[135]

At the moment, European foreign direct liability claims that fall outside the scope of the Brussels I regime (*i.e.*, claims against corporate defendants that do not have their statutory seat, central administration or principal place of business within any of the EU Member States) are governed by the Member States' domestic rules on international civil jurisdiction. Those may or may not be as lenient as the US rules on personal jurisdiction in this respect. Under the Dutch domestic rules on international civil jurisdiction, for example, Dutch courts may exercise jurisdiction over claims against non-resident companies that have a Dutch branch or office, but only to the extent that the branch or office in question can be said to have been involved in the wrongful activities in dispute. At the same time, the Dutch domestic regime on international civil jurisdiction also features a number of additional bases for international civil jurisdiction over non-resident corporate defendants in foreign direct liability cases. These include, for instance, the interconnectedness of claims in cases involving multiple defendants (which is the basis upon which the The Hague district court has assumed jurisdiction over the claims against Shell's Nigerian subsidiary in the Dutch Shell cases) and *forum necessitatis* (the unavailability of alternative fora). It should further be noted that the Dutch regime, just like the Brussels I regime, does not allow courts to dismiss, on the basis of *forum non conveniens*, international civil cases that fall within their jurisdiction.[136]

All in all, whether a foreign direct liability claim can be brought against a non-EU-based defendant, such as a host country subsidiary, is at present dependent on the specific circumstances of each case in combination with the domestic regime on international civil jurisdiction that is applicable within the particular Member State where it is sought to bring the claim. All of this may change in the near future depending on the outcome

135 Compare sub-sections 4.1.2 and 4.2.2.
136 See further section 5.1. See also Enneking, Giesen *et al.* 2011, pp. 552-553.

of the revision of the Brussels I regime that is currently in progress.[137] As discussed, the Commission proposal that has been put forward in this respect seeks among other things to improve the Brussels I regime's functioning in the international legal order by extending it to international civil claims brought before EU Member State courts against defendants that are not domiciled within the EU.[138] However, it introduces only a very limited number of grounds on the basis of which jurisdiction can actually be exercised over such claims. As such, it risks worsening the status quo with respect to the feasibility of bringing foreign direct liability claims before European courts, at least in comparison with the domestic systems of international jurisdiction that are in place now in some of the EU Member States.

Under the 'new' Brussels I regime as proposed by the Commission it seems unlikely, for example, that Dutch courts would in the future be able to exercise jurisdiction over foreign direct liability claims against non-EU-based corporate defendants that are so closely connected to related claims against EU-based corporate defendants as to warrant their joint adjudication. This would be a backward move in comparison with the situation as it exists now, as it would mean that claims similar to the Dutch Shell cases could in the future only be directed at Netherlands-based arms of the multinational corporations involved and not also against their host country subsidiaries (or business partners and/or sub-contractors). Similarly, the *forum necessitatis* provision that is included in the Brussels I regime is actually more restricted than the *forum necessitatis* provision that is currently featured in the Dutch domestic regime on international jurisdiction and which, in contrast to the proposed Brussels I provision, does not always require the claim to have connections with the Dutch legal sphere. At the same time, it should be noted that the EU-wide introduction of such a provision, depending on the way in which it will be interpreted by the Member State courts and the European Court of Justice, might also improve the feasibility of bringing foreign direct liability claims in other EU legal systems that currently do not provide for such a jurisdictional basis for claims that cannot be brought in other fora.[139]

It should be noted in this respect that the previously mentioned study of the legal framework on human rights and the environment applicable to European enterprises operating outside the EU has recommended the introduction in the Brussels I regime not only of a *forum necessitatis* provision but also of a provision on the basis of which similar claims against multiple defendants can, under certain circumstances, be brought under the jurisdiction of an EU Member State court that has jurisdiction over one of those claims

137 Similarly Enneking, Giesen *et al.* 2011, p. 559.

138 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), COM(2010) 748 final (14 december 2010). See further sub-section 4.2.2.

139 See further sub-section 4.2.2.

but not over the others. The most important suggestion made in this respect, however, seems to be the suggestion that:

> "[a]*ll proposals to reform the Brussels I Regulation should be scrutinised for their impact on access to justice for third-country victims of human rights and environmental abuses by European parent corporations and/or their third-country subsidiaries*".[140]

Whether and to what extent the European Commission will pay heed to these recommendations and take into account the consequences for foreign direct liability cases of changes to the Brussels I regime is likely to become more clear towards the end of 2012 when the Commission publishes its report on priorities in implementing the UN policy framework on business and human rights.[141]

Applicable law: the Rome II regime

Just like the Brussels I Regulation, the EU's Rome II Regulation may also have a significant impact on the feasibility of foreign direct liability cases brought before domestic courts in the EU Member States. The Rome II Regulation provides an exhaustive choice-of-law regime for non-contractual liability claims with international aspects that fall within its substantive scope and its temporal scope (the Regulation pertains to claims involving events giving rise to damages that have occurred since January 2009[142]). Accordingly, it determines on the basis of which system of tort law foreign direct liability claims brought before EU Member State courts will be decided. On the basis of the Rome II Regulation's general rule, this will in most of these cases be the law of the host country as the place where the harmful consequences have occurred (the *Erfolgsort*). This may be different only in foreign direct liability cases pertaining to environmental harm, provided that the host country plaintiffs can make a plausible case for the home country to be considered as the place where the wrongful conduct (for instance lack of supervision by the parent company) has taken place (the *Handlungsort*). In such cases, the host country plaintiffs in foreign direct liability cases have an option to choose home country substantive rules on tort law as the rules on the basis of which the allegedly wrongful corporate conduct is assessed. Still, under most circumstances, host country tort law is likely to be the law that governs foreign direct liability cases that are brought before domestic courts in the EU Member States and that fall within the temporal scope of the Rome II regime.[143]

It should be noted, however, that the scope of the applicable law (meaning the legal rules that are assigned to act as the basis upon which the case is to be decided by the court

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140 EC Report (Augenstein) 2010, p. 76.

141 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011), p. 14 (footnote 24).

142 See further sub-section 4.3.3.

143 See further sub-sections 4.3.3 and 5.2.1.

seized of the matter) is limited to rules of private law, more specifically rules on non-contractual liability.[144] The applicability of relevant home or host country rules of conduct of a public law nature remains in principle dependent on the geographic scope of those rules, which in the contemporary international legal order of sovereign nation states is likely to be restricted to the territory of the country issuing them.[145] Under the Rome II regime such rules of a public law nature do, however, take effect in various ways in the private law dispute between the host country plaintiffs on the one hand and the corporate defendants on the other.[146] At the same time, the scope of the law applicable under the Rome II Regulation does not, in principle, extend to rules of a procedural nature: matters of civil procedure and litigation practice, which, as has already been mentioned and as will be further discussed below, may have a significant impact on the feasibility of foreign direct liability cases, remain governed by the domestic law of the EU Member State where the case is brought.[147]

Despite the fact that the applicable system of tort law will not cover all of the legal aspects of a foreign direct liability claim brought before a domestic EU Member State court, it may still have a substantial effect on the feasibility of such a claim. Just as public law rules of conduct differ from country to country and will generally lead to very different behavioural standards for corporate activities in developed home countries than in developing host countries, so rules of tort law also differ from country to country and may sometimes lead to substantially different results in foreign direct liability cases depending on the applicable system of tort law. Relevant differences in this respect may include for instance the question whether and under what circumstances a parent company may be held liable for a failure to supervise and/or interfere with the host country activities of their local subsidiaries. This may be formulated as an active breach of a duty of care, but may also be said to constitute an omission; under some tort systems the latter will more

144 Compare for instance Article 15 Rome II Regulation, which determines that the law applicable shall govern in particular: "*(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them; (b) the grounds for exemption from liability, any limitation of liability and any division of liability; (c) the existence, the nature and the assessment of damage or the remedy claimed; (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation; (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance; (f) persons entitled to compensation for damage sustained personally; (g) liability for the acts of another person; (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation*".

145 See further sub-section 4.3.1.

146 It does so in particular through the provisions on the application of overriding mandatory provisions of the forum, on the taking into account of rules on safety and conduct in force at the time and place of the event giving rise to the liability, and on the possibility for the court to refuse application of a provision of the applicable law where such application is manifestly incompatible with the public order of the forum country: Articles 16, 17 and 26 Rome II Regulation, respectively.

147 See further sub-section 4.5.3.

rarely lead to liability for negligence.[148] Other potentially significant differences that are determined by the applicable system of tort law may pertain for example to the existence of relevant strict(er) liabilities, the way the burden of proof is divided among the host country plaintiffs and the corporate defendants to the case, as well as the types of remedies and amount of damages that may be claimed.[149]

Furthermore, especially in view of the fact that courts dealing with tort claims often act as developers of the law where they are asked to set standards on the basis of open-ended concepts such as due care, the existence of relevant case law under the applicable system of tort law can also make a big difference for the outcome of a foreign direct liability case. Under the Dutch system of tort law, for example, existing precedent that may be relevant (albeit indirectly) in the context of foreign direct liability cases may include case law pertaining to the tortious liability of parent companies towards their subsidiaries' creditors; similarly, the precedent on parent company liability that was recently set in the *Chandler* case belongs to the field of English substantive tort law.[150] This also means that the Rome II Regulation's choice-of-law regime affects the possibility of creating a new body of case law on a particular matter under any particular country's system of tort law. In the end, useful precedent for instance on the circumstances under which a parent company of a multinational corporation may owe host country third parties a duty of care with respect to the potential impacts of the group's transnational activities on their people- and planet-related interests can only be created under home country tort law.

Another factor to be taken into account in this respect is the fact that each country's system of tort law reflects certain domestic policy choices and may to a certain extent be used to pursue specific domestic policy objectives.[151] The provision of strict liability (*i.e.*, liability linked to the materialization of specific risks and as such not dependent on whether the tortfeasor was at fault) for certain inherently risky activities (for instance driving a car, working with potentially harmful substances) reflects a particular policy choice, for example.[152] At the same time, following the US example, in most European countries the tort system is increasingly viewed not only as a compensation mechanism but also as a mechanism for providing behavioural incentives and/or for enforcing internally and externally generated rules of conduct.[153] As will be discussed in more detail in part III of this study, this view is highly relevant in the context of foreign direct liability cases too, where home country tort systems may have a function in (monitoring and) enforcing local or international conduct-regulating standards against multinational corporations violating those standards, and in deterring those corporate actors from

148 See further sub-section 4.4.2. See also, in more detail: Enneking 2008a.
149 See further sub-section 4.5.1.
150 See further sub-sections 3.3.2 and 5.3.1.
151 Compare, for instance: Van Dam 2006, pp. 125-129.
152 See further sub-section 5.3.2.
153 See, for instance: Kortmann 2009. See further sub-sections 4.5.3 and 5.4.1.

engaging in activities that have legally inadmissible harmful effects on people- and planet-related interests.[154]

The extent to which a country's tort system is able to carry out its underlying policies in an international context as well, however, is dependent in part on the choice-of-law rules that apply to transnational tort cases brought before its courts. After all, if a country's rules on substantive tort law are not applicable to particular transnational activities and/or transnational legal relationships between private actors, those rules can also not be used to pursue any policy objectives that may be sought to be accomplished in respect of those actors and/or activities. Especially in a context where alternative regulatory options are scarce, this may prove to be an undesirable side effect of the applicable choice-of-law rules. It should be noted that even if home country rules on substantive tort law cannot be applied to foreign direct liability claims, home country systems of tort law more generally may still act as enforcement mechanisms for existing public law rules of conduct, albeit through the application of host country rules of substantive tort law, in foreign direct liability cases brought before home country courts. In such cases it will not be possible, however, for home country courts to develop precedent-setting tort-based behavioural standards (*i.e.*, standards of care pertaining to particular activities or situations) on the basis of their own substantive rules on tort law, nor to put into effect any policy rationales that may be inherent in such rules.[155]

Accordingly, the Rome II Regulation's choice-of-law regime may not only substantially affect the outcome, and thus the feasibility, of foreign direct liability cases brought before EU Member State courts, but may also affect any policy objectives sought to be pursued through those cases by the home countries of the multinational corporations involved. Due however to the fact that the Rome II regime is primarily aimed at achieving uniformity in the choice-of-law decisions by the courts of the EU Member States so as to create legal certainty with respect to the applicable law in non-contractual liability claims brought before those courts, its primary focus is on a neutral, geographically-based selection of the law applicable, rather than on any specific substantive outcomes or the pursuit of underlying policy objectives. In this sense, it differs significantly from the US state choice-of-law regimes, most of which today favour a flexible, policy-oriented approach to choice of law and focus on material justice rather than conflicts justice.[156]

On the basis of the Rome II Regulation's general rule, the law of the country in which the damage occurs (the *lex loci damni*) is the law that is to be applied in principle to non-contractual liability claims brought before EU Member State courts, also in cases where

154 See also, on the regulatory function of tort law in the context of foreign direct liability cases: Enneking 2008a, pp. 287-292. See further section 8.3 as well as chapter 9.

155 See, for further detail and with a focus on foreign direct liability cases and the Rome II Regulation: Enneking 2008a.

156 Compare, for instance: Symeonides 2008b; Enneking 2008a. See also further sub-sections 4.3.2 and 4.3.3.

the allegedly wrongful behaviour giving rise to that damage has taken place in another country (the *Handlungsort*). According to the Commission, this choice of the *lex loci damni* as the Regulation's starting point is justified, *inter alia*, by the concern for certainty in the law, as well as by the consideration that "[...] *the modern concept of the law of civil liability* [...] *is no longer* [...] *oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates*".[157] This assertion seems to be somewhat at odds, however, with the previously mentioned rise in Europe of a more instrumental view of the tort system, a development that is in fact strongly promoted by the EU's increasing emphasis on the use of domestic systems of civil law in general and tort law in particular as mechanisms for the private enforcement of substantive conduct-regulating EU norms in fields such as competition law and consumer law.[158] By contrast, many of the US state choice-of-law-regimes allow courts to give consideration to the policy objectives sought to be pursued by so-called conduct-regulating rules of tort law (*i.e.*, rules of tort law that are aimed at deterring certain actors from engaging in behaviour that is considered to be socially undesirable) by applying the law of the place of conduct if that law imposes a higher standard of conduct on the tortfeasor than the law of the place of injury.[159]

All in all, the Rome II regime's geographically-oriented nature and focus on conflicts justice does not leave European home country courts much room in foreign direct liability cases brought before them to opt for application of the system of tort law that achieves what is considered to be material justice in the case at hand, and/or that seeks to put into effect relevant policy objectives.[160] More specifically, the choice for the application of the *lex loci damni* as the Rome II regime's general rule does not easily accommodate the pursuit by the EU Member States of aims of behavioural regulation and deterrence through their systems of tort law with respect to transnational actors and activities. In the particular context of foreign direct liability cases, it may prove difficult to create a body of precedent on parent company liability for damage caused in host countries under any of the Member States' systems of tort law, as the host countries where the damage typically occurs in these cases are usually developing countries outside the EU. At the same time, the *lex loci damni* rule may prevent European home countries of multinational corporations from seeking to regulate through their systems of tort law the behaviour of 'their' multinational corporations with a view to protecting host country people- and planet-related interests.[161]

The Rome II regime's neutral, (semi-)closed, 'black letter law' system does, however, create a measure of legal certainty for the parties involved as to the law that will be

157 Explanatory Memorandum to the 'Commission Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II")', COM(2003) 427, p. 12.
158 See further sub-section 4.5.3.
159 See also: Symeonides 2008a, pp. 1745-1746, as well as, for a comprehensive discussion, Symeonides 2006, pp. 123-263.
160 Compare Symeonides 2008b.
161 For a more detailed discussion, see Enneking 2008a.

applied to their dispute, which comports with its objectives of creating uniformity and legal certainty. The regime also features a number of exceptions to the general rule on the basis of which provisions of the law of the home country may find application in foreign direct liability cases brought before courts in the EU Member States even where the applicable system of tort law is that of the host country. These include the provisions: on the application of overriding mandatory provisions of the home country; on the taking into account of rules on safety and conduct in force at the time and place of the event giving rise to the liability; and on the possibility for the court to refuse application of a provision of host country tort law where such application is manifestly incompatible with the public order of the home country.[162] In the previously mentioned European study on the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union, it has been noted in this respect that:

> "[...] *there is evidence that as a matter of public policy, EU Member State courts can refuse the application of foreign law on grounds of 'manifest breaches' or 'flagrant denials' of human rights*".[163]

Accordingly, these exceptions and in particular the public policy exception may provide some important minimum guarantees in foreign direct liability cases where adjudication on the basis of host country rules of substantive tort law would lead to outcomes that would starkly contrast with applicable standards on the protection of people- and planet-related interests in the home countries involved.[164]

The most important exception to the Rome II Regulation's *lex loci damni* rule in the context of foreign direct liability cases, therefore, is its rule on environmental damage, which is specifically aimed at raising the general level of environmental protection by giving the victim of environmental harm the opportunity to choose application of the most favourable system of tort law in cases where the *Handlungsort* and the *Erfolgsort* are in two different countries. As mentioned, this rule may give host country plaintiffs the option to choose application of home country tort law to their claims if the wrongful corporate conduct at issue can be said to have taken place in the home country as the place from where the activities of the defendant multinational corporations are (or should have been) managed and/or controlled. This is important especially where home country rules of substantive tort law impose a higher standard of conduct for the tortfeasor than the rules of substantive tort law of the host country where the harmful activities at issue have been carried out and the damage has arisen. Interestingly, the Rome II rule on environmental

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162 Articles 16, 17 and 26 Rome II Regulation, respectively. Compare, for instance: Van Den Eeckhout 2010; Van Hoek 2008, pp. 162-168; Enneking 2008a, pp. 303-307. See further sub-sections 4.3.3 and 5.2.1.

163 EC Report (Augenstein) 2010, p. 76.

164 Compare Van Hoek 2008, pp. 165-167. See further sub-sections 4.3.3 and 5.2.1.

damage bears resemblance to the more policy-oriented US state choice-of-law regimes in the sense that it enables the EU-based home countries involved to pursue environmental protection-related policy objectives through their domestic systems of tort law.[165]

Whether this rule was actually drafted with a view to the protection of non-EU-based environmental interests as well, such as the people- and planet-related host country interests that are at stake in foreign direct liability cases, remains a matter of debate. It has been suggested that the purpose of the provision is limited to preventing transboundary pollution in a strict sense and thus only applies to disputes between private parties from neighbouring countries.[166] Still, in my opinion, Rome II's environmental damage rule itself does not provide any cause for such a restrictive interpretation, which means that it may also be applicable in the context of transnational (but not *stricto sensu* transboundary) environmental harm such as may be at issue in foreign direct liability cases.[167] It seems that the lack of clarity on this matter will eventually have to be resolved by case law on the matter by the European Court of Justice.

Procedural and practical circumstances: recent developments

Circumstances pertaining to civil procedure and litigation practice, also a very important factor in determining the feasibility of foreign direct liability cases before domestic European courts, tend to be determined in principle not by EU law but by the domestic laws of the EU Member States where those cases are brought. Still, there are currently a number of developments taking place at the EU level that may turn out to have an impact in this area too. As discussed, the European Commission is showing an increasing interest in using Member States' domestic systems of civil law in general and tort law in particular as private enforcement mechanisms with respect to EU law in fields such as competition law and consumer law. To this end, it has put forward several proposals aimed at strengthening this enforcement role, for instance by adopting a 'coherent European framework on collective redress'.[168] Other suggestions made by the Commission with a view to enhancing the enforcement function of the Member States' domestic systems of tort law in these areas have included not only the introduction of aggravated damages with respect to violations of EU antitrust law (a proposal that turned out to be highly controversial), but also adjustments to domestic rules on disclosure, limitation periods, and court fees in the EU Member States.[169]

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165 Article 7 Rome II Regulation. See, in further detail: Van Den Eeckhout 2010; Enneking 2008a, pp. 298-312. See also further sub-sections 4.3.3 and 5.2.1.

166 See, for example: EC Report (Augenstein) 2010, p. 72 and DMEAFA Report (Castermans/Van Der Weide) 2009, p. 53. See further sub-sections 4.3.3 and 5.2.1.

167 Compare Enneking, Giesen *et al.* 2011, pp. 553-554; Van Den Eeckhout 2010; Enneking 2008a. See further sub-sections 4.3.3 and 5.2.1.

168 See, for an idea of the various options that the Commission seems to be considering in this respect: Commission staff working document, public consultation: 'Towards a coherent European approach to collective redress', SEC(2011)173 final (4 February 2011).

169 See further sub-section 4.5.3.

Whether and in what form these proposals will eventually lead to EU legislative action remains to be seen. What also remains to be seen is whether possible future EU measures in this context will be restricted to particular subject matter areas such as consumer protection or antitrust law, or whether they will come to apply to tort-based civil liability claims before EU Member State courts across the board. In the latter case, such measures could potentially turn out also to have a significantly beneficial effect on the feasibility of bringing foreign direct liability cases before EU Member State courts. After all, improvements for instance in collective redress mechanisms may substantially improve the feasibility of foreign direct liability cases brought on behalf of groups of host country victims and/or with a view to the protection of broader, more public interests such as the local environment in the host countries involved.[170]

It will also be interesting to see if any of the measures that may be taken at the EU level with a view to implementing the UN policy framework on business and human rights will have an impact on procedural and practical circumstances in the EU Member States that affect the feasibility of foreign direct liability cases. It should be noted in this respect that the previously mentioned European study on the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union has suggested that not only the EU Member States but also the European Union itself are under a duty to address existing procedural obstacles that host country plaintiffs may face in obtaining redress from EU-based multinational corporations that have caused harm outside the EU. In line with the Ruggie framework, the report mentions three types of procedural obstacles in particular:

> "*the problem of costs of obtaining legal advice and of the case itself should the claim prove unsuccessful; procedural barriers resulting from limitations on standing and on the ability to bring group claims for compensation; and financial, social and political disincentives for lawyers to represent claimants in this area*".[171]

The previously mentioned report that the European Commission has promised to publish by the end of 2012 on its priorities in implementing the UN policy framework on business and human rights will no doubt provide further clarity on whether the Commission will act on this recommendation by addressing these potential procedural and practical barriers to foreign direct liability cases at the EU level.[172] Considering the increasingly prominent place within the EU constitutional framework of the objective

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170 Compare, for instance: Enneking, Giesen *et al.* 2011, pp. 555-556, 560. See further sub-sections 4.5.3 and 5.4.2.

171 EC Report (Augenstein) 2010, p. 76 (citations omitted).

172 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011), p. 14.

of human rights protection not only within the EU but also worldwide, it will be very interesting to see how far the Commission is willing to go in order to enhance the prospects for obtaining remedies before EU Member State courts of victims of violations of human rights and the environment outside the EU by EU-based internationally operating business enterprises. Obviously, any measures taken at the EU level with a view to removing procedural and practical barriers in this respect in EU Member States will greatly enhance the feasibility of bringing foreign direct liability cases before EU Member State courts. All in all, the number of EU rules and regulations that may have an impact in this context, whether directly by providing substantive conduct-regulating norms for the corporate actors involved or by requiring the Member States to impose such norms, or indirectly by affecting the way in which norms from whatever source may be enforced in this context by host country plaintiffs before courts in the EU Member States, is growing steadily.

Even if recent developments in this context will not lead to the imposition of further EU measures aimed at establishing or improving the accountability of EU-based multinational corporations for people- and planet-related harm caused in host countries, the UN policy framework does impose an obligation on the EU to ensure that its rules and policies do not impose new barriers to access to remedies for victims of corporate human rights abuse.[173] Accordingly, the Commission would do well to take seriously the suggestion made by the previously mentioned European study that its proposals to reform the Brussels I regime should be scrutinized for their potential impacts on access to justice for host country plaintiffs seeking to hold European parent companies and/or their host country subsidiaries accountable before domestic courts in the EU Member States.[174] The same is true for any future EU measures that may have an effect on the four main factors determining the feasibility of (European) foreign direct liability cases: jurisdiction; applicable law; substantive legal basis; and procedural and practical circumstances.

6.3.3 Foreign direct liability cases and the ECHR

Finally, mention should be made here of the role that the European Convention on Human Rights may play with respect to foreign direct liability cases that are brought before domestic European courts. As has been mentioned before, due to its limited territorial reach the ECHR does not, in principle, impose obligations on ECHR Member States to actively protect non-European host country citizens from human rights violations perpetrated abroad (outside the geographical scope of the ECHR) by or with the involvement of multinational corporations operating out of their territories. Accordingly, it also in principle does not provide those victims with a right to remedies

173 Compare UNHRC Report (Ruggie) 2011, principle 26, p. 23.
174 EC Report (Augenstein) 2010, p. 76.

for such violations before ECHR Member State courts.[175] Still, there have been suggestions that ECHR Member States may, under a limited number of circumstances, have certain responsibilities with respect to extraterritorial human rights violations or with respect to human rights violations with extraterritorial effects, responsibilities that may also pertain to human rights violations by corporate actors.[176]

Leaving aside the potential extraterritorial dimension of substantive ECHR norms, it should be noted that Article 6 ECHR's right to a fair trial may have interesting implications for foreign direct liability claims brought before courts in the ECHR Member States. As has been discussed before, it may potentially provide the host country plaintiffs in these cases with a number of procedural minimum guarantees that may be important in cases where excessively high litigation costs, the unavailability of affordable legal assistance or legal aid, and/or an impermissible inequality of arms impose procedural and practical barriers that are considered to be 'unfair' under the ECHR. Considering the inequality of arms that typically exists between the host country victims and their corporate opponents both with respect to financial scope and with respect to access to relevant information, these minimum guarantees may potentially play an important role in this context. Of course, the question remains under what circumstances the inequality of arms in these cases is so significant that it may be said to actually constitute a violation of the plaintiffs' right to a fair trial, also considering the fact that not all limitations of the rights ensuing from Article 6 are automatically incompatible with the Convention.[177] In a September 2011 decision in the Dutch Shell cases, the The Hague district court denied an appeal to Article 6 ECHR by the host country plaintiffs, stating that its refusal to order the exhibition by Shell of certain evidentiary documents did not amount to an infringement of their right to a fair trial.[178]

However, also with respect to Article 6 ECHR, which in essence is a procedural rather than a substantive provision, questions arise when it comes to its application in transnational civil cases brought before ECHR Member State courts. One of those questions is whether its protection would extend to foreign direct liability cases brought before ECHR home country courts on the basis of (non-ECHR) host country tort law. European Court of Human Rights case law seems to suggest that in such cases Article 6 ECHR would not be

175 Compare Van Hoek 2008, pp. 156-157. See further sub-section 4.5.3.

176 See, for more detail on this (limited) extraterritorial dimension of the European Convention on Human Rights in the context of business and human rights: EC Report (Augenstein) 2010, pp. 23-25. The study further suggests that the jurisprudence of the European Court of Human Rights "[...] *may be taken as an indication that, in cases such as transboundary environmental pollution, Convention States can be liable for failures to regulate corporate activities within their territory that result in human rights violations outside their territory*" (p. 25). See also more generally on the extraterritorial application of human rights treaties: Milanovic 2011.

177 See further sub-section 4.5.3.

178 See, for instance: *Oguru et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.; Oguru et al. v. Shell Petroleum N.V. and The "Shell" Transport and Trading Company Limited*, Rechtbank 's-Gravenhage, case nos. 330891/HA ZA 09-0579 and 365498/HA ZA 10-1677 (14 September 2011), p. 11. See further sub-sections 3.2.2, 3.3.2 and 5.4.2.

applicable.[179] Another question that has been raised in this respect is whether the right to access to court that is inherent in Article 6 ECHR may require ECHR Member State courts to assume jurisdiction over foreign direct liability claims over which they would otherwise not have jurisdiction. In effect, this would mean that the ECHR Member States would under certain circumstances have to provide a *forum necessitatis* under the ECHR in cases where no other forum is available before which the host country plaintiffs can feasibly bring their claims. Van Hoek suggests that such may indeed be the case, provided that "[...] *the claimant has a prima facie claim under national law*". With respect to claims brought on the basis of foreign law, which as discussed will often be the case in foreign direct liability claims, she notes that "[a]*t present, there is insufficient evidence in the case law of the ECtHR to assume a more encompassing obligation*".[180]

In the end, the need to rely on Article 6's access to court requirement will generally only arise in foreign direct liability cases brought against foreign (for instance host country-based) corporate actors, since under the Brussels I regime that is applicable to civil claims brought before courts in the EU Member States jurisdiction will not be an issue in claims against corporate defendants that are domiciled in the forum country. However, under the Rome II regime those claims will typically not be based on the substantive rules of tort law of the home country where the claim is brought.[181] Accordingly, it seems that there is a need for further case law by the European Court of Human Rights to clear up whether, under Article 6, ECHR Member States may be required to exercise jurisdiction over foreign direct liability claims over which, on the basis of the applicable rules of international civil jurisdiction, they would not have jurisdiction. At the same time, the question may be raised under what circumstances it can be said that host country plaintiffs do not have proper access to justice in another forum. May this situation arise only where there is no other forum available at all or where the plaintiffs cannot expect to receive a fair and impartial trial in the host country? Or does it also arise where there are substantial procedural and practical barriers to pursuing claims in the host country, for instance where legal aid is not available or where rules to (properly) deal with collective actions are absent? Similar questions were in fact raised in the *Cape* case, but never addressed as international civil jurisdiction was assumed on other grounds.[182]

These questions link up with more general debates over the need for Western society courts to be able to exercise universal civil jurisdiction over civil claims pertaining to violations of international human rights by private actors that cannot be addressed elsewhere. This issue, which has in the past also been raised in the context of the Hague Conference of Private International Law, has over the last few years been put back on

179 For more detail, see, for example: Van Hoek 2008, pp. 156-160. See further sub-section 4.5.3.
180 Van Hoek 2008, p. 169.
181 See further sub-sections 4.2.2 and 4.3.2 as well as *supra* sub-section 6.3.2.
182 Compare also Van Hoek 2008, pp. 167-168. See further sub-section 3.2.2.

the scholarly agenda by the proliferation of ATS-based foreign direct liability cases.[183] It will be interesting to see if the European Commission, in the course of the revision of the Brussels I regime (with respect to which it has in fact proposed the introduction of a *forum necessitatis* provision) and/or in the course of the implementation of the UN policy framework on business and human rights, will further address this matter, particularly in view of the EU's own obligations once it becomes a member of the ECHR.[184]

Another way in which the European Convention on Human Rights may play an indirect role in foreign direct liability cases that are brought before European courts, is through the public policy (*ordre public*) exception in the applicable choice-of-law regime (as discussed, this will be the Rome II regime for foreign direct liability cases that are brought before EU Member State courts and pertain to events giving rise to damage that have occurred since January 2009).[185] This exception comes into play in foreign direct liability cases where the applicable rules of host country law that these courts have to apply to the case brought before them are considered to be manifestly incompatible with the fundamental principles and values of the legal orders in the European countries involved.[186] It may also come into play in cases where those courts are asked to enforce a judgment rendered by host country courts, for instance against a domestic corporate defendant. In this latter context, the European Court of Justice has held that the enforcement of a foreign judgment may be refused where it would result in a manifest breach of the human rights norms laid down in the European Convention on Human Rights.[187] This shows that where norms of host country law are manifestly incompatible with provisions of international and/or domestic human rights law, the application of such norms (and/or the enforcement of foreign judgments rendered on the basis of those norms) may exceptionally be refused on public policy grounds.[188]

In the context of foreign direct liability cases, the question may be raised for example as to whether a situation in which under the applicable host country law the liability of corporate actors for gross violations of human rights would be barred altogether could provide a violation of public policy of the European home country in which the resulting foreign direct liability claim is brought.[189] Here again, however, account needs to be

183 For more detail, see, for instance: Van Hoek 2008, pp. 154-156; Ryngaert 2007; Donovan & Roberts 2006. See also further sub-section 8.2.5.

184 See the Council of Europe website for further information on the latest developments in this respect: <www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention>.

185 See further sub-section 4.3.3 and *supra* sub-secton 6.3.2.

186 See, for instance, with a focus on Dutch private international law and the Dutch legal order: Strikwerda 2005, pp. 56-63, and with a focus on foreign direct liability cases brought before Dutch courts: Enneking 2007, pp. 92-94, 98, 102.

187 See *Krombach v. Bamberski*, [2000] ECR I-1935 (28 March 2000), par. 44.

188 See, for more detail: Van Hoek 2008, pp. 167-168. See also: DMEAFA Report (Castermans/Van Der Weide) 2009, pp. 53-55.

189 See further Van Hoek 2008, pp. 167-168; DMEAFA Report (Castermans/Van Der Weide) 2009, pp. 53-55.

taken of the fact that ECHR provisions have extraterritorial effect only to a very limited extent and as such are not likely to impose substantive human rights obligations with respect to the actors and activities involved in foreign direct liability cases. Accordingly, it is questionable whether human rights norms that do not apply directly to the wrongful behaviour in dispute can be applied indirectly via the public order exception in this type of transnational civil litigation. Nonetheless, indirect extraterritorial application of ECHR provisions to a transnational civil dispute through the public order exception seems to be much less problematic than the direct extraterritorial application of such provisions as rules of conduct in such a dispute. After all, in the case of indirect application of such norms through the public policy exception, those norms are not directly applied, but rather used as a substantive minimum standard against which individual host country norms and/or the outcome of the dispute on the basis of such norms are measured.[190] However, the European home country court determining a foreign direct liability case that is brought before it will only in exceptional cases be allowed to refuse application of the otherwise applicable host country norms on this basis; this will only be possible where the norms and/or outcome concerned are manifestly incompatible with the human rights norms that are applicable, whether on the basis of the ECHR or on some other legal basis, in the home country.[191]

6.3.4 An assessment

As is clear from what has been discussed in chapters 3 and 4 and from what has been discussed here, foreign direct liability cases are crossing the Atlantic and making their way into domestic courts in Europe.[192] On the basis of the current European legal framework, bringing foreign direct liability cases before courts in EU Member States is unproblematic as long as the claims are brought against arms of the multinational corporations involved – usually their parent companies – that are domiciled in one of the EU Member States. Where host country plaintiffs seek to bring foreign direct liability cases before domestic courts in Europe against corporate defendants that are not domiciled in the European Union, the feasibility of those claims is dependent on the domestic jurisdictional rules of the Member States where those claims are brought. Those rules will tend to be more restrictive than the lenient rules on personal jurisdiction that apply in the US, but may in some cases also prove to be more lenient, for instance because of the non-availability of *forum non conveniens* provisions and/or the availability of *forum necessitatis* provisions.

Although no country in Europe (or elsewhere) has a provision like the Alien Tort Statute that provides a specific legal basis for foreign direct liability claims, general

190 Compare Van Hoek 2008, pp. 167-168.
191 Compare, for instance: Enneking 2008a. See also further sub-sections 4.3.3 and 5.2.1.
192 Note that this sub-section is based largely on Enneking 2009, pp. 934-938.

principles of tort law provide a suitable basis for these cases in principle. In fact, the generic provisions on tort/delict of the continental European legal systems benefit claimants in foreign direct liability cases because they do not require the host country plaintiffs to base their claims on specific causes of action. Any act contrary to that which the defendant parent companies, considering their special qualities, ought to have done or not to have done and which results in damage, potentially gives rise to an obligation to compensate that damage. In English law, the tort of negligence fulfils a similar function.

One drawback of the use of ordinary tort law as the basis for a foreign direct liability claim, however, is that it may not generate the level of moral condemnation that a similar case on the basis of alleged violations of international human rights norms perhaps would. Another drawback is the fact that it raises choice-of-law questions that would not arise in an ATS-based foreign direct liability case. Unless the claim pertains to environmental harm, the provisions of tort law of the developing host country, not those of the developed home country, are likely to apply. This may not be beneficial to the host country plaintiffs as standards of care and damages awards may be lower in the host country tort law than they are in home country tort law. At the same time, the likelihood that host country law is the applicable law in foreign direct liability claims hampers the potential use of tort law as a mechanism to regulate the behaviour of multinational corporations operating abroad.

For this reason, future European foreign direct liability cases will be most likely to come in the shape of claims for environmental damage in the host country as a result of actions or inactions by the home country-based parent company. This will distinguish them from corporate ATS claims, which are typically based on a narrow range of international human rights violations and which have thus far not been successful in claims for environmental damage. Accordingly, especially in foreign direct liability cases pertaining to environmental harm, European foreign direct liability cases may provide an interesting alternative to ATS-based foreign direct liability claims. Of course, if the Supreme Court were to uphold the Second Circuit Court of Appeals judgment that the ATS does not provide a jurisdictional and legal basis for this type of transnational tort-based civil claim against corporate actors, the importance of European foreign direct liability cases as an alternative to similar claims brought in the US will grow significantly.

Procedural rules and practical circumstances, such as the unavailability of adequate collective action mechanisms, legal aid, or affordable legal representation may create barriers to the successful pursuit of foreign direct liability cases before courts in the EU Member States. Most of these procedural and practical circumstances are (still) determined at the domestic level. This means that the feasibility of current European foreign direct liability cases varies from legal system to legal system and that the feasibility of future ones depends largely on the willingness of domestic policymakers to remove such barriers. Where the barriers amount to a denial of the host country plaintiffs' right to a fair trial, however, Article 6 ECHR may provide a way around them. In the end, whether and to

what extent existing procedural and practical barriers seriously impair the successful pursuit of a foreign direct liability case will depend on the specific circumstances of each case.

It will be up to the protagonists of foreign direct liability cases to persuade policymakers at the EU and Member State level to remove existing barriers to access to justice for developing host country victims, and to refrain from erecting new ones. In doing so, they will have to focus not only on the ongoing debates on international corporate social responsibility and accountability, but also on developments in the fields of civil law, private international law, corporate law, and civil procedure law, as these may turn out to have a crucial effect on the feasibility of foreign direct liability cases. EU influence should not be underestimated in this respect. Wherever the EU promulgates new rules and regulations in relevant subject matter areas, Member States' discretionary powers are irretrievably narrowed, and derogation from those instruments by individual states is no longer an option once they are implemented. Vigilant doorkeeping may be necessary by those in favour of European direct liability cases.

It seems likely, however, especially since the promulgation of the UN policy framework on business and human rights, that policymakers at EU level will now also increasingly become aware of the concept of foreign direct liability and the way in which EU laws and policies may affect the feasibility of these claims. Whether and to what extent the analysis of the legal framework on human rights and the environment applicable to European multinational corporations operating outside the European Union and the Guiding Principles of the UN policy framework on business and human rights will lead to actual changes in the legal framework applicable to European foreign direct liability cases remains to be seen. The report that the European Commission will publish by the end of 2012 on its priorities in implementing the UN policy framework on business and human rights is likely to provide further clarity in this respect.

In the end, the fact that foreign direct liability cases are crossing the Atlantic and finding their way into courts in the EU Member States is likely to provide host country victims of people- and planet-related harm caused by the transnational activities of EU-based multinational corporations with increased access to justice. Even if the laws and litigation culture in Europe may not in all respects be as favourable for this type of transnational tort-based civil litigation as those in the US, bringing foreign direct liability claims before European domestic courts is currently feasible. European foreign direct liability cases will provide a useful and potentially even necessary alternative to their US counterparts and may open the door to a cross-pollination that takes foreign direct liability cases on both continents a step further, benefiting not only those who bring them but also those seeking to promote international corporate social responsibility and accountability.

Whether the emerging European trend towards foreign direct liability cases will eventually develop into an efficacious accountability mechanism through which multinational corporations may be held accountable for their overseas transgressions depends on the willingness of European policymakers to endorse or at least not counteract them. The current developments internationally, at EU level and in the individual EU Member States, seem to be the start of a more structured debate on the feasibility and desirability of European foreign direct liability cases. Even more fundamentally, though, the future role of European foreign direct liability cases depends on those willing to take up these cases and set a precedent. Recent cases brought before domestic courts in Europe suggest that these may prove to be interesting times for foreign direct liability, on both sides of the Atlantic.

6.4 Foreign direct liability cases in the Dutch legal system

6.4.1 The Netherlands as a venue for foreign direct liability cases

Recent developments

In the Netherlands, attention to foreign direct liability cases has grown over the past few years not only among legal scholars and practitioners but also among policymakers. This is largely due both to the promulgation of the influential UN framework on business and human rights and also to the introduction with the Dutch Shell cases of the first examples of this particular type of transnational tort-based civil litigation into the Dutch legal order. In 2009, following parliamentary debate on the issue of international corporate social responsibility and accountability in general and the role of foreign direct liability cases in particular, the Dutch Ministries of Economic Affairs and Foreign Affairs commissioned a study into the liability of Dutch multinational corporations for violations of human rights norms, labour norms and environmental norms abroad. This led to the publication of a report on the legal liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognised rights in December 2009.[193]

The report, which provided a survey of the status quo of relevant Dutch rules and practices on this subject, led to some further parliamentary debate, among other things on the question whether a legal aid fund should be introduced for victims of violations by Dutch multinational corporations of people- and planet-related interests abroad, which should financially assist host country plaintiffs in foreign direct liability cases.[194] After further research on this particular matter, the Dutch Minister of Economic Affairs indicated that he did not feel there was a need to introduce such a legal aid fund, also with a view to the fact that under certain circumstances host country plaintiffs in foreign direct

193 DMEAFA Report (Castermans/Van Der Weide) 2009.
194 Motie Voordewind, 13 April 2010, Kamerstukken II, 2009-2010, 26 485, nr. 91.

liability cases brought before Dutch courts might in fact apply for legal aid. He further indicated that he felt that any efforts made by the Dutch government in this respect should be directed at improving access to justice for the plaintiffs involved not in the Netherlands, but in their own countries.[195]

At the same time, persistent criticism by NGOs and the media, not only in the Netherlands but also abroad, of Shell's allegedly poor environmental record in the Niger Delta also prompted parliamentary debate. In March 2011, this debate resulted in a roundtable meeting by the Dutch parliamentary committee on Economic Affairs, Agriculture and Innovation on 'CSR in West Africa', in which Shell was asked to provide clarity on its business practices in the Niger Delta. In this roundtable meeting, human rights and environmental NGOs accused Shell of violating human rights, of failing to clean up environmental damage and of continuing the hazardous practice of gas flaring in the Niger Delta. Shell, on the other hand, spoke about the steps it was taking to reduce the environmental impacts of its operations in the Niger Delta, but also pointed to sabotage as the major cause of most of the oil spills from its local pipelines and to the fact that local issues of safety of people and crime are ultimately the responsibility of the Nigerian government. In response to remarks about the potential role of foreign direct liability cases in this context, Shell replied that legal action in the Netherlands is not the best way of achieving change and that it should be left to the Nigerian courts to enforce local laws. According to Shell, the Dutch government should promote international corporate social responsibility and accountability by encouraging greater empowerment of the Nigerian legal system, rather than by enacting legislation pertaining to the transnational activities of Dutch multinational corporations and/or by promoting the pursuit of foreign direct liability cases against Dutch multinational corporations before Dutch courts.[196]

As has been discussed in the first part, international pressure on Shell in relation to its oil extraction operations in the Niger Delta increased with the release of a United Nations Environment Programme report in July 2011 on the impacts of oil pollution on the environment and communities in the Ogoniland region of the Niger Delta. This report, which was drawn up at the request of the Nigerian government, provides an independent assessment of the environmental and public health impacts of oil contamination in Ogoniland, and options for remediation.[197] Some of its main conclusions are that the environmental pollution caused by oil spills in the Ogoniland region of the Niger Delta is

195 Brief van de Staatssecretaris van Economische Zaken, Landbouw en Innovatie, 23 March 2011, Kamerstukken II, 2010-2011, 26 485, nr. 105. The research that is mentioned involves a report of some exploratory consultations: DMEA Report (De Poorter/Van den Brule) 2011, and is included as an addendum to the Secretary of State's letter.

196 See, for instance: Max 2011. Note that the author participated in this parliamentary roundtable meeting as a legal expert.

197 UNEP Report 2011. See also the introduction to part I.

much more serious and extensive than had hitherto been assumed and that the control and maintenance of local oilfield infrastructure by local operators such as Shell is inadequate.[198]

In addition, just prior to the planned release of the report, it was announced that Shell admitted liability in a foreign direct liability case that was brought in the UK in April 2011 by a group of some 69,000 Nigerians living in the Bodo region of the Niger Delta. In this case, it was sought to hold parent company Royal Dutch Shell plc and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria Ltd liable for the widespread environmental damage caused by two massive oil leaks in that region in 2008 and 2009. In an agreement between the parties, Shell's Nigerian subsidiary agreed to formally accept liability for these spills, which Shell admits were a result of equipment failure rather than sabotage or theft, and to concede to the jurisdiction of the UK, meaning that the claims against the parent company will cease. Shell has said that it will pay compensation to the Nigerian plaintiffs in accordance with Nigerian law.[199]

It has already been suggested with respect to these two developments that further foreign direct liability claims brought by Nigerians affected by oil spills from Shell-operated pipelines in the Niger Delta are likely to be initiated before European courts in the near future.[200] Obviously, this may also have major repercussions for the Netherlands, where the main office of the Shell group's parent company Royal Dutch Shell plc (a public limited company established under the law of England and Wales that has its statutory seat in England and Wales) is located, as it is possible that some of these potential future foreign direct liability claims will be initiated before Dutch courts.[201]

Jurisdiction

Under the combined regimes on international jurisdiction that apply to transnational civil claims brought before Dutch courts, there are ample opportunities to bring foreign direct liability cases within the Dutch courts' jurisdiction. Especially where it comes to claims brought against Dutch or Netherlands-based arms (usually the parent companies) of multinational corporations, getting Dutch courts to assume jurisdiction over such claims is unproblematic. After all, under the Brussels I regime Dutch courts will in principle have jurisdiction over transnational civil cases against corporate defendants that are

198 See for instance: 'UNEP Ogoniland oil assessment reveals extent of environmental contamination and threats to human health', UNEP website, <www.unep.org/newscentre/Default.aspx?DocumentID=2649&ArticleID=8827&l=en >; Persson 2011a; 'Zelfs de krabben stinken in Bodo naar ruwe olie', *De Volkskrant*, 5 August 2011, pp. 4-5.

199 See for instance: Depuydt & Lindijer 2011; 'Shell accepts responsibility for oil spill in Nigeria', press release on the Leigh Day & Co website, <www.leighday.co.uk/News/2011/August-2011/Shell-accepts-responsibility-for-oil-spill-in-Nige>; 'Ogoniland oil spills: Shell admits Nigeria liability', *BBC News* online (3 August 2011), <www.bbc.co.uk/news/world-africa-14391015>. See also further sub-section 3.3.2.

200 See for instance: Persson 2011b, p. 5. See further sub-section 3.3.2.

201 See also, however, 'Ogoniland oil spills: Shell admits Nigeria liability', *BBC News* online (3 August 2011), <www.bbc.co.uk/news/world-africa-14391015>, where one of the host country plaintiffs' lawyers in the UK case is quote as stating that the settlement in that case "[...] *could set a precedent for other communities in the Niger Delta to seek compensation in British courts*".

domiciled in the Netherlands, in the sense that they have their statutory seat, their central administration and/or their principal place of business there.[202]

Furthermore, in foreign direct liability cases against multinational corporations that are based not only in the Netherlands but also in other EU Member States, the Brussels I regime on various grounds may in effect offer the host country plaintiffs a choice between different EU Member State fora, allowing them to pursue their claims in the forum of their liking (*i.e.*, that offers the best prospects for success). Dutch courts will for example also have jurisdiction over claims against corporate defendants that are domiciled not in the Netherlands but in one of the other EU Member States if the harmful events in dispute can be said to have taken place (or are likely to take place) in the Netherlands or if the dispute arises out of the operations of a Netherlands-based branch, agency or other establishment of the corporate defendants involved.[203] As is clear from the recent developments that have been set out above, the Brussels I regime has enabled different groups of plaintiffs from the same host country to pursue foreign direct liability cases against the same Shell corporations before Dutch and English courts simultaneously, for instance. Similarly, the foreign direct liability case against multinational shipping company Trafigura that was brought before the London High Court could also have been pursued before the Dutch courts.[204]

When it comes to foreign direct liability claims against arms of multinational corporations that are neither based in the Netherlands nor in any of the other EU Member States, however, Dutch courts will generally only have jurisdiction by way of exception. This situation will typically arise where claims against host country subsidiaries are involved, or where it is sought to bring foreign direct liability claims before Dutch courts against parent companies that are based in other non-EU Western societies, such as the US. In this sense, the jurisdictional reach of Dutch courts is somewhat more limited than that of their US counterparts. After all, US courts may, as discussed, fairly easily (the threshold is that of 'minimum contacts') assume jurisdiction over foreign defendants where they can be said to be doing business in the forum state, not only where they do so directly but also where they do so indirectly through their US-based subsidiaries, branches, offices and/or agencies and regardless of whether the dispute is in any way connected to those local contact points.[205] Dutch courts, by contrast, will have jurisdiction over foreign corporate defendants that have branches, offices or other establishments in the Netherlands only if the dispute is related to those local contact points.[206]

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202 See further sub-section 4.2.2.
203 See further sub-section 4.2.2.
204 See further sub-section 3.2.2.
205 See further sub-section 4.2.1.
206 Article 2 Dutch Code of Civil Procedure and Article 1:14 Dutch Civil Code. See also further sub-section 5.1.1.

Dutch courts may assume jurisdiction over foreign direct liability claims against foreign corporate defendants for instance where those claims are so closely connected to similar claims against Dutch or Netherlands-based corporate defendants that reasons of efficiency warrant their joint adjudication. This provision may prove useful for those seeking to pursue foreign direct liability claims against both Netherlands-based and foreign arms of multinational corporations, as is evidenced by the Dutch Shell cases.[207] This basis for jurisdiction over foreign (non-EU-based) corporate defendants in foreign direct liability cases is contingent, however, on the fact that the Dutch courts do have jurisdiction over closely connected claims, that are not completely without merit, against other corporate defendants such as a Dutch or Netherlands-based parent company.[208] It is important to note that, like under the Brussels I regime, Dutch courts under the Dutch domestic regime on international civil jurisdiction may not refuse to exercise such jurisdiction on the basis of discretionary ('prudential') doctrines such as *forum non conveniens* or the political question doctrine. In fact, the Dutch domestic regime includes a *forum necessitatis* provision, on the basis of which Dutch courts may assert jurisdiction over transnational civil claims that have few if any connections with the Dutch legal order if no other forum is available in which those claims can feasibly be brought.[209]

This *forum necessitatis* provision may be of great significance in the context of foreign direct liability cases, which are characterized by the fact that for various reasons the host country plaintiffs' prospects of receiving a proper and procedurally safeguarded process of law before host country courts are generally limited.[210] Reasons for this may be the fact that the host country plaintiffs cannot expect to receive a fair trial locally because local authorities are involved in or otherwise closely linked to the harmful local activities and/or to those carrying them out. A case that comes to mind in this respect is the *Unocal* case, which pertained to the alleged involvement by the US-based multinational corporation Unocal in human rights violations perpetrated by Burmese government forces in furtherance of a local pipeline project.[211] Another reason why the host country plaintiffs' prospects for bringing their cases locally are generally poor is the fact that the legal systems in the host countries involved, which are typically developing countries or emerging economies, will often not be up to the task of adequately dealing with this type

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207 Article 7(1) Dutch Code of Civil Procedure. See further sub-sections 3.2.2 and 5.1.1.

208 As is suggested by the Dutch Shell cases, foreign direct liability claims brought against a Netherlands-based corporate defendant merely to get the Dutch courts to establish jurisdiction over related claims against foreign defendants may risk being disposed of as an abuse of procedural law where the former claims do not have any substantial merit of their own. It should be noted, however, that a finding by Dutch courts of such abuse of procedural law is very exceptional; in the Dutch Shell cases an appeal to this end by the corporate defendants was dismissed. See, for instance: *Oguru et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*, Rechtbank 's-Gravenhage, LJN BK8616 (30 December 2009).

209 Articles 9(b) and (c) Dutch Code of Civil Procedure. See, in more detail: Strikwerda 2005, pp. 245-246 and sub-section 5.1.3.

210 See further sub-section 3.2.3.

211 See further sub-section 3.2.2.

of complicated civil procedure. A case that comes to mind is the Bhopal litigation, where the host country plaintiffs advanced various arguments as to why the Indian court system and system of civil litigation were inadequate to properly handle the litigation in this matter, including the problem of delay and backlog in the Indian court system, the lack of expertise on the part of Indian legal practitioners and the lack of procedural devices essential to the adjudication of complex cases, such as pre-trial discovery, class actions and contingency fees.[212] Of course, it remains to be seen under what circumstances Dutch courts will assume jurisdiction over foreign direct liability claims against foreign (non-EU-based) corporate defendants on the basis of the Dutch *forum necessitatis* provision.

All in all, the system of international civil jurisdiction that is applicable to foreign direct liability cases brought before Dutch courts also provides some interesting potential avenues for claims brought against foreign corporate defendants such as host country subsidiaries. How the status quo will be affected by the current revision of the regime on international civil jurisdiction under the Brussels I Regulation remains to be seen, however.[213] It is important to note that the *forum necessitatis* provision under the current Commission proposal is more restrictive than that under the Dutch domestic regime on international civil jurisdiction. Whereas the latter may under certain circumstances also provide a basis for jurisdiction over claims that have no connections with the Dutch legal order whatsoever, the former requires a 'sufficient connection' between the dispute and the forum state. At the same time, the proposal does not include a provision on the joint adjudication of closely connected claims against EU-based and non-EU-based defendants like that provided by the Dutch domestic regime on private international law. This means that under the proposed regime, Dutch courts would not have been able to assume jurisdiction over the claims against Shell's Nigerian subsidiary in the Dutch Shell cases as they have done now.[214]

Accordingly, the Commission proposal for a revised Brussels I regime in effect involves a deterioration of the legal status quo with respect to the possibilities for host country plaintiffs to bring foreign direct liability claims against non-EU-based corporate defendants before Dutch courts. The previously mentioned study on the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union suggests two possibilities for extension of the Brussels I regime over non-EU-based corporate actors. The first is the introduction of a *forum necessitatis* clause,

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212 *In re Union Carbide gas plant disaster at Bhopal, India in December 1984*, 634 F.Supp. 842 (S.D.N.Y. 1986), p. 845-852. See also J. Cassels, 'The uncertain promise of law: lessons from Bhopal', 29 *Osgoode Hall Law Journal* 1 (1991), where it is noted that the assertion by the Indian government representing the victims in the Bhopal litigation that justice could only be obtained in American courts was corroborated by the Chief Justice of the Indian Supreme Court, who apparently stated: "*It is my opinion that these cases must be pursued in the United States.* [...] *It is the only hope these unfortunate people have*" (p. 16, citations omitted). See further sub-section 3.2.2.

213 See also: Enneking, Giesen *et al.* 2011, pp. 553-559.

214 See further sub-sections 4.2.2 and 5.1.3.

which is included in the Commission proposal, the second is an extension of Article 6(1) of Brussels I so as to allow for joint claims against EU-based and non-EU-based corporate defendants (where a sufficient connection exists) much like under the Dutch domestic regime. It is also suggested that:

> "[a]*ll proposals to reform the Brussels I Regulation should be scrutinised for their impact on access to justice for third-country victims of human rights and environmental abuses by European parent corporations and/or their third-country subsidiaries*".[215]

Whether the Commission will pay heed to these suggestions is likely to become clear by the end of 2012, when the European Commission will publish its report on the implementation within the EU legal framework of the UN policy framework on business and human rights.[216]

Applicable law

As has been discussed before, future foreign direct liability cases brought before Dutch courts are increasingly likely to fall under the Rome II regime on the law applicable to non-contractual obligations that has been discussed in the previous sub-section. However, as is evidenced also by the Dutch Shell cases, claims that pertain to events that have taken place before the Regulation's date of application in January 2009 remain governed by the Dutch domestic choice-of-law regime. For the sake of completeness, this section will provide a brief recap of the way in which these two regimes will work out in foreign direct liability cases that are brought before Dutch courts.

A foreign direct liability claim that is brought before Dutch courts (which means that the claim will be qualified on the basis of Dutch law[217]) will in practice generally be determined on the basis of host country law as the *lex loci damni* (*i.e.*, the law of the country where the damage has arisen), both under the Rome II Regulation (which applies to non-contractual liability claims pertaining to harmful events that have occurred since January 2009) and under the domestic Dutch choice-of-law regime.[218] The scope of the applicable law will encompass matters such as the basis and extent of liability, the existence, nature and assessment of the damages or other remedies claimed, liability for the acts of another person and prescription of claims.[219] As discussed, adjudication of a foreign direct liability case under host country rather than home country tort law may prove detrimental

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215 EC Report (Augenstein) 2010, p. 76.

216 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011), p. 14.

217 For more detail on qualification of civil claims with international aspects, see Strikwerda 2005, pp. 43-47.

218 Article 4(1) Rome II Regulation and Articles 3(1) and (2) Dutch Private International Law (Torts) Act. See further sub-sections 4.3.3 and 5.2.1.

219 Article 15 Rome II Regulation and Article 7 Dutch Private International Law (Torts) Act. Compare also: Enneking 2007, pp. 82-89. See further sub-sections 4.3.3 and 5.2.1.

to the host country victims bringing those cases, as standards of liability and standards of damages are likely to be more favourable to them under home country law. Arguably, this is likely to be related to the fact that the systems of tort law featured in developed home countries such as the Netherlands may be more geared towards the protection of people- and planet-related interests from modern societal risks in general and industrial risks in particular than those in developing host countries.

Apart from the fact that applicability of Dutch tort law may be preferable in this context from the perspective of victim protection, it may also be preferable from a policy perspective. After all, as has been discussed with respect to the Rome II regime on choice-of-law, policies aimed at deterring harmful behaviour by multinational corporations and protecting people- and planet-related interests in this transnational context that may be pursued through Dutch substantive rules of tort law can only be effectively pursued if foreign direct liability cases brought before courts in the Netherlands are adjudicated on the basis of Dutch tort law.[220] This will provide these courts with the leeway to set tort standards and damages awards at such a level as to provide adequate incentives for the corporate actors involved and others like them to refrain from conduct that is considered to be socially undesirable. In doing so, the courts may also for instance apply forms of stricter liability, stretch standards of care and/or shift the burden of proof onto the defendant where they feel such is justified considering the particular circumstances of the case. At the same time, applicability of Dutch tort law will provide the Dutch legislature with an opportunity, where necessary, to make adjustments with a view to improving legal protection in this context, for instance through the introduction of strict liability or rules of negligence liability with a reversed burden of proof.[221]

With respect to both aspects (behavioural regulation of multinational corporations and protection of host country people- and planet-related interests), the emphasis under the Rome II Regulation as well as the domestic Dutch choice-of-law regime on the applicability of the law of the *Erfolgsort* (*lex loci damni*) may be considered to be unfortunate in the North-South context of foreign direct liability cases, as Dutch standards of care are likely to be higher and more protective than developing host country standards. At the same time, it rules out the possibility that the Dutch legislator could, through the imposition of specific conduct-regulating rules of tort law like for instance strict(er) forms of liability, seek to impact the transnational activities of Netherlands-based corporate actors in this context. In this sense, it could be argued that the more plaintiff-friendly and policy-oriented approach of many of the US choice-of-law regimes, as discussed above, might be preferable when it comes to this particular type of transnational tort-based civil litigation.[222] Such an approach could admittedly have a detrimental impact on certainty, predictability and uniformity of result. However, the question may be raised as to whether

220 See further *supra* sub-section 6.3.2.
221 Compare Van Dam 2008, pp. 255-265. See further sub-section 5.3.1.
222 Compare, for instance: Symeonides 2008b.

this policy objective should not be made subordinate to policies aimed at the promotion of international corporate social responsibility and accountability through the tort system, especially in view of the recent developments and relative scarcity of alternative regulatory mechanisms in this context, as will be discussed in the next part.[223]

As discussed, under the choice-of-law rules that will apply to foreign direct liability cases brought before Dutch courts, there are some limited exceptions to the general rule of applicability of host country tort law. The most relevant of these exceptions in the context of foreign direct liability cases is the Rome II regime's special rule on environmental damage, on the basis of which the host country plaintiffs may choose application of Dutch tort law as the law of the *Handlungsort* in cases where the harmful events can be said to have occurred in the Netherlands. In foreign direct liability cases, this may be claimed to be the case where the defendant parent companies can be said to supervise and control the multinational group's international operations from their offices in the Netherlands. As is clear from what has been discussed here, applicability of Dutch tort law may be more advantageous to the host country plaintiffs bringing those cases and may at the same time allow Dutch courts and policymakers to pursue policies of transnational environmental protection by providing host country victims of environmental harm caused by the local activities of Netherlands-based multinational corporations with an opportunity to bring liability suits on the basis of the higher standards of home country tort law.[224]

However, this special provision on environmental damage in the Rome II Regulation also raises questions. As discussed, one of the questions raised in this context is whether it could in fact be applied in the particular North-South context of foreign direct liability cases, or whether it is merely aimed at protecting European interests against more traditional forms of transboundary pollution. Another question is under what circumstances the tortious actions or omissions giving rise to environmental harm in the host country could be localised in the Netherlands.[225] At the same time, the question may be raised as to why enhanced protection is only available in cases of environmental damage and not in cases of people- and planet-related harm that cannot be said to be a (direct) result of environmental pollution. Similarly, the question may be raised as to why the possibility of pursuing policy objectives through the tort system is limited to environmental protection policies only and does not extend to other policy objectives in the field of international corporate social responsibility and accountability, such as protection against corporate human rights violations perpetrated abroad. After all, the Commission's argument that "[...] *the author of environmental damage, unlike other torts or delicts, generally derives an economic benefit from his activity*" is by no means limited to

223 See further chapters 8 and 9.

224 Article 7 Rome II Regulation. Compare Enneking 2007, pp. 87-79. See further sub-sections 4.2.2, 5.2.1 and 6.3.2.

225 See further sub-section 6.3.2.

instances of environmental damage in this particular subject matter area.[226] At the same time, the special provision's reference to a particular result, *i.e.* environmental damage, rather than to particular conduct, itself engenders a certain measure of legal uncertainty for the actors involved as well as for their (potential) victims.[227]

Even where foreign direct liability claims brought before Dutch courts are determined on the basis of host country tort law (*i.e.*, the law of the *Erfolgsort*), there are certain ways in which Dutch substantive legal provisions and legal policies may play a role nonetheless.[228] Dutch courts may (or, under the Rome II Regulation, should) for instance take into account rules of safety and conduct that apply at the place where the event giving rise to the damage has occurred. In foreign direct liability claims against (arms of) Dutch multinational corporations that operate out of the Netherlands, these rules may include Dutch rules of safety and conduct that are applicable to the potentially harmful (risky) transnational corporate activities in dispute. It should be noted that the Dutch courts adjudicating such claims will not actually apply any existing rules of safety and conduct that pertain to the allegedly tortious behaviour in question, but rather they will take them into account as a factual element in determining liability.[229] Nonetheless, it seems likely that Dutch courts, like probably any Western society home country forum, will automatically take account of unwritten Dutch norms pertaining to proper societal conduct when interpreting open norms such as due care with respect to the behaviour of Netherlands-based corporate actors, even if the applicable rules of tort law are those of the host country.[230]

At the same time, Dutch courts will under both regimes have to apply (not just take into account) mandatory (semi-)public provisions of Dutch law as the law of the forum state in foreign direct liability cases that are adjudicated on the basis of host country tort law. Thus, to the extent that Dutch law also imposes statutory duties on internationally operating business enterprises operating out of its territory to comply with particular human rights, labour or environmental standards abroad, those duties will have to be applied by Dutch courts determining foreign direct liability claims, regardless of the fact that host country tort law is the applicable law. In light of the transnational nature of the conduct in question, however, and of the fact that the scope of a country's public rules and regulations tends to be restricted to territorially-based actors and activities, the number of (semi-)public provisions of Dutch law that may be applicable in this context is likely to be very limited at this point.[231]

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226 Explanatory Memorandum to the 'Commission Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II")', COM(2003) 427, p. 19. See also: Enneking 2008a, pp. 310-311; Enneking 2007, pp. 88-89.

227 Enneking 2008a, p. 311.

228 Compare Enneking 2007, pp. 89-94.

229 Article 17 Rome II Regulation, Article 8 Dutch Private International Law (Torts) Act. Compare also: Van Hoek 2008, p. 166; Enneking 2007, pp. 89-90. See further sub-sections 4.3.3 and 5.2.1.

230 Compare, for instance, Jessurun d'Oliveira 1985. See also further sub-section 5.2.1.

231 Article 16 Rome II Regulation and HR 13 May 1966, NJ 1967, 3 (Alnati). See, in more detail: Van Hoek 2008,

Finally, Dutch courts may (as an *ultimum remedium*) refuse to apply provisions of host country tort law that are manifestly incompatible with the public policy (*ordre public*) of the Netherlands.[232] As discussed, public policy in this respect also encompasses norms of public international law that are directly (or indirectly) applicable within the Dutch legal order; when it comes to treaty provisions, however, account must be taken of the territorial scope of the norms ensuing from the international regime.[233] By way of example, it can be mentioned here that Dutch courts have held (under the old domestic Dutch regime on choice of law) that the mere fact that a strike that would have been lawful under Dutch domestic law was considered unlawful under the applicable rules of Filipino law, did not make those rules manifestly incompatible with Dutch public policy, even though the right to strike is laid down in the European Social Charter and is directly applicable in the Dutch legal order. According to the Advocate-General in this case, this would only be different if the foreign regime on the right to strike, taken as a whole, would be so strict and to the detriment of the employees that the right to strike itself would be practically stripped of any substantive meaning. His assessment was that the transnational civil case involved did not have sufficient connections to the Dutch legal order, nor was the right to strike a sufficiently fundamental and absolute principle within the Dutch legal order, so as to justify application of the public policy exception. Of course, the question may be raised whether a similar case would deliver a similar outcome today.[234]

All in all, the systems of choice of law that is applicable to foreign direct liability cases brought before Dutch courts, whether on the basis of the Rome II Regulation or on the basis of the Dutch domestic choice-of-law regime, are not necessarily very plaintiff-friendly and thus not necessarily very conducive to the pursuit of foreign direct liability claims. Still, it should be kept in mind that applicability of host country tort law to a foreign direct liability claim by no means automatically renders that claim infeasible altogether; it may just prove to be less favourable to the host country victims binging the claim due to the fact that standards of liability and amounts of damages in the host country system of tort law may be less geared towards protection of victims from people- and planet-related harm caused by corporate actors than similar standards of home country tort law may be. At the same time, the public policy exception provides an important minimum guarantee in this respect, as it may lead to the refusal of the application of provisions of host country tort law where those would lead to complete immunity for the corporate

p. 167; Enneking 2007, pp. 90-92; Strikwerda 2005, pp. 68-75. Compare also DMEAFA Report (Castermans/ Van Der Weide) 2009, p. 53, who notes: "*There are no obvious mandatory provisions in (internal) Dutch law which might qualify as priority rules in the context of violations of fundamental, internationally recognised rights*" (citations omitted). See further sub-sections 4.3.3 and 5.2.1.

232 Article 26 Rome II Regulation, and see, with respect to the domestic Dutch choice-of-law regime Strikwerda 2005, pp. 56-63. See also Van Hoek 2008, pp. 166-168; Enneking 2007, pp. 92-94.

233 See further sub-sections 4.5.3 and 6.3.3.

234 HR 16 December 1983, NJ 1985, 311 (*Saudi Independence*). For more detail, see, for instance: Dorssemont & Van Hoek 2010, pp. 248-250; Enneking 2007, pp. 92-93.

defendants involved for people- and planet-related host country interests that should, according to fundamental principles and values of the Dutch legal order, receive at least some legal protection.

Furthermore, even though ideas of using the tort system as a behavioural or enforcement mechanism are still in their infancy in the Netherlands (as in Europe more generally), interesting developments are taking place in this respect as the idea that policy objectives may be sought to be achieved through the tort system is gathering pace, even in a transnational context (as is exemplified by Rome II's special rule on environmental damage). As will be discussed further in subsequent chapters, it is developments such as these that may be of particular significance for foreign direct liability cases as well as for the role that domestic systems of tort law may play in promoting international corporate social responsibility and accountability more generally.[235] It should also be noted, however, that with these developments come interesting but complicated questions pertaining to the (regulatory) role that systems of private international law are to play in this context, questions that go beyond the scope of this study but that do warrant further and more fundamental research in the future.[236]

Procedural and practical circumstances

Rules on civil procedure and litigation practices, which are another factor that may play a major role in determining the feasibility of bringing transnational civil claims before Dutch courts, are largely governed by Dutch law as the law of the forum country. Determinative in this respect is the Dutch attitude towards civil litigation which, in view of the societal costs that may result from the unrestricted pursuit of (potentially frivolous) civil claims, is focused on moderating the number of civil claims initiated and on keeping the development and use of the Dutch tort system within limits.[237] As is evidenced also by the Dutch Shell cases, there are three factors in particular that may act as a threshold to the pursuit of foreign direct liability cases before Dutch courts, in view of the inequality of arms that typically exists in these cases between the host country plaintiffs and their corporate opponents when it comes to financial scope, organization, and the necessary knowledge/information. These include the costs involved in bringing foreign direct liability cases before Dutch courts, the possibilities for acquiring the necessary evidence and the possibilities for bringing collective actions.[238]

Although under the Dutch litigation system as it currently stands, none of these factors poses an absolute bar to the pursuit of foreign direct liability cases before Dutch courts, as can be deduced from the Dutch Shell cases currently pending before the The Hague district court, they may put off host country plaintiffs from initiating such suits in

235 See further chapters 8 and 9.
236 Compare, for instance: Muir Watt 2011b; Wai 2005; Wai 2002. See further sub-section 8.2.5.
237 See further sub-section 5.4.1.
238 See further sub-section 5.4.2.

the first place, or may induce them to bring their claims before alternative home country courts, where those are available. A question that may be raised in this respect is why the host country plaintiffs in the Trafigura case decided to pursue their foreign direct liability claims before courts in the UK where the defendant's head office is located, and not in the Netherlands, where the defendant is incorporated.[239] Similar questions arise with respect to the fact that the Nigerian Bodo community sought to pursue its foreign direct liability claims against Royal Dutch Shell and Shell Petroleum Development Company of Nigeria (the same corporate defendants as in the Dutch Shell cases) before English rather than Dutch courts.[240]

Of course, there may be many reasons for the fact that these two foreign direct liability cases were brought in the UK instead of in the Netherlands. Speculatively, however, the question may be raised whether this choice had anything to do with the fact that the system of civil procedure in England and Wales may be more favourable to the victims in these cases, for instance because of the fact that it allows plaintiffs to enter into conditional fee agreements with their legal representatives.[241] Another factor that may have played an important role in these cases, considering the fact that they both involved large groups of plaintiffs (some 3,000 and some 69,000 host country plaintiffs, respectively) is the fact that it is able to handle group actions relatively efficiently through so-called Group Litigation Orders.[242] Of course, the combined circumstances that a number of foreign direct liability claims have over the past two decades already been pursued before the English courts and have in various instances resulted in out-of-court settlements (although some precedent has been created on jurisdiction issues), and that this has resulted in a growing body of expertise among (a limited number of) English legal practitioners with respect to this type of transnational tort-based civil litigation, may also have played an important role here.

Within the Dutch civil system, outcome-related lawyers' fees are prohibited and the costs of pursuing civil litigation are high and rising, while the government is cutting back on the system of government-funded legal aid.[243] Considering the fact that foreign direct liability cases will usually be complex, drawn-out and therefore inherently costly affairs, these circumstances may combine to provide a major stumbling block when it comes to the feasibility of bringing such cases before Dutch courts. As is evidenced by the Dutch Shell cases, host country plaintiffs in these cases may apply for legal aid in the Netherlands. However, the existing Dutch system of government-funded legal aid is neither financially

239 See further sub-section 3.2.2.
240 See further sub-section 3.3.2.
241 See, for instance: WODC Report (Faure, Hartlief & Philipsen) 2006, pp. 57-65. See also, for instance, the website of Leigh Day & Co: <www.leighday.co.uk/faqs/funding-your-case>.
242 For a more comprehensive discussion of the English GLO (Group Litigation Order), see Hodges 2008, pp. 53-67.
243 See, in more detail: Giesen & Coenraad 2011, pp. 958-959; WODC Report (Faure, Hartlief & Philipsen) 2006, pp. 25-36.

nor administratively equipped to adequately deal with complex and costly international litigation such as foreign direct liability cases. As a result, its capacity to provide financial assistance to the plaintiffs in these cases and their legal representatives is not up to the mark, a situation that will only deteriorate as more of these types of cases are brought before Dutch courts. At the same time, these cases are putting a strain on the system that may end up detrimentally affecting the system's financial scope that is needed to deal with more 'regular' cases as well.[244]

Moreover, whereas the Dutch regime on collective claims consists of two different but related mechanisms for them (one on representative actions and one on collective settlements), both mechanisms due to their inherent restrictions leave gaps when it comes to host plaintiffs' possibilities for obtaining collective redress in foreign direct liability cases.[245] The Dutch Shell cases indicate that the Dutch representative action mechanism may play an important role in foreign direct liability cases in that it allows representative organisations to bring civil claims that serve to defend the interests of others. The interests concerned may involve both aggregated private interests and more 'public' interests such as for instance environmental interests, and may also concern interests that are partially or completely situated outside the Dutch legal sphere, such as host country environmental interests. An important drawback of this representative action mechanism is that the type of remedy that may be claimed through representative actions is limited: it is not possible to bring damages claims on this basis. Furthermore, court judgments rendered on this basis will have legal effect only between the representative organisations bringing them and the corporate defendants involved in foreign direct liability cases, and will as such not automatically apply to the legal relationship between the host country plaintiffs and those corporate defendants.[246]

The Dutch mechanism on collective settlements in multi-party claims may be highly valuable in the sense that it allows for an efficient and effective settlement of mass damages claims, and can result in compensation being paid out to the plaintiffs. However, it is relevant only where the parties to a foreign direct liability case are able to come to an out-of-court settlement and does not provide the parties with means of putting pressure on one another.[247] It has been noted in this respect:

> "*A disadvantage of the Dutch model is that one cannot force any party to settle. Accordingly, if a party refuses to agree, the procedure is irrelevant and inoperable. The failure to provide a procedure that enables collective cases to be both brought and managed is a clear weakness, both as a general collective procedure and in encouraging settlement*".[248]

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244 Compare DMEA Report (De Poorter/Van Den Brule) 2011. See further sub-section 5.4.2.
245 Compare Enneking, Giesen *et al.* 2011, pp. 555-556.
246 See further sub-section 5.4.2.
247 Compare Enneking, Giesen *et al.* 2011, pp. 555-556. See further sub-section 5.4.2.
248 Hodges 2008, p. 91.

This means that the host country plaintiffs are completely dependent in this respect on the willingness of their corporate opponents to come to a settlement, and these opponents may not be provided with sufficient incentives to do so.[249] Accordingly, the (purely hypothetical) question may legitimately be raised as to whether the pursuit of foreign direct liability cases such as the Trafigura case and the recent case against Shell brought by the Nigerian Bodo community, could in fact have feasibly been brought before Dutch courts, and whether they would also have led to admissions of liability/out-of-court settlements had they been brought in the Netherlands.[250]

Furthermore, as is clearly shown by the Dutch Shell cases, the Dutch procedural rules on evidence gathering may be too restrictive in foreign direct liability cases, especially in view of the lack of transparency that typically exists in these cases with respect to the complex group structures of the defendant multinational corporations, as well as on their internal policies and transnational business practices. In combination with the inequality of arms between the host country plaintiffs and their corporate opponents that characterizes these cases, not only with respect to financial scope but also with respect to access to relevant information, the Dutch system of evidence gathering may in practice significantly limit the feasibility of pursuing foreign direct liability cases before Dutch courts.[251] An interesting development in this respect is the increasing emphasis in Dutch civil procedural law on 'truth finding', which presupposes that parties to a dispute are enabled to discover the necessary facts. Accordingly, there are currently plans to extend the Dutch regime on exhibits with a view to promoting more efficient truth finding in civil procedures and achieving more equality of arms between the parties to a civil dispute.[252] Obviously, these developments are very important from the perspective of the feasibility of bringing foreign direct liability cases before Dutch courts as well.

Of course, the fact that the Dutch system of civil litigation is at present not highly conducive to the pursuit of foreign direct liability cases before Dutch courts when compared, for instance, with the English and especially the US systems of civil litigation, may be viewed as a good thing. After all, the US system in particular is often depicted as offering (groups of) plaintiffs opportunities for forcing corporate defendants into so-called 'blackmail settlements' through what are, in essence, unmeritorious claims. At the same time, the unrestricted pursuit of foreign direct liability cases before Dutch courts runs the risk of: burdening the Dutch court system; imposing unwanted costs on

249 Compare Enneking, Giesen *et al.* 2011, pp. 555-556. See further sub-section 5.4.2.

250 It should be noted that although Shell has admitted liability for the oil spills in the Bodo procedure, out-of-court settlement negotiations between the parties are only to commence in the autumn of 2011; the plaintiffs in this case have indicated that they are prepared to go back to court if a settlement cannot be reached. See, for instance: Depuydt & Lindijer 2011. See further sub-section 3.3.2.

251 See further sub-section 5.4.2.

252 See Giesen & Coenraad 2011, pp. 959-960. For a comprehensive discussion of these matters, see also De Bock 2011 and Verkerk 2010. See further sub-section 5.4.2.

Dutch society; involving negative side-effects for the international competitiveness of Netherlands-based internationally operating business enterprises and thus also for the attraction of the Netherlands as a home country; and/or causing international friction.[253] Perhaps also with a view to these arguments, the Dutch government, when explaining its refusal to introduce a legal aid fund for host country victims of people- and planet-related harm caused as a result of the operations abroad of Dutch multinational corporations, has indicated that any efforts it may undertake in this context would be aimed at improving access to justice for the host country victims in their own countries, rather than in the Netherlands.[254]

At the same time, however, the question may be raised as to what extent it is permissible both socio-politically and legally to raise or maintain procedural thresholds that prevent even foreign direct claims over which Dutch courts do have jurisdiction and that cannot be brought before courts in other Western society home countries, from being pursued in the Dutch legal order. After all, as has been mentioned, one of the primary reasons for host country plaintiffs to bring foreign direct liability cases before home country courts is the fact that for various reasons they face a denial of justice in their own countries.[255] In fact, the question whether the various procedural and practical barriers to the pursuit of foreign direct liability claims that exist in this respect in the Dutch legal order may amount to violations of Article 6 ECHR's right to a fair trial is a legitimate one in this context. Indeed, suggestions have been made that Article 6 ECHR may under certain circumstances even impose a duty on its Member States to provide host country plaintiffs in foreign direct liability cases with access to court if they have no feasible options for pursuing their claims elsewhere.[256]

It is also important to note in this respect that the Guiding Principles accompanying the UN policy framework on business and human rights, which have been endorsed by the UN Human Rights Council as well as by governments, international organizations, businesses and civil society actors around the world, emphasize the obligation on governments, including home state governments, to provide victims of corporate human rights abuse with access to effective redress mechanisms, both judicial and non-judicial. More specifically, the Guiding Principles call on states to consider ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedies in this respect.[257] Specific examples of practical and procedural barriers to civil claims that are mentioned by the Principles include: the costs of bringing claims where they

253 Compare, for an informative overview of different views on the desirability of supporting this type of transnational tort-based civil litigation before Dutch courts through the introduction of a legal aid fund for host country plaintiffs in these cases: DMEA Report (De Poorter & Van den Brule) 2011. See further sub-section 5.4.1.

254 Brief van de Staatssecretaris van Economische Zaken, Landbouw en Innovatie, 23 March 2011, Kamerstukken II, 2010-2011, 26 485, nr. 105.

255 See further sub-section 3.2.3.

256 See Van Hoek 2008, pp. 156-162. See further sub-sections 4.5.3 and 6.3.3.

257 See further sub-sections 7.3.3 and 7.3.4.

"[...] *go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through government support, 'market-based' mechanisms (such as litigation insurance and legal fee structures), or other means*"; the difficulties that host country plaintiffs may experience "[...] *in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area*"; and limitations in the possibilities "[...] *for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures)*" where this prevents individual claimants from obtaining effective remedies.[258]

Whether and to what extent the Dutch government in consideration of these Guiding Principles will make any changes to the Dutch system of civil litigation in order to enhance the feasibility of foreign direct liability cases that are brought before Dutch courts remains to be seen. If its rather one-sided decision to refrain from introducing a Dutch legal aid fund for host country victims of alleged environmental and human rights violations by Dutch multinational corporations perpetrated abroad is anything to go by, things do not look good.[259] Still, it seems inevitable that the Dutch government, whether unilaterally or in the EU context, will in response to the UN policy framework on business and human rights have to evaluate the barriers posed by Dutch procedural and practical circumstances to the feasibility of bringing foreign direct liability cases before courts in the Netherlands. Considering the fact that the European Commission has called on Member States to develop their national plans for the implementation of the framework before the end of 2012, this evaluation will need to take place somewhere in the near future.[260] On the basis of the findings made here, it may be concluded that there is room for improvement.

6.4.2 Dutch tort law as a basis for foreign direct liability claims

The applicability of Dutch tort law

As discussed, in foreign direct liability cases brought before Dutch courts it will generally be the law of the host country on the basis of which the claims involved are decided. There are some exceptions, however, the most important one being the Rome II regime's special rule on environmental damage. On the basis of this rule, the host country plaintiffs may have the choice of bringing their claims on the basis of home country rather than host country law in cases where the home country can be said to be the country in which

258 UNHRC Report (Ruggie) 2011, principle 26, p. 23.

259 Note that the study on which the Ministry of Economic Affairs has largely based its opinion paints a far more nuanced picture and comes with a number of recommendations that do not seem to be reflected in the Ministry's decision. See further DMEA Report (De Poorter & Van den Brule) 2011 and Brief van de Staatssecretaris van Economische Zaken, Landbouw en Innovatie, 23 March 2011, Kamerstukken II, 2010-2011, 26 485, nr. 105.

260 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011), p. 14.

the event giving rise to the damage suffered by the host country plaintiffs occurred, provided the damage suffered by them consists of environmental damage or personal injuries or property damage arising out of such damage.[261] The home countries of the multinational corporations involved in foreign direct liability cases may be claimed to be the *Handlungsort* to the extent that the alleged wrongful conduct by the parent companies of these multinational corporations can be said to have occurred in their home country boardrooms, from where they manage, supervise, control and/or coordinate their groups' international operations.[262]

Accordingly, host country plaintiffs suffering environment-related damage as a result of the local operations of multinational corporations may claim that the parent companies involved have intentionally or negligently taken decisions in their home country boardrooms that they could have reasonably foreseen would result in harm to particular host country people- and planet-related interests. They may also claim that it is not those parent companies' wrongful acts that should give rise to liability but rather their omissions, in the sense of their failure to exercise supervision over the local host country activities carried out by local subsidiaries (and/or business partners or sub-contractors) despite the risks to people- and planet-related interests they knew or could have known were inherent in the group's host country activities. Accordingly, on the basis of the Rome II Regulation's special rule on environmental damage host country plaintiffs bringing foreign direct liability cases before Dutch courts (or before courts in one of the other EU Member States) may under certain circumstances choose Dutch law as the law on the basis of which claims of parent company liability for environment-related host country harm resulting from acts or omissions committed in the Netherlands are to be decided.[263]

An interesting question that arises with respect to foreign direct liability cases in which claims not only against multinational corporations' Netherlands-based parent companies but also against their host country subsidiaries are brought before Dutch courts (which, as discussed above, is possible for instance where the claims can be said to be so closely linked as to warrant joint adjudication), is whether the latter claims will also be governed by Dutch law if the former are on the basis of the Rome II Regulation's special rule on environmental damage. Generally speaking, in the interests of certainty, predictability and uniformity of result, the Rome II Regulation's provisions will seek to avoid dépeçage (the application of different laws to different issues in the same case).[264] On the other hand, its provision on environmental damage refers to the law applicable to *a non-contractual obligation* arising out of the environment-related damage caused rather than to the law

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261 According to recital 24 Rome II Regulation, environmental damage in this sense "[...] *should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms*".

262 See further sub-sections 4.3.3, 5.2.1, 6.3.2 and 6.4.1.

263 See further sub-sections 4.3.3, 5.2.1, 6.3.2 and 6.4.1.

264 See, in more detail: Symeonides 2008b, pp. 184-186; Symeonides 2006, pp. 37-39.

applicable to the tort as a whole, which suggests that the courts involved will have to distinguish between the different obligations that may arise out of the same harmful event affecting people- and planet-related host country interests.[265] Conversely, the scope of the law applicable (again) *to non-contractual obligations* under the Rome II Regulation also encompasses the division of liability between joint perpetrators.[266]

Thus, it seems that a case could be made for application of home country law also to the claims against the host country subsidiary in foreign direct liability cases falling within the ambit of the Rome II Regulation's special rule on environmental damage, at least where it is sought to hold the parent company and its subsidiary jointly liable for the environmental damage caused as a result of the multinational corporation's host country operations. Whether this would indeed be the case or whether the claims against the host country subsidiary would in such a case be governed by host country rather than home country tort law (after all, the host country subsidiary's *Handlungsort* will generally be located in the same country as the *Erfolgsort*, namely the host country) remains to be seen, however. Ultimately, it is the European Court of Justice that would have the final say in this matter. Importantly, it should be noted that this issue may also have a bearing on whether Dutch courts will assert jurisdiction over foreign direct liability claims against a host country subsidiary; after all, the fact that the claim against the parent company would have to be decided on the basis of a different system of tort law than the claim against its subsidiary may have consequences for the Dutch court's decision as to whether those claims are sufficiently closely connected to warrant their joint adjudication for reasons of procedural efficiency.[267]

Parent company liability under Dutch tort law

One of the main questions to arise in this context is whether the parent company of a multinational corporation can be held liable on the basis of Dutch tort law for harm caused to people- and planet-related interests by the multinational corporation's host country activities. The relevance of this question is evident from the increasing numbers of foreign direct liability claims that are currently being brought against parent companies of multinational corporations before courts not only in the US but also in other Western societies.[268] Furthermore, as will be discussed further in the next part, the relevance of this question also follows from the increasing interest in those societies for the possibilities of implementing 'parent-based' regulatory measures aimed at promoting international corporate social responsibility and accountability.[269]

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265 Compare Symeonides 2008b, p. 185.

266 Compare Article 15 Rome II Regulation and Explanatory Memorandum to the 'Commission Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II")', COM(2003) 427, p. 23.

267 See further sub-section 5.1.3.

268 See further chapter 3.

269 See further sections 8.2 and 8.3.

Outside the US, where the majority of foreign direct liability claims have been brought on the basis of the Alien Tort Statute, this type of transnational tort-based civil litigation has typically been brought on the basis of general principles of tort law.[270] The most recent example are the claims that were brought in the UK in April 2011 against Royal Dutch Shell (the Anglo/Dutch parent company of the Shell group), along with its Nigerian subsidiary Shell Petroleum Development Company of Nigeria, by members of the Bodo community with respect to damage caused by massive oil spills from Shell-operated pipelines in the Bodo area of the Niger Delta in 2008 and 2009. As discussed, these claims led to an admission of liability by the Nigerian Shell subsidiary in July 2011, and seem to be heading towards an out-of-court settlement; this also means, however, that the matter of parent company liability will not be further addressed.[271] The Dutch Shell cases, which are currently pending before the The Hague district court and which are the first example of foreign direct liability cases brought before Dutch courts, also seek to hold the Shell group's parent company, Royal Dutch Shell, liable in tort along with its Nigerian subsidiary for damage caused as a result of oil spills from Shell-operated pipelines in the Niger Delta.[272] These claims are by no means uncontested, however, and many of the issues in dispute are as yet undecided. In a September 2011 judgment, the court has indicated that it considers Nigerian law to be the law applicable to the case.[273] This means that these cases are not likely to provide further guidance or precedent with respect to the issue of parent company liability in foreign direct liability cases under Dutch tort law. In December 2011, final written pleas were filed; accordingly, issues of substantive tort law are expected to come under discussion in the first half of 2012.[274]

Despite the fact that a considerable and still growing number of foreign direct liability cases have so far been brought before courts in Western society home countries such as the US and the UK, in these countries little precedent exists with respect to substantive issues of tortious liability in this particular context. This is because many of these cases have been either dismissed at preliminary stages or settled out of court, as a result of which case law on matters such as parent company liability for people- and planet-related harm caused in host countries by their multinational groups' activities there, has remained undeveloped. It is debatable whether this is an unintended side-effect of these settlements

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270 See further section 4.4.

271 As discussed, Shell's Nigerian subsidiary in July 2011 formally accepted liability for these spills, admitting that they were a result of equipment failure rather than sabotage or theft, and has promised to pay compensation to the Nigerian plaintiffs in accordance with Nigerian law. See further sub-section 3.3.2.

272 See further sub-section 3.2.2.

273 See, for instance: *Oguru et al. v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.; Oguru et al. v. Shell Petroleum N.V. and The "Shell" Transport and Trading Company Limited*, Rechtbank 's-Gravenhage, case nos. 330891/HA ZA 09-0579 and 365498/HA ZA 10-1677 (14 September 2011), p. 7. See further sub-section 3.3.2.

274 See the Milieudefensie website: <http://milieudefensie.nl/english/shellinnigeria/oil-leaks/the-people-of-nigeria-versus-shell>.

or a calculated strategy on the part of the multinational corporations involved, which may not be very keen on letting Western society courts pronounce on the legal responsibilities that Western society parent companies of corporate groups may have vis-à-vis third parties in the host countries in which those groups operate. Still, the question of parent company liability in this context has not lost its importance and may even get more topical in the near future, as it has already been suggested that the settlement of the Bodo claims, in combination with the UNEP report on the impacts of oil spills on the Ogoniland region of the Niger Delta, is likely to result in further foreign direct liability cases being brought by Nigerian host country plaintiffs against the Shell group's parent company and its Nigerian subsidiary before courts in the UK and/or in the Netherlands.[275]

The main issue of law in this respect is whether the parent company of a multinational corporation may under certain circumstances be under a duty to exercise due care vis-à-vis particular host country third parties that stand to be or are being detrimentally affected by the multinational corporation's local operations, and how far this duty extends. In turn, this legal question raises further legal questions, like whether the parent company can also be held liable in respect of harm that has been directly caused by activities of local subsidiaries, business partners and/or sub-contractors, and to which the parent company's own activities are more indirectly linked. In the Dutch Shell cases, for example, the host country plaintiffs seek to hold the Shell group's Netherlands-based parent company liable for spills that have occurred in the course of oil extraction activities in the Niger Delta by a joint venture of oil companies operated by Shell's local subsidiary. The alleged liability of the group's Netherlands-based parent company for that harm is said to result from the control it had over the local actors and harmful activities in question through its influence on and say in its local subsidiary's environmental policies, and the fact that it has not used that influence and say to prevent and/or mitigate the harm being caused to people and planet locally by oil spills from pipelines operated by that subsidiary.[276]

Another point of law is whether a duty of care of the parent company in this context may go as far as to require a parent company of a multinational corporation to involve itself actively and/or closely with host country activities that are carried out locally by subsidiaries and/or business partners, even where such involvement does not yet exist. Furthermore, the question may arise whether parent company liability may also exist for harm that is ultimately caused not by the activities of local operators over which the parent company may exercise some form of control, but by activities of third parties to which it is not related through equity or contract. If it were to turn out in the Dutch Shell cases, for example, that the oil spills in dispute were caused not by equipment failure but by sabotage (as is held by Shell), could the parent company then still be held liable for the resulting damage? Another question that arises in this respect is how an active duty on the parent company to interfere with its foreign subsidiaries' activities, whether based on statute or

275 See further sub-section 3.3.2.
276 See further sub-sections 3.2.2 and 5.3.1.

judicially created, or parent company liability for harm caused by actors, activities and/or events that lie outside its direct control, relate to the corporate law principles of separate legal personality and limited liability.

Under Dutch tort law, the general provision on tort provides the most obvious basis for parent company liability in this context.[277] The number of written legal norms providing rules of conduct pertaining to the responsibilities of multinational corporations' parent companies for people- and planet-related host country interests is likely to be very limited in this particular transnational context. After all, the territorial scope of domestic public law regulations will generally be limited to the particular territory of the country in which they are issued, which makes them poorly suited to dealing with transnational corporate activities. At the same time, there are only few norms of public international law that can create private rights and/or duties that apply directly to the horizontal interrelationships of private actors; moreover, such direct appeals to written or unwritten norms of public international law in transnational civil disputes between private parties raise many complicated issues of the interrelationship of public international law and private international law. An example of a Dutch provision that may be extraterritorial in nature or at least have extraterritorial implications is Article 10.60 of the Dutch Environmental Management Act which, pursuant to international obligations,[278] lays down prohibitions on the shipment of certain waste out of the Netherlands and the EU more generally; this Article has played a role in the criminal case against petrol trader Trafigura in relation to the Probo Koala incident.[279]

Still, the number of existing domestic or international written, hard law rules of conduct pertaining to the transnational activities of multinational corporations and the duties of parent companies in this respect more particularly is very limited. Therefore, claims of parent company liability that are brought on the basis of the Dutch general provision on tort/delict are most likely to be constructed as alleged violations by the parent companies involved of unwritten norms pertaining to proper societal conduct (*i.e.*, duties of (due) care or *zorgplichten*). This open norm allows the host country plaintiffs to indirectly rely on a wide variety of hard (by analogy) and softer legal standards and societal norms from domestic and/or international sources, in order to construct the behavioural standard that the parent company, according to the plaintiffs, should have lived up to so as to prevent or minimize the risks to people- and planet-related host country interests inherent in the multinational corporation's activities. Depending on the nature of the activities and the nature of the interests to be protected, relevant norms in this context may be said to follow

277 Article 6:162 Dutch Civil Code.

278 Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, 1993 *O.J.* L 030/1 (6 February 1993); Basle Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal.

279 See further sub-section 3.2.2.

for instance from international instruments such as the UN 'Protect, Respect and Remedy' framework for business and human rights, the International Declaration on Human Rights, the OECD Guidelines on Multinational Enterprises, the UN Global Compact principles, as well as from more specific behavioural standards that are applicable in the parent company's particular sector or branch, or even from company-specific instruments such as corporate codes of conduct.[280]

With the growing awareness in home country societies of the potentially detrimental impacts of multinational corporations' transnational activities on people and planet in host countries comes an increasing pressure on these corporate actors to operate in a socially responsible manner not only at home but also abroad, as well as an increasing number of instruments seeking to lay down concrete obligations for multinational corporations in this respect. This means not only that the host country plaintiffs in foreign direct liability cases have more societal norms to draw on, but also that the risks and responsibilities of multinational corporations in general and their parent companies in particular are becoming more delineated and thus more real and less easy to escape for the corporate actors involved. This is reflected also in the UN 'Protect, Respect and Remedy' framework on business and human rights, which elaborates on the corporate obligation to implement policies and take measures aimed at the prevention, mitigation, and remediation of their operations' adverse human rights impacts, among other things through human rights due diligence procedures.[281]

A finding of parent company liability by domestic home country courts in foreign direct liability cases has the potential of giving legal effect to the societal norms ensuing from these instruments, and in doing so may create new law where the court decisions concerned may be transposed to similar activities by other multinational corporations and similar protected interests of other host country third parties. This is likely to be one of the main reasons why most of the corporate defendants in foreign direct liability cases seek to prevent things from coming to a head by agreeing to out-of-court settlements in cases where the host country plaintiffs have reasonable prospects of obtaining favourable judgments on the merits. Conversely, the awareness that these instruments create among internationally operating business enterprises of the potentially detrimental impacts that their transnational activities may have on people and planet abroad and the rising standards for such activities that may ensue from them, will gradually make it more difficult for parent companies of multinational corporations to evade responsibility for those impacts.[282]

Under the Dutch general provision on tort, a court will look at a number of closely interrelated factors in order to determine whether the defendant parent company, in a

280 See further sub-section 5.3.1.
281 UNHRC Report (Ruggie) 2011, principles 17-21, pp. 16-20.
282 See further sub-sections 5.3.1 and 7.3.4.

foreign direct liability case, violated a duty of care it owed to the host country plaintiffs in view of the people- and planet-related interests that stood to be harmed by the multinational corporation's host country activities. The conduct of the parent company involved will be measured against a standard of reasonableness in order to establish whether the parent has taken sufficient care in light of the risks of people- and planet-related harm inherent in the multinational corporation's host country activities. Relevant factors in this respect are the probability that the risk will materialize and the seriousness of the expected damage on the one hand, and the character and benefit of the activities and the burden of taking precautionary measures on the other. At the same time, liability can only arise under the Dutch general provision on tort/delict if the parent company can be said to have been at fault, meaning that it was or could have been aware of the risks involved in the host country activities in question for the particular people- and planet-related interests involved, and that it was or could have been able to prevent those risks from materializing and/or to mitigate their harmful results.[283]

This means that the question to be answered by the court in these cases is whether the parent company, in view of the knowledge it could have had of the risks involved in the multinational corporation's host country activities and of the capacities it could have used in order to exercise control or influence over those activities, took the care (in the sense of precautionary measures) it could have been expected to take in light of those risks. Where the court decides that in light of the circumstances of the case, the parent company cannot be said to have exercised sufficient care vis-à-vis the host country plaintiffs' legally protected interests, it can hold the parent company liable for the resulting damage. The fact that there may have been other actors who have also contributed to the harm involved and whose activities may even have been more closely connected either in time or in space to the consequences suffered by the host country plaintiffs does not alter this outcome: the parent company is held (jointly and severally) liable for its own sub-standard conduct.[284] The fact that the parent company has acted in accordance with local statutory norms and/or permits does not automatically relieve it from the possibility of being held liable for breach of unwritten duties pertaining to proper social conduct.[285]

Because the parent company is held liable in principle for its own conduct and not for that of others, such as its local subsidiaries, there is no conflict with corporate law principles of separate legal personality and limited liability. In contrast, for instance, to cases of piercing the corporate veil in which the parent company is identified with its

283 For more detail, see Van Dam 2008, pp. 63-70. See further sub-section 5.3.1.

284 See further sub-section 5.3.1.

285 It should be noted, however, that under choice-of-law regimes such as that of the Rome II Regulation the court will, in assessing the parent company's conduct, have to take into account the fact that the harmful host country operations involved were in compliance with local rules of safety and conduct. Still, as mentioned, this does not preclude the court from finding that the parent company acted in violation of unwritten norms. Moreover, on the basis of these choice-of-law provisions the court is not required to apply those rules, but merely to take them into account. See further sub-sections 4.3.3, 5.2.1 and 6.3.2.

subsidiary, the corporate veil is left intact in foreign direct liability cases.[286] In addition, under Dutch tort law the parent company may be held liable in this context regardless in principle of whether its wrongful conduct is qualified as an act or as an omission. The only restriction in the case of an alleged omission on the side of the parent company is that there needs to have been a (pre-existing) special relationship between the parent company and the host country plaintiffs or between the parent company and the actor, object or venue creating the risk. Without such a special relationship, the parent company can only be held liable where it can be said to have been aware of the gravity of the danger that the multinational corporation's host country activities posed to the host country plaintiffs.[287]

Whether a court determining a foreign direct liability case on the basis of Dutch tort law will find that the parent company, in light of the particular risks inherent in the multinational corporation's host country activities and in light of what the parent company could have known about those risks and could have done to prevent them from materializing, should have taken more care, will be dependent on the particular circumstances of each individual case and is thus difficult to predict. What can be said, however, is that in principle there are no reasons why the parent company of a multinational corporation could not under certain circumstances be held liable for people- and planet-related harm caused by the multinational corporation's operations in host countries. Dutch courts have already held parent companies liable for causing or failing to prevent their subsidiaries' creditors from sustaining (financial) harm. From this existing line of case law, it is but a small step to the substantive questions of tort law at issue in foreign direct liability cases; the fact that these cases play out in a transnational context does not change things in this respect. In fact, both the fact that foreign direct liability claims usually revolve around personal injury or property damage rather than pure financial loss and the fact that in many of these cases the injured parties are not in a contractual relationship with the host country subsidiaries (unless they are local employees, for instance) are reasons why parent company liability is even more likely to be assumed in foreign direct liability cases.[288]

Furthermore, precedent in English law shows that in a personal injury context a parent company of a multinational corporation may be held to owe a duty of care vis-à-vis third parties that are somehow connected to its subsidiaries. In April 2011, the Queen's Bench division of the English High Court held in the case of *Chandler v Cape plc* that under certain circumstances a parent company of a corporate group may owe a duty of care to an employee of its wholly owned subsidiary who has suffered personal injuries (contracted asbestosis) due to exposure to asbestos in the course of his employment.[289] This decision, which in fact cited a foreign direct liability claim as an illustration of parent company

286 See also Lennarts 2003.
287 See further sub-sections 5.3.1 and 5.3.2.
288 Compare Enneking, Giesen *et al.* 2011, pp. 547-549. See further sub-section 5.3.1.
289 *Chandler v Cape plc.* [2011] EWHC 951 (QB) (14 April 2011).

liability for personal injuries suffered by employees of its subsidiary, is an interesting judgment for foreign direct liability claims brought on the basis of Dutch tort law as well. After all, even though English precedent is clearly not binding on Dutch courts deciding foreign direct liability cases under Dutch tort law, the recent *Chandler* case may still be considered as a source of inspiration when it comes to determining the circumstances under which parent companies of multinational corporations may be said to owe a duty of care towards host country citizens detrimentally impacted by the local activities of their subsidiaries.[290]

A hypothetical case study: parent company liability in the Dutch Shell cases under Dutch tort law

As discussed, the The Hague district court has held that the Dutch Shell cases are governed by Nigerian tort law; still, it is possible to use these cases in order to do a hypothetical case study on parent company liability under Dutch tort law in the context of foreign direct liability cases.

Generally speaking, it seems that if the Dutch Shell cases were to be decided on the basis of Dutch tort law, it would by no means be impossible that the court would hold the Shell group's Netherlands-based parent company liable with respect to the harm caused by the oil spills in dispute. The fact that it is only indirectly involved in the Nigerian oil extraction activities, which are conducted locally by a joint venture that is operated by its subsidiary, does not in principle make a difference in this respect. Of course, parent company liability will only arise if the host country plaintiffs can actually convince the court that the parent company could have been aware of the risk of oil spills such as the ones in dispute and that it had the capacity to prevent those risks and/or to mitigate their consequences. Accordingly, parent company liability in this context requires that in practice the parent company could have had knowledge of the risk of harm inherent in the local oil extraction activities and could have exercised some control over those activities so as to prevent that risk from becoming a reality.[291]

The plaintiffs in the Dutch Shell cases assert that the Shell group's Netherlands-based parent company is aware of the issue of oil spills from the Nigerian oil pipelines operated by its local subsidiary and the harm that those may cause to the local environment and local inhabitants. They also claim that the parent company has both formal and *de facto* say over its Nigerian subsidiary's policies and over the way those are executed, and that it uses its influence in this respect especially when it comes to policies pertaining to oil spills and the local environment. Relevant circumstances that have been advanced by the host country plaintiffs in this respect include shareholdership (the parent company indirectly holds 100% of the shares in its Nigerian subsidiary), particular leadership strategies within the group, policy guidance and common strategies within the group, the need for

290 See further sub-sections 3.3.2 and 4.4.3.
291 See further sub-section 5.3.1.

'parental' approval of important investment decisions, direct influence on the appointment and discharge of the subsidiary's directors, existing group policies on health, safety and environment, the appointment of parent company executives in regional management positions, etc.[292] On this basis, the plaintiffs seek to hold the Shell group's Netherlands-based parent company liable for breaching its duty to exercise due care vis-à-vis the host country plaintiffs by failing to use the influence and say it allegedly has over its Nigerian subsidiary, and thus over the local oil extraction activities, in order to make sure that those activities were conducted with due care for local people- and planet-related interests.

The *Chandler* case (discussed in sub-section 4.4.3 above) suggests, *inter alia*, that for a duty of care to arise in this context it may be sufficient to establish that the parent company controlled or took overall responsibility for the measures adopted locally to protect third parties against harm resulting from the local activities. As regards foreseeability, it suggests that there should be actual knowledge on the part of the parent of the way business operations are carried out locally by the subsidiary and a general awareness of the risk of harm involved in those activities. A relevant factor in this respect is whether the harm caused can be said to be a result of a 'systemic failure' of which the parent company is fully aware, or whether it is (merely) the result of a failure in day-to-day management.[293] Perhaps the most relevant passage in the *Chandler* decision pertains to the policy influence of the parent company in that case on the health and safety policies (the case pertained to asbestos-related damage, not environmental damage like the Dutch Shell cases) of its subsidiaries:

> "*On the basis of the evidence as a whole it was the Defendant, not the individual subsidiary companies, which dictated policy in relation to health and safety issues insofar as the Defendant's core business impacted upon health and safety. The Defendant retained responsibility for ensuring that its own employees and those of its subsidiaries were not exposed to the risk of harm through exposure to asbestos. In reaching that conclusion I do not intend to imply that the subsidiaries, themselves, had no part to play – certainly in the implementation of relevant policy. However, the evidence persuades me that the Defendant retained overall responsibility. At any stage it could have intervened and* [the subsidiary] *would have bowed to its intervention*".

Of course, the *Chandler* decision is not automatically transposable to the Dutch system of tort law and any conclusions drawn from it cannot serve as a source of law but merely as a source of inspiration. Furthermore, a true assessment of whether and to what extent the holding in this case is transposable to the Dutch tort system would require a full-blown comparison that would go beyond the scope of this study. At the same

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292 The complaints in these cases are available at the Milieudefensie website: <http://milieudefensie.nl/oliewinning/shell/olielekkages/documenten-shellrechtszaak#juridischedocumenten>.

293 *Chandler v Cape plc.* [2011] EWHC 951 (QB) (14 April 2011), pp. 7, 12-13.

time, a difference between the *Chandler* case and the Dutch Shell cases, apart from the transnational context, is that the plaintiffs in the latter are not employees of the subsidiary, but local 'neighbours'. Under the English tort of negligence this difference may be relevant in relation to the duty-of-care requirement of proximity (which requires the existence of a 'special relationship' between the parent company and the host country victims for a duty of care to arise). Under Dutch tort law, however, it seems unlikely that the fact that the host country plaintiffs are 'neighbours' rather than employees of Shell's local subsidiary will lead to a different outcome when it comes to assuming that a duty of care existed between the parent company and the host country plaintiffs, and thus in assuming parent company liability.[294] Still, what may be concluded from this (very limited) comparative exercise is that the host country plaintiffs in the Dutch Shell cases might indeed have a *prima facie* case for parent company liability under Dutch tort law if they could substantiate their claims that the Netherlands-based parent company was ultimately responsible for the environmental policies of its Nigerian subsidiary, as well as that it had functional control and could exercise decisive influence over the way in which the risks of environmental harm inherent in the local operations were handled.[295]

Under Dutch tort law the outcome of this issue will in principle be the same whether the parent company's alleged wrongful conduct is constructed as an action or as an omission; in practice, it may not even be very easy to make the distinction in this respect. However, for liability for nonfeasance to arise, which effectively puts an affirmative duty on the parent company to actively interfere in the harmful local activities even if it did not already do so, it may be necessary to show that a special relationship exists between the parent company and the host country plaintiffs or between the parent company and the person, object or venue creating the risk. It seems very possible to argue that such a special relationship exists between the parent company and the object or venue creating the risk (the oil pipelines that are used to transport extracted oil through the Ogoniland region of the Niger Delta) since for decades the Shell group has undertaken oil exploration activities in the Niger Delta.

To the extent that the particular oil spills in dispute can be said to be a result of equipment failure, a special relationship can also be said to exist between the parent company and the actor creating the risk (its Nigerian subsidiary that the plaintiffs claim is responsible for maintenance and repair of those pipelines and the cleaning up of oil spills). It should be noted that it has been suggested in this respect, on the basis of existing Dutch case law on parent company liability vis-à-vis subsidiaries' creditors, that such a special

294 For more detail on the proximity requirement in English law, see Van Dam 2008, pp. 90-95; Van Dam 2000, pp. 111-123. See also in an English-Dutch comparative perspective, with respect to a different subject matter area but similar issues: Enneking 2008b, discussing *Sutradhar v. Natural Environment Research Council* [2006] UKHL 33.

295 See, for instance, (the English translation of) the complaint in the Oruma case, available at the Milieudefensie website: <http://milieudefensie.nl/publicaties/bezwaren-uitspraken/dagvaarding-oruma>, pp. 35-53.

relationship will not be assumed to exist merely on the basis of the fact that the parent company (indirectly) holds the shares of the subsidiary, but that there need to be special circumstances, such as a detailed involvement by the parent company in the management of its subsidiary.[296] Whether such intensive intervention by Shell's parent company in the management of its subsidiary could be said to be present remains a matter for debate. It has to be noted, however, that the threshold in this respect is likely to be lower in foreign direct liability cases than in these cases of parent company liability vis-à-vis subsidiaries' creditors, as foreign direct liability cases pertain to liability for personal injuries and/or property damage, rather than liability for pure financial loss.

Where no such special relationship can be said to exist between the parent company and the object, venue or actor creating the risk, Dutch courts will be more hesitant in (retrospectively) assuming an affirmative duty on the parent company to actively intervene in the local activities in which it had no prior involvement. After all, to do so would impose a significant restriction on the parent company's freedom to organize its multinational group as it sees fit, within the boundaries of course of the applicable corporate law regimes in the different countries involved, and may even create tension with the fundamental corporate law principles of separate legal personality and limited liability. Therefore, the host country plaintiffs will in such cases need to convince the court not only that the parent company was (subjectively) aware of the risk, but also: that the imposition of an affirmative duty would be justified in light of the severe damage that has resulted or is likely to result from the materialization of the risk involved in the host country activities; that the burden on the parent company of taking certain precautionary measures is justified by their expected effects; and that the parent company on the basis of its superior knowledge and capacities would be in a far better position to neutralize the particular risks than the (potentially) affected host country third parties themselves.[297]

Accordingly, it might theoretically be possible under Dutch tort law, but only under exceptional circumstances, to seek to hold the parent company liable for the harm caused by the oil spills even if those are a result of 'external' forces such as sabotage by local third parties (which, it should be noted, is not a circumstance that can be imputed to the victim) and the parent company cannot be said to have a special relationship with the person(s), object or venue creating the risk. With the widespread knowledge of the devastating impacts of oil spills on the Niger Delta environment (which has recently again been underlined by the UNEP report) and of the significant role that sabotage of the oil pipelines involved plays in this respect, the required awareness on the side of the parent company of the gravity of the risk of sabotage-related harm posed by the multinational corporation's activities may arguably be assumed to be present.[298] Whether this theoretical

296 Van Andel 2006.
297 See further sub-section 5.3.1.
298 See further sub-section 5.3.1.

possibility would make for a practically feasible claim for parent company liability in this context remains to be seen, however.

In the end, it would be up to the court to determine whether the Shell group's parent company, also considering its knowledge of and capacity to influence the risks involved, has exercised sufficient care under Dutch tort law. In doing so, it would consider the seriousness of the risk of oil spills (whether as a result of equipment failure or of sabotage) and of their impacts on people and planet locally, as well as the nature of the activities involved and the burden (particularly costs) of taking precautionary measures.[299] As far as precautionary measures are concerned, the host country plaintiffs, who assert that the oil spills in dispute were a result of equipment failure, suggest among other things that the parent company should have used its influence to ensure that the pipelines involved were checked on a regular basis to prevent oil spills occurring from pipeline corrosion or other types of equipment failure, to ensure that contingency plans were in place to allow an adequate and effective reaction in case oil spills would occur, and to ensure that every oil spill would be documented and reported and that its harmful consequences would be adequately repaired.[300] Also, where it comes to preventing harm resulting from acts of sabotage, there could be certain precautionary measures that could be suggested that the parent company should have its local operators take, such as security surveillance of the pipelines or other practical measures that would make sabotage of the oil pipelines more difficult.

Whether the Shell group's parent company, in view of its knowledge of and control over the local oil extraction activities and their harmful consequences and in view of the costs involved in taking precautionary measures that would mitigate the risk, could have been required to take any of those measures would be for the court to decide in what in practice comes down to a cost-benefit analysis. The fact that the norms pertaining to proper social conduct that the parent company has allegedly violated were aimed at protecting host country third parties against personal injury and property damage would be likely to lead the court to attach less weight to the burden of taking precautionary measures. Accordingly, it could well adopt a stricter standard of care than in cases pertaining to conduct resulting in purely financial loss, like the previously mentioned cases in which parent companies have been held liable for causing or failing to prevent their subsidiaries' creditors from sustaining (financial) harm.[301]

Of course, for liability to arise on the basis of the Dutch general provision on tort/delict, all of the requirements involved (wrongful act or omission, imputability, causation,

299 See, for further detail: Van Dam 2008, pp. 63-70. See further sub-section 5.3.1.

300 See, for instance, (the English translation of) the complaint in the Oruma case, available at the Milieudefensie website: <http://milieudefensie.nl/publicaties/bezwaren-uitspraken/dagvaarding-oruma>, p. 53.

301 See further sub-section 5.3.1.

damage, relativity) need to be fulfilled.[302] It should be noted here that virtually all of the statements made by the host country plaintiffs in the Dutch Shell cases have been contested by the corporate defendants. The burden of proof in this respect will in principle be on the host country plaintiffs bringing the foreign direct liability case, although there are various ways in which this burden may be lightened. This does however emphasize the importance of the ability on the plaintiffs' part to gather sufficient evidence so as to substantiate their allegations. Accordingly, the September 2011 judgments of the The Hague district court, in which the plaintiffs' request for exhibits of key evidentiary documents has been denied, may turn out to play a pivotal role in these cases. After all, if the plaintiffs in these cases do not succeed in substantiating their claims, the court may not even get round to determining whether and under what circumstances the Shell group's parent company may be said to owe a duty of care vis-à-vis the Nigerian plaintiffs.[303]

At least from a scholarly point of view, this would be a pity, although it should be noted that in reality the court will in this case not actually base its decision on parent company liability on Dutch tort law, but on the basis of Nigerian tort law. Accordingly, if it were to come to a decision on parent company liability in this matter, this would not create any real precedent for future foreign direct liability cases brought before courts in the Netherlands on the basis of Dutch tort law.

The role of human rights-related interests

A further question that arises with respect to foreign direct liability cases that are brought on the basis of Dutch tort law is whether there would be a difference between claims pertaining to alleged violations of international or fundamental human rights and claims pertaining to alleged infringements of other people- and planet-related interests. It should be noted in this respect that the Dutch Shell cases deal with corporate violations of human rights norms only in passing, that is where they state that the harm suffered by the host country plaintiffs constitutes a violation of the right to privacy and family life and the ensuing right to a clean living environment, as codified in Article 8 of the European Convention on Human Rights and Article 24 of the African Charter on Human and People's Rights.[304] By contrast, the ATS-based foreign direct liability cases against Shell, which in the end can be reduced to the same underlying issue of the detrimental impacts of Shell's oil extraction activities in the Niger Delta on the local environment and local communities, revolved solely around alleged human rights violations perpetrated in this context. Obviously, this was due largely to the fact that the Alien Tort Statute, as discussed,

302 See further sub-section 5.3.1.

303 Compare Enneking, Giesen *et al.* 2011, p. 554. See further sub-sections 3.3.2 and 5.3.1.

304 See, for instance, (the English translation of) the complaint in the Oruma case, available at the Milieudefensie website: <http://milieudefensie.nl/publicaties/bezwaren-uitspraken/dagvaarding-oruma>, p. 72.

provides a domestic remedy for violations of a very limited number of international norms dealing with human rights/international crimes only.[305]

In principle, it seems that Dutch tort law would not treat foreign direct liability claims pertaining to alleged human rights violations differently from foreign direct liability claims that cannot be framed as actionable violations of international or domestic human rights norms. After all, as has already been mentioned, any concern for life, health and property may ultimately be formulated as a private interest that is worthy of legal protection through private law mechanisms such as the tort system. As such, violations of human rights norms may under general principles of tort law give rise to the same obligation on the part of the norm violator to compensate the resulting damage as do violations of other types of norms, such as environmental norms, labour norms, health and safety norms, etc. In this sense, the qualification of a specific private interest as a human right may not necessarily have added value beyond signalling that a fundamental value is at stake and that violation of that interest is therefore likely to result in enhanced moral condemnation.

Even where human rights norms can be said to function as an objective set of fundamental values, the question arises whether, how and to what extent these values can be made actionable in private law disputes. Since the human rights concept is potentially very broad and may encompass any infringement of another's fundamental interests, a tort case for example can almost always be said to somehow revolve around a conflict of fundamental interests pertaining to life, liberty, privacy and property on both sides of the dispute. The Dutch Shell cases, for example, could be framed as a conflict between the host country plaintiffs' right to a clean and healthy environment on the one hand, and the corporate defendants' freedom of action and property rights on the other. It seems unlikely that framing a case like this as a discourse on fundamental rights would lead to another or even a better (in the sense of more just) outcome to the dispute.[306]

At the same time, especially in the transnational context of foreign direct liability cases, questions may be raised as to the universality of the values involved; the right to a clean and healthy environment may be interpreted very differently in the host countries than in the home countries involved in foreign direct liability cases, for instance, and even starker differences may exist when it comes to the extent to which this right may give rise to legally enforceable obligations on private actors.[307] Arguably, it is in this sense that the insistence

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305 See further sub-sections 3.1.1, 3.1.2 and 4.4.1 as well as *supra* sub-section 6.1.2.

306 Compare Smits 2006; Smits 2003. Smits argues that fundamental rights have only limited value in deciding private law cases, since they are subsidiary to rules designed for relationships between private parties, since they do not offer enough guidance to decide a case and since they are in principle not binding on private parties. Note that this view is not shared by everyone; see, for instance: Nieuwenhuis 2006, pp. 1-8, who argues that fundamental rights talk is an enrichment of legal discourse in private law, and Lindenbergh 2006, pp. 97-128, who considers that fundamental rights may inspire the development and improve the quality of civil law.

307 Even under the European Convention on Human Rights, the right to a clean and healthy environment, for example, is interpreted as imposing an obligation on states (that is the ECHR Member States) rather than private actors. Compare for example: ECtHR, *Lopez Ostra v. Spain*, 16798/90 [1994] ECHR 46 (9 December

of US federal courts (including the US Supreme Court) on restricting the use of the Alien Tort Statute to 'specific, universal, and obligatory' norms of customary international law should be understood. As is clear from the case law that has so far been generated under the Alien Tort Statute, US courts have so far identified only very few sufficiently 'specific, universal, and obligatory' customary norms of international law that may pertain directly to the interrelationships between private actors; whether any of these norms may create obligations for corporate actors is, as has been discussed, a major point of contention at present.[308] When it comes to treaty norms, questions arise not only with respect to the extent to which those norms can have direct and horizontal effect in the interrelationships between private parties, but also with respect to the extent to which they can be applied extraterritorially in transnational private disputes brought before domestic courts. The ECHR's norms, for example, in principle apply only to human rights violations taking place within the territories of the ECHR Member States.[309]

As such, it seems that the feasibility of foreign direct liability cases brought before Dutch courts on the basis of general principles of (Dutch) tort law would in principle not be affected by whether or not the claims involved pertain to alleged (involvement in) violations of international or fundamental human rights by the corporate actors involved, or to violations of norms seeking to protect people- and planet-related interests that cannot as easily be defined as universally applicable international or fundamental human rights norms.

The (potential) role of strict(er) liabilities

Another question that arises with respect to foreign direct liability cases that are brought on the basis of Dutch tort law is whether next to its general, fault-based provision on tort, the Dutch tort system offers other, more strict liabilities that might be applicable in the context of foreign direct liability cases. The relevance of any such strict(er) liability standards in this context would be that they might enhance the feasibility of foreign direct liability cases brought on such alternative legal bases, usually by relieving the host country plaintiffs of the burden of having to prove fault (imputablility) and/or even wrongfulness on the side of the alleged tortfeasor.[310] Under Dutch tort law there are a number of strict liability standards that, depending on the particular circumstances of each case, may play a role in foreign direct liability cases.[311] These include, for instance, strict liability for defective products, for dangerous substances, and for damage caused by dumping sites

1994) and ECtHR, *Guerra v. Italy*, 14967/89, [1998] ECHR 7 (19 February 1998). Both cases deal with the responsibilities of ECHR Member States when it comes to actively securing the rights to private life and property of their citizens against industrial pollution.

308 See further sub-sections 3.1.1, 3.1.2, 3.3.2 and 4.4.1, as well as *supra* sub-section 6.1.1.

309 See further sub-sections 4.5.3 and 6.3.3.

310 See, generally: Van Dam 2000, pp. 287-294. See also further sub-section 5.3.2.

311 See further sub-section 5.3.2.

or mining operations.[312] At the same time, the Dutch tort system features a number of relevant provisions of negligence liability with an extra (strictly liable) debtor, including the liability of employers for the faults of their employees and the liability of principals for the faults of their independent contractors or agents.[313] In addition, on the basis of Dutch case law, employers have a rather strict duty of care (which is sometimes said to constitute a pseudo-strict liability) with respect to the health and safety of their employees.[314]

Due to the fact that multinational corporations' parent companies will generally only be indirectly involved in their groups' operations in host countries, which are usually carried out by local subsidiaries, often in cooperation with local business partners and/or sub-contractors, it will generally not be possible to use these strict(er) liability standards as a basis for parent company liability in foreign direct liability cases that are governed by Dutch tort law. After all, local factories will generally be owned not by the parent company but by its local subsidiaries, local employees and/or sub-contractors will generally be contractually linked not to the parent company but to its local subsidiaries, and dangerous substances will generally be considered to be used not in the conduct of the parent company's business, but in that of the subsidiary. As such, these provisions will generally not be available as a direct basis of foreign direct liability claims on the basis of Dutch tort law against multinational corporations' Netherlands-based parent companies. Of course, if indeed it is possible that under certain circumstances, as has been discussed before, Dutch tort law may also be applicable to foreign direct liability claims against host country subsidiaries that are brought before Dutch courts, these strict liability standards could be very relevant in providing potential legal bases for such claims.

Still, the existence of these strict(er) liability standards may also have an indirect effect on foreign direct liability claims against multinational corporations' parent companies that are brought on the basis of the Dutch tort system's general provision on tort/delict, in particular where they are based on the alleged violation by the parent company of unwritten norms pertaining to proper societal conduct. After all, the provision of strict liabilities in particular subject matter areas can be seen as an indication that the Dutch legislature has sought to provide enhanced protection for certain groups within society it considers particularly vulnerable (such as consumers, employees, etc.) and/or against certain relatively risky activities. Often, the decision by the Dutch legislature to make particular actors strictly liable for certain circumstances, actors or activities that are inherently dangerous and/or lie within their sphere of influence, is connected to the fact that it is those actors in particular that stand to gain from the circumstances concerned and/or that are in the best position (both *qua* knowledge and *qua* capacities) to prevent the risks involved from materializing and to mitigate their consequences. Dutch courts seeking to determine under the Dutch tort system's general provision on tort/delict whether a

312 Articles 6:185, 6:175, 6: 176 and 6:177 Dutch Civil Code, respectively
313 Articles 6:170, 6:171 and 6:172 Dutch Civil Code, respectively.
314 Article 7:658 Dutch Civil Code..

parent company has acted with due care, can take into account these considerations where the foreign direct liability claim in question pertains to activities that would under other circumstances be adjudicated on the basis of a strict(er) liability standard.[315]

Interestingly, with respect to the Dutch tort system's strict liabilities for immoveable property, defective moveable property, and for dangerous substances, all of which (may) rest on the actor who uses them in the conduct of its business, the question has been raised whether '(conduct of) business' in this sense should be interpreted broadly so as to pertain to the activities of different legal entities within one corporate group as well. In this interpretation, the activities of different members of the corporate group should, for the purposes of these strict liabilities, be viewed as the activities of one enterprise if a sufficient degree of technical, functional or organizational unity between those entities could be said to exist. The reasoning behind this suggested broad interpretation was that the strict liabilities in question could lose their meaning if the corporate groups involved could evade applicability of them by having the activities in question conducted by certain, less solvent members of the corporate group. The then Minister of Justice did not see any reason to adopt such a broad interpretation. However, in light of the particular issues underlying foreign direct liability cases, especially the fact that in this context risky activities are typically left to be performed by foreign subsidiaries in host countries, this suggested broad interpretation is highly relevant. It ties in with suggestions that have been made by proponents of foreign direct liability cases, as will be further discussed in the next part, that multinational corporations' home countries should, with a view to improving international corporate social responsibility and accountability, introduce provisions of enterprise liability and/or strict parent company liability for their subsidiaries' activities when it comes to people- and planet-related harm caused in host countries by those groups' local operations.[316]

The role of corporate law notions of separate legal personality and limited liability

Finally, and closely linked to these suggested forms of strict(er) liability when it comes to multinational corporations' international operations, a question that may be raised in this context is whether foreign direct liability claims seeking to hold parent companies of Netherlands-based multinational corporations liable under Dutch tort law conflict with fundamental corporate law notions of separate legal personality and limited liability. In fact, foreign direct liability cases seeking to hold parent companies liable for people- and planet-related harm caused in the course of multinational corporations' host country activities are often erroneously characterized as examples of cases in which it is sought to pierce the corporate veil separating different legal entities within a corporate group. However, foreign direct liability claims brought against multinational corporations' parent companies on the basis of general principles of tort law, in principle seek to hold

315 Compare Enneking 2007, pp. 73-76. See further sub-section 5.3.2.

316 See, in more detail and with further references: Enneking 2007, pp. 74-75. See further sub-section 5.3.2.

those parent companies liable for their own wrongful acts or omissions and thus leave the corporate veil intact. This means that these cases should be distinguished from cases where it is sought to hold parent companies liable for the debts of their subsidiaries on the basis of the corporate law doctrine of piercing the veil (*vereenzelviging*), by which courts may, under very exceptional circumstances (which will usually only arise in clear-cut cases of abuse of separate legal identity/limited liability), attribute the acts and liabilities of a subsidiary to the parent company, holding the latter liable for the former's debts.[317]

Having said this, however, and in view of what has been stated above with respect to suggestions of enterprise liability and/or strict parent company liability for people- and planet-related harm caused by subsidiaries' activities in host countries, it should be noted that the imposition of strict(er) liability standards on parent companies in this respect might in fact cause tension with corporate law notions of separate legal personality and limited liability. After all, the less the parent company's own behaviour/own fault is taken into consideration in considering whether it should be held liable, and the more such liability is based on the more abstract idea that the parent company, due to its position as head of the corporate group and/or as potential controller of its subsidiaries, should be held liable for any harm resulting from the group's and/or its subsidiaries' activities, the more this may be considered to be at odds with corporate law's focus on legal rather than economic realities in this respect. This tension does not necessarily rule out the possible adoption in the future of standards seeking to hold parent companies more strictly liable for the detrimental impacts of multinational corporations' international activities, but it does indicate that Dutch courts are likely to look for legislative guidance before holding parent companies of multinational corporations liable for harm to host country people- and planet-related interests merely on the basis of their (indirect) shareholder relationship with their local host country subsidiaries.

In fact, arguments for abandoning the corporate law notions of separate legal personality and limited liability altogether when it comes to tort-based liability, especially in personal injury cases, have also been raised outside the context of international corporate social responsibility and accountability in general and foreign direct liability cases more specifically. Such arguments are based on the idea that these traditional corporate law notions have become outdated by the contemporary realities of highly integrated corporate groups, as well as on the concern that these contemporary realities make it all too easy for corporate groups to distribute responsibilities among members of the corporate group in ways that are advantageous to the group, but not necessarily to the creditors of its individual entities. This is considered to be highly problematic especially when it comes to tort victims who, in contrast to contract creditors, are involuntary creditors in the sense that they have not chosen to become involved with the group and/or any of its entities.[318]

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317 See further sub-section 5.3.2.

318 Compare Dearborn 2009; Blumberg 2005; Blumberg 2001; Hansmann & Kraakman 1991. See also Enneking,

Arguably, these suggestions are even more relevant in the context of foreign direct liability cases, which play out in a transnational setting in which multinational corporate groups often deliberately have certain activities undertaken by local subsidiaries in host countries where operations are cheap due to the fact that the degree of legal protection provided with respect to local people- and planet-related interests is generally lower than that provided in the home countries from where these groups operate. As such, the question may legitimately be raised in this context whether traditional corporate law notions, such as separate legal personality and limited liability, may interfere with host country plaintiffs' attempts to hold those responsible for their detriment accountable and obtain compensation for the damage suffered. Similarly, the question may be raised whether such notions should prevent home country governments, seeking to use their tort systems as a mechanism for behavioural regulation and/or enforcement with a view to promoting international corporate social responsibility and accountability of 'their' multinational corporations, from adopting strict(er) liabilities in this context.

A number of these issues will be discussed further in the next part. The most important point to make here, however, is that foreign direct liability cases brought on the basis of the Dutch general provision on tort do not generally conflict with fundamental corporate law notions of separate legal personality and/or limited liability. After all, as has been discussed, these claims typically pertain to parent companies' own wrongful acts and/or omissions, despite the fact that those are often connected in this context to the control and/or supervision that these parents do or could or should exercise over the activities of their local subsidiaries. The fact that in these claims the parent company is usually only indirectly involved in the harmful host country activities does not take away from the fact that the parent company may under certain circumstances be held liable for breaching a duty of care owed to certain host country third parties for failing to make sure, as far as may reasonably be expected of it, that the multinational corporation's host country activities leave people and planet locally unharmed. Still, when the fault requirement is abandoned in assuming parent company liability in this context, either judicially or by the legislature, or when an affirmative duty to act is imposed on the parent company to actively intervene in the local activities in which it had no prior involvement, this does undeniably create a certain tension with the corporate law notions of separate legal personality and limited liability.

6.4.3 An assessment

As is evidenced by the Dutch Shell cases, the Netherlands may provide a venue for host country plaintiffs seeking to hold Netherlands-based parent companies of multinational corporations accountable for harm caused to people- and planet-related interests in the

Giesen *et al.* 2011, p. 551. See further sub-sections 4.4.3 and 5.3.2.

course of their host country activities. This is important, since similar claims against Netherlands-based multinational corporations such as Shell and Trafigura that have been brought before courts in the US and the UK show that internationally operating business enterprises are not beyond reproach when it comes to their business practices in developing host countries. The recent release of a UNEP report on the widespread and serious detrimental impacts of oil extraction activities by multinational corporations such as Shell on the environment and communities in the Niger Delta confirms this picture. In fact, it has been suggested that this report, in combination with the current controversy surrounding the US Alien Tort Statute and the recent admission of liability by Shell's Nigerian subsidiary in a class action brought against it in the UK also in relation to oil spills in the Niger Delta, may lead to further foreign direct liability cases being brought before courts in the Netherlands and/or the UK against Shell for environmental damages caused in Nigeria. If this is true, further claims against other Netherlands-based multinational corporations for other instances of harm caused to people and planet in host countries may follow.

Whether this will actually happen remains to be seen, however. It seems that host country plaintiffs seeking to bring foreign direct liability claims before Dutch courts will be faced in practice with two major stumbling blocks. First of all, the costs of litigating in the Netherlands are very high which, in combination with the fact that lawyers in the Netherlands are not allowed to work on a contingency fee basis, may prove a significant barrier to initiating this type of transnational tort-based civil litigation before Dutch courts. After all, these cases are typically drawn-out, complex and costly affairs that furthermore typically involve a significant inequality of arms in financial scope between the host country plaintiffs and their corporate opponents. Although the host country plaintiffs seeking to initiate foreign direct liability claims in the Dutch legal order may apply for government-funded legal aid, as is evidenced by the Shell cases, the funds provided are generally not nearly sufficient to cover the costs of the plaintiffs and their legal representatives in these cases. Furthermore, there are indications that the Dutch legal aid system would not be able to cope either financially or administratively if more foreign direct liability claims were to be brought before courts in the Netherlands in the future.

Depending on the circumstances of each case, one way of lowering the costs of bringing foreign direct liability claims before Dutch courts would be for groups of host country victims to bring collective actions instead of individual claims. However, the Dutch system on collective actions is at present less than ideally suited for handling such claims. Under Dutch procedural law it is possible for a representative organisation such as an NGO to bring a representative action on behalf of collective private interests and/or public interests (*e.g.*, the local environment), but the remedies that may be claimed in such representative actions do not include damages. When it comes to mass damages claims, the Dutch system of civil procedure offers the possibility of having a settlement agreement between the parties to a civil dispute declared binding, which may be attractive from a

defendant's perspective since it provides 'closure'. However, this system as it exists now does not provide the host country plaintiffs with any means of putting pressure on their corporate defendants to actually come to a settlement. Arguably, any incentives in this respect on the side of the multinational corporations involved are further diminished by the inequality of arms in these cases, which means that they are much better able to 'slug it out' than the host country plaintiffs.

Another major obstacle for host country plaintiffs seeking to bring foreign direct liability claims in the Netherlands is the Dutch system of evidence gathering, which offers only limited possibilities for requesting exhibits. As is evidenced by the Dutch Shell cases, this may make it very hard for the host country plaintiffs to obtain key evidentiary documents on, for instance, corporate structures, policies and operating practices that may be necessary to substantiate their claims, as those documents will usually not be in their possession. After all, the inequality of arms that is so typical of these cases pertains not only to financial scope, but also to available information. Although there is talk of introducing a less restricted exhibition regime, especially with a view to the increasing value that is attached to truth finding in civil procedures in the Netherlands, this regime has yet to be adopted.

Combined, these factors seem to raise almost insurmountable barriers to the pursuit of foreign direct liability claims against Netherlands-based multinational corporations. Proposals for the introduction of a legal aid fund for victims seeking to hold Netherlands-based corporate actors accountable for environmental and human rights violations perpetrated abroad have been rejected by the Dutch government, which has suggested that the money would be better spent on strengthening the rule of law in the host countries where those claims originate and where the plaintiffs should ideally pursue their claims. In so holding, however, it completely passes over the fact that the whole issue underlying these claims is that the host country victims for various reasons are typically unable to get access to justice and/or obtain remedies in their own countries. Of course, in an ideal world they would just as well be able to bring their claims locally, but in the contemporary North-South reality underlying these cases this is presently not the case, nor is it likely to be the case in the near to medium-term future, regardless of any funds that the Dutch government is willing to make available to strengthen the rule of law in the host countries involved.

Accordingly, to deny these victims access in practice to Dutch courts is to deny them the chance of putting the bill for the transnational activities of Netherlands-based multinational corporations where it belongs. This is inadmissible especially where meritorious foreign direct liability claims are involved that have sufficient connections with the Dutch legal order so as to justify Dutch courts exercising jurisdiction over them. Furthermore, it also conflicts with the fundamental values that underlie the Dutch provision on *forum necessitatis*, which opens up the Dutch forum to transnational claims

that cannot feasibly be brought elsewhere (sometimes even where the claim has no connections to the Dutch legal order), as well as the right to access to court that ensues from the European Convention on Human Rights. At the same time, it also passes over the fact that under the UN policy framework on business and human rights, states have a duty to provide effective judicial remedies to victims of corporate human rights abuse, even when such abuse has taken place abroad. According to the Guiding Principles to the framework, this duty requires states to address legal, procedural and practical barriers that may deny such victims from getting access to justice in their legal systems. And, finally, the Dutch government's hostile attitude to the pursuit of this type of transnational civil litigation before Dutch courts also fails to appreciate the fact that these cases provide a useful way to promote international corporate social responsibility and accountability by Netherlands-based internationally operating business enterprises.

It is important to note in this respect that to support or at least not counteract the pursuit of foreign direct liability claims against Netherlands-based multinational corporations does not provide the host country victims with some sort of lottery ticket at the expense of the corporate defendants involved. Whether on the basis of Dutch tort law or on the basis of host country provisions of tort law, Dutch courts deciding these cases will objectively and in accordance with the law balance the corporate defendants' interests in being allowed to freely pursue their transnational activities against the host country plaintiffs' interests in being protected from the detrimental impact that those activities may have on people and planet locally. Depending also on the contents of the law that is applicable to the case, the corporate actors involved will generally only be held liable for harm that can be said to be a result of their intentionally or negligently wrongful conduct. Accordingly, they will only be held to have an obligation to compensate the damage caused by their operations where they have failed to take the precautions that could reasonably have been expected of them. In the absence of any provisions providing for stricter (*i.e.*, non-fault-based) forms of liability this means that the burden of adversity will only be shifted from the host country plaintiffs onto the multinational corporations involved where the latter can be said to have exercised insufficient care in conducting their transnational activities.

In the end, what is at stake here is not some scheme for global redistribution at the expense of the Dutch business community, but rather the rightful pursuit by host country plaintiffs before Dutch courts of remedies for harm suffered at the hands of multinational corporations that have in the pursuit of their private interests caused – and failed to redress – harm to people and planet locally. In a broader perspective, these cases are about corporate accountability in a transnational setting and about fairness not only on a local but also on a global scale. In light of the fact that the European Commission has also called on Member States to develop by the end of 2012 their plans on the implementation of the UN policy framework on business and human rights, it seems that the time has come for the Dutch government to put these foreign direct liability cases into a more realistic legal

and socio-political perspective and perhaps even recognize their broader use. In doing so, it seems that there is no getting around the fact that at least some action is required in addressing the main obstacles faced by host country plaintiffs seeking to bring meritorious foreign direct liability claims against Netherlands-based multinational corporations. This study provides a basis for the development of a (more realistic) policy agenda in this respect, as well as for a further development of the role(s) that the Dutch system of tort law may potentially play in promoting international corporate social responsibility and accountability more generally.

6.5 Concluding remarks

In this part, the rise and main characteristics of the socio-legal trend towards foreign direct liability cases has been discussed, as well as the factors that determine the feasibility of these cases. As a result not only of socio-political developments but also of the deteriorating legal status quo determining the feasibility of bringing those cases before US courts, it is to be expected that in the near to medium-term future a growing number of this type of transnational tort-based civil claim will be brought before domestic courts in other Western societies, including Europe. What has become clear is that the applicable regimes on international civil jurisdiction and the prevailing procedural and practical circumstances in EU Member States such as the Netherlands do in fact, under certain conditions, allow host country plaintiffs to bring their foreign direct liability claims there, in particular if that is where the defendant parent companies are based. Similarly, the tort systems in these countries may easily accommodate foreign direct liability claims against (parent companies of) multinational corporations for people- and planet-related harm caused abroad. Whether on the basis of home country or host country tort provisions, general principles of tort law and in particular the tort of negligence will generally be able to accommodate such claims, regardless of whether the alleged norm violations in dispute pertain to international or domestic, written or unwritten norms.

What has also become clear, however, is that procedural and practical circumstances in particular may not always be congenial to the pursuit of foreign direct liability claims before non-US courts. This is important in light of the scarcity of alternatives that host country victims tend to have when it comes to addressing and getting redress for the detrimental impacts of the transnational activities of multinational corporations on their people- and planet-related interests. It is also important in light of the increasing contemporary calls especially in Western societies for international corporate social responsibility and accountability and the scarcity of tools available to adequately regulate the transnational activities of multinational corporations with a view to protecting people and planet abroad. As a result, there is an increasing emphasis on the potential role that Western society tort systems may play when it comes to promoting international corporate

social responsibility and accountability, and the preconditions that need to be fulfilled in order for them to play this role.

In this part, a number of areas have been identified in which there may be room for further improvement of the contemporary legal status quo pertaining to the feasibility of bringing foreign direct liability cases before domestic courts in Europe. In the next part, the socio-political field in which foreign direct liability cases play out will be further explored, together with the role that Western society tort systems may play in promoting international corporate social responsibility and accountability more generally.

PART III

Foreign direct liability cases: perspectives

Introduction

The contemporary socio-legal trend towards foreign direct liability cases that has been discussed in the previous part clearly ties in with changing societal notions, especially in Western societies, on international corporate social responsibility and accountability. In the end, these cases revolve around the question whether and to what extent it is (legally) acceptable that Western society-based internationally operating business enterprises pursue profits at the expense of people and planet in host countries, even where this is done in compliance with regulatory standards as imposed and enforced locally. The contemporary socio-legal trend towards this type of transnational tort-based civil litigation raises the broader question as to what the potential role of tort law may be in promoting international corporate social responsibility and accountability.

As is clear from what has been discussed before, Western society systems of tort law may act as an indicator of societal change in this respect, by reflecting, through these cases, changing societal attitudes towards the societal responsibilities of internationally operating business enterprises. The question arises whether, to what extent and in what way Western society systems of tort law may also act as a facilitator of societal change where they are consciously and deliberately applied in order to bring about or further societal change in this respect by inducing internationally operating business enterprises to incorporate into their corporate policies, management decisions and operational practices an awareness and consideration of the impacts of their activities on people and planet in the societies in which they operate. This is of particular importance in light of contemporary pressure on home country policymakers to regulate extraterritorially, where necessary, the transnational activities of 'their' internationally operating business enterprises, as well as in view of the limited regulatory options currently in existence and the promise of private law regulation in this respect

In this part, the contemporary socio-legal trend towards foreign direct liability cases will be further explored with a focus on its broader socio-political and legal perspectives. The general framework of these broader perspectives will be gradually set out in the first three chapters of this part, after which a number of issues will be worked through further in a discussion. To this end, chapter 7 will provide an outline of the broader socio-political context within which this type of transnational tort-based civil litigation is set. In chapter 8, the contemporary challenges of global business regulation with a view to the promotion of international corporate social responsibility and accountability will be further explored. Following this, chapter 9 will go into the potential role that Western society systems of tort law may play in this broader context.

On the basis of these findings, this part will end in chapter 10 with a discussion in which answers will be sought to various of the questions raised in or by the preceding

chapters. These questions include how the contemporary socio-legal trend towards foreign direct liability cases should be understood in a broader societal context, as well as whether, in what way and to what extent Western society home country systems of tort law can and should play a role in promoting international corporate social responsibility and accountability. This discussion will be rounded off with recommendations as to what should be put on the policy agenda in order to improve and expand the role(s) of tort law in promoting international corporate social responsibility and accountability.

In line with its more abstract nature, also when compared to the technical-juridical discussion of foreign direct liability cases in part II, the discussion in this part will be based largely on secondary sources (*i.e.*, literature references rather than statutory and case law). As was also mentioned in chapter 2, the broad outline that is provided in this part of the role and functioning of systems of private law/tort law in Western societies largely rests on a basic comparative understanding of these systems and their similarities and differences. This understanding is based in part on the broad body of comparative literature on European legal systems that has been prompted by the tendency towards harmonization/unification of these systems in the EU context.

Chapters 8 and 9 will provide an exploration of the demands on the law in general and on home country systems of private law more particularly that are made by the rising calls for global business regulation with a view to promoting international corporate social responsibility and accountability. Chapter 10 will focus on Western society systems of tort law, which will be approached both as a dependent variable (an institution that reacts to and is shaped by today's societal demands and pressures) and as an independent variable (an institution that may be deployed to influence tomorrow's societal realities).

7 Foreign direct liability cases in a broader context

7.1 Actors, interests, principles

7.1.1 Multinational corporations in context: a visualization

As is clear from what has been discussed so far, one of the defining features that set foreign direct liability cases apart from other types of tort cases is the fact that they do not only raise specific (combinations of) legal issues, but also typically occur in a context of complicated socio-political relationships between a range of state and private actors. The principal actors involved in foreign direct liability cases are, of course, those who have suffered damage as a result of multinational corporations' operations in host countries and in that capacity bring civil claims before home country civil courts, as well as the corporate defendants, usually the parent companies of the multinational corporations involved. One of the main factors setting these transnational tort-based civil liability cases apart from ordinary tort cases is that they represent a range of competing interests that go far beyond those of the litigants, and as such may potentially affect a range of actors that is far broader than those directly involved in any particular foreign direct liability claim itself. This means that these foreign direct liability cases, their underlying issues and socio-political impacts, as well as the legal issues that they raise, can only be properly understood when viewed from a broader perspective.

The actor that occupies a central position within each of the various dimensions of the widening framework that will be discussed in this section is the multinational corporation. It represents the focal point in foreign direct liability cases, where its conduct is evaluated by Western society home country courts, and is the main subject of contemporary debates on international corporate social responsibility and accountability and on global business regulation.[1] Its interaction with the various actors that are directly or indirectly involved in foreign direct liability cases can be represented as follows:

1 Similarly: Muchlinski 2007, p. 82.

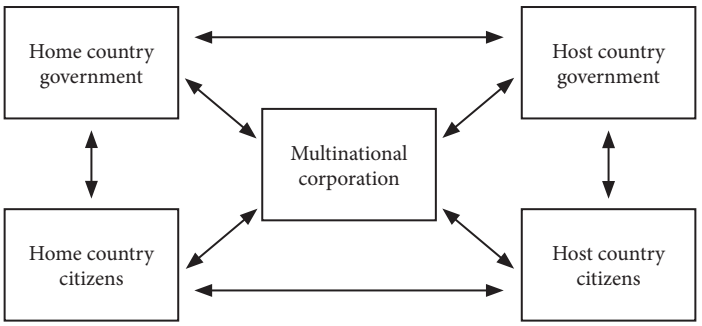

Figure 1. Multinational corporations in context

Of course, this diagram represents a drastic simplification of a situation that is much more complicated in reality, among other things by the fact that multinational corporations typically consist of a vast and intricate web of interrelated but legally separate legal entities, which means that both in fact and in law they cannot be said to be a single entity. However, for the purposes of this section, which aims to represent the actors, interests and principles making up the broader context of foreign direct liability cases, this simplified depiction will suffice.

Multinational corporations and host country actors

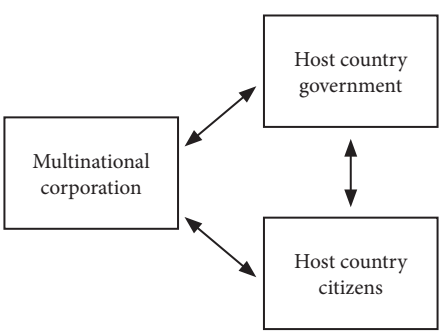

Figure 2. Multinational corporations and host country actors

The starting point in this context is the situation in host countries where multinational corporations conduct some of their business operations, operating local mines, factories, oil or gas pipelines, etc. As multinational corporations typically undertake their worldwide activities through a web of foreign direct investments, the local operations in the host country will generally be carried out by locally incorporated subsidiaries

(or, when unincorporated, local branches). These local subsidiaries may operate alone or together with private or state-owned local business partners, through joint ventures or otherwise. Whereas the local subsidiaries in principle carry out their local activities more or less autonomously, they are directly or indirectly, through links of ownership and control, connected with parent companies located in the multinational corporations' home countries. This makes it possible in theory for those parent companies to exercise managerial influence and control over the local subsidiaries, although the extent to which such influence and control is actually exercised over the subsidiaries' day-to-day activities will vary in practice.[2]

Although the multinational corporations' local subsidiaries will in principle fall within the regulatory competence of the host country government, just like host country citizens, this does not mean that these two types of actors are on a par with one another when it comes to their dealings with the governments of the host countries involved. First of all, there may be tight links between the economic interests of these local subsidiaries and the economic interests of the governments of the host countries in which they operate, where both parties act in close association with one another. Secondly, the multinational groups of which these local subsidiaries form part represent a force of their own, powerful enough to set their own rules or at least potentially able to command favourable regulatory conditions in the host countries in which they operate. After all, any host state will encourage the entry of firms that bring, through foreign direct investments, "[…] *new capital, technology, goods, or services that no locally based firm can supply at equivalent or lower cost*", and this is especially true when it comes to developing host countries.[3]

Multinational corporations' special position vis-à-vis the governments of the host countries involved is likely to be reflected in a very high level of access to and influence over political decision-making in those countries. It has been noted in this respect that "[t] *here is little doubt that* [multinational enterprises] *lobby governments and* [international governmental organizations] *to ensure that normative development is business friendly*".[4] A case in point is the information that was made public by Wikileaks in December 2010 on the seemingly far-reaching involvement of oil multinational Shell with the Nigerian government, which apparently provided it with first-hand knowledge of everything that was going on within the Nigerian ministries. The documents further revealed, among other things, that Shell top executives apparently had routine meetings with Nigeria's oil,

2 For more detail, see, for instance: Zerk 2006, pp. 49-53; Dine 2005, pp. 43-53. See also sub-section 1.1.2.

3 Muchlinski 2007, pp. 82-85 (quote p. 85). UN Special Representative John Ruggie has noted in this respect: "*Each legally distinct corporate entity is subject to the laws of the countries in which it is based and operates. Yet states, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so by having to compete internationally for investment*". UNHRC Report (Ruggie) 2008, p. 6.

4 Muchlinski 2007, pp. 105-108 (citations omitted).

gas and defence ministers as well as with top military leaders and senior advisors to the Nigerian president.[5]

Depending also on the particular political and socio-economic circumstances in the host countries in question, multinational corporations' relative bargaining strength vis-à-vis host country governments may be further enhanced by their mobility, in the sense of their flexibility when it comes to relocating all or part of their operations abroad, and by the dependence of the developing host countries involved on the much-needed investments, jobs and innovation they bring into the country. This allows these companies to freely pick and choose among potential host countries, except of course where the operations in question are geographically restricted, for instance because they require specific raw materials that can only be obtained at specific sites. It is both through their mobility and through the superior power, wealth and knowledge that come with the economies of scale that they represent, that multinational corporations set themselves apart from business enterprises that operate locally rather than internationally.[6]

These two factors, in combination with the high level of integration that may exist in multinational corporate groups, tend to give them a measure of insight in and control over the activities undertaken locally in the host countries involved that is unlikely to be matched by the governments of the host countries where they outsource their operations. In addition, the opacity of multinational corporations' transnational group and operational structures, buttressed by fundamental corporate law notions of separate corporate personality and limited liability, further enhances their elusiveness, typically rendering them impervious in practice to adequate outside regulation of their activities and the impacts that those may have on people and planet locally.[7]

The regulatory standards governing multinational corporations' local activities will in principle flow from the local rules and standards that are enacted by the governments of the host countries in which they take place and that are enforced by local courts. This also means that the protection of the people- and planet-related interests of local citizens from any detrimental impacts of those activities is in principle dependent on local standards as enforced by local courts. As the majority of multinational corporations' foreign subsidiaries are located in developing host countries, where regulatory standards on matters such as health, safety, welfare and the environment tend to be less demanding in practice than the standards imposed on corporate activities in the home countries where

5 See, for instance, with links to further information: Smith 2010.

6 Similarly: Zerk 2006, pp. 47-48.

7 According to UN Special Representative John Ruggie, "[t]*he root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation*". See UNHRC Report (Ruggie) 2008, p. 3. See also, for instance, Dine 2005, pp. 43-96.

the parent companies are based, the level of regulatory protection afforded will generally be significantly lower in these host countries than in the home countries involved.[8]

This situation tends to be closely linked to lower levels of development and welfare in the host countries concerned, often in combination with weak governance structures. Overall, these countries tend to score low, for example, on 'rule of law' indicators such as accountable government, publicized and stable laws that protect fundamental rights, accessible, fair and efficient process, and access to justice. Since lower regulatory standards generally entail lower production costs, this may make these developing host countries attractive venues for foreign direct investments by the multinational corporations concerned. At the same time, however, the resulting lower level of protection increases the risk that local business operations will have detrimental impacts on the people- and planet-related interests of the citizens of these host countries, and reduces their chances of being able to hold the corporate actors involved accountable for such detriment.[9]

Consequently, where host country regulatory demands on corporate actors are low, negative effects of production processes are easily externalized and as such may come to be borne in the end not by the corporations involved, but rather by those living in the host countries involved, and especially by vulnerable and/or marginalized local communities. It is generally recognized that permissive host country regulatory environments increase the risk of inadvertent or intentional blameworthy acts by the companies involved. Such acts are likely to remain without adequate sanctions or reparation especially in those host countries that are affected by conflict or where local authorities lack the capacity or will to protect the public interest and/or the interests of those societal actors that are most vulnerable. Especially over the past few decades, with the increase of transparency and information as a result of technological advancements and modern media, it has become clear that serious harm to human rights, health and safety, labour, environmental, and other social interests may be committed by companies operating under permissive regulatory regimes.[10] It is these issues that underlie contemporary debates on international corporate social responsibility and accountability and that trigger an increasing number

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8 See, for instance, Zerk 2006, pp. 84-85, who notes: "[...] *not all states have the same capacity to regulate companies effectively. Developing host states, highly dependent on foreign investment, face a particular set of problems. First, in sectors where there is competition for inward investment with other states (e.g. clothing manufacture), host states may find themselves in a relatively weak bargaining position, and their governments may be concerned about the potential effect of higher regulatory standards on the country's attractiveness as a foreign investment destination. Second, governments of poorer states may simply lack the technical and financial resources to monitor and enforce standards effectively*".

9 A 2006 survey by UN Special Representative John Ruggie of allegations of the worst cases of corporate-related human rights harm showed that corporate human rights abuses typically occurred in those countries "[...] *where governance challenges were greatest: disproportionately in low income countries; in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high*". See UNHRC Report (Ruggie) 2008 (quote p. 6); UNHRC Report (Ruggie) 2006, pp. 5-6. See also sub-sections 1.2.1 and 3.2.3.

10 See, similarly, UNHRC Report (Ruggie) 2006, pp. 6-9.

of initiatives in this respect, often in cooperation with the multinational corporations involved.[11]

Multinational corporations and home country actors

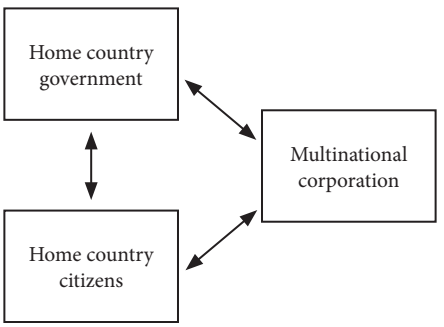

Figure 3. Multinational corporations and home country actors

The situation is somewhat different in home countries, where the multinational corporations' parent companies are typically located (incorporated and/or headquartered). It is in these home countries, which typically are developed economies, where the boardrooms are situated from which the groups' international activities in general are coordinated and managed, where corporate policies are drawn up and where the profits end up. It is also from there that the activities of subsidiaries operating in host countries are, to a greater or lesser extent, supervised and/or controlled by their home country-based parent companies.[12]

These multinational corporations occupy a special position with respect to home country actors as well. They will generally have a lot of clout with the governments of the home countries in which they are located.[13] After all, home countries also stand to benefit greatly from the presence and activities of multinational corporations operating in and out of their territories, through tax returns, employment, knowledge, innovation, etc.

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11 For examples of existing responses to challenges in the field of business and human rights, see, for instance: UNHRC Report (Ruggie) 2006, pp. 6-10. The report also notes, however, that many of the existing arrangements have fundamental weaknesses, for instance because they are geared more towards "[...] *what is politically acceptable within and among the participating entities*" than towards "[...] *objective human rights needs*", because they do not include 'determined laggards', and/or because they are fragmented and as such "[...] *leave many areas of human rights uncovered, and human rights in many geographical areas poorly protected*". For more detail on contemporary regulatory initiatives seeking to deal with issues of international corporate social responsibility and accountability see also *infra* sub-section 7.2.2.

12 See also sub-sections 1.1.2 and 3.2.3.

13 Braithwaite and Drahos refer to this as the 'capture or corruption of states by business'; they also state that "[t]*he global law-makers today are the men who run the largest corporations, the US and the EC*". See Braithwaite & Drahos 2000, pp. 610, 629.

Therefore, it is in these home countries' best interests, notwithstanding their demanding regulatory regimes, to retain a relatively favourable establishment climate that allows the international business enterprises located there to remain competitive, both locally and internationally. Failure to do so risks having these highly lucrative enterprises relocate to other potential home countries or having them outsource more of their activities to countries with less demanding regulatory regimes and/or lower wages. As such, the flexibility and mobility inherent in these internationally operating business enterprises not only affects their bargaining power vis-à-vis host country governments, but also with respect to home country governments.[14]

The regulatory standards governing the local operations of multinational corporations' parent companies within their home countries are largely defined by the legal systems of those home countries, as reflected in local legislation and enforced by local courts. The majority of multinational corporations active around the world have their home base in developed Western societies. This means that any activities undertaken by these multinational corporations' parent companies that fall within the home country regulatory ambit will generally be subject to the relatively sophisticated, detailed and demanding regulatory standards that characteristically apply in these developed societies. This regulatory ambit is necessarily limited, however, due to the fact that in today's legal order the geographical scope of domestic rules and regulations tends to be restricted to actors located and activities occurring within the territory of the state issuing them.[15] At the same time, as corporate groups multinational corporations tend to be regarded in law as assemblies of separate, legally independent corporate entities, rather than as integrated economic enterprises.[16] This means that multinational corporations' activities undertaken outside the home country, particularly those undertaken not by the parent companies themselves but by their foreign subsidiaries, business partners and/or sub-contractors, tend to fall outside the home country's regulatory ambit. As a result, the transnational activities of multinational corporations are typically subject to a patchwork of rules and regulations depending on the home and/or host countries in which these activities are effectively carried out.[17]

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14 UN Special Representative John Ruggie states with respect to the field of business and human rights that: "[h]*ome states of transnational firms may be reluctant to regulate against overseas harm by these firms because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those firms might lose investment opportunities or relocate their headquarters*". UNHRC Report (Ruggie) 2008, p. 6. See also, for instance, Braithwaite & Drahos 2000, p. 610, who state: "*Sometimes regulatory standards are lower than citizens want* […] *because economic analysis has persuaded governments that their firms would become less economically competitive to the point where the public interest in saving jobs is greater than the interest in stronger consumer or environmental protection*".

15 For more detail on the limitations and challenges involved in home country regulation of internationally operating business enterprises, see section 8.2.

16 See, critically, for instance: Dine 2005, pp. 43-62.

17 Similarly, for example: UNHRC Report (Ruggie) 2008, pp. 5-6. See also Dine 2005, pp. 43-62, who notes, *inter alia*: "*So far as companies are concerned, they benefit both from national laws which permit groups of companies to operate as a power block while treating them in law as separate companies and operations, and*

This situation has over the last few decades increasingly been experienced as unsatisfactory. Especially in Western societies, where advanced and relatively stable socio-economic environments have allowed people to broaden their views and look beyond their own immediate interests, the perceived regulatory deficit with respect to the transnational activities of internationally operating business enterprises has raised concern. This has turned the scope of the debates on corporate responsibilities in those societies towards the social responsibilities and accountability of internationally operating business enterprises in general and of multinational corporations specifically. In reaction to this, multinational corporations, especially those with high public profiles, have gone out of their way to convince the general public in Western societies, who often also represent their main pools of consumers, investors and employees, of their good intentions in this respect through voluntary initiatives such as corporate codes of conduct and/or business principles, reporting initiatives and labelling schemes. Despite these efforts, however, it is still generally felt that multinational corporations' international business structures and business practices remain characterized by a lack of transparency, which effectively obstructs the view of those in the home country who wish to establish whether 'their' multinational corporations indeed practise abroad what they preach at home, and a resulting lack of accountability for any detrimental impacts that their transnational activities may have on people and planet abroad.[18]

It is no surprise therefore that also under the influence of the wide media coverage of recent corporate scandals, both at home and abroad, home country governments throughout the Western world are dealing with increasing socio-political pressure to engage in some form of regulatory intervention with respect to the transnational activities of 'their' multinationals, *i.e.*, multinational corporations that are run by parent companies located within their regulatory ambit. In particular, local (home country-based) and international NGOs representing environmental, labour, human rights and consumer interests as well as international labour unions are persistently calling for governmental action in this respect.[19] Pressure for home country regulatory intervention may also follow more directly

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international laws which impose difficult jurisdictional barriers between the different component companies in groups so that it becomes exceptionally difficult to call companies to account for any wrongs that may be committed" (p. 45).

18 It is in recognition of these issues that the UN Commission on Human Rights in 2005 requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises, whose mandate comprised, *inter alia*, the request to "[...] *identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights*", as well as to "[...] *elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation*" (resolution 2005/69). For more detail, see: UNHRC Report (Ruggie) 2006.

19 See, for instance, with respect to labour standards and the environment: Braithwaite & Drahos 2000, pp. 242-243, 271-274.

from societal concern among the general public.[20] At the same time, however, these calls for home country regulatory intervention are receiving fierce opposition from local business communities in those Western societies, supported by local and international business and trade organisations, which tend to point to the potentially adverse impacts on home country economic and trade interests of any measures taken in this respect.[21]

As a result, policymakers in a growing number of Western society home countries are finding themselves faced with the dilemma of whether or not to take regulatory action in this respect. Those who would be willing, in principle, to do so are then faced with the difficult question of what type of regulatory engagement would be most suitable, also considering the regulatory tools they have at their disposal and the expected economic, social, and (international) political implications of utilizing any one of those tools. Furthermore, in considering whether and how to take regulatory action in this respect, they need to be constantly aware that their first and foremost duty is to the citizens of the home country which they govern. As such, they have to constantly balance the justifications for home country regulatory intervention in this context against the potential adversarial effects of such intervention on the interests of the home country and its citizens. Such adversarial effects may lie not only in the potentially reduced competitiveness of multinational corporations operating out of home countries that set high regulatory standards with respect to their international operations, but also in the costs the home country and its citizens as taxpayers may have to incur in order to effect such regulatory measures. At the same time, regulatory overzealousness in this respect by individual home countries may ultimately induce multinational corporations to relocate to other home countries, as they will typically "[...] *seek a business friendly environment that offers as few unnecessary regulatory hurdles as possible to the free choice of operating means*".[22]

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20 See, with respect to environmental disasters: Braithwaite & Drahos 2000, pp. 272-274. The recent BP oil spill in the Gulf of Mexico and the fast policy responses by the US government are a good example of the political pressure that may be exerted by public opinion in this respect. See, for example, 'On the beach', *The Economist* (3 June 2010).

21 Arguments like these tend to come up in the course of the wider debate in these societies on whether corporate social responsibility requires governmental regulation or should be left to corporate discretion. See, for instance, Zerk 2006, who notes (pp. 32-33): "[...] *representatives of companies and industry organisations argue that CSR should not be regulated. Regulation, it is argued, would stifle innovation and damage national 'competitiveness'. Instead, companies should be able to develop their own responses to CSR problems and, through peer pressure, collectively 'raise the bar' for industry in general. Not only would new regulations be counter-productive, say those in the 'voluntarist' camp, they are also unnecessary as companies already are aware that there are financial gains to be made in being 'socially responsible'*". See also, however, De Hoo 2011, pp. 22-26, who points out that the corporate world's mindset has gradually changed over the past decade from viewing corporate social responsibility as a threat to viewing it as an opportunity, and that views on corporate social responsibility have been widening. See also *infra* section 7.2.

22 Muchlinski 2007, p. 85.

Multinational corporations and state actors

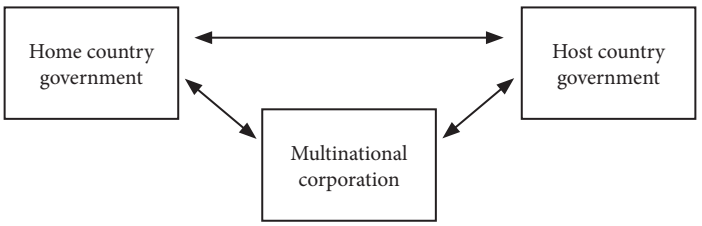

Figure 4. Multinational corporations and state actors

The question whether and to what extent home countries may regulate the way in which 'their' multinational corporations conduct their international operations arguably lays bare the inadequacy of the international legal order's focus on sovereign nation states when it comes to the regulation of international actors or activities. Under this traditional but currently still predominant paradigm, each country in which a multinational corporation undertakes activities, whether home or host country, has a sovereign right to regulate those activities as it sees fit, free from outside interference. Furthermore, due to its state-centred nature, the international legal system has traditionally been viewed as incapable of placing direct obligations upon multinational corporations. Indirect obligations may exist but are contingent upon individual states' ability and willingness to meet their international obligations by implementing and enforcing domestically any public international law norms relating to the behaviour of internationally operating business enterprises.[23] Even where international norms may be said to directly bestow rights or impose duties on multinational corporations, such as in the field of international human rights, the legal enforcement of those rights and duties will, in the absence of international fora able to exercise jurisdiction over claims by other private actors seeking to address corporate violations of those norms, have to be dealt with through domestic legal mechanisms.[24]

As has already been mentioned, the result of this situation is that in practice the regulatory ambit of each of the countries involved in multinational corporations' international operations in most cases tends to be restricted to locally executed segments of those operations. As such, it will typically not cover the whole operational chain from

23 Compare, for instance, with a focus on corporate responsibility for international crimes and/or human rights violations: UNHRC Report (Ruggie) 2007, pp. 7-14. Ruggie also notes, however: "*Long-standing doctrinal arguments over whether corporations could be 'subjects' of international law, which impeded conceptual thinking about and the attribution of direct legal responsibility to corporations, are yielding to new realities. Corporations increasingly are recognized as 'participants' at the international level, with the capacity to bear some rights and duties under international law*" (pp. 7-8).

24 See, for instance, for a detailed discussion of corporate liability under international law, Stoitchkova 2010. See also sub-section 1.1.3.

start (its design and/or set-up in the home country, followed by its management, control and/or supervision from there) to finish (its eventual execution in the host country).[25] This means that in principle there is not a single regulator that has the capacity to set rules for the entire scope of these multinational corporations' activities. It also means that the regulatory spheres of the various countries that have a regulatory interest in any one multinational corporation and its activities will inevitably meet at some points. Any unilateral expansion by one of these countries of its regulatory sphere in this respect is likely to result in an overlap with the regulatory sphere of another country and may potentially, depending on the regulatory interests involved on both sides, cause those regulatory spheres to collide, creating a potential source of conflict between the two would-be regulators.

Therefore, any regulatory actions that home countries may want to take with respect to the international activities of 'their' multinational corporations will require the express or implied consent of the host countries where the activities take place that those home countries intend to regulate extraterritorially.[26] It is not at all self-evident, however, that host countries will assent to such regulatory interference by home countries in the activities undertaken locally by multinational corporations. After all, the relatively less demanding regulatory standards on matters such as health, safety, welfare and the environment that may apply in developing host countries have the effect of lowering the costs of producing there, making them attractive sites for foreign direct investments by multinational corporations. In these countries in particular, such investments are vital for the progressive realization of economic development and prosperity, although in reality, as a result of serious corruption and/or overall inequalities in the distribution of wealth in these countries, their direct benefits will often be reserved for the local elite.

Any type of extraterritorial measures implemented by home countries with the aim of ensuring 'their' multinational corporations' socially responsible behaviour abroad would be likely to raise those standards (*i.e.*, make them more demanding), thus effectively cancelling out the competitive advantages associated with the (partial) relocation of business activities to host countries. As a result, such extraterritorial measures may well be perceived by the host countries where their effects are felt as unwanted forms of paternalistic or neo-imperialistic interference, or even veiled trade measures. After all, where the reason for the multinationals involved to outsource their activities to the host countries concerned is that local regulatory environments are less stringent, allowing

25 Similarly: Muchlinski 2007, p. 115; Dine 2005, pp. 68-76. See also sub-section 1.1.1. See, for more detail on the position of multinational corporations under public international law: Zerk 2006, pp. 60-103, who notes, *inter alia*: "*Many writers point to a 'mismatch' between the international legal system – built around the notion of a society of 'sovereign equals', each with jurisdiction over a defined patch of territory – and the reality of transnational corporate activities*". One of her conclusions is that, in the end, "[t]*he primary obstacles to effective international CSR regulation of multinationals are* [...] *not legal but political*".

26 See, for a more comprehensive discussion of the concept of extraterritoriality in the context of global business regulation, for instance: Zerk 2010; Enneking 2007, pp. 115-167; Zerk 2006, pp. 145-197. See also further section 8.2.

for lower production costs, such extraterritorial measures will in effect take away the competitive edge of some of these host countries by reducing the incentives for outsourcing activities there.[27]

Of course, such objections may be overcome where the home and host country governments involved reach mutual agreement over the regulatory standards that are to be set with respect to the transnational operations of the multinational corporations involved, for instance through bilateral or multilateral treaties. However, as a result of the divergent self-interests of the countries involved, reaching the international consensus necessary to come to some kind of international regime in this context, such as a multilateral treaty, remains problematic.[28] As has been indicated by host country policymakers in this respect:

> "*Cheaper labour cost is a form of competitive advantage that most developing countries rely upon out of necessity, but this has now been labelled as an unfair advantage. 'Social clauses' have been promoted to govern international trade, which may sound like concern for the welfare of the workers in the developing countries but which will effectively negate any competitive advantage that we may have*".[29]

Even where international regimes do exist, as is the case for instance with respect to certain matters in the environmental domain, these treaties in many cases "[...] *offer only symbolic victories to environmentalists – they are vague statements of intention with infrequent provision for enforcement of specific commitments*".[30] In reality, despite the fact that these treaties "*help to create among international actors a common language which the well-intentioned and less well-intentioned must use publicly*", such commitment of language is still too often not accompanied by a corresponding commitment of action.[31]

In practice, contentious issues may arise not just in situations where home countries attempt to get host countries to enforce more demanding regulatory standards on matters such as health, safety, welfare and the environment, but also in the reverse situation. Over the last few years, there has been increasing attention for the potentially problematic consequences in this context of bilateral investment treaties concluded between multinational corporations' home and host countries, and investment contracts

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27 For more detail on the reasons why multinational corporations' home countries may seek to extraterritorially regulate the activities abroad of 'their' multinational corporations, see Zerk 2006, pp. 151-160. See also Muchlinski 2007, pp. 115-117.

28 See also further sub-section 8.1.4.

29 Braithwaite & Drahos 2000, p. 518.

30 Braithwaite & Drahos 2000, pp. 294-295. Elsewhere (p. 270), they even cynically refer to these treaties as "*frameworks with little substance, frameworks for saving a planet that is already substantially lost*". Still, they do find that even such 'weak' regulatory regimes do have merit, as they play an essential role in the dynamic process towards building global regulatory regimes. They do so by facilitating a dialogue which increases governmental concern and allows states to re-evaluate their interests, a process that necessarily precedes decision-making on international standards (p. 295).

31 Braithwaite & Drahos 2000, p. 517.

concluded directly between private investors and host states (so-called 'host government agreements').[32] Such treaties and contracts are primarily drafted in order to address investor concerns and generally aim to create favourable, stable regulatory regimes in the host countries with respect to foreign direct investments. However, these instruments are increasingly criticized for not adequately reflecting the interests of host country citizens who may be affected by the foreign investments to which they pertain. A related point of criticism is that in authoritatively establishing the legal regimes applicable to those foreign investments, such bilateral investment treaties and host government agreements stand in the way of the improvement by the host country of regulatory standards on matters such as health, safety, welfare and the environment so as to better reflect the interests and needs of its citizens.[33] So-called 'stabilization clauses', for instance, may allow multinational corporations to hold the host state legally accountable, usually by way of arbitration, for any changes to the regulatory regime applicable in the host country that may adversely affect (the profitability of) their operations there and/or for other alleged deviations.[34]

Multinational corporations and private actors

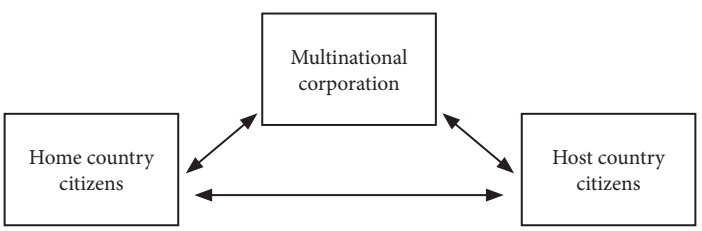

Figure 5.Multinational corporations and private actors

As has already been mentioned, the principal thrust towards home country regulatory action with respect to the social responsibility and accountability of internationally operating business enterprises is emanating from home country and international NGOs

32 See, for example, UNHRC Report (Ruggie) 2010, pp. 6-7. See, generally on bilateral regulation: Muchlinski 2007, pp. 117-118.

33 For a more detailed discussion of this matter, see, for instance: Cotula 2008; Leader 2006.

34 Compare Nollkaemper 2009, pp. 56, 411-413. Illustrative in this respect are the foreign direct liability claims against Texaco/Chevron brought by Ecuadorian and Peruvian citizens for environmental damage caused in the Oriente Region, first in the US and upon dismissal in Ecuador. In the course of this litigation, Chevron filed an international arbitration claim before the Permanent Court of Arbitration in The Hague, alleging that in the course of this lawsuit the government of Ecuador has violated a US-Ecuador bilateral investment treaty. In February 2011 the international arbitration panel ordered the Ecuadorian government to suspend any judgment rendered in the proceedings before its courts against Chevron. See for more information and further references on these legal entanglements, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador>. See also Muir Watt 2011a.

and a number of international organisations, as well as – to some extent – from the general public in these home countries.[35] The relatively high socio-economic standards and overall welfare enjoyed by the majority of those living in Western societies, in combination with the growing supply of reliable information on what is going on in the world that is made available to them through increasingly advanced media, raise an awareness that their choices and actions may have consequences for the interests of those living abroad. In most Western societies, this is leading to a growing realization among the public at large that their comfortable standards of living may come at a price to others in less comfortable situations. Increasingly, consumers, politicians, shareholders and other investors, spurred on by a growing number of increasingly active NGOs, are demanding transparency with respect to the global ripple-effects of their purchasing behaviour, their investments and their policies. As has been noted in this respect:

> "*Levi-Strauss, Wal-Mart, Dayton-Hudson, Reebok and other firms have been pressured by media exposure and shareholder resolutions from ethical investment activists into auditing the compliance of their international subcontractors with labour standards*".[36]

As has been mentioned, multinational corporations are seeking to meet these demands by providing more transparency with respect to their international business practices. This has resulted in the proliferation over the past decade of a large variety of independent reporting initiatives, monitoring schemes, behavioural guidelines and labelling schemes, next to the corporate codes of conduct promulgated by these multinational corporations themselves. Some, however, particularly home country-based and international NGOs striving for increased awareness and protection of environmental, labour and human rights interests and/or international corporate social responsibility and accountability in general, remain critical. They demand more efforts and especially more results from corporate actors in adopting socially responsible standards of behaviour, both at home and abroad, and in providing the transparency needed for others to ascertain that they do. They also expect more and more coercive efforts from home country governments in inducing such standards of behaviour and in correcting behaviour that is deemed socially unacceptable.

Whereas some of these organisations are attempting to change corporate behaviour in this respect from within, by taking a cooperative approach, others pursue more militant courses of action. Growing numbers of increasingly detailed and professional reports are published that expose and denounce perceived social wrongs occurring abroad, publicly naming and shaming the multinational corporations involved. The information upon which these reports are based is generally obtained through increasingly sophisticated

35 Note that the impact of NGOs on regulatory initiatives with respect to internationally operating business enterprises is especially strong in the environmental field. See Braithwaite & Drahos 2000, pp. 271-272.

36 See, for instance: Braithwaite & Drahos 2000, pp. 254-255 (citations omitted).

global networks of civil society organisations. In addition, a number of these organisations have applied themselves to providing host country individuals, whose interests have been adversely affected by multinational corporations' activities there, with the practical, legal and financial assistance necessary to help them pursue remedies, for instance through foreign direct liability cases brought before courts in the home countries of the multinational corporations involved.

7.1.2 Conflicting interests, contesting principles, different world-views

It is obvious that the various broader societal, economic and political interests that play a role in this wider context do not always go together very well. In fact, underlying the various standpoints of the different actors involved are a number of conflicting principles that are likely to guide the conduct of the different actors in this context and as such will also determine their attitude towards foreign direct liability cases. In turn, these principles reflect different world-views. In this sense, the different positions that may be taken in this broader context may be seen as representing a continuum with those promoting principles such as consistent best practice, continuous improvement, harmonization and transparency on the one side and those promoting principles such as deregulation, lowest-cost location, rule compliance and national sovereignty on the other.[37]

On one end of the continuum are those who take the view that in situations of double standards, internationally operating business enterprises should seek to apply the highest societal standards throughout their international operations, especially when it comes to health and safety, environmental, labour and human rights matters. This principle of consistent best practice (or world's best practice) suggests that multinational corporations should apply the same standards to all of their operations, irrespective of where in the world those take place, and also in their interactions with business partners such as suppliers, contractors, consultants, franchisees and joint venture partners. It also implies that in those worldwide operations and interactions multinational corporations should strive to apply the highest available standards, meaning that when operating in host countries where the requirements that apply to their activities on the basis of local regulations as enforced in practice are lower than the standards set for similar activities conducted in their home countries, they should seek to apply the higher standards. In this view, multinational corporations' directors and managers should not take advantage of weak systems of governance resulting in inadequate protection of local public or third party interests when operating abroad, no matter how much pressure is brought to bear on them to "[...] *yield to the temptations of labour and environmental 'arbitrage' as a route to*

37 Compare Braithwaite & Drahos 2000, who define principles as "[…] *abstract prescriptions that guide conduct*" and place them next to mechanisms, which "[…] *are tools that actors use to achieve their goals*" (p. 9).

cost-savings".[38] A related principle is that of continuous improvement, according to which companies may be expected to continuously seek to improve their performance when it comes to minimizing their impacts on people- and planet-related interests, and to do better year after year.[39]

Together, these principles may lead to expectations that in situations of double standards, multinational corporations set and adhere to behavioural standards that exceed behavioural requirements imposed by local regulations and enforced by local courts, especially where it comes to their operations in developing host countries. Those promoting principles of consistent best practice and continuous improvement commonly argue that in the present world in which consumers, investors and the general public in developed societies are increasingly aware of global concerns pertaining to, *inter alia*, the environment, health and safety, human rights and labour standards, internationally operating business enterprises as well as countries stand to gain from being leaders rather than laggards in adopting higher standards.[40] At the same time, "[h]*ome-base transnationals from those nations can be recruited to support upgrading of standards in other nations, through their subsidiaries in those nations, thus setting back their competitors from laggard nations*".[41] The current increase in numbers, complexity and impact of self-regulatory schemes on the basis of which companies voluntarily adopt higher standards than strictly required by existing state or international regulation, not only in the environmental domain but also in other fields, attests to the fact that multinational corporations pay heed to the growing expectations in this respect.[42]

Generally speaking, those urging multinational corporations to adopt consistent best practice and to continuously improve their performance in this respect are also urging them to provide transparency on their impacts on people and planet around the world. Such transparency is crucial in light of the fact that the only way to externally measure the performance of multinational corporations in this respect is on the basis of adequate information. Sure enough, increasing demands for transparency, especially by NGOs, and the ensuing proliferation of a wide variety of mostly voluntary transparency mechanisms over the past decade, have greatly increased the amount of information that is made available to consumers, investors and the general public in developed societies on the foreign business practices of internationally operating business enterprises. As a result, multinational corporations are increasingly encouraged (and, in some cases, compelled)

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38 For further detail, see, for instance: Braithwaite & Drahos 1999, pp. 24 and further; Kerr, Janda & Pitts 2009, pp. 285-345 (quote p. 287).

39 Compare Braithwaite & Drahos 2000, pp. 25 and further.

40 See, for example, with respect to environmental standards: Braithwaite & Drahos 2000, pp. 267-269, 294. In the CSR debate, this view is commonly referred to as the business case for CSR; see further *infra* sub-section 7.2.1.

41 Braithwaite & Drahos 2000, pp. 267-268.

42 Braithwaite & Drahos 2000, 517. With respect to these self-regulatory standards, Braithwaite and Drahos refer, *inter alia*, to the environmental management standards developed by the International Organization for Standardization (ISO). See further *infra* sub-section 7.2.2 and sub-section 8.3.1.

to provide periodic reports on their environmental and social performance, for instance, and to disclose material information relating to environmental and social matters within their sphere of influence.[43]

On the other end of the continuum, however, are those promoting principles such as deregulation, lowest-cost location, rule compliance and national sovereignty. According to these principles, the number and stringency of rules regulating international business practices should be reduced rather than increased. Furthermore, economic activity should be located wherever and under whatever regulatory rules it can be transacted most cheaply. According to this view, the fact that multinational corporations are able to shift their operations from countries with relatively demanding regulatory standards to host countries with lower standards and as such benefit from situations of double standards is a good thing, as it allows them to produce efficiently and at low cost, and it generates investments, jobs and knowledge in the host countries involved. When combined with the principle of rule compliance, which implies that these internationally operating business enterprises need only go as far as local rules require in the protection of local public or third party interests, and no further, this mobility of capital allows these companies, in the pursuit of low production costs, to relocate their operations to host countries with relatively low regulatory standards on matters such as health and safety, the environment, labour and human rights. And although it is often argued that the adoption of these principles will induce especially developing host countries in competition for foreign investments to engage in a regulatory race to the bottom in which they set their standards as low as necessary to remain competitive vis-à-vis other host countries, the tenability of this race to the bottom hypothesis has not gone unchallenged.[44]

At the same time, principles of consistent best practice and continuous improvement, especially when propagated by developed home countries, may be said to conflict with the principle of national sovereignty, which holds that the nation-state has supreme power over matters taking place within its territory and/or affecting its citizens. Different societies and different cultures come with different values, meaning that one standard may not fit all; "[...] *what may seem appropriate in one country may not be so in another*".[45] Accordingly, calls by civil society actors and/or home country governments upon multinational corporations to adopt consistent best practice in their worldwide operations may be experienced by the host countries involved as at best bothersome and paternalistic. At worst, they may be considered to constitute unwanted interference in their sovereign right to regulate actors and activities within their territories as they see fit and to set the level of protection that they see fit with respect to public and private interests located within their territories. After all, the host country governments involved may have compelling

43 For an in-depth discussion of the principle of transparency, see Kerr, Janda & Pitts 2009, pp. 241-284.
44 Braithwaite & Drahos 2000, pp. 279-280, 481-482.
45 Kerr, Janda & Pitts 2009, p. 291.

reasons not to regulate the multinational corporations operating within their territories too stringently, especially if they want to remain attractive to foreign direct investors and/or if they have made a conscious choice to sacrifice some private or public interests for the sake of economic development.

Furthermore, compliance by multinational corporations with expectations of consistent best practice, whether voluntarily or in response to home country regulatory requirements to that end for instance, may risk affecting their competitiveness in the short run. Adopting higher standards than those that are legally imposed and enforced locally may detrimentally affect the competitiveness of the multinational corporations involved vis-à-vis multinational corporations operating out of societies where principles of consistent best practice and continuous improvement are not as strongly supported, as well as vis-à-vis local host country business enterprises. After all, where no global level playing field exists in this respect, their competitors may not be similarly required or inclined to adopt or promote operational standards that exceed local regulatory standards and practices in situations of double standards. At the same time, living up to these expectations is likely to come at a price, one that the shareholders and other investors of these multinational corporations and the consumers of their products or services may not be willing to pay. Furthermore, home countries may ultimately risk capital flight to other home countries with relatively more favourable business climates when they unilaterally present multinational corporations operating out of their territories with highly stringent requirements to adopt such consistent best practice.

Some of these objections could be overcome if the applicable rules and standards were to be harmonized, for instance through multilateral agreements, on the basis of which the same standards would govern business operations around the world. This would create a level playing field for business enterprises worldwide and obviate the need for multinational corporations to independently adopt consistent best practice. However, as has been discussed, the substantive international consensus that would be needed to effectively bring about uniform, binding international standards of protection for people- and planet related-interests in relevant subject-matter areas such as health and safety, labour, human rights and the environment seems to be lacking just now. Existing regimes in these areas are few and far between, and where they do exist the consensus tends to produce merely vague aspirational standards, which only through further elaboration by individual states are suitable to provide multinational corporations with behavioural guidelines, and which for their enforcement are dependent again on an individual state's ability and willingness to do so through domestic enforcement mechanisms. This means that the realization of a binding international regime providing uniform standards of conduct for multinational corporations and their international activities with a view to creating a universal level of protection for people- and planet-related interests and a level playing field for multinational corporations around the world, provides a long-term ideal

rather than a short-term solution that may reconcile the views of those on opposite ends of the continuum.

With the rise in numbers and importance of multinational corporations and with the shift in focus of domestic debates on corporate social responsibility to the responsibilities and accountability of internationally operating business enterprises, the conflicting interests, contesting principles and different world-views that exist in this respect have increasingly come to the fore in the debates on international corporate social responsibility and accountability that are taking place in Western societies around the world. As will be discussed further in this chapter, recent developments in this respect suggest that the expectations in Western societies with respect to the standards adhered to by multinational corporations in their worldwide activities are shifting towards the consistent best practice end of the spectrum. Increasingly, multinational corporations are expected to take responsibility for the impacts of their operations on people and planet worldwide, regardless of the protection afforded to these interests by conduct-regulating rules imposed by local authorities. It is in light of these developments that the contemporary socio-legal trend towards foreign direct liability cases should be seen.[46]

7.2 International corporate social responsibility and accountability

7.2.1 Defining (international) corporate social responsibility and accountability

Corporate social responsibility

The concept of corporate social responsibility (CSR) itself is not only in vogue but is also a somewhat vague concept that may mean many things to many people.[47] The way it is defined by different actors and interest groups in society generally reflects the agenda and/or preferences of whoever provides the definition. As has been noted in this respect:

> "*The CSR field* [...] *brings together, as allies or adversaries, a multitude of actors who occupy a variety of strategic positions. The field therefore provides for the formation of coalitions, commercial relations, and ideological networks that coalesce around certain specific understandings (and vested interests in pursuing certain understandings) of the very term* social responsibility".[48]

Whereas NGOs often present corporate social responsibility as a compulsory concept involving ethical imperatives accompanied by legal obligations for example, organizations

46 See further *infra* section 7.3.

47 See, in more detail and with an overview of different definitions of corporate social responsibility: Kerr, Janda & Pitts 2009, pp. 5-32.

48 Shamir 2004, p. 648.

more closely related to business interests usually stress the concept's voluntary nature and/or depict it as a matter of corporate philanthropy.[49] Also in the literature on corporate social responsibility its exact definition is subject to – sometimes slight – differences in focus and ambit.[50] The difficulties in defining an exact and universal definition of corporate social responsibility are not just the result of conceptual differences of opinion, but are also linked to the fact that it a dynamic concept, which encompasses a potentially very wide range of sub-issues and is constantly evolving. After all, "[t]*he notion of what is* socially responsible *is situated by contemporary needs and concerns and thus cannot be pinned down in precise and unchanging terms*".[51]

The CSR concept may have a normative purport and/or outcome-focused orientation where it emphasizes the role that companies are expected to play in society and their responsibilities in contributing to desirable societal and environmental outcomes. In this sense, it may be defined as:

> "[...] *the notion that each business enterprise, as a member of society, has a responsibility to operate ethically and in accordance with its legal obligations and to strive to minimise any adverse effects of its operations and activities on the environment, society and human health*".[52]

It may also have a more operational purport and/or process-focused orientation, however, where it emphasizes the way in which companies can organize their business activities and especially their decision-making processes so as to be able to properly respond to the societal expectations that exist in this respect.[53] In this sense, it may be described as:

> "[...] *a shift in the focus of corporate responsibility from profit maximisation for shareholders within the obligations of law to responsibility to a broader range of* stake*holders, including communal concerns such as protection of the environment, and accountability on ethical as well as legal obligations*".[54]

The notion of corporate social responsibility is often equated with the so-called 'triple bottom line' (people, planet, profit), which expresses the view that companies should reconcile their primary interest, the pursuit of profits (bottom line), with broader societal interests of social justice (people) and environmental quality (planet).[55] Accordingly, corporate social responsibility can be seen as reflecting society's expectations with respect

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49 Similarly: Zerk 2006, pp. 29-32.
50 Similarly: Eijsbouts, Kristen *et al.* 2010b, pp. 16-17.
51 Kerr, Janda & Pitts 2009, p. 5. See also: Eijsbouts 2011, pp. 11-17; Eijsbouts, Kristen *et al.* 2010b, pp. 4-8; Lambooy 2010, p. 12.
52 Zerk 2006, p. 32.
53 Eijsbouts 2011, pp. 31-34; Eijsbouts, Kristen *et al.* 2010b, pp. 23-31; Zerk 2006, p. 31.
54 McBarnet 2007, p. 9.
55 See, in more detail: Elkington 1999. See also, for instance: Eijsbouts 2011, pp. 7-17.

to the extent to which companies should integrate environmental and social imperatives into their traditional focus on economic considerations, and how they should balance these often competing interests.[56] The particular environmental and societal concerns that may be said to fall within the corporate 'sphere of influence' and that as such may have to be taken into account vary according to the type and geographical location of each individual company's activities; generally speaking, they encompass "[...] *the people and situations that are in contractual, economic, geographic and political proximity with the corporate enterprise*".[57]

The CSR concept is related to but also fundamentally different from the concept of corporate governance. In the latter, the corporation takes central stage as corporate governance primarily pertains to the way in which it is directed, administered or controlled in light of the interests of the corporation itself and those directly involved in it.[58] It should be noted however that different approaches exist in this respect in different legal systems. In common law systems, especially in the US, the focus is almost exclusively on the interests of the company's shareholders (the so-called shareholder primacy principle) and the creation of short-term shareholder value (the so-called shareholder wealth maximization principle); the main internal relationship to be governed being the fiduciary duties that the company's directors owe to its shareholders. The stakeholder-oriented models of corporate governance on the European continent are geared more towards long-term value maximization and also take into account the interests of non-shareholder stakeholders, including employees, creditors, business partners and the community at large.[59] Still, even here the emphasis is in the end on the interests and the continued existence of the company itself.

By contrast, the concept of corporate social responsibility focuses on the way in which a corporation through its operations interrelates with its external environment; it does not take as its point of departure the interests of the corporation and those directly involved in it, but rather focuses on the way in which it impacts the interests of third parties outside the company. Accordingly, the CSR debate addresses companies' responsibilities towards the interests of a wide range of so-called stakeholders, *i.e.*, individuals or groups that may affect or may be affected by the company's actions, decisions, policies, practices or goals and whose specific interests society may expect companies to somehow take into account. CSR stakeholders may include for instance, depending on each company's particular

56 Compare Kerr, Janda & Pitts 2009, p. 9; McBarnet 2007, p. 9; and, in more detail, Eijsbouts 2011, pp. 7-37. See also further *infra* sub-section 7.2.3.

57 Kerr, Janda & Pitts 2009, pp. 9-12.

58 Kerr, Janda & Pitts 2009, pp. 19-22.

59 See, for instance: Eijsbouts 2010, pp. 47-60, where it is noted that the UK steers a middle course in this respect with its so-called enlightened shareholder value approach. In this approach each of the directors has a duty to take into consideration the company's long-term interests as well as the interests of certain non-shareholder stakeholders (employees, suppliers, customers, etc.), with a view to promoting shareholder value in the long term.

sphere of influence, its employees and their representatives, its customers, its business partners and suppliers, the community at large (which may be affected both beneficially and detrimentally by the company's operations), particularly vulnerable communities, minorities and individuals within the societies in which the company operates, NGOs, governments or other corporate regulators, and the environment.[60]

Especially in the European continental stakeholder models of corporate governance, there may be considerable overlap between the stakeholders whose interests the company should take into account from a corporate governance perspective and those whose interests it should take into account from a CSR perspective. After all, the notion of stakeholder in itself "[...] *reflects the idea that corporations should consider the concerns of a broader range of persons or groups than merely company shareholders*".[61] In the end, however, although the two concepts may require that account is taken of the interests of similar stakeholders, the rationales for doing so are very different; whereas corporate governance remains focused on the corporate interest and value maximization, corporate social responsibility revolves around the protection of people- and planet-related interests from companies acting in the pursuit of profits. Although corporate profits and the protection of people and planet may sometimes converge (this is often referred to as the business case for CSR),[62] there are also situations in which what is in the company's best interests is diametrically opposed to what would be in the best interests of, for instance, neighbours, the community at large and/or the environment.

It is with a view to these situations that, in my opinion at least, a distinction should be made between the two concepts. It should be noted, however, that not everyone would agree; according to Eijsbouts, for instance, "[t]*he most recent view* [...] *is that the corporate governance concept, of course in an extended way, should encompass CSR*".[63] In my view, to equate corporate social responsibility with corporate governance is to pass over the fact that the latter still puts the position, interests and continued existence of the company itself first, unlike the former, which focuses on the interests of third parties and society at large. Accordingly, despite the undeniable bracket frames and potential for mutual reinforcement, amalgamating these two concepts risks limiting the potential and reach of each of them.

International corporate social responsibility

Since as a result of globalisation the majority of business operations around the globe by now have transnational aspects of some kind, the focus of CSR debates around the world has progressively shifted to corporate social responsibility in an international context, including and focusing on the interests of foreign stakeholders next to those of domestic

60 Kerr, Janda & Pitts 2009, pp. 13-14. See also: Lambooy 2010, pp. 6-7.
61 Kerr, Janda & Pitts 2009, p. 13. See also, for more detail on the stakeholder concept: Mullerat 2010, pp. 225-234.
62 See, for instance: Schreck 2009; Vogel 2008.
63 Eijsbouts 2011, pp. 42-45 (quote p. 43). See also Eijsbouts 2010, pp. 55-60.

stakeholders. As such, the range of interests that internationally operating business enterprises are expected to reconcile with their core business, the pursuit of profits, is widening. Especially when it comes to business operations in developing societies with weak systems of governance resulting in relatively poor protection of local public or third party interests from the adverse consequences of those operations, business practices that comply with local rules will more and more often be found to be lacking on the basis of developed society expectations of consistent best practice in this respect. Accordingly, Zerk notes that:

> "[...] *for campaigners based in the richer, industrialised countries of the world, the issue at the top of the agenda continues to be the treatment by multinationals of the most vulnerable, particularly those who live and work in less developed countries*".[64]

It is in this context that Western society expectations of consistent best practice and continuous improvement come to the fore, which in essence reflect the normative idea that internationally operating business enterprises, when confronted with double standards (in the sense of different levels of protection of people- and planet-related interests) in the countries in which they operate, should seek to independently adhere to the highest applicable standards throughout their international business operations. This is especially likely to be relevant when it comes to their operations in developing host countries, where relatively less demanding regulatory standards on matters such as health, safety, welfare and the environment may apply to corporate activities than would apply to similar activities in the home countries from which these internationally operating business enterprises coordinate, supervise and/or control their transnational activities. These less demanding standards of behaviour may reflect conscious policy choices by the authorities in the host countries involved, but may also be a result of regulatory incapacity; in the latter case, home country expectations that multinational corporations should adopt consistent best practice in their host country operations as well are less likely to cause controversy than in the former. An example is that of multinational corporations operating in failed states, where for instance as a result of internal struggle there is no government that is able to fulfil the conditions and responsibilities of a sovereign state. In those situations in particular, multinational corporations may be expected to take over some of the responsibilities that would normally be reserved for local authorities, in the sense that they independently set and adhere to higher standards with respect to their impacts on people and planet locally than may be required of them on the basis of locally imposed and/or enforced conduct-regulating rules.[65]

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64 Zerk 2006, p. 22. See also further sub-section 7.2.3

65 See *supra* section 7.1 and *infra* sub-section 7.2.3, as well as sub-section 1.2.3. For more detail on the principle of consistent best practice, see also Kerr, Janda & Pitts 2009, pp. 285-345.

Whereas the main issues in this international CSR context pertain to the responsibilities of internationally operating business enterprises with respect to labour norms, health and safety norms, environmental norms and human rights norms, other issues may also come up, for instance with respect to bribery, unfair competition, consumer interests, knowledge-dispersal and intellectual property rights, transparency and tax evasion.[66] As the debates on international corporate social responsibility currently stand in most Western societies, these issues may be raised with respect to all types of internationally operating business enterprises that are located within those developed societies and that may through their transnational operations somehow affect foreign stakeholders. Consequently, it is not just the foreign business practices of big, highly integrated multinational corporations with an abundance of foreign subsidiaries that are being addressed, but also for instance those of companies, both large and small, that work with foreign buyers and/or foreign suppliers. In this sense, the notion of 'supply chain responsibility' that is often used in this context indicates that a company may not only be expected to take responsibility for its own activities abroad, but also, under certain circumstances, for those of its foreign business partners.[67]

Still, responsibility for another company's activities goes hand in hand with the prospect of actually being able to exert the influence necessary to induce the other party to improve its business practices. It is in this light that the preoccupation in the CSR context with multinational corporations in particular should be understood. After all, the prospects for internationally operating business enterprises to exercise influence or control over local business partners seem best where the business enterprises involved are parent companies and their local subsidiaries that are all part of the same, highly integrated multinational groups. In reality, however, the structures of ownership as well as the degrees of actual management control of parent companies over their direct or indirect subsidiaries within multinational groups may vary widely. At the same time, other types of internationally operating business enterprises may in practice also have a large degree of control and influence over contractually rather than equity related foreign business partners and the local activities conducted by them. In the end, it is very possible that a company that has a long-standing and close working relationship with its foreign suppliers will in

66 See, for instance: Eijsbouts, Kristen *et al.* 2010b, pp. 4-8, as well as Lambooy 2010, pp. 10-11, who notes that besides such general themes that can be said to apply to all types of companies, "[...] *many sectors of industry have special concerns that need to be taken into account*". See also, for instance, the OECD Guidelines for Multinational Enterprises (2011 edition), which "[...] *provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards*" in a broad range of subject matter areas: disclosure; human rights; employment and industrial relations; environment; combating bribery, bribe solicitation and extortion; consumer interests; science and technology; competition; and taxation. Available at the OECD website: <www.oecd.org/dataoecd/43/29/48004323.pdf>.

67 For an in-depth discussion of the matter of supply chain management, which dependent on the particular definition chosen is closely related to and/or to some extent overlaps with the topics under discussion in this study, see EC Report (Van Opijnen/Oldenziel) 2011.

practice have more say over the way they conduct their local operations than a parent company may have over any of the foreign subsidiaries to which it is directly or indirectly linked. This explains why most contemporary debates on international corporate social responsibility and most initiatives developed in this respect are aimed not just at multinational corporations that carry out their transnational operations through a web of foreign direct investments and locally incorporated subsidiaries, but at all internationally operating business enterprises that may somehow through their business dealings in host countries, whether directly or indirectly via local subsidiaries, business partners and/or sub-contractors, have a detrimental impact on local people- and planet-related interests.[68]

Corporate accountability

Closely connected to the concept of (international) corporate social responsibility is the concept of (international) corporate accountability. Where corporate social responsibility requires companies to take into account the impacts of their business practices on people- and planet-related interests, corporate accountability goes one step further. On the one hand, it requires companies to account publicly for the impacts of their activities on their stakeholders, for instance by reporting on CSR-related matters or by engaging directly with those stakeholders. On the other hand, it requires both companies and governments to enable stakeholders whose interests have been detrimentally affected by corporate activities to hold the corporate actors involved to account, by providing adequate redress mechanisms.[69] Increasingly, the two notions seem to be going hand in hand, as corporate social responsibility, both in a domestic and an international setting, seems to be perceived less and less as a voluntary concept and a matter of corporate discretion, and more and more as an external obligation to society to achieve "[...] *results or success in line with stated business goals, legal requirements, and social expectations*".[70]

In this sense, corporate social responsibility may be seen as a positive, normative, process-based and internally-focused notion that refers to the incorporation and observance in the operations of business enterprises of contemporary notions on responsible business practices that are held in the societies in which they operate. It may be said to involve ethical obligations of means that may or may not be reflected in and/or incentivized by the law and legal obligations, and a process with which *companies* are positively engaged in order to make their business practices more socially responsible.[71] Corporate accountability, on the other hand, may be seen as a more repressive, outcome-based and externally-oriented notion that refers to the idea that business enterprises must answer to the societies in which they operate, a process that gives *society* more power in

68 Compare also sub-sections 1.1.2 and 3.2.2.
69 See Kerr, Janda & Pitts 2009, pp. 27-29; Bendell 2004, p. 18.
70 Kerr, Janda & Pitts 2009, p. 29.
71 Compare Bendell 2004, p. 18.

determining what constitutes responsible corporate behaviour and what does not.[72] This means that companies may be required to account for the way in which they discharge their social responsibilities, and may be held accountable for any adverse consequences that result from business practices that are considered as below standard in this respect. As such, the notion of corporate accountability turns the ethical obligations of means that form the basis of the notion of corporate social responsibility into ethical obligations to produce or avoid certain results; in turn, those obligations that may take the form of legal duties.

7.2.2 Legal aspects of (international) corporate social responsibility and accountability

A role for regulation?

A lasting area of controversy permeating the debates on (international) corporate social responsibility and accountability has been the question as to which role is reserved for the law in the definition of and making operational the CSR concept.[73] Whereas in many Western societies business enterprises have proactively attempted to address public concerns over the potentially adverse societal and/or global impacts of their operations, the official position in the debates on (international) corporate social responsibility and accountability remains that corporate social responsibility is mainly a voluntary concept and that the adoption of corporate CSR policies is "*a matter of business going the extra mile beyond what the law requires*".[74] In this view, corporate social responsibility is a matter of self-imposed ethics, which, even where they give rise to internal business commitments, remain voluntary and discretionary and as such do not create any external obligations.[75] By and large, policymakers have tended to agree with this reading of corporate social responsibility as a voluntary, discretionary concept. The European Commission, for example, has up until very recently held on to the definition of corporate social responsibility as:

> *"[a] concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".*[76]

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72 Compare Bendell 2004, p. 18.

73 See, for an in-depth discussion of the matter of the relationship between CSR and the law, for instance: McBarnet, Voiculescu & Campbell 2007.

74 McBarnet 2007, p. 11.

75 See also Kerr *et al.*, however, who argue that "[...] *the idea of a business commitment to CSR can be understood to embrace both a reciprocal obligation and a self-imposed ethic*"; Kerr, Janda & Pitts 2009, p. 17.

76 See 'Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility', COM (2001) 366 (18 July 2001), Commission Communication 'Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility', COM(2006) 136 (22 March 2006), as well as the website of the European Commission DG Enterprise and Industry: <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm>.

Over the last decade, however, this emphasis on voluntarism and corporate discretion when it comes to corporate social responsibility has been strongly challenged. With the aid of modern media and information technology, a growing number of increasingly proactive NGOs have, in the course of their advancement of domestic as well as global people- and planet-related interests, actively promoted a less open-ended, more mandatory approach to corporate social responsibility among business communities, policymakers and the general public in Western societies. Accordingly, the emphasis of societal debates is increasingly on the duties that business enterprises may have to their wider communities in this respect, duties that go "[...] *beyond staying within the law and satisfying stakeholders*"[77] and that may under certain circumstances have legal consequences. As will be discussed in more detail in sub-section 7.3.2, even the European Commission has now abandoned its interpretation of corporate social responsibility as a purely voluntary concept. In October 2011 it put forward a new definition of corporate social responsibility as "*the responsibility of enterprises for their impacts on society*", and stipulated that "[p]*ublic authorities should play a supporting role* [in the development of CSR] *through a smart mix of voluntary policy measures and, where necessary, complementary regulation* [...]".[78]

With these developments over the past decade has come a growing interest in and emphasis on the legal aspects of corporate social responsibility, especially with respect to the concept's international dimension. As a result, contemporary debates are increasingly focusing on the role that the law may play in closing the regulatory gap that is perceived by many to exist with respect to the transboundary activities of internationally operating business enterprises, and in helping to define, promote and realize international corporate social responsibility and accountability.[79] In turn, as will be outlined further in this sub-section, this has led to a growing variety of regulatory initiatives at domestic, transnational and international levels, not only by public policymakers, but increasingly also by civil society actors and corporate actors themselves.

Domestic regulatory initiatives

In line with this development, an increasing number of governments especially in Western societies are now starting cautiously to consider imposing authoritative legal regulations that specifically address CSR-related issues, both in a domestic and in an international context.[80] More generally, it seems that support for applying the law as a mechanism to

77 Lambooy 2010, p. 11.

78 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011).

79 See, for instance: Kerr, Janda & Pitts 2009, p. 30; Bendell 2004, pp. 29-30.

80 See also further sub-section 1.2.4.

specifically promote CSR-related objectives is growing among policymakers in various Western societies.[81] It has been noted in this respect that:

> "[...] *legal reforms across the globe in recent years have begun to correct what was perhaps an over-emphasis on neo-liberal globalization and corporate shareholder primacy during the heyday of the '80s and '90s*".[82]

This has resulted in the introduction of a fair number of new laws in jurisdictions such as Canada, the European Union, Australia, the United Kingdom, the United States, South Africa, China and Indonesia that aim to encourage business behaviour that is in line with the notion of corporate social responsibility.[83]

With respect to these still cautious domestic regulatory initiatives, a distinction can be made between three main ways in which domestic laws may theoretically play a role in this context. First of all, legal rules may be introduced that lay down substantive norms seeking to regulate corporate conduct so as to ensure that it is in line with prevailing notions of what constitutes socially responsible business behaviour and does not impact unacceptably on people and planet at home or abroad. Secondly, rules may be introduced that do not prescribe particular conduct, but that instead require the corporate actors involved to provide transparency on the impacts of their business operations on people and planet, whether at home or abroad, for instance through annual reports. And thirdly, domestic legal systems may provide correction mechanisms for corporate conduct, at home or abroad, that is considered to be socially irresponsible, either because it violates existing domestic (or international) conduct-regulating or transparency rules, or because it is at variance with unwritten norms of proper societal conduct.[84]

In practice, the domestic regulatory initiatives that have been considered and/or introduced in this respect have so far predominantly been focused on application of the law to promote transparency on the impacts of business operations on people- and planet-related interests, especially through the imposition of reporting requirements on business enterprises with respect to their environmental and social performance.[85] It has been noted in this respect that: "[...] *some of the most significant regulatory advances in the area of CSR involve reporting and disclosure measures*".[86] Even here, however, progress has been very cautious and the developments made in this area have generally been limited to obligations on companies to include information on non-financial key performance indicators (including environmental and social matters) in their annual reports and the

81 Kerr, Janda & Pitts 2009, pp. 30-31.
82 Pitts 2009, p. 416.
83 Kerr, Janda & Pitts 2009, pp. 30-31.
84 Compare Lambooy 2010, pp. 79-90, who distinguishes between "[...] *the enforceability of desired corporate conduct on the one hand, and the enforceability of the possibility to examine that conduct on the other*".
85 See, in more detail and with further examples, Kerr, Janda & Pitts 2009, pp. 241-284; Lambooy 2010, pp. 147-169.
86 Kerr, Janda & Pitts 2009, p. 241.

integration of CSR provisions in corporate governance codes.[87] This is not surprising, given the substantial political, legal and practical difficulties surrounding more far-reaching types of regulatory intervention in this context, especially when it comes to the promotion of corporate social responsibility and accountability in an international setting.[88] As discussed, considerations of an economic nature (competitiveness) as well as considerations of an international political nature (sovereignty) tend to induce Western societies to exercise restraint in this context. At the same time, the fact that CSR-related expectations are difficult to define since they are subject to change over time and may vary depending on the particular actors and activities in question, provides an important practical impediment in this respect.

The general reluctance even in Western societies to unilaterally impose mandatory CSR-related rules and requirements which pertain to business operations conducted abroad is exemplified by the fate of some proposals that have been made in this context in various Western societies over the past decade.[89] An Australian bill seeking to impose substantive environmental, employment, health and safety and human rights standards on Australian (or related) companies operating abroad, as well as reporting requirements and enforcement mechanisms in this respect was considered to be premature and problematic.[90] Similar progressive proposals advanced in the US and the UK to legally address issues of international corporate social responsibility and accountability have also been rejected.[91] Proposals by the European Parliament for the implementation of a code of conduct for European companies operating in developing countries have also not been followed up.[92] Nonetheless, the promulgation of the UN policy framework on business and human rights in particular, which will be discussed further below, has provided Western society policymakers with an important impetus to further consider the use of legal mechanisms in order to promote CSR both at home and abroad.[93]

International regulatory initiatives

Next to these cautious developments at the domestic level in various Western societies when it comes to application of the law to promote international corporate social responsibility and accountability, there are a number of regulatory developments at the international level that are also relevant in this sense. First of all, there is a small but growing number of international treaties that seek to specifically address business impacts in a number of CSR-related subject matter areas such as the environment, human rights, corruption and

87 For an in-depth discussion, see Lambooy 2010, pp. 107-169.
88 See further *supra* section 7.1.
89 See, in more detail: Zerk 2006, pp. 165-171.
90 Australian Corporate Code of Conduct Bill 2000, <www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/1999-02/corp_code/report/report.pdf>. See also: Zerk 2006, pp. 165-167.
91 See, in more detail and with further references: Zerk 2006, pp. 167-170.
92 Zerk 2006, pp. 170-171.
93 See *infra* section 8.3 and see also sub-section 1.2.4.

working conditions.[94] In recognition of the potentially serious detrimental impacts that the transnational operations of internationally operating business enterprises may have on the (global) environment and natural resources, for instance, a number of environmental treaties have over the years been adopted to deal with these impacts in specific subject matter areas.[95] Examples include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[96], the International Convention on Civil Liability for Oil Pollution Damage (CLC)[97] and the International Convention for the Prevention of Pollution from Ships (MARPOL)[98]. Similarly, numerous ILO Conventions have been adopted that set international labour standards with respect to child labour, forced labour and health and safety concerns in specific industries.[99] International issues such as (international) corruption and bribery have led to the adoption of a number of international conventions, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[100] and the UN Convention against Corruption.[101]

International 'hard law' instruments such as these are undeniably having a significant impact on the operational practices of internationally operating business enterprises involved in the types of activities or industries that fall within their ambit.[102] It has to be

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94 European Parliament, 'Resolution on EU standards for European enterprises operating in developing countries: towards a European code of conduct', *O.J.* C104/180 (14 April 1999). See further: Zerk 2006, pp. 170-171.

95 See also, for instance: EC Report (Augenstein) 2010, pp. 25-31.

96 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989. This convention was adopted with the objective of protecting human health and the environment against the adverse effects of hazardous wastes. See further the Basel Convention website: <www.basel.int/Home/tabid/2202/Default.aspx>.

97 International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, replaced by 1992 protocol, 27 November 1992. This convention was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships. See further the website of the International Maritime Organization: <www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx>.

98 International Convention for the Prevention of Pollution from Ships 73/78. This convention covers the prevention of pollution of the marine environment by ships from operational or accidental causes. See further the website of the International Maritime Organization: <www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx>.

99 See, for an overview of these conventions and their texts, the International Labour Organisation website, <www.ilo.org/ilolex/english/convdisp1.htm>.

100 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997. See further the OECD website: <www.oecd.org/dataoecd/4/18/38028044.pdf>.

101 UN Convention against Corruption, GA Res. 58/4, 31 October 2003. See further the UN website: <www.unodc.org/unodc/en/treaties/CAC/>.

102 See, for instance: Kerr, Janda & Pitts 2009, pp. 145-155, who note that hard law instruments "[...] *are the traditional forms of law that rely on the authority and power of the state, and ultimately its monopoly on force, to construct, operate, implement, and enforce legal frameworks*"; they may be contrasted with soft law instruments, which encompass "[...] *norms and guidelines that are not attributable to an official public author of statutory rules and which do not appear directly enforceable by traditional means for the execution and*

noted, however, that these international instruments usually do not address internationally operating business enterprises directly; as regards the main international human rights instruments, for instance, including the ILO Conventions, it has been found that they currently do not impose direct legal responsibilities on corporations.[103] Instead, these instruments generally require Member States to introduce domestic legislation aimed at preventing corporate actors from acting in contravention of the rules set out in them, including criminal or (strict and/or fault-based) civil liability regimes to redress corporate abuses.[104] As such, their effectiveness is determined to a large degree by the ability and willingness of the Member States involved to implement and enforce the substantive provisions concerned adequately. There are some exceptions to the general rule that the regulation of corporate activities ultimately falls within the national rather than the international sphere, however, which may indicate that a shift is occurring towards international conventions that address not only the responsibilities of states but also those of corporations directly.[105] An example is the 1999 protocol to the Basel Convention, which, once it has entered into force, can directly impose tort-based civil liability on corporate actors for damage caused by the transboundary movement or disposal of hazardous or other wastes.[106] A similar civil liability protocol has been adopted (but not yet entered into force) with respect to transboundary damage caused by industrial accidents in the Member States of the UN Economic Commission for Europe.[107]

A related limitation to the application of these international hard law instruments in CSR-related subject matter areas is that their geographical ambit tends to be restricted to the territories of their Member States. After all, as has also been discussed before, international treaties in general and those that may be applicable in the context of international corporate social responsibility and accountability in particular, generally do not apply extraterritorially, that is, to actors and activities outside the Member States' territories.[108] Especially in light of the fact that international consensus on applicable rules and standards in CSR-related subject matter areas may be, as discussed, particularly hard to reach, which is likely to limit the number of relevant instruments adopted, the number of participating states, and/or the aspirational levels of the standards set, the impacts of these instruments are necessarily restricted.[109] Still, some of the international hard law instruments that are

application of legal rules"; (p. 146, citations omitted).

103 UNHRC Report (Ruggie) 2007, pp. 12-15.

104 For an in-depth discussion of the position of multinationals under public international law, see Zerk 2006, pp. 60-103.

105 Kerr, Janda & Pitts 2009, pp. 310-312.

106 'Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal' (1999), available at the website of the Basel Convention: <www.basel.int/pub/protocol.html>.

107 'Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters' (2003), available at the UNECE website: <http://unece.org/env/civil-liability/documents/protocol_e.pdf>.

108 For a detailed study on the extraterritorial application of human rights treaties: Milanovic 2011.

109 See also further sub-section 8.1.4.

applicable in CSR-related subject matter areas do have (limited) extraterritorial effects as they require Member States to take measures within their territories that are meant to protect interests or public goods, such as the environment, that at least partly fall outside their territories due to their global scope.[110] An example is – again – the Basel Convention, which requires its Member States to take domestic procedural and substantive measures to control and regulate transboundary movements of waste by companies based within their territories that could potentially lead to environmental pollution outside their territories.[111] Another example is provided by the various international conventions that have been adopted with the aim of preventing bribery of foreign officials, which require their Member States to implement domestic legislation that has significant extraterritorial impacts.[112]

The inability and/or unwillingness of states so far to adopt more and/or broader-based binding international instruments that directly address internationally operating business enterprises and their responsibilities with respect to their worldwide impacts on international CSR-related subject matter areas, has been counterbalanced to a certain extent by their willingness to endorse a growing variety of international 'soft law' CSR-related standards and initiatives.[113] Contrary to the aforementioned hard law instruments, which "[...] *are the traditional forms of law that rely on the authority and power of the state, and ultimately its monopoly on force, to construct, operate, implement, and enforce legal frameworks*", these international soft law instruments do not by themselves create legally binding obligations.[114] They do however have normative force in the sense that they represent a recognition by states and other key actors of certain societal expectations, and as such may also have legal relevance.[115] Well-known examples of international soft law instruments that are relevant in the context of international corporate social responsibility and accountability are the OECD Guidelines for Multinational Enterprises[116] and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[117]

Next to these intergovernmental initiatives, states are increasingly cooperating directly with business actors and civil society organisations to develop CSR standards and/or

110 See, for instance, EC Report (Augenstein) 2010, pp. 25-31, 57-61.
111 EC Report (Augenstein) 2010, pp. 26-27.
112 See, with further references: Kerr, Janda & Pitts 2009, pp. 306-308.
113 See, for instance, with a focus on human rights soft law mechanisms, UNHRC Report (Ruggie) 2007, pp. 15-19.
114 Kerr, Janda & Pitts 2009, pp. 145-155 (quote p. 146).
115 UNHRC Report (Ruggie) 2007, p. 15.
116 OECD Guidelines for Multinational Enterprises, adopted in 1976 and updated in 2011. See further the OECD website: <www.oecd.org/dataoecd/43/29/48004323.pdf>.
117 ILO Tripartite Declaration of principles concerning multinational enterprises and social policy (MNE Declaration), adopted in 1977, 4th edition 2006. See further the ILO website: <www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm>.

redress CSR issues on a multi-stakeholder basis. In the human rights field in particular, an increasing number of human rights multi-stakeholder instruments is being developed that set operational standards and procedures for firms in specific industries, such as the extractive sector (the Extractive Industries Transparency Initiative[118]) or the security sector (Voluntary Principles on Security and Human Rights[119]), and/or that address specific sources of corporate-related abuse.[120] Through their establishment of non-binding operational standards, these alternative regulatory mechanisms play an important role in distinguishing and expressing international norms that are currently emerging as a result of evolving societal expectations on what constitutes socially responsible conduct of internationally operating business enterprises. As such, they provide a welcome alternative for states that seek to somehow address the societal and global impacts of international business practices but for a variety of reasons may not (yet) be able or willing to take firmer (binding) regulatory measures in this respect.[121]

Private initiatives and corporate self-regulation

Despite the growing number of domestic and international regulatory mechanisms that are adopted or adhered to by Western society governments with a view to the promotion of international corporate social responsibility and accountability, these initiatives due to their inherent limitations still leave a significant regulatory gap when it comes to the transnational operations of internationally operating business enterprises. In response to the limited impact of state regulatory mechanisms in the field of international corporate social responsibility and accountability, an increasing number of norms and guidelines have over the past decade been developed in this field that are not attributable at all to public authorities and/or to public legislation, but that are developed and adopted by private actors without state and/or legislative intervention.[122] These private regulatory instruments include self-regulatory instruments that are unilaterally adopted by the business actors whose behaviour they seek to regulate themselves, such as corporate codes of conduct. They also include more externally oriented CSR mechanisms adopted by civil society actors, whether or not in cooperation with the corporate addressees themselves, to which the business actors concerned may seek to adhere voluntarily.[123] Examples in this respect include multi-stakeholder initiatives, certification and labelling schemes and/or

118 The Extractive Industries Transparency Initiative (EITI) aims to set a global standard for transparency in oil, gas and mining. See further the EITI website: <http://eiti.org/>.

119 The Voluntary Principles on Security and Human Rights set out voluntary principles for private security conduct in host countries. See further the voluntary principles website: <www.voluntaryprinciples.org/>.

120 UNHRC Report (Ruggie) 2007, pp. 17-19.

121 Similarly: UNHRC Report (Ruggie) 2007, p. 15.

122 See, for instance: Kerr, Janda & Pitts 2009, pp. 145-155.

123 For more detail on the variety of private regulatory initiatives that are currently emerging in the CSR context, see Lambooy 2010, pp. 228-232.

international framework agreements concluded between international trade unions and multinational corporations.[124]

Questions may be raised as to the ability of these private regulatory initiatives to act as a substitute for state-based regulation in this context. Because they are developed by private rather than by state actors through procedures that do not contain the democratic and legal safeguards that state legislative procedures do, these private regulatory regimes may run the risk of lacking the necessary quality and/or legitimacy.[125] Similarly, the success of these mechanisms, adherence to which is in many cases voluntary, is to a large extent also determined by the possibilities for ensuring compliance by the participants. Monitoring and enforcement will generally be in the hands of private actors, for instance through public pressure by NGOs, consumers or trade unions, or through cancellation of membership or de-certification by the initiators of the regime. In some cases it may also involve state action, for instance where it is sought to enforce the norms involved through litigation before domestic courts.[126] A related matter is the effectiveness of these private regulatory regimes: to what extent do they succeed in actually attaining the objectives for which they have been created?[127] In practice, it seems that when assessed on these criteria only very few private regulatory regimes measure up to public regulatory regimes.[128] Nonetheless, these private, bottom-up initiatives come with certain advantages, such as a measure of flexibility and acceptance among the regulatory addressees that may be more difficult to attain through public regulatory regimes. As such, these private regulatory initiatives undeniably fulfil a role in this context, especially where it comes to the creation of a measure of transparency on the people- and planet-related impacts of the transnational activities of internationally operating business enterprises.

Whether representing a genuine expression of corporate ethics and morality or a strategic response to societal pressure from civil society actors, consumers, investors and the general public, there is an increasing tendency among internationally operating business enterprises in Western societies to voluntarily adopt CSR-related policies and management practices and to voluntarily join CSR-related initiatives. Increasingly, individual companies and corporate groups voluntarily adopt corporate codes of conduct, which generally involve written, public statements in which they commit themselves to adopting certain standards and/or adhering to certain principles in their (worldwide) operations. These corporate codes of conduct may be company-specific or may be established and applied collectively, for instance throughout an entire sector or industry. Well-known examples of industry-wide codes of conduct include, for example, the Clean Clothes Campaign Code

124 For a discussion of the contemporary role of private regulation in the CSR context, see, for instance: Lambooy 2010, pp. 227-276.
125 Compare, for instance: Lambooy 2010, pp. 252-260.
126 Compare Lambooy 2010, pp. 260-265.
127 Compare Lambooy 2010, pp. 265-270.
128 See, for instance: Vogel 2006.

of Labour Practices for the Apparel Industry and the Extractive Industries Transparency Initiative.[129]

At the same time, an increasing number of internationally operating business enterprises have chosen to participate in one or more of the many voluntary CSR-related initiatives that have come into existence in the past 15 years or so, set up by industries, governments, industries and governments jointly, third parties (non-government, non-business) or international organizations.[130] The objectives of these initiatives commonly include:

> "[...] *minimizing negative environmental and social impacts of corporate activity; increasing ecological efficiency in the production of corporate goods and services; encouraging corporate adherence to internationally recognized human rights and labour standards; and encouraging the uptake of internal policies and practices consistent with the concept of CSR*".[131]

Well-known examples include: transparency and reporting initiatives such as that provided by the Global Reporting Initiative;[132] labelling schemes such as the European Ecolabel[133] and the Max Havelaar quality label;[134] management and self-assessment tools such as the ISO 26000 standards that provide guidance on social responsibility[135] and Human Rights Impact Assessments;[136] sustainability benchmarks such as the Dow Jones Sustainability Indexes[137] and the JSE's Socially Responsible Investment Index;[138] certification standards such as the SA8000 accountability standard for fair working conditions;[139] and policy

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129 See, for a more detailed overview and classification of initiatives and instruments relevant to corporate social responsibility: Hohnen 2009, pp. 235-260. See also, for instance: Mullerat 2010, pp. 251-267

130 Kerr, Janda & Pitts 2009, pp. 93-95.

131 Kerr, Janda & Pitts 2009, p. 93.

132 The Global Reporting Initiative (GRI) is a network-based organization that produces a comprehensive sustainability reporting framework that is widely used around the world. See further the GRI website: <www.globalreporting.org/Home>.

133 The European Ecolabel is a voluntary scheme that is aimed at encouraging businesses to market environmentally friendly products and services. See further the EC website: <http://ec.europa.eu/environment/ecolabel/>.

134 Max Havelaar is a well-known fair trade quality brand. See further the website of the Max Havelaar Foundation, <www.maxhavelaar.ch/en/homepage/>.

135 ISO 26000 is an international standard that provides guidelines for (corporate) social responsibility. See further the ISO website: <www.iso.org/iso/social_responsibility>.

136 A Human Rights Impact Assessment maps out the potential human rights impacts of a business operation. See, for instance, the website of the Human Rights Impact Resource Centre, <www.humanrightsimpact.org/about-the-hrirc/>.

137 The Dow Jones Sustainability Indexes track the financial performance of the world's leading sustainability-driven companies. See further the Dow Jones Sustainability Indexes website, <www.sustainability-index.com>.

138 The Johannesburg Stock Exchange's SRI index provides a listing of companies listed on the JSE that incorporate sustainability principles into their everyday business practices. See further the Johannesburg Stock Exchange website, <www.jse.co.za/About-Us/SRI.aspx>.

139 SA8000 is a global social accountability standard for decent working conditions. See further the Social

frameworks such as the UN Global Compact.[140] The popularity of these voluntary initiatives among internationally operating business enterprises is obvious: the UN Global Compact, for example, has 7700 participants in 130 countries around the world, including over 5300 businesses numerous business organizations.[141]

Supporters of a voluntary approach to the matter of international corporate social responsibility and accountability point out that the voluntary private initiatives and non-binding international soft law instruments discussed here provide internationally operating business enterprises with adequate regulatory direction as regards their operations in the transnational realm, where poorly functioning regulatory structures may give rise to corporate risks. Those in favour of a more mandatory approach, however, question the effectiveness of these alternative regulatory mechanisms when it comes to bridging the regulatory gap that exists in relation to the impacts of the transnational activities of internationally operating business enterprises on people- and planet-related interests. They point out that the popularity of these private initiatives and soft law mechanisms is mainly due to their non-committal nature, their PR value, and the fact that compliance with the norms and standards laid down in them is in principle not legally enforceable. It has been suggested in this respect that many of these instruments "[…] *offer little more than moral force, in that the major method of enforcement is through the shame of non-adherence*".[142]

Legal enforcement

The question may be raised, however, whether these voluntary private initiatives and non-binding soft law mechanisms are truly as non-committal as they are made out to be.[143] Realization is dawning that corporate social responsibility, even when interpreted as a voluntary, ethical concept and/or laid down in soft law instruments, may undeniably have certain legal consequences. It has been noted in this respect that:

Accountability International website: <www.sa-intl.org/>.

140 The UN Global Compact is a policy framework for the development, implementation, and disclosure of sustainability principles and practices that aims to contribute to a more sustainable and inclusive global economy. It asks companies to embrace, support and enact, within their sphere of influence, ten principles as representing core values in the areas of human rights, labour standards, the environment and anti-corruption. Furthermore, it requires participating companies to annually provide a communication on the progress made in the areas covered by the Global Compact and its principles. See, further the UN Global Compact website, <www.unglobalcompact.org/AboutTheGC/index.html>.

141 See, generally, the UN Global Compact's website, <www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>.

142 Muchlinski 2007, p. 111.

143 Compare more generally, on the legal consequences of forms of private and soft law regulation, Witteveen, Giesen & De Wijkerslooth 2007.

> "[...] *the normative nature of even voluntary commitments once made and embodied in corporate strategies and processes, and the power of social norms and expectations,* [...] *erode the distinction between the law and ethics of corporate social responsibility*".[144]

In fact, there is a wide variety of ways in which CSR-related statements voluntarily made and voluntary commitments to CSR-related initiatives may acquire legal effect.[145] Companies' statements on the way they interpret and discharge their social responsibilities, for example, made through corporate codes of conduct or otherwise, may engender a measure of public faith that inevitably brings with it certain obligations for the companies involved to practise what they preach.[146] That this is a practical reality rather than just a theoretical possibility was made clear for example in 1998 when a lawsuit was brought against Nike before the California state court for false advertising and unfair competition following allegedly false statements that the company had made about its labour practices and about the working conditions in some of the overseas factories where its products were made, in response to public criticism on that matter. The case was eventually settled for $1.5 million, which was used to strengthen workplace monitoring and factory worker programmes.[147] Similarly, as one of the factors in its assessment of whether the Dutch company Batco Nederland had been mismanaged, the Dutch business court considered that the company had publicly announced its (voluntary) adherence to the OECD Guidelines for Multinational Enterprises, but had subsequently laid off employees in a way that was at variance with those guidelines.[148]

Furthermore, it is increasingly recognized that voluntary initiatives and soft law mechanisms may harmonize business practices among the companies voluntarily adhering to them and as such may bring about new custom where the level of participation is high enough and/or where businesses encourage their business partners to adhere to the same standards. The voluntary standards set by such mechanisms may turn into hard law as they come to be seen as representing common (international) practice or, at the next stage, emerging standards of customary (international) law. As such, they may be applied by courts in the application of open legal norms such as due diligence, good faith, due care and proper social conduct.[149] Alternatively, the standards laid down in such private

144 Kerr, Janda & Pitts 2009, p. 82.

145 See, with a focus on codes of conduct: Kerr, Janda & Pitts 2009, pp. 152-153.

146 See also: Muchlinski 2007, pp. 111-112.

147 See the website of the Business & Human Rights Resource Centre for more information on this case: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/NikelawsuitKaskyvNikeredenialoflabourabuses>. One of the main legal issues in this case was whether the public statements made by Nike could be qualified as 'commercial speech' and as such lacked constitutional protection for freedom of speech. See *Kasky v. Nike*, 27 Cal.4th 939 (Cal., 2002).

148 *Batco Nederland BV*, Hof Amsterdam (Ondernemingskamer) 21 June 1979, *NJ* 1980, 71.

149 For an in-depth study of the interaction between these and other forms of alternative regulation on the one hand and the field of private law on the other: Giesen 2007. See also, for instance, with a focus on the role of the notion of reasonable care in (Dutch) tort law in the context of foreign direct liability cases, Enneking 2007, pp. 76-78.

initiatives and soft law mechanisms may acquire legal force through their incorporation in or being coupled with contractual obligations which may be imposed by internationally operating business enterprises on their foreign suppliers.[150] In addition, these standards may eventually find their way into enforceable hard law instruments such as international treaties and/or domestic legislation.[151] This will often happen at the instigation of those favouring a less voluntary approach to corporate social responsibility, including states and companies that already prescribe and/or adhere in their business practices to these higher standards and wish to level the playing field vis-à-vis their foot-dragging competitors.[152]

It is important to note, however, that the legal application and enforcement of any behavioural standards that may ensue from this variety of CSR-related regulatory instruments, will in the end generally have to take place through the laws and/or before the domestic courts of the countries in which the internationally operating business enterprises involved are based and/or conduct their business operations. After all, in line with the fact that states are the primary subjects of public international law, there are currently no international tribunals which have jurisdiction over civil or criminal claims against corporations for violations of CSR-related international norms.[153] Violations of any of the very limited catalogue of international norms that may directly apply to private actors in general and corporate actors in particular will therefore in principle have to be addressed before domestic courts, on the basis of domestic causes of action, just like any behavioural norms that may ensue in this transnational context from domestic legal standards (which may in turn implement international norms that are not directly applicable to private actors).[154] Similarly, behavioural norms following from non-binding international soft law instruments and private regulatory initiatives will in the end also have to be legally applied and enforced through domestic laws and/or through proceedings brought before domestic courts on the basis of domestic causes of action, where non-legal modes of enforcement (public pressure, cancellation of membership, de-certification) do not bring about the desired effect.[155]

This means that those seeking to hold multinational corporations legally accountable for failing to live up to any societal expectations that may exist with respect to the way in which they reconcile their pursuit of profits with people- and planet-related interests are, at least for now, ultimately still dependent on domestic rules and procedures. As discussed, this situation is far from ideal because it raises complicated issues of double

150 Kerr, Janda & Pitts 2009, p. 153.
151 See also: Muchlinski 2007, pp. 111-112.
152 See also *supra* sub-section 7.1.
153 See generally Nollkaemper 2009, pp. 407-446. Note however that international arbitrage proceedings may indirectly pertain to CSR-related issues; see *supra* section 7.1.
154 See generally: Nollkaemper 2009, pp. 447-483.
155 For a detailed treatise on the legal enforcement through domestic law and litigation of privately initiated and/or soft law regulatory standards, see Witteveen, Giesen & De Wijkerslooth 2007.

standards between home and host countries, of sovereignty and extraterritoriality, of international competitiveness and the lack of a level playing field, etc. However, it also underlines the important role that transnational tort-based civil claims brought before multinational corporations' home country courts may play in providing a legal mechanism through which CSR norms and standards ensuing from international hard law and soft law instruments, as well as from private initiatives in this field, can be given legal effect.

7.2.3 Exploring (international) corporate social responsibility and accountability

Markets and morals

In essence, the concept of corporate social responsibility may be viewed as an ethical construct.[156] As discussed, it can be defined as society's expectations with respect to the way in which companies reconcile their pursuit of profits with broader societal interests, including both public and private third party interests.[157] Those expectations may impose certain normative duties on companies, both positive ones (duties to act in a certain way) and negative ones (duties to avoid unnecessarily harming others).[158] Together, these normative duties and corresponding corporate responsibilities reflect the kind of corporate behaviour society considers appropriate. Under certain circumstances, widely held societal expectations pertaining to the way in which companies comply with the societal responsibilities imposed on them by these ethical duties may eventually, through a society's legal system, be transformed into legal norms.[159]

Contemporary economic views, based on the Western world's championship of capitalism as the world's economic ideal and a concomitant drive towards free markets, free trade, privatization and deregulation, hold that the point of departure here should be that of free market processes.[160] The free supply of and demand for products will, according to welfare economists, in theory lead to efficient behaviour by private actors, as their free bargaining with one another over their interests and needs will result in an efficient allocation of societal costs and societal benefits.[161] The general idea is that leaving private actors to pursue their own self-interests will eventually yield outcomes that are in

156 See generally: Steinmann 2007.

157 Similarly: Eijsbouts, Kristen *et al.* 2008a, p. 28, where the normative component of CSR is defined as an entrepreneur's responsibility to comply in his business dealings with society's justified expectations with respect to the societal consequences of those business dealings, such as economic, social and environmental consequences, for all stakeholders involved.

158 Compare generally, but with a focus on international ethics: Shapcott 2008, pp. 194-206.

159 Compare Gribnau 2001, pp. 119-125.

160 See also section 1.1.

161 Note, however, that efficiency criteria may differ: according to the Pareto criterion, a rule of practice is efficient if it increases the welfare for one or more persons and leaves no one worse off; according to the Kaldor-Hicks criterion, a rule or practice is efficient if its aggregate benefits are larger than its aggregate costs. See, for instance: Weterings 2007, pp. 8-10.

line with what is in the interests of society at large. In this view, free market processes will ultimately lead to a maximisation of societal welfare, obviating the need for legal rules except for those creating the socio-legal framework within which these market processes are to function freely.[162] In principle, this socio-legal framework is largely provided by private law, which serves to reinforce the private interests both of those involved in the bargaining process and of third parties affected by their outcomes.[163]

It is commonly recognized, however, that in practice market processes do not always reach the desired outcomes and may in some cases need to be adjusted through further-reaching regulation, with the law potentially acting as a correction mechanism.[164] Markets may fail under certain circumstances, causing bargaining processes to yield inefficient results.[165] One source of market failure that is very relevant in the CSR context is that of externalities (or spillover effects, external costs, negative external effects) "*whereby activities affect third parties in ways not reflected in the prices set by producers*".[166] It arises when the bargaining process between private parties inside the market does not encompass the total amount of the costs that a product or activity in reality entails for society, meaning that its purchasers do not pay for its true societal costs. This leaves the costs that are excluded to spill over onto third parties that have not been involved in the bargaining process and/or onto society as a whole. In turn, this leads to purchasing behaviour and/or a level of activity that is not in line with the product or activity's actual societal costs.[167] Another potential source of market failure that may typically play a role in this context is that of severe informational asymmetries affecting the relationship between producers/suppliers and consumers. This problem arises when the market system is distorted by the fact that one party to the bargaining process – in this context the producer – has much more information about the product the parties are bargaining over, including its origins and the circumstances

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162 See generally: Ogus 1994, pp. 15-28.

163 Ogus 1994, pp. 15-28.

164 See, generally: Baldwin & Cave 1999, pp. 9-17. See also: Ogus 1994, pp. 27-28. Note that Ogus' definition of regulation refers to law that is directive, public and centralized, which is as such in principle distinct from the facilitative, decentralized private law arrangements that frame the market and where rights are left to individuals to be enforced and obligations are incurred voluntarily and can always be displaced by agreements between the affected parties: *id.*, pp. 1-3 (but see pp. 257-261 on private regulation). That this is a common distinction becomes obvious, for example, from: Van Boom, Lukas & Kissling 2007, in particular pp. 1, 419.

165 See, for instance: Ogus 1994, pp. 23-25.

166 Ogus 2002, p. 629; Baldwin & Cave 1999, pp. 11-12.

167 This is generally a result of high transaction costs, *i.e.*, the costs that are involved in locating bargaining partners (search costs), bargaining with them (bargaining costs) and enforcing the agreement that was reached (enforcement costs), which prevent certain private parties from participating in negotiations that affect them. This results in a failure of the market system, as the bargaining process yields an allocation of costs and benefits between the private parties that are involved in the bargaining process that is not socially efficient. See Cooter & Ulen 2004, pp. 44-46, 91-96, 220-221; Ogus 1994, pp. 18-19, 35.

under which it has been produced, than the other party to the bargaining process – in this context the consumer.[168]

At the same time, there may also be other reasons to believe that free market processes may even in the absence of market failure or after the correction of market failure lead to undesirable behaviour and/or undesirable results. For example, private parties may be thought to be incapable of judging or acting upon what is in their own best interests, for example where they act upon short-term best interests that do not coincide with their best interests in the long run. Things may also become problematic where there are certain public goods that can only be attained through collective action or where societal actors are somehow insulated from the full consequences and responsibilities of their actions. Similarly, the outcomes of free market processes may be considered undesirable for instance in light of a just distribution of wealth and resources across society, or, more generally, where they conflict with widely held societal moral values and/or individuals' fundamental rights. Furthermore, adjustment may be necessary in order to meet the needs of future generations and/or to satisfy altruistic concerns.[169]

In all these cases where free market processes and the pursuit of private interests lead to outcomes that are considered to be unjust, unfair or otherwise not in the best interests of society as a whole both in the short term and in the long term, a society may decide to intervene in free market processes and overrule private preferences in the pursuit of broader public policy goals. Accordingly, free market processes and free entrepreneurship may be curtailed in order to promote or command corporate behaviour that is more in line with what is thought to be morally right and/or in the best interests of society as a whole.[170] This is the point at which notions of free market processes, free trade, privatization and deregulation meet the concept of corporate social responsibility, which is concerned with those instances in which the pursuit of private self-interests by corporate actors conflicts with the private interests of others in society and/or with the public interest, whether at a societal or at a global level. It involves the idea that free market processes and free entrepreneurship may have to be limited under certain circumstances where they adversely affect the rights and interests of third parties and/or where they run counter to overarching public interests such as sustainability, equality and justice. In a more general sense, contemporary CSR debates may reflect a countermovement against the capitalist, market-based, financially driven notion of welfare that has for quite some time predominated in Western societies. It reflects a nascent tendency in these societies towards new notions of welfare, in which factors that are not necessarily directly measurable in financial terms, such as well-being, quality of life, conservation of the environment, a sustainable future and international equality and justice play an important role.[171]

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168 See, for instance: Baldwin & Cave 1999, p. 12.
169 See for these and other limitations of free market processes: Baldwin & Cave 1999, pp. 13-16.
170 See, generally, Ogus 1994, pp. 29-54.
171 See, for instance, Heertje 2006; Dijkstra & Zwaan 2009.

As such, the concept of corporate social responsibility imposes an ethical obligation on companies, which may or may not (eventually come to) be reflected in and/or enforced by legal rules, to tune their behaviour to societal interests and societal concerns, even where their own economic/financial objectives would have them behave differently. It should be noted, however, that in reality the ideas on what would constitute ethical behaviour in this respect may fundamentally differ according to one's world view and concomitant ideas of what constitutes a fair and just society. There are those, for instance, who believe that rules and actions should be judged according to their outcomes, meaning that they are ethically 'right' if they promote or lead to a certain desirable outcome, such as human welfare, societal welfare, and/or 'the greatest good of the greatest number'. Others, however, may believe that rules and actions derive their moral justification from the fact that they are 'right' in themselves, for instance because they reflect fundamental values such as human equality and freedom, and not because of the consequences they may produce. These different world-views are based on fundamentally different principles, as the one revolves around notions such as efficiency, welfare and utility, whereas the other revolves around notions such as justice, fairness and equality. As such, they may lead to fundamentally different ideas on what is in the best interests of society as a whole and/or of its individual members and on how these interests are best to be served, protected and/or promoted.[172]

Accordingly, these world views may lead to diverging and even conflicting societal expectations with respect to the way in which companies reconcile their pursuit of profits with broader societal interests and accompanying views on what constitutes socially responsible business behaviour. Externalities caused by a factory that dumps polluting materials into the river as a by-product of its production processes may be seen by some as socially unacceptable as they impose costs on and potentially infringe the rights of the people living downstream, who now have to purify their drinking water, buy clean water elsewhere, or run the risk of suffering health consequences as a result of their continued use of the river water as drinking water. Others, however, may point out that although the factory's activities have adverse consequences for some, society as a whole stands to benefit from the factory's relatively unfettered economic activities through low prices for the products it makes, high tax and investment returns as a result of the profits it makes, high employment rates, and a resultant high level of economic welfare. In the end, what is judged to be in society's best interests is dependent on the values, principles and interests one advocates and these may diverge between different actors and groups in society.

Contemporary CSR debates revolve around contesting normative views on the content and scope of corporate duties and responsibilities in this respect. The point of departure of the CSR concept is that companies themselves, in their capacity of societal actors, have a responsibility, whether reflected in the law or not, to align their behaviour with

172 See, for an idea of the more general debate on fairness versus welfare: Kaplow & Shavell 2001 and (in reply) Dorff 2002.

broader societal interests. The idea is that companies of any legal form exist by the grace of society, which may be said to have provided them with their 'licence to operate', and that in return for that companies have an inherent duty to give back to society.[173] In the past, legal personality has been seen as a favour bestowed by societies on companies with a view to the promotion of societal interests, which in turn renders them accountable for the extent to which they fulfil their public, societal purpose.[174] Accordingly, a company's licence to operate may be seen as resting upon the trust placed in that company, by the general public in the society within which it operates and by its stakeholders specifically, that the company will conduct its operations in a way that benefits not only itself and its shareholders, but society as a whole.[175] However, views on what kind of contribution to society companies are required to make remain open to ideological debate and may change over time as notions of societal responsibility evolve.[176] On one side of the debate are those who, in line with Milton Friedman's now famous 1970 statement that "[t]*he social responsibility of business is to increase its profits*", take the view that companies fulfil their duties to society purely by maximizing shareholder profits while acting in accordance with the basic rules of society as embodied in law and in ethical custom.[177] On the other side of the debate are those who impute today's companies with duties to the societies they operate in that go way beyond 'mere' profit-maximization and local rule compliance.[178]

Over time as, with the rise of the capitalist ideal in Western societies, the market itself has come to be equated with the promotion of the public good and governments have taken a step back in this respect, it has largely become left to companies themselves to give interpretation to their societal purpose, at least to the extent that this is not ingrained in the legal context framing their activities. However, the notion of companies' public, societal purposes has continued to "[...] *justify the very possibility of allowing bodies corporate with enduring legal personality to come into existence*". It is reflected even today in the idea that companies must earn their 'social licence to operate' and in notions of corporate citizenship, which form the basis of contemporary debates on corporate social responsibility.[179] Arguably, today's CSR debates reflect a diminishing public trust in the idea that the public good can be promoted through markets and financial/economic benchmarks alone, and a growing awareness that non-financial values play at least an equally important role in establishing societal welfare and well-being. At the same time, these debates reflect a reinterpretation of traditional notions of companies' role in society. Although only few would go as far as to state that companies are required to actively

173 This licence to operate may also be referred to as a 'social contract'. See, for instance: Eijsbouts 2011, pp. 35-37; Muchlinski 2007, p. 101.
174 Compare also Eijsbouts, Kristen *et al.* 2010, pp. 8-10.
175 Kerr, Janda & Pitts 2009, pp. 17, 55.
176 See, for instance, Kerr, Janda & Pitts 2009, p. 5; Muchlinski 2007, pp. 100-104.
177 Friedman 1970.
178 Compare, for instance: Kerr, Janda & Pitts, pp. 285-345. See also *supra* sub-section 7.1.2.
179 See, for instance: Kerr, Janda & Pitts 2009, pp. 56-64 (quote p. 63).

realise public objectives, companies are increasingly expected, at the very least, to pursue their own, private, financial/economic ends in ways that do not fundamentally conflict with broader, non-financial/economic societal interests, values and/or objectives.[180]

Companies, states and the law

In theory, the state may be expected to intervene where unregulated business behaviour conflicts with what society perceives to be morally right and/or where it yields results that conflict with what is thought to be in the interests of society at large. After all, it is the state that is ultimately responsible for protecting the interests of private actors within its society, also against activities undertaken by other private actors, and for promoting the public good. As such, a society's ideas on what constitutes socially responsible business behaviour may be expected to be reflected in its legal system, through rules and regulations that, where necessary, regulate corporate behaviour and protect others from its adverse consequences, and through the absence or facultative nature of such rules and regulations where market mechanisms are believed to produce corporate behaviour that is perceived as socially responsible in this sense.[181] These ideas will shine through, for instance, in the behavioural standards which legislators and courts set in fields of criminal law, contract law, corporate law and tort law as well as in a state's rules and regulations concerning, for instance, fundamental rights, health and safety, the environment and working conditions.

In the end, these rules, regulations and standards can be seen as representing the outcome of a balancing act by local authorities between on the one hand private/corporate self-interests and in particular the freedom of private/corporate actors to determine their own course of action in pursuit of private interests/profits (personal/entrepreneurial freedom), and on the other hand the private interests of others in society as well as the interests, principles and values of society as a whole (public interest). A distinction can be made here between private law standards such as those arising out of tort or contract law, which are traditionally considered to concern the private interests of citizens and (business) organizations, and public law standards such as those arising out of criminal or administrative law, which are traditionally considered to be an expression of the public interest as the product of a political process.[182] Combined, standards of private law as the law of economic processes and public law as the law of political process provide both the legal framework for free market processes and the correction mechanism for their socially undesirable consequences, such as externalities or societal inequality resulting from corporate activities. As such, a society's legal norms as imposed and enforced by the

180 Compare Steinmann 2007.

181 This idea comports with the public interest approach to regulation, which "[...] *holds that the state acts in the public interest to tackle market imperfections. Public officials thus translate public preferences into legal regulatory regimes and elected legislatures direct such officials in pursuit of the public good*"; Baldwin, Scott & Hood 1998, p. 9.

182 See, for instance: Wightman 1999, p. 253.

state may be expected to be the principal source of corporate duties in this respect and constitute a reflection of companies' social responsibilities.[183]

In practice, however, things are more complicated than that. As has been noted, ideas on what constitutes ethically sound/socially responsible business behaviour may vary widely. Even where it is possible to discern shared, legitimate societal expectations on socially responsible business behaviour, those expectations are not always reflected in legal norms. One of the reasons for this is that it takes time for changing societal attitudes to become reflected in the law; thus where community values and attitudes change rapidly rather than gradually, as often happens in modern-day societies, the law tends to lag behind societal developments.[184] At the same time, this gap between ethical standards that are prevalent in society and legal standards is an inevitable and perhaps even desirable reality. After all, it has to be recognized that:

> "[...] *the province of law is always and properly limited, since there is a very real sense in which governments 'can't legislate morality' particularly in the most challenging ethical areas. Legal norms, their interpretation and application, emerge incrementally and through compromise. Attempts at exhaustive formal rule-making can hinder socially and economically productive freedom of action and innovation*".[185]

In recognition of the fact that contemporary values and attitudes are diverse and changeable, contemporary legal systems in Western societies are typically made up not just of legal instruments based on mandatory, highly specific, but therefore also rigid written legal norms. In addition, they feature more flexible legal instruments, such as contract law or tort law, which are largely based on unwritten legal norms that may be turned into positive law through open-ended notions such as due diligence, good faith, reasonable care and proper societal conduct. The consequence of the flexibility and responsiveness of these instruments, however, is that they may engender a certain measure of legal uncertainty with respect to the legal status of societal expectations that are applicable at any one time to specific types of actors and activities. Even where the law may be clear on some of the core responsibilities that determine socially responsible corporate behaviour, there may be other, more contentious issues on which the societal and/or political consensus required to come to any general system of rules and regulations is lacking, and which therefore are left to be decided on a case-by-case basis.[186]

In addition to this, it is increasingly recognized these days that states are not infallible and that they cannot always be counted on to promote and (legally) enforce that which is in the best general interests of the societies they represent. Confidence in the superiority and

183 See, generally, Eijsbouts, Kristen *et al.* 2008b.
184 Vago 2009, pp. 21-22, 332-337; Friedman 1975, pp. 334-337; Friedman & Ladinsky 1967. See also section 1.3.
185 Kerr, Janda & Pitts 2009, p. 80.
186 Similarly: Eijsbouts 2011, p. 27; Vranken 2006, p. 68.

unassailability of the nation state as society's chief regulator and the ultimate protector of the public good is waning. It is possible, for instance, that a country's lawmaking processes may be undemocratic, where they are aimed at advancing the interests of societal elites, to the detriment of other groups in society. At the same time, some states may just not have the institutional capacity to establish and/or maintain a functioning legal system. Even in democratic states governed by the rule of law, lawmakers are often said to be prone to regulatory capture by powerful societal interest groups advancing their own self-interests, in particular groups representing producers, and as such may disregard deviating majority opinions.[187] So, even if there is a majority opinion on a given issue, the law may not always run parallel to the status quo of societal attitudes towards a particular issue.

As a consequence, society's legitimate expectations with respect to the way in which companies reconcile their pursuit of profits with broader societal interests will never be fully and exhaustively reflected by the law. Conversely, this means that companies operating within a given society in compliance with the legal norms that apply within that society may not automatically operate in what is considered to be a socially responsible manner. After all, compliance with local rules may be seen as a prerequisite for but is not an equivalent to socially responsible business behaviour. As such, companies may find themselves faced in this respect with two distinct behavioural standards: a legal standard (the standard of the law that is enforced in practice by the state in which they operate) and a normative standard (the standard of societal expectations reflecting societal notions on how business enterprises should ideally behave). Similarly, they may find themselves confronted with two types of responsibilities: legal responsibilities vis-à-vis the state in which they operate, and societal (social) responsibilities vis-à-vis the society in which they operate and all those in it. Whereas it is possible that these two types of responsibilities largely coincide, companies' societal responsibilities, by their very nature, go beyond their legal responsibilities.[188]

Arguably, these societal expectations on the way in which business actors align their private interests (particularly the pursuit of profits) with the private interests of other actors within society and with the public interest more generally are especially relevant in these times of hands-off governments, liberalization, privatisation and deregulation. The decline of state power and authority has given rise to a concomitant increase of power, influence, authority and control of semi-public and private (particularly corporate) actors in society, which are left with ample freedom to conduct their business activities at their discretion. However, with greater power tends to come greater responsibility, which means that increased societal powers and discretion may involve increasingly broad societal responsibilities for the way in which those powers are exercised and for the increasingly

187 See, for instance: Ogus 1994, pp. 55-75, in particular pp. 69-75. See also Baldwin, Scott & Hood 1998, pp. 8-14.

188 Compare also Eijsbouts 2011, pp. 18-24.

pervasive effects corporate behaviour may have on the private interests of other societal actors and/or on matters of public interest such as the environment. Accordingly, business actors may find themselves faced with situations in which legal standards that apply to their operations may deviate significantly from societal expectations as to how they execute those operations, meaning that much more may be expected of them in the way of social responsibilities than mere local rule compliance.

The current debates on corporate social responsibility, then, are particularly concerned with what business enterprises may be required to do over and above 'merely' operating within the confines of the law; they focus on those social responsibilities that are not, not yet or not clearly or completely reflected in a state's legal system. They are mainly concerned both with establishing what legal and normative standards exist with respect to any CSR-related issue in any particular society, and also with defining what kind of corporate behaviour is to be expected in the grey area between legal standards and normative standards, between legal responsibilities and purely social (or ethical) responsibilities. What may be expected in a world where corporate actors increasingly rival states in terms of power, influence, authority, control, knowledge and skills? Opinions on that matter vary, ranging between the previously mentioned principles of rule compliance (the notion that companies should only go as far as the rules require and no further as legality exhausts their obligations) and world's best practice (the notion that companies should conduct their economic activities according to standards that substantially exceed the requirements set by present practice or regulation).[189] Thereupon, the principal legal question in these CSR debates is whether and under what circumstances purely social (or ethical) responsibilities may become binding legal responsibilities. When do normative ideas on socially responsible business behaviour become legitimate societal expectations, and how are such expectations transformed into cognizable and enforceable legal norms? As has been noted in the previous sub-section, it is increasingly recognized in this respect that CSR-related initiatives, even those that are voluntary and/or involve non-binding norms, may have legal effects.

At the moment, the relationships between states, corporate actors and societies are being redefined and reorganised, both normatively and legally, a process that lies at the basis of the contemporary debates on corporate social responsibility. As discussed, societal expectations are changing with respect to the extent to which companies have a responsibility to consider the private interests of a broadening group of corporate stakeholders, as well as certain public interests, and to incorporate respect for those interests into their corporate policies, management decisions and operational practices.[190] In the end, corporate social responsibility involves the incorporation of considerations of relevant societal interests into all aspects of corporate activity, ranging from the

189 See further section 7.1.
190 See further section 1.2.

procurement and production of goods and services to internal governance practices, corporate policies and management decisions as well as interactions with business partners.[191] Corporate accountability involves the reporting back to society by companies on the ways in which they do so and on instances in which their activities nonetheless conflict with such interests, as well as their voluntary assumption of and/or externally imposed responsibility for any detrimental societal impacts arising as a result of such conflicts. Accordingly, companies can continue to earn the public trust that forms the foundation of their social licence to operate by reflecting an awareness of their broader role in society and by both internally and externally addressing the externalities to which their operations may directly or indirectly give rise, at least to the extent that those lie within their sphere of influence.[192]

As such, even though ultimately it is the state that remains responsible for the protection of public interests and the private interests of all societal actors and for the advancement of the public good, derivative obligations can be said to rest on companies to contribute to the public good by internalizing awareness and consideration of societal interests that lie within their sphere of influence and by preventing and/or addressing any adverse consequences that their operations may have on those interests. These corporate obligations, which are reflected in the notion of corporate social responsibility, are first and foremost process-based and internally oriented; however, they also involve accompanying obligations that are more outcome-based and externally-oriented, which is reflected in the notion of corporate accountability. These obligations, which may be referred to as best efforts obligations, do not in principle entail that companies should actively work to bring about certain socially desirable outcomes, since this remains the province of the state, which is under an obligation of result in this respect.[193] They do entail, however, that companies should where possible align their business practices with the interests of others in society and/or society as a whole, and that they should avoid bringing about certain socially undesirable outcomes.

The law may potentially play an important role in this context. It may have a role in clarifying, defining and exploring the boundaries of the legal obligations that may flow from the CSR movement's ethical imperatives at any point in time, in particular obligations on companies to avoid certain socially undesirable outcomes. At the same time, it may also be applied as a mechanism to promote, incentivize and foster the incorporation of consideration of societal interests into corporate policies, management decisions and operational practices. How far the role for the law in this context currently goes and how far it ideally should go remains a matter of debate, however. Similarly, the question may be raised which fields of the law would be most suitable for implementing the societal

191 Kerr, Janda & Pitts 2009, p. 313.
192 Kerr, Janda & Pitts 2009, pp. 85-87.
193 Note that this may be different when it comes to companies operating in conflict zones and/or failed states.

expectations that currently exist on the way in which companies reconcile their pursuit of profits with broader, people- and planet-related societal interests.

It may be argued in this respect that the pursuit of exhaustive, highly specific and inflexible legal rules that provide a step-by-step definition of what companies ought to do in order to operate in a socially responsible manner, is not only unattainable but is also something that should not (solely) be aimed for in this respect. Actual changes in corporate culture will in the end have to develop from within/bottom up, rather than from outside/top down; the role of the law in this context should be to foster such changes. However, since the notion of corporate social responsibility is inherently subject to change as notions of what constitutes socially responsible business behaviour constantly change in line with changing contemporary needs, concerns and expectations, it seems unlikely that the best way to do so would be by laying down in highly detailed rules when corporate behaviour is socially responsible. A better way of fostering such changes would arguably be for the law to provide a more flexible, general framework within which the rapidly changing societal norms and expectations in this context can crystallize into legal norms and standards. Obviously, such a framework will at least have to reflect the overall aims to be attained and certain fundamental underlying values and principles that are to be incorporated, and will have to be adaptable so as to be able to comprise emerging legal norms and standards. At the same time, it will have to provide other societal actors with the opportunity and the means to denounce corporate behaviour that they feel does not live up to contemporary social standards and/or is in breach of a company's obligation to avoid negative results. Beyond that, however, it will have to give corporate actors a certain measure of freedom to work out by which means they are best able to respond to societal expectations and incorporate socially responsible business practices.[194] The question arises whether domestic systems of private law in general and of tort law in particular would be able to fulfil such a role in this context; it is this particular question that will be further discussed in the next two chapters.

Externalities, double standards and consistent best practice

The issues and questions that may be raised with respect to the concept of corporate social responsibility are further complicated when it comes to issues pertaining to the socially responsible behaviour of internationally operating business enterprises that operate not in one, but in multiple societies, and that as such are confronted with different sets of legal and normative standards. After all, the range of private and public interests that these business enterprises may be expected to take into consideration when acting in the pursuit of their private interests is considerably expanded in this international context. At the same time, however, different societies may have different levels of development and accompanying ideas on what is in the best interests of those societies at large and/or

194 Compare, for instance: Kerr, Janda & Pitts 2009, p. 239.

of their individual members. As incorporating societal interests becomes a transnational exercise, the main issues become: who are the stakeholders whose interests may be affected by the transnational operations of the internationally operating business enterprises involved, whose societal expectations may need to be lived up to; how are the various interests involved weighed up against one another; and what are the consequences of corporate behaviour that is considered sub-standard in one society, but is deemed to be up to standard in another?

As has been mentioned before, legal standards (in the sense of the standard of the law that is enforced in practice) on matters such as health and safety, welfare, labour and the environment will, due to lower levels of development and welfare, often in combination with weak governance structures generally, be less demanding in the host countries than in the home countries from which these internationally operating business enterprises originate. Regulatory races-to-the-bottom vis-à-vis other (developing) host countries with a view to attracting foreign investments from lowest-cost locators may push down standards even further. The combination of lower living standards and less demanding legal standards generally results not only in low production costs for the business enterprises operating there, but also in relatively lower behavioural standards for these companies and, in line with this, relatively lower levels of protection for the citizens of those societies as well as their living environment.

Accordingly, internationally operating business enterprises undertaking activities in these developing host countries (or emerging economies) will often be allowed to externalize the negative effects of their production processes in excess of what would be allowed according to normative and/or legal standards in their developed home countries, or to otherwise behave in a manner that is sub-standard according to the notions that exist in the home countries from which they originate. In some cases, the standard of conduct that is in practice enforced locally may fall below even international, fundamental standards such as universally accepted human rights standards. The developing host countries involved may be weak or failed states that are not capable of fairly and democratically balancing the interests of the internationally operating business enterprises operating within their societies against the interests of other private actors in those societies and/or local or global public interests. Even in developing host countries or emerging economies where more democratic and stable governments are in place, the institutional capacity may be lacking to set up and enforce a legal framework that can adequately regulate local corporate activities and through which corporate abuse and/or other detrimental consequences of those activities that affect local stakeholders may be addressed. In other cases, the political will to do so may be absent, due to corruption or due to a general desire to attract foreign investments. As a consequence, vulnerable or marginalized groups and the local environment in these societies are at particular risk of being burdened with the adverse consequences of the local operations of these internationally operating business enterprises, in the absence of any real possibility to avert or address them.

Also and/or particularly in this context the question arises as to what the societal responsibilities are of the companies involved vis-à-vis the (host country) stakeholders whose interests may fall within their sphere of influence. Arguably, even more may be expected of these internationally operating business enterprises in the sense of taking into account particular host country societal and environmental concerns, than where their operations at home are involved. After all, with greater power, in the sense of superior power, influence, authority, control, knowledge and skills when compared with not only other private actors in these developing host countries, but also with respect to the governments that are supposed to represent these societies, comes greater responsibility for the way in which that power is used. This means that in this transnational context there may be even more reason to assume that business practices may come with certain obligations vis-à-vis host country stakeholders that fall within the sphere of influence of the internationally operating business enterprises involved. After all, in situations where states are less able to meet their responsibility to protect public interests as well as the private interests of all societal actors and to promote the public good, the derivative corporate obligation to contribute to that public good and to take into account those interests in their corporate policies, management decisions and business practices is arguably even more comprehensive. Accordingly, the rationale for requiring corporate actors to internalize an awareness and consideration of societal interests that lie within their sphere of influence and to prevent and/or address any adverse consequences that their operations may have on those interests, is even stronger when it comes to their transnational activities in a North-South context. Accordingly, in this international context of 'double standards', the question as to what the societal responsibilities of internationally operating business enterprises are in the grey area between legal standards and normative standards gains an extra dimension.

As a consequence, contemporary debates on international corporate social responsibility and accountability primarily revolve around the question as to what behaviour, according to home country societal expectations, is to be expected of internationally operating business enterprises that are confronted with such double standards in the course of their operations in host countries. The emphasis is on situations where host country standards are significantly lower than legal standards in the home country and as such allow these internationally operating business enterprises directly or indirectly to engage in or profit from local business practices that are substantially less concerned with the impacts on local public and third party private interests than would be required by home country normative and/or legal standards and societal values. As such, these debates are particularly concerned with what internationally operating business enterprises may be required to do over and above local rule-compliance. This issue is considered to be especially pressing in those instances where host country legal standards (in the sense of the standard of the law that is enforced in practice) set a standard for corporate

behaviour that contradicts or falls short of not only home country societal and/or legal norms and values, but also internationally agreed standards or internationally recognized fundamental values such as those reflected in certain international human rights or labour instruments. The question arises as to what extent internationally operating business enterprises are morally and/or legally allowed to profit, and as such generate societal benefits in their home countries, from activities that entail significant societal costs in the host countries where they are carried out, costs that are typically borne ultimately by host country individuals or groups of individuals and/or the local or global environment.

As such, the concept of international corporate social responsibility and accountability is grounded in ideas of societal and global justice, fairness, equality and sustainability, and relates to the role and responsibilities of internationally operating business enterprises in promoting these ideals, even and especially where local governments fail to do so. Its main assumption is that the social responsibilities of internationally operating business enterprises dictate that under certain circumstances, especially when operating under relatively permissive regulatory regimes, these business enterprises are to adopt consistent best practice instead of limiting themselves to strict adherence to the behavioural standards that are imposed and legally enforced locally.[195] As discussed, the principle of consistent best practice involves the moral imperative that internationally operating business enterprises should seek to apply the highest CSR-related standards throughout their operations and in their interactions with business partners or sub-contractors, whether at home or abroad. It indicates that even where local rules do not require them to do so, home country societal expectations may hold that these companies have a responsibility to contribute to the public good in the host countries in which they operate, by internalizing awareness and consideration of host country private third party and public interests that lie within their sphere of influence and by preventing and/or addressing and where necessary redressing any adverse consequences that their operations may have on those interests.[196]

As has already been noted, the principle of consistent best practice and the more general concept of international corporate social responsibility and accountability are by no means undisputed. One of the reasons for this is that they may challenge the notions of corporate responsibilities and society's best interests that are, whether consciously or by default, reflected in the legal standards of the host countries involved. This challenge may be seen as an interference in these host countries' sovereign rights to shape their societies and their legal systems according to their own ideas of what is in their best interests. At the same time, it may be considered paternalistic or even neo-imperialistic by pluralists who believe that the cultural diversity between states, although allowing them to coexist and tolerate one another, precludes any universal morality and should keep them from

195 For a more detailed discussion of (the legal aspects of) the principle of consistent best practice, see Kerr, Janda & Pitts 2009, pp. 285-345.

196 Kerr, Janda & Pitts 2009, p. 285. See also *supra* section 7.1

trying to impose their own views on others. In this view, it should be accepted that in a multiform world balances are struck, and should be allowed to be struck, in different societies in different ways.[197]

From a more cosmopolitan perspective, however, this challenge is unavoidable in light of the contemporary reality of a globalizing world in which the primacy of sovereign nation-states is slowly giving way to a global community of right-bearing individuals, which is diverse but at the same time has important common goals, common concerns and shared fundamental values.[198] This view reflects a growing popular awareness of the increased interconnectedness of human beings across the globe as a result of globalization. It is considered to be a necessary corollary of contemporary realities, especially by those advocating principles such as world's best practice, sustainable development, continuous improvement, transparency and, in the end, international harmonization of standards on CSR-related matters such as the environment, human rights, health and safety and labour.[199] According to cosmopolitans, the rules of every society, as well as the actions of everyone in society, should reflect the idea that people across societies are equal and live in the same world, and that therefore the same moral (and, ultimately, legal) standards should be applied to all. It is considered that the equal consideration of everyone's interests in this respect, which may give rise to both positive duties to actively promote the interests of individuals living in other societies and negative duties to avoid unnecessarily harming them or their living environment, will increase global justice, fairness, equality and sustainability.[200]

In the end, as in the debates on corporate social responsibility in general, the question arises as to what the actual responsibilities of internationally operating business enterprises are in this respect, as well as the corresponding legal question whether and under what circumstances purely social (or ethical) responsibilities may become legal responsibilities. To what extent may internationally operating business enterprises themselves be responsible for respecting and/or protecting third party private or public interests in the host countries in which they operate, even where those interests are not protected by local rules? Which are the normative or legal standards that define their social responsibilities in such cases? Although clear-cut answers to these questions do not exist at this point, it seems undeniable, in light of the recent developments that will be discussed in the next section, that internationally operating business enterprises are indeed expected under

197 For further detail on the international ethical theories of realism (according to which there is no shared global morality in a world characterized by anarchy and statehood, which renders self-interest the only viable ethics) and pluralism (according to which in a culturally diverse world of co-existing nation-states there can be no truly universal morality), see Shapcott 2008, pp. 194-205.

198 See generally on cosmopolitanism (according to which humanity should be "*treated as a single moral community that has moral priority over our national (or subnational) communities*"): Shapcott 2008, pp. 194-205.

199 See, for instance: Linklater 2008, p. 555. See further *supra* sub-section 7.1.

200 Compare, for instance: Shapcott 2008, pp. 196-198; Pogge 2002.

certain circumstances to take responsibility for the protection of people- and planet-related interests in the host countries in which they operate, even where local rules do not require them to do so. Increasingly, companies in general and internationally operating business enterprises in particular are expected to incorporate in their corporate policies, management decisions and operational practices awareness and of consideration of people- and planet-related interests in the societies in which they operate.

A related question is where, to what extent and by whom these corporate actors can be held accountable for not complying with their social responsibilities in this context. It is at this point that the closely related concept of international corporate accountability becomes relevant. In this international context, international accountability involves the responsibility of internationally operating business enterprises to answer, especially to home country stakeholders such as consumers, shareholders and other investors, the general public and home country governments, for the way in which they conduct their operations abroad. This means that they may be required to both assess and create a measure of transparency on the CSR-related issues and risks they are faced with in their transnational operations.[201] International accountability also involves a responsibility for those companies to address such issues and risks to the extent that they lie within their sphere of influence, which may require them not only to engage their own local operations, but potentially also those of their local business partners.

At the same time, however, international corporate accountability in this context pertains to the importance of enabling host country stakeholders and/or their representatives to address, legally or otherwise, any adverse consequences they may suffer as a result of the local activities by the internationally operating business enterprises concerned, including the possibility, under certain circumstances, to obtain redress for loss and damages suffered. However, as has been discussed in the previous part, such redress may be particularly difficult to obtain for host country victims of these adverse consequences before courts in the host countries involved. It is this particular problem that has triggered the recent proliferation of foreign direct liability cases, which are now confronting civil courts and policymakers in Western home countries with the question as to what extent home country courts and home country systems of tort law can be used to hold accountable 'their' internationally operating business enterprises for operating abroad in a manner that is considered to be socially irresponsible.

201 For a detailed discussion of (the legal aspects of) transparency in this context and specific transparency mechanisms, see Kerr, Janda & Pitts 2009, pp. 241-284.

7.3 Current developments

7.3.1 The driving forces behind the CSR movement

Over the past few decades the rise in popularity, acceptance and global impact of the CSR concept has been dramatic.[202] It is impossible to attribute this pervasive, still ongoing societal development to any one particular cause. Rather, a number of driving forces behind the CSR movement may be distinguished.[203]

The first one is formed by calls from NGOs and the wider community (especially in Western societies) upon international operating business enterprises to live up to Western societal expectations as to the way in which they integrate environmental and social imperatives into their traditional focus of economic considerations and balance these often competing interests, both when operating at home and abroad, and to account for any failures to do so.[204] As will be further discussed below, some of the main impetus for the current debates on international corporate social responsibility and accountability has come and is still coming from a growing number of increasingly active, well-organised, well-informed and well-connected NGOs. It has been noted in this respect:

> "*The importance of community opinion and sentiment as a driver of CSR cannot be overstated. Just as the average member of society is dependent on corporations, so too are corporations dependent on society; the relationship is one of mutual dependency.* [...] [C] *itizens across the globe are using their views on CSR to inform their decisions about the companies with which they will work or invest and the goods and services they buy*".[205]

The driving force of community pressure, which is particularly emanating from Western societies, has a significant effect on the business community. It is roused to a significant extent by NGO activism combined with increasingly frequent and detailed media reports and news coverage on CSR-related matters, which create a hitherto unprecedented measure of transparency on (international) business practices and their consequences.[206] Corporate scandals and/or well-covered catastrophes such as the Bhopal disaster, the Enron scandal, the Probo Koala incident involving shipping company Trafigura, and the BP oil spill in the Gulf of Mexico are likely to play an especially provocative role in this respect. The effects of community pressure can be highly direct and tangible, in particular for those companies that have their main markets in these Western societies.[207] In addition, this community pressure is affecting governments in these societies, which in response to changing

202 Kerr, Janda & Pitts 2009, pp. 33-34.
203 Kerr, Janda & Pitts 2009, pp. 33-52.
204 Kerr, Janda & Pitts 2009, pp. 35-38.
205 See Kerr, Janda & Pitts 2009, p. 38.
206 Compare, for instance: Mullerat 2010, pp. 301-306.
207 Compare, for instance: Bendell, pp. 13-15.

opinions in this respect within their electorates, "[...] *are implementing new mechanisms to promote CSR-like behaviour from the corporations that operate in their jurisdictions*" and as such themselves become an increasingly important driving force behind the CSR movement.[208] It has been noted that it is the information and communications revolution of the past few decades, which has enabled citizens around the globe to become aware of their interconnectivity and interdependence and of the shared global issues they face and has resulted in a "[...] *historically unprecedented degree of technology-driven transparency, scrutiny and accountability* [...]", that is in fact the most significant driving force behind the CSR movement.[209]

Another external driving force is emanating from individual and institutional investors that, both in response to community awareness of CSR-related matters and as a result of the realization that such matters may influence shareholder returns, increasingly factor in CSR considerations to their investment decisions.[210] Insurers too have woken up to the risks involved in CSR-related issues such as climate change. Similarly, financial institutions are increasingly including sound environmental and social performance as a requirement for companies that wish to acquire loan facilities.[211] The ultimate drive for corporate social responsibility of course comes from the global problems that are fuelling the CSR movement in the first place, such as global inequality, population growth, climate change, depletion of resources, poverty, disease, environmental degradation and conflict, to name but a few. As well as motivating stakeholders to provide businesses with external driving forces to incorporate CSR-related considerations into all aspects of corporate activity, these global problems may also directly affect companies and their operations and as such provide them with an internal driving force to consider and address relevant social and environmental interests and issues.[212]

Other more internal driving forces include the corporate moral imperative and the much-debated business case for corporate social responsibility. Even though companies themselves, as fictional entities and legal constructs, arguably cannot be attributed with any kind of morality, the people that together make up a company are of course moral actors. Their acknowledgement of the company's social responsibilities and their willingness to address CSR-related issues and incorporate considerations pertaining to broader societal interests into all aspects of corporate activity, ranging from the procurement and production of goods and services to internal governance practices, corporate policies and management decisions as well as interactions with business partners, constitutes an

208 Kerr, Janda & Pitts 2009, pp. 38, 51.

209 Kerr, Janda & Pitts 2009, pp. 531-535.

210 See further on the notion of Socially Responsible Investment (SRI), for example: Mullerat 2010, pp. 363-368.

211 See, for instance: Kytle & Ruggie 2005, who speak of the rise of 'social risk' in the context of corporate social responsibility and note, *inter alia*: "*Some insurance companies are beginning to demand information from companies for which they provide directors and officers' liability coverage on whether they have a carbon accounting or reporting system in place. Large institutional investors, especially public sector pension funds, are increasingly applying pressure as well*" (p. 6).

212 Kerr, Janda & Pitts 2009, pp. 35-52.

important and arguably ultimately the most important driving force behind the realization of corporate social responsibility.[213] Even in companies where such a moral imperative is lacking or insufficiently strong to actually influence management and business practices, CSR incentives may flow from so-called 'enlightened self-interest', meaning that socially responsible business practices are pursued because of the perception that this will create business value. According to this business case for corporate social responsibility, which is not undisputed, the benefits of pursuing sustainable practices outweigh the costs, as embracing the CSR concept may in fact lead to cost savings, productivity and operational efficiency.[214] In addition, CSR programmes may be seen as forms of risk management, in the sense that they anticipate and diminish a company's risk of being targeted by community pressure to change certain practices that are perceived to be socially irresponsible.[215] Finally, good CSR performance may have positive effects not only on employee recruitment, retention and motivation, but also on the corporate image in general and consumer behaviour in particular.[216]

7.3.2 Using the law to promote international corporate social responsibility and accountability

NGO activism

Over past years, NGO activism has played an especially important role where it comes to the promotion of corporate social responsibility and accountability in the international sphere, and has given rise to an exponential growth in impact and importance of this movement.[217] It has been noted in this respect that

> "[n]*on-governmental activity on a global scale has now become a key part of the discourse of globalisation and is routinely identified – by governments, commentators and business itself, as one of the key 'drivers' of the contemporary CSR movement*".[218]

Some of the NGOs active in this field have opted for a collaborative approach, in the sense that they cooperate with internationally operating business enterprises in changing business practices from within in order to make them more socially responsible. Together with these corporate CSR leaders and Western society policymakers, they work on mapping the CSR issues that may arise in an international business context and on developing best practice when it comes to addressing these issues. Others, however, have taken a more confrontational line, in the sense that they focus on CSR laggards rather than

213 Kerr, Janda & Pitts 2009, pp. 39-41.
214 See, for example: Schreck 2009; Vogel 2008.
215 Compare, for instance: Mullerat 2010, pp. 301-306; Doh & Guay 2006.
216 Kerr, Janda & Pitts 2009, pp. 39-47.
217 See, in more detail: Bendell 2004.
218 McBarnet 2007, p. 15.

leaders and put their efforts into exposing and denouncing, with the help of the media and modern information technology, corporate malpractice in this context, rather than into identifying, developing and lauding corporate best practice.[219]

No matter what their approach, most NGOs in the international CSR field have been advocating a more prominent role for the law in the promotion of international corporate social responsibility and accountability. Countless proposals have been put forward in recent years for a variety of legal instruments and initiatives which are to promote and/or enforce international corporate social responsibility and accountability in a less piecemeal fashion than is provided for by the current hard law instruments and in a more compulsory fashion than is provided for by the current soft law and voluntary initiatives.[220] Their calls have received support from an increasing number of legal scholars and international organisations, as well as from (mostly left-wing) parliamentarians in various Western societies.[221] For a number of years now, the European Parliament, for example, has already been calling for the application at the EU-level of certain legal (as well as non-legal) instruments in order to frame and advance the EU's CSR policies.[222] Similarly, the previously mentioned bills seeking to implement binding codes of conduct for the transboundary activities of multinational corporations are examples of a wider range of legislative proposals that have been put forward in this context in a number of Western societies.[223]

UN impetus on business and human rights

Slowly but surely, the persistent and increasing socio-political pressure exercised in this respect has also created an awareness among Western society policymakers that even if companies are free to decide how to integrate awareness and consideration of people- and planet-related interests into their corporate policies, management decisions and operational practices, this does not automatically mean they should be free to choose whether or not to consider such interests at all.[224] Nonetheless, most of the proposals and initiatives of a more compulsory nature that have so far been advanced in this context have

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219 For a more in-depth analysis, see Winston 2002. See also Doh & Guay 2006, who note *inter alia* that: "[...] *European NGOs tend to employ a collaborative approach with policy-makers at the EU level, while leaving their more activist and confrontational strategies aimed at national governments back home*" (p. 54).

220 See, for instance, the proposals made in this respect by the European Coalition for Corporate Justice (ECCJ), a civil society network devoted to corporate accountability within the EU, which regularly publishes reports on how the EU legal framework pertaining to international corporate social responsibility and accountability should be improved. Some of their more recent reports include ECCJ Report (Gregor) 2010 and ECCJ Report (Gregor/Ellis) 2008, which will be briefly touched upon in section 10.2. See further the ECCJ website: <www.corporatejustice.org/>.

221 See generally, for instance, Kerr, Janda & Pitts 2009 and McBarnet, Voiculescu & Campbell 2007.

222 See, with further references: Enneking 2009, pp. 907-913.

223 See *supra* sub-section 7.2.2. See also, for further analysis: Zerk 2006, pp. 160-171.

224 Compare, for instance: Prepared Remarks by SRSG John G. Ruggie, Public Hearings on Business and Human Rights, Sub-Committee on Human Rights, European Parliament, Brussels (16 April 2009), available at <www.reports-and-materials.org/Ruggie-remarks-to-European-Parliament-16-Apr-2009.pdf>, pp. 4-6.

been met with reactions ranging from scepticism or disinterest to downright rejection by both policymakers and business communities, in line with their continued adherence to the notion of corporate social responsibility as a matter of corporate discretion. The best example of the stark difference in this respect is offered by the fate of the UN 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', which represented an attempt to formulate a definitive, comprehensive and mandatory set of standards with respect to the human rights responsibilities of business enterprises.[225] This ambitious attempt ultimately failed, as debates on these Norms ended in a stalemate between business representatives on the one hand and human rights groups on the other, and the UN Human Rights Commission in the end refused to approve them.[226]

The failure of these UN Norms, however, gave rise to another UN initiative, one that has provided the debates on international corporate social responsibility and accountability with serious new momentum; in 2005, a Special Representative of the UN Secretary-General was appointed on the issue of human rights and transnational corporations and other business enterprises.[227] In April 2008, this Special Representative, Professor John Ruggie, presented a semi-legal policy framework for business and human rights that rests on three pillars: the state duty to promote and protect human rights, also against the impacts that the operations of business enterprises may have in this respect; the corporate duty to respect the human rights of third parties; and the access of victims of corporate human rights violations to judicial and/or non-judicial remedies.[228] The 'Protect, Respect and Remedy' framework puts beyond doubt that at least when it comes to human rights, the concept of international corporate social responsibility and accountability does involve more or less concrete responsibilities for internationally operating business enterprises to prevent their business practices from detrimentally impacting the people- and planet-related interests of others. It also makes clear that legal as well as non-legal remedies are to be provided, both by states and by the internationally operating business enterprises involved themselves, to those who are detrimentally affected by the failure of these corporate actors to live up to their responsibilities in this respect. The operationalisation of these duties for corporations and corresponding remedies for victims is to a large extent in the hands of policymakers in both home and host countries, as it is ultimately the duty of those states to make sure that human rights are protected, also against corporate abuse.

225 For an in-depth discussion of these Norms and their strengths and weaknesses, see, for instance: Kinley, Nolan & Zerial 2007, pp. 459-475.

226 See, for a critical discussion: UNHRC Report (Ruggie) 2006, pp. 14-17.

227 Similarly: Enneking 2009, p. 909. See, for more information on John Ruggie's mandate and the work he has done in the course of that mandate, including further references, the website of the Business & Human Rights Resource Centre, <www.business-humanrights.org/SpecialRepPortal/Home>.

228 UNHRC Report (Ruggie) 2008.

According to Ruggie, states should fulfil this duty through the adoption of a policy mix of legal and non-legal, mandatory and voluntary measures.[229]

The 'Protect, Respect and Remedy' framework as laid down in the Special Representative's 2008 report was unanimously welcomed by the Human Rights Council and has since provided the different sides in the debates on international corporate social responsibility and accountability in Western societies around the world with some common ground, at least with respect to their human rights dimension.[230] As such, it has managed to lift these debates to a higher level, completely discarding the long-standing 'mandatory vs. voluntary' stand-off between those in favour of a mandatory regulatory framework for corporate social responsibility and those maintaining that CSR-related issues should be left to be dealt with by companies as they see fit.[231] The Special Representative's 2008 report setting out the framework has been followed up by further reports and a set of guiding principles that provide guidance on its operationalization and implementation by state actors and by corporate actors, all of which have been endorsed by the UN Human Rights Council.[232] It has received public acclaim across the board, not just from NGOs but also from the business community, and has been endorsed by national policymakers around the world.[233]

All in all, the UN policy framework on business and human rights, which will be discussed in more detail in the next two sub-sections, has strongly influenced the global CSR agenda, decisively shifting the focus of CSR debates around the world away from corporate social responsibility in the domestic context, towards international CSR-related issues and the responsibilities and accountability of internationally operating business enterprises. The emphasis on human rights that is coupled with the UN's involvement in this respect has put human rights concerns at the centre of the debate. Nevertheless, this does not mean that issues that may less easily be defined as involving human rights or internationally recognized human rights, such as environmental issues, health and safety issues, corruption, unfair competition, consumer issues etc., have left the agenda. The framework's broad, flexible approach to the human rights/internationally recognized rights that lie at its basis has left the door open to related issues.[234] Similarly, its broad, all-encompassing approach to the types of internationally operating business enterprises

229 See further *infra* sub-section 7.3.3.

230 Similarly: Enneking 2009, pp. 909, 934-935.

231 Ruggie addressed this mandatory vs. voluntary debate at the Public Hearings on Business and Human Rights held by the European Parliament Sub-Committee on Human Rights on 16 April 2009, referring to it as a "*stale debate*"; his prepared remarks are available at <www.reports-and-materials.org/Ruggie-remarks-to-European-Parliament-16-Apr-2009.pdf>. See also, critically, with respect to this mandatory vs. voluntary contradiction: Kerr, Janda & Pitts 2009, pp. 30-31, 93-104; Zerk 2006, pp. 32-36.

232 See, for an overview of relevant documents and further references, the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/SpecialRepPortal/Home>.

233 See for instance: Blitt 2011, pp. 12-14.

234 Significant in this respect is the fact that Ruggie has made the conscious choice not to draw up any limitative list of internationally recognized rights that internationally operating business enterprises have a responsibility to respect. See, for instance: UNHRC Report (Ruggie) 2008, pp. 4, 14-16.

has made it clear that corporate responsibilities in this context are to be observed not only by multinational corporations working abroad through foreign subsidiaries, but by any company the activities of which potentially or actually impact the enjoyment of human rights by others, whether at home or abroad.

European policy responses

The UN policy framework has put questions pertaining to the existence, extent and enforceability of human rights responsibilities for business enterprises in general and for internationally operating business enterprises in particular, high on the political agenda in Western societies worldwide. The same is true for questions pertaining to the interplay of those corporate responsibilities with state responsibilities in this respect and access to remedies for victims of corporate-related human rights abuse. As a result, the socio-political debate in these societies on the legal aspects of international corporate social responsibility and accountability seems to be increasingly shifting away from the more coincidental, indirect legal effects of corporate responsibilities in this respect towards a more conscious, systematic and purposive application of the law in this context. This tendency shines through for instance in the various policy initiatives that have followed in the wake of the UN policy framework on business and human rights, at the EU level as well as at the domestic level in various European societies. As mentioned before, the European Commission in 2009 commissioned a study on the legal framework on human rights and the environment applicable to European enterprises operating outside the EU.[235] Similar studies, with varying scopes, have been conducted at the instigation of domestic policymakers in several European countries, including the UK, Norway and the Netherlands.[236]

In October 2011, the European Commission promulgated a new CSR strategy (2011-2014) in which the impact of the UN policy framework on business and human rights is clearly visible.[237] Importantly, the Commission departs from its previous understanding of corporate social responsibility as a purely voluntary concept, stating:

> "*Corporate social responsibility concerns actions by companies over and above their legal obligations towards society and the environment. Certain regulatory measures create an environment more conducive to enterprises voluntarily meeting their social responsibility*".[238]

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235 Similarly, with a focus on the European context: Enneking 2009, pp. 909-910, 912, 934-938. See also further sub-section 1.2.4.

236 See, respectively: UKJCHR Report 2009; NMFA Report CSR 2009; DMEAFA Report (Castermans/Van Der Weide) 2009.

237 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011) (hereinafter: EC Communication CSR 2011).

238 EC Communication CSR, p. 3. See also *supra* sub-section 7.2.2.

It redefines its notion of corporate social responsibility as "*the responsibility of enterprises for their impacts on society*" and emphasizes the importance of corporate respect for applicable legislation and for collective agreements between social partners. Furthermore, the Commission indicates that companies should have in place:

> "[...] *a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:* [1] *maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large;* [2] *identifying, preventing and mitigating their possible adverse impacts*".[239]

Although, according to the Commission, companies should have the lead in the development of CSR initiatives, public authorities should play a supporting role in this respect, using:

> "[...] *a smart mix of voluntary policy measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability*".[240]

The Commission also indicates that it is committed to implementing the UN policy framework on business and human rights throughout the EU.[241]

Clearly, the Commission's new CSR strategy may have major implications not only for the legal framework applicable to foreign direct liability cases brought before domestic courts in the EU Member States, but also for the broader question whether and to what extent European home countries of multinational corporations are to adopt legal measures to promote international corporate social responsibility and accountability by 'their' multinational corporations. It seems inevitable that the Commission's new strategy, in combination with the UN policy framework on business and human rights, will somehow translate into further legal and/or policy initiatives in this context both by the EU and by its individual Member States. The Commission has indicated that it will publish a report by the end of 2012 on its priorities in implementing the UN framework, and has invited the Member States by that time to develop their national plans in this respect.[242] In the meantime, the ongoing socio-legal trend towards foreign direct liability cases is guaranteed to keep policymakers as well as NGOs, business communities and the general public (including consumers and investors) in the Western societies involved aware of the

239 EC Communication CSR, p. 6. As will become clear from the discussion of the UN policy framework on business and human rights in the next sub-section, the process proposed by the Commission is very closely connected to (or inspired by) what is proposed with respect to human rights due diligence in the UN framework.

240 EC Communication CSR 2011, p. 7.

241 EC Communication CSR 2011, p. 14.

242 EC Communication CSR 2011, p. 14.

role that the law may play in addressing some of the issues faced by states, internationally operating business enterprises and those affected by transnational business operations in today's globalized world.

7.3.3 The UN policy framework on business and human rights

The reports drafted by the UN Special Representative, in the course of his mandate, on the issue of human rights and transnational corporations and other business enterprises, all of which have been endorsed by the UN Human Rights Council, seek to present and operationalize a policy framework to anchor the international business and human rights debate.[243] The 'Protect, Respect and Remedy' policy framework does not address the matter of international corporate social responsibility directly but rather focuses on the human rights-related aspects of the debate, with the specific objective of helping to achieve more effective protection for individuals and communities from corporate-related human rights harm.[244] In recognition of the difficulties faced by the UN Norms, the failure of which prompted the decision to appoint a UN Special Representative on the issue of business and human rights in the first place, and in recognition of the difficulties more generally of establishing a mandatory international regime in this context, the policy framework expressly focuses on alternatives to the current regulatory status quo that are more readily achievable than an overarching treaty imposing binding international standards on companies.[245] As such, the framework is meant to offer "[...] *a platform for generating cumulative and sustainable progress without foreclosing further development of international law*".[246]

As discussed, the framework fundamentally rests on three pillars: the state duty to protect against human rights abuses by third parties, including corporate actors, through policies, regulation and adjudication; the corporate responsibility to respect human rights, which means that companies must act with due diligence to avoid infringing on the rights of others; and the need for (better) access of victims of corporate human rights abuse to effective remedies, whether judicial or non-judicial.[247] The operationalization of this framework so far has yielded a wide variety of policy recommendations directed at all of the societal actors involved in the business-human rights debate, in particular states, businesses and civil society. In his final report in 2011, the Special Representative has set a

243 See, for an overview of all of the materials and recommendations produced by Professor Ruggie and his team over the course of his mandate, the website of the Business & Human Rights Resource Centre: <www.business-humanrights.org/SpecialRepPortal/Home>.

244 See, generally, UNHRC Report (Ruggie) 2008, pp. 3-9.

245 See, specifically: Ruggie 2008. See also further sub-section 8.1.4.

246 Ruggie 2008.

247 UNHRC Report (Ruggie) 2010, p. 3.

number of specific Guiding Principles for the implementation of the 'Protect, Respect and Remedy' policy framework. These guiding principles have the objective of:

> "[...] *enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization*".[248]

A number of them are especially relevant with respect to the question as to which role is to be granted to the law when it comes to the promotion of international corporate social responsibility and accountability; these will be briefly further discussed here.

The state duty to protect human rights

International human rights law imposes a duty upon states to respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. According to the guiding principles, this duty obliges states to:

> "[...] *protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises*" by "[...] *taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, regulations, and adjudication*".[249]

The measures to be taken by states in this respect include both preventative and remedial measures. Preventative measures taken by states under their duty to protect human rights should comprise "[...] *a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights*".[250] Rights-respecting corporate cultures can be promoted for instance through: the adoption of domestic CSR guidelines and policies that explicitly refer to international human rights standards; encouraging or legally prescribing reporting obligations for companies on human rights policies and impacts; the legal specification and enforcement of director's duties; and considering 'corporate culture' as a mitigating or aggravating circumstance in criminal law.[251] In addition, states should make sure that existing laws requiring business enterprises to respect human rights are adequate and can effectively be enforced; ensure that existing laws and policies pertaining to business enterprises and their operations, for instance in the field of corporate law, enable rather than constrain corporate respect for human rights; provide guidance to corporate actors on how to respect human rights throughout their operations, for instance by helping to share best practice; and encourage companies to

248 *Ibid.*, p. 6.
249 *Ibid.*, principle 1, pp. 6-7.
250 *Ibid.*, pp. 7-8.
251 *Ibid.*, pp. 5-12.

communicate on their human rights impacts, for instance through formal public reporting requirements.[252]

Additional steps are required when it comes to providing protection from human rights abuses perpetrated by business enterprises that are closely connected to the state, such as state-owned or state-controlled companies, or companies that receive substantial support and services from state agencies, for instance in the form of export subsidies or loans and/or investment insurances or guarantees.[253] Similarly, states remain (partly) responsible for the way in which privatized state services are carried out and are obliged to promote respect for human rights among the business enterprises with which they enter into commercial contract relationships.[254] Furthermore, states should ensure policy coherence both in the sense of making sure that governmental departments, agencies and other state-based institutions that shape business practices are aware of and observe the state's human rights obligations, and in the sense of maintaining adequate domestic policy space in their dealings with other states and/or with business enterprises directly.[255] In their capacity as members of multilateral institutions, they should make sure that the state duty to protect and corporate respect for human rights are promoted and facilitated instead of hindered, and "[...] *promote shared understanding and advance international cooperation in the management of business and human rights challenges*" on the basis of the 'Protect, Respect and Remedy' framework.[256]

Under international human rights law as it currently stands, states are generally not required to regulate the activities undertaken abroad by corporate actors domiciled in their territories and/or jurisdictions, although they are also not prohibited from doing so where a recognized jurisdictional basis exists.[257] The guiding principles make clear, however, that:

> "[t]*here are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses*".[258]

Approaches that may be adopted in this respect include both domestic measures with extraterritorial implications, such as requirements imposed on parent companies of multinational corporations to report on the global operations of the entire group, and direct extraterritorial legislation and enforcement, such as criminal law regimes that allow for the prosecution of offences that have taken place abroad.[259]

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252 *Ibid.*, principle 3, pp. 8-9.
253 *Ibid.*, principle 4, pp. 9-10.
254 *Ibid.*, principles 5 and 6, p. 10.
255 *Ibid.*, principles 8 and 9, pp. 11-12.
256 *Ibid.*, principle 10, pp. 12-13.
257 *Ibid.*, principle 2, p. 7.
258 *Ibid.*, principle 2, p. 7.
259 *Ibid.*, principle 2, p. 7.

A special situation arises when it comes to business operations in conflict-affected areas, where the risk of gross human rights abuses is heightened due to the fact that local human rights regimes cannot be expected to function as intended. Where, in conflict-affected areas, host countries are unable to protect human rights adequately due to a lack of effective control, multinational corporations' home countries "[...] *have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse*". They may fulfil their role in this respect for instance by engaging with the corporate actors involved and helping them to assess and address the human rights-related risks of their activities and business relationships, by denying public support and services to corporate actors that are involved in such abuses and refuse to address them, as well as by ensuring the effectiveness of existing policies, legislation, regulations and enforcement measures seeking to address the risk of business involvement in gross human rights abuses.[260] Where existing preventive measures policies, legislation and/or regulation prove ineffective, states should address those gaps by:

> "[...] *exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses*".[261]

Thus, the guiding principles imply that in such situations the use of domestic measures with extraterritorial implications is considered to be justified.[262]

The corporate responsibility to respect human rights

The UN framework on business and human rights puts beyond all doubt that business enterprises themselves have an independent responsibility to respect internationally recognized human rights regardless of where they operate. The human rights involved include at a minimum those contained in the International Bill of Rights (which encompasses the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and in the Declaration on Fundamental Principles and Rights at Work (which encompasses the eight ILO core conventions). Under their responsibility to respect human rights, companies "[...] *should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved*", also where this would require them to go beyond compliance with national laws and regulations protecting human rights. This "[...] *global standard of expected conduct*" for business enterprises applies independently of the willingness and/or ability to protect human rights of the states in which they operate but "[...] *is distinct from issues of legal liability*

260 *Ibid.*, principle 7, pp. 10-11.
261 *Ibid.*, principle 7, p. 11.
262 See also: UNHRC Report (Ruggie), pp. 5-12.

and enforcement, which remain defined largely by national law provisions in relevant jurisdictions".[263]

The responsibility to respect human rights requires business enterprises to avoid directly (through their own activities, whether they be actions or omissions) causing or contributing to adverse human rights impacts, as well as to address such impacts where they occur by taking adequate preventive, mitigating and, where appropriate, remedial measures. At the same time, it also requires them to try to prevent or mitigate adverse human rights impacts by their relationships with business partners, entities in their value chains and other non-state or state entities that are directly linked to their business operations, products or services.[264] Depending on their size and circumstances, companies should have in place appropriate policies and processes in order to meet their human rights responsibilities. These include first of all a statement of policy that sets out publicly a company's internal and external responsibilities, commitments and expectations with respect to its responsibility to respect human rights.[265] In addition, a human rights due-diligence process should be in place in order to identify, prevent, mitigate and account for how a company addresses its impacts on human rights; this process "[...] *should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed*".[266] Lastly, a company should provide for and/or cooperate in legitimate processes to enable the remediation of any adverse human rights impacts it may have caused or to which it may have contributed.[267]

Although the corporate responsibility to respect human rights applies to business enterprises regardless of their size, sector, operational context, ownership and structure, the scale and complexity of the measures they are expected to deploy in this respect may vary depending on these factors (including whether and the extent to which they conduct business through a corporate group or individually) as well as depending on the severity of the (expected) human rights impacts involved.[268] Irrespective of the particular country and local contexts within which they operate, business enterprises should always comply with all applicable laws and respect internationally recognized human rights; where faced with conflicting requirements in this respect, they should seek ways to honour the principles of internationally recognized human rights to the greatest extent possible under the circumstances and be able to demonstrate their efforts in this respect. Furthermore, regardless of the domestic legal context companies should treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue:

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263 UNHRC Report (Ruggie), principles 11 and 12, pp. 13-14.
264 *Ibid.*, principles 11 and 13, pp. 13-14
265 *Ibid.*, principles 15 and 16, pp. 15-16.
266 *Ibid.*, principles 15 and 17-21, pp. 15-20.
267 *Ibid.*, principles 15 and 22, pp. 15, 20-21.
268 *Ibid.*, principle 14, p. 14.

> "[...] *given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility*".

At the same time, corporate directors, officers and employees may be held individually liable for their involvement in gross human rights abuses.[269]

Access to remedies

Next to these predominantly preventative measures that states and business enterprises are required to take under their duty to protect and responsibility to respect human rights, respectively, remedies need to be made available to those suffering the consequences of instances of corporate human rights abuse that occur in spite of the precautions taken. Under their duty to protect against business-related human rights abuse, states are required to:

> "[...] *take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy*".

States may do so by providing grievance mechanisms through which those affected may directly or indirectly (through an intermediary) seek remedies such as:

> "[...] *apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition*".

The grievance mechanisms involved may be judicial or non-judicial in nature; examples of state-based grievance mechanisms that may play a role in this context include:

> "*the courts (for both criminal and civil actions), labour tribunals, National Human Rights Institutions, National Contact Points under the* [OECD] *Guidelines for Multinational Enterprises* [...], *many ombudsperson offices, and Government-run complaints offices*".[270]

Effective judicial mechanisms are the main way in which victims of corporate human rights abuse can be given access to remedy. Therefore, states are obliged to ensure their effectiveness, including by "[...] *considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy*" and by refraining from erecting new barriers in this respect that may "[...] *prevent legitimate cases from being*

269 *Ibid.*, principle 23, pp. 21-22.
270 *Ibid.*, principle 25, pp. 22-23.

brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable". At the same time, states will have to ensure the impartiality, integrity and ability to accord due process of the judicial mechanisms involved. Special attention may need to be paid in this respect to "[...] *the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise*", as well as to the fact that the most vulnerable and marginalized (groups of) individuals will often face additional impediments when it comes to access to remedy for business-related human rights abuse.[271]

Next to these state-based judicial grievance mechanisms, effective and appropriate non-judicial grievance mechanisms need to be made available to victims of corporate human rights abuse; both states and companies have a role in providing, endorsing, facilitating and/or participating in such mechanisms. With respect to all these non-judicial grievance mechanisms, whether state-based or non-state-based, a number of effectiveness criteria need to be fulfilled, including: legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility and learning potential. In addition, operational-level non-judicial mechanisms, such as corporate codes of conduct, need to be based on engagement and dialogue with the stakeholder groups for whose use they are intended.[272]

7.3.4 Some legal and policy implications of the UN framework

General reflections

As discussed, the UN policy framework on business and human rights is already having a major impact on the debates on international corporate social responsibility and accountability that are taking place in most Western societies today. One of its most significant feats is the fact that it has received acceptance and following across the board, a direct result of the fact that the framework itself has been realized through extensive engagement and dialogue with the different stakeholders involved. The semi-legal UN framework represents an authoritative reflection of the current status quo in the field of business and human rights with a strong normative undertone; it is at the same time fundamental in the sense that it addresses the main underlying principles and highly pragmatic in the sense that it also seeks to provide guidance as to the operationalization of those principles. By offering a platform for further progress through a categorization of the contemporary status quo, it provides the different sides to these debates with some much-needed common ground and forms a strong, fundamental and widely accepted basis for further discussion and development in this respect.

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271 *Ibid.*, principle 26, pp. 23-24.
272 *Ibid.*, principles 27-31, pp. 24-27.

Although its focus is on the impacts of business operations on the human rights-related interests of third parties in general and on internationally recognized human rights in particular, its substantive scope is flexible as the framework deliberately does not provide a limited catalogue of human rights that could potentially be affected by corporate actors. The international human rights instruments that, according to the framework, set out the bare minimum international human rights that business enterprises should respect (the rights expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO's Declaration on Fundamental Principles and Rights at Work) cover a very broad spectrum of human rights. Additional human rights standards may need to be considered by business enterprises where circumstances so require. Importantly, the framework indicates that the question as to which internationally recognized human rights should be respected by business operations under their duty to respect, is distinct from the question whether and to what extent those rights can be enforced and/or can lead to legal liability under provisions of domestic law in relevant jurisdictions.

As such, many of the instances of harm caused to people- and planet-related interests as a result of the transboundary activities of internationally operating business enterprises with which the contemporary debates on international corporate social responsibility and accountability are concerned, may potentially be covered by the framework. After all, violations of environmental, labour or health and safety norms may under certain circumstances also be qualified as violations of (the principles underlying) internationally recognized human rights standards. At the same time, even when it comes to instances of corporate-induced harm to people- and planet-related interests that cannot be said to amount to violations of internationally recognized rights, the UN framework on business and human rights seems likely, by way of analogy, to have a strong normative effect. The boundaries of its reach seem to lie in violations of norms that are less fundamental and/or universally accepted than the internationally recognized human rights principles that lie at its core. However, in line with what has also been discussed for instance in the context of foreign direct liability cases, even those boundaries may prove to be relative as many norms, especially those in the field of private law, will be reducible in the end to certain fundamental, universal principles that seek to protect the basic rights and entitlements of private individuals.[273]

It should be noted here that although the UN policy framework has been welcomed and endorsed by governments and intergovernmental organisations around the world, as well as by business enterprises, it has also received criticism. It has been asserted, especially by human rights NGOs, that its guiding principles do not go far enough when it comes to regulating corporate human rights impacts. Complaints have been raised that the

273 See further sub-section 6.4.2.

principles are nothing more than an endorsement of the status quo in which corporate actors do not have any real obligations to respect human rights, and that mechanisms to put the principles into practice are lacking. Other points of criticism pertain to the fact that the principles do not include a (human) right to judicial remedy for victims of corporate human rights abuse, and that they do not include obligations on states to take measures to prevent their internationally operating business enterprises from becoming involved in human rights abuses perpetrated abroad. It has been noted in this respect that:

> "[...] *from a human rights standpoint, the key stumbling block moving forward remains convincing state and corporate actors of the need for legally binding and enforceable international norms capable of effectively regulating business conduct wherever human rights concerns may arise*".[274]

And indeed, the framework does not put in place new or more binding behavioural norms for internationally operating business enterprises, nor does it create stronger corporate accountability mechanisms. Accordingly, it does not present the major leap forward that some NGOs in the CSR field may have hoped for, but instead a moderate step in what is undeniably the right direction.

Still, even though the framework itself does not directly impose any binding norms or mechanisms, its impact on corporate accountability should not be underestimated. After all, the general norms that the framework sets out, particularly those with respect to the corporate responsibility to conduct human rights due diligence, will inevitably acquire legal effect, as is the case with the existing soft norms and private and self-regulatory initiatives in this field. As discussed before, this legal effect may ensue for instance from the fact that the framework creates certain public expectations as to the way in which internationally operating business enterprises conduct their worldwide activities, expectations that may in turn create certain legal obligations. Furthermore, especially considering the broad basis of support for the framework among business enterprises too, it is likely that the norms set out in it will eventually become part of general custom. This general custom may in turn acquire legal effect through the open norms in domestic legal systems, such as for instance the notion of due care in tort law. Accordingly, the norms set out in the framework will become further developed as courts are asked to apply them in civil disputes against internationally operating business enterprises. At the same time, it is likely that the norms set out will eventually somehow find their way as well into mandatory rules set out by domestic legislators, for instance in the field of criminal law.[275]

All in all, even though the UN policy framework on business and human rights does not set out any legally binding norms or create stronger corporate accountability mechanisms,

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274 Blitt 2011, p. 16.

275 See *supra* sub-section 7.2.2. See also, for further detail on the legal effects of 'alternative modes of regulation', of which the framework is an example: Witteveen, Giesen & De Wijkerslooth 2007.

the indirect effects that it is likely to have in enhancing corporate accountability of internationally operating business enterprises are likely to be significant. And precisely because it does not set any binding norms, the framework in effect allows for the further practical development and expansion of the basic norms set out in it. It is in this particular context that transnational tort-based civil litigation such as foreign direct liability claims may clearly play a crucial role.

Impacts on corporate accountability and foreign direct liability

The UN policy framework on business and human rights provides an important tool for states, companies and other stakeholders in the field of business and human rights as it provides clarity on a number of fundamental issues. Some of these issues are closely linked to legal and policy issues arising in the more general context of international corporate social responsibility and accountability. As is clear from what has been discussed before, one particular issue that arises in this respect pertains to the role of home countries in promoting socially responsible conduct by 'their' multinational corporations undertaking activities abroad as well as in holding those corporate groups accountable for their detrimental impacts on people- and planet-related interests in host countries. The question arises whether and if so how home countries should seek to regulate the transnational activities of 'their' internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability, and what role the law can play in this respect. At the same time, the question arises as to how foreign direct liability cases fit into this picture. The 'Protect, Respect and Remedy' policy framework provides a number of important clues and leads with respect to these two questions.

First of all, the UN framework on business and human rights puts beyond all doubt that companies, regardless of the place and/or the context in which they operate, have an individual responsibility to take into account the human rights-related interests of third parties. It also makes clear that this is a universal responsibility that exists independently of the legal, political and practical context at the particular location where business enterprises conduct their operations, which is especially relevant of course when it comes to the activities of multinational corporations in host countries. The standard of expected conduct accompanying the corporate responsibility to respect the human rights of others is not contingent on the willingness and/or ability of the host countries involved to protect human rights locally and may as such go beyond the standard of conduct set and/or enforced by host country laws and regulations. As such, the framework may be interpreted to denounce situations in which multinational corporations profit from double standards between developed home countries and developing host countries, at least when it comes

to internationally recognized human rights, and to promote consistent best practice in this respect.[276]

This responsibility applies in principle to all business enterprises, regardless of their size, sector, operational context, ownership and structure. However, expectations as to the measures that companies should apply in order to prevent, mitigate or address human rights abuses are likely to be proportional to these factors, as well as to the severity of the (potential) human rights abuses involved. Another factor that, according to the framework, may play a role here is whether and to what extent the business enterprises involved conduct their operations through a corporate group or individually, although it leaves aside how exactly this may affect the expectations as to the way in which they comply with their respective responsibilities to respect human rights. Still, depending on the particular risk of people- and planet-related harm involved, it seems safe to say that the expectations of the measures taken by (the corporate entities forming part of) multinational corporations in order to prevent and/or redress the impacts of their operations on human rights-related interests of others will in most cases be relatively high, in line with the often superior size, influence, financial resources, expertise and/or internal information and control structures that will generally be connected with their particular organizational structures.[277]

Mindful of the controversy that surrounded the UN Norms, which sought to impose a binding set of substantive conduct-regulating norms on (internationally operating) business enterprises, the framework deliberately stops short of actually going into the conduct that is expected of companies in this respect. Instead, it sets out the institutional framework and the basic distribution of obligations and responsibilities between states and business actors when it comes to protecting and promoting the human rights-related interests of citizens around the world, and offers important practical suggestions especially for business actors on how to fulfil their role in this respect. Accordingly, the question as to what particular steps should be taken by multinational corporations in any particular situation so as to avoid, mitigate and/or address the impacts of their operations on the people- and planet-related interests of particular third parties is left to be answered in the first place by the business enterprises concerned themselves, and in the second place by

276 Compare UNHRC Report (Ruggie) 2011, principles 11-13, pp. 13-14.

277 Compare UNHRC Report (Ruggie) 2011, principle 14, pp. 14-15. It should be noted in this respect that the 2010 draft version of the Guiding Principles held that with respect to corporate groups considering themselves to be a single business enterprise, the responsibility to respect would attach to the group as a whole and would encompass "[...] *both the corporate parent and its subsidiaries and affiliates*", whereas with respect to entities in the group considering themselves distinct business enterprises the responsibility to respect would attach to them individually and would extend "[...] *to their relationships with other entities – both within the group and beyond – that are connected to their activities*"; this provision has not been included in the final version, however. 'Draft Guiding Principles for business & human rights posted for consultation' (22 November 2010) (prepared by John Ruggie), principle 12, p. 13.

domestic legislators and/or courts regulating that conduct and/or addressing its harmful impacts on those interests.[278]

The framework does make clear, however, that regardless of where or in which context they operate, business enterprises should comply with applicable laws and should respect internationally recognized human rights; if the two conflict, they should nonetheless seek to honour the underlying principles of the internationally recognized human rights involved. Furthermore, according to the framework, the risk of involvement by corporate actors in gross human rights abuses perpetrated by other actors in particular operating environments, such as conflict-affected areas, has become a 'legal compliance issue'. After all, due to the growing popularity of transnational accountability mechanisms such as foreign direct liability claims, the risk for internationally operating business enterprises of being held accountable before home country courts for their involvement in such gross human rights abuses perpetrated abroad has increased significantly. As such, the framework makes clear that multinational corporations can expect to be held legally accountable for their involvement in gross violations of internationally recognized human rights in host countries, where necessary before home country courts if those rights are not adequately protected locally through appropriate host country rules and regulations that are imposed on and enforced against the business enterprises and other actors involved.[279]

At the same time, the UN framework on business and human rights makes clear that although the corporate responsibility to respect human rights exists independently of the willingness and/or ability to protect human rights of the states in which they operate, it is states that remain the principal duty bearers when it comes to the promotion, protection and fulfilment of human rights. It holds that the state duty to protect human rights also encompasses a duty for states to protect against human rights abuse that takes place within their territory and/or jurisdiction by (internationally operating) business enterprises. Under this duty, states must provide for effective preventative measures through which corporate human rights abuse can be prevented, as well as for effective remedial measures through which abuses that do occur can be investigated, punished and redressed. As with the corporate responsibility to respect, the UN framework on business and human rights does not set out which measures states should take in order to fulfil their obligations in this respect; rather than favouring particular approaches or measures for the prevention of business-related human rights abuse, it recommends that states adopt a 'smart mix' of national and international, mandatory and voluntary measures. At the same time, it stresses the importance of adequate enforcement of existing laws that directly or indirectly regulate business respect for human rights and of creating alignment of domestic laws and

278 Compare UNHRC Report (Ruggie) 2011, principles 16-24, pp. 15-22.
279 Compare UNHRC Report (Ruggie) 2011, principle 23, pp. 21-22.

regulations and policy coherence in this respect so as to create an environment conducive to business respect for human rights.[280]

The framework stops short of requiring that states should regulate the activities that multinational corporations domiciled in their territory and/or jurisdiction carry out abroad. It does, however, state that home countries should clearly set out the expectation that 'their' internationally operating business enterprises are to respect human rights abroad; the policy reasons for doing so are even stronger if the state itself is somehow involved in or supports the transnational activities of those business enterprises. At the same time, it also points out that states have already adopted a variety of measures in this regard, ranging from domestic measures with extraterritorial implications to direct extraterritorial legislation and enforcement. Especially when it comes to activities of internationally operating business enterprises that take place in conflict-affected areas where host countries are not able to exercise the control necessary for adequate protection of human rights, home countries have an important role to play in ensuring that 'their' multinational corporations do not become involved in human rights abuses and in seeking to impose civil, administrative or criminal liability on those that do commit or contribute to gross human rights abuses locally. One of the ways in which home countries can comply with this duty is by allowing foreign direct liability cases against the home country-based parent companies of the multinational corporations involved to be brought before their courts and by closely monitoring and where necessary adapting the factors affecting the feasibility of such claims (jurisdiction, applicable law, legal basis, procedural and practical circumstances) so as preserve this avenue for the enforcement of internationally recognized human rights against multinational corporations infringing them.[281]

Finally, the UN framework on business and human rights stresses the importance of remedial measures provided by states to victims of business-related human rights abuse through state-based grievance mechanisms that seek to counteract or make good any human rights harms that have occurred. According to the framework, under their duty to protect states are obliged to take appropriate steps to ensure that those affected by corporate human rights violations occurring within their territory and/or jurisdiction have access to effective remedies, which may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions, as well as preventive remedies such as injunctions or guarantees of non-repetition. Effective judicial mechanisms through which victims of business-related human rights abuse may express their grievances and obtain redress play a key role in this respect, possibly complemented by non-judicial grievance mechanisms and non-state-based grievance mechanisms. Especially where judicial recourse is an essential part of victims' access to remedies and/or where other remedies are unavailable, states should ensure that they reduce existing legal, practical and

280 Compare UNHRC Report (Ruggie) 2011, principles 1 and 3, pp. 6-7, 8-9.
281 Compare UNHRC Report (Ruggie) 2011, principles 2 and 7, pp. 7, 10-11.

procedural barriers to the pursuit of legitimate cases in this respect, as well as refraining from erecting new ones. Obviously, this obligation may have an important bearing on the feasibility of foreign direct liability cases, which, as has been discussed in the previous part, is dependent on a number of particular legal, procedural and practical circumstances in the home countries where they are brought as well as on the particular legal bases for the pursuit of such cases that are made available by the applicable system of tort law.[282]

The framework does not go deeper into the circumstances under which corporate human rights violations may be said to have occurred within the territory and/or jurisdiction of multinational corporations' home countries, and which would as such oblige those home countries to provide the host country victims involved with effective remedies before home country courts. It does however refer in particular to the legal barriers that may exist to the pursuit of legitimate cases seeking to address corporate human rights violations where host country plaintiffs face a denial of justice in the host country and cannot access home country courts regardless of the merits of the claim. Another potential legal barrier that is highly relevant in the context of foreign direct liability cases and that is specifically mentioned by the framework, is the possibility that domestic (criminal and) civil laws facilitate the avoidance of accountability by corporate groups for their involvement in human rights violations as a result of the way legal responsibility is attributed to the different legal entities within the group. Similarly, legal barriers in this respect may exist where the human rights interests of certain societal groups receive less protection than those of the wider population. Relevant practical and procedural barriers to victims' access to judicial remedies that home as well as host countries may need to address under their duty to protect include the costs of bringing claims, where those are prohibitive (*i.e.*, go beyond forming an appropriate deterrent to unmeritorious cases) and cannot be reduced to reasonable levels, difficulties for the host country plaintiffs in securing adequate legal representation and the inadequacy or absence of options for aggregating claims or enabling representative proceedings. With respect to criminal procedures, the framework points out the barriers that may arise where state prosecutors lack adequate resources, expertise and support to investigate business involvement in human rights-related crimes.[283]

Three crucial points

To sum up, three of the legal and policy implications of the UN framework on business and human rights are of particular relevance for this study.

The first is the fact that the framework seems to condone states' exercise of extraterritorial jurisdiction over multinational corporations operating out of their territories with a view to preventing and/or redressing corporate human rights violations abroad, especially where this is done through domestic measures with extraterritorial implications rather

282 Compare UNHRC Report (Ruggie) 2011, principles 25 and 26, pp. 22-24.
283 Compare UNHRC Report (Ruggie) 2011, principle 26, pp. 23-24.

than through direct extraterritorial legislation and enforcement. Although it does not go as far as holding that states are required to adopt regulatory measures aimed at preventing 'their' internationally operating business enterprises from violating international human rights norms abroad, it does require them to set out expectations of corporate respect for human rights abroad as well. Furthermore, under very specific circumstances, where multinational corporations operate in conflict areas, the framework holds that home countries should actively seek to prevent these corporate actors from becoming involved in gross human rights violations and should impose civil, administrative or criminal liability on those that do. These are important steps forward in an international legal order that is based on principles of territoriality and state sovereignty.

The fact that the framework implies that home countries may and in some situations ought to regulate extraterritorially, through legal or other means, the transnational activities of 'their' internationally operating business enterprises, is of particular significance in the context of international corporate social responsibility and accountability. After all, as has been discussed, the strongest drive for consistent best practice and/or transparency in this respect is currently emanating from NGOs, consumers, shareholders and other investors, policymakers and the general public in multinational corporations' home countries. At the same time, developing host countries and/or emerging economies in particular are generally perceived to be part of the 'problem' in this respect, in the sense that due to unwillingness and/or inability, they tend to do little (or at least much less than is common in developed home countries) to regulate the local activities of multinational corporations with a view to protecting the people- and planet-related interests of host country citizens and as such perpetuate the existence of double standards with respect to those activities and corresponding people- and planet-related interests of home country citizens.

The second implication of the UN framework that is of particular relevance in light of this study is its (indirect) reference to foreign direct liability cases and the particular role that this type of transnational tort-based civil litigation may play in fostering business respect for the human rights-related interests of others. As such, the UN framework confirms that foreign direct liability cases have an important role to play at present in promoting international corporate social responsibility and accountability, by inducing internationally operating business enterprises in general and multinational corporations in particular to incorporate awareness and consideration of particular people- and planet-related interests that may be affected by their (involvement in) host country business operations. It also makes clear that home country governments have a role in creating the preconditions under which this type of litigation can fulfil its societal role in this respect, by removing legal, procedural and practical impediments to the pursuit of these cases by host country plaintiffs and by ensuring that the creation of new or further barriers to legitimate claims of this nature is prevented. Arguably, the framework's acknowledgement of the role that foreign direct liability cases may fulfil in this context is highly significant in light of the uncertainties surrounding the role of the law in general and the role of

domestic home country legal systems in particular when it comes to the promotion of international corporate social responsibility and accountability.

Finally, even though the framework does not set out any binding conduct-regulating rules for internationally operating business enterprises, it does provide some relatively clear directions, especially where it comes to the corporate responsibility to conduct human rights due diligence. This is of crucial importance for foreign direct liability cases brought on the basis of negligence. After all, foreseeability plays a major role as a factor in determining whether the defendant parent company was negligent in not preventing the people- and planet-related harm at issue in these cases from being caused by the transnational activities of its corporate group. Generally speaking, the parent company can only be held liable in this type of case if it could have been able to foresee the risk of harm being caused to people and planet locally by the activities in question, and if it would have been able to do something to prevent that harm from occurring. The UN framework on business and human rights in effect places a responsibility on internationally operating business enterprises to actively gather information on and monitor the human rights-related risks of their transnational activities, including those of their foreign subsidiaries, business partners and sub-contractors.

All in all, this will render it much harder in future foreign direct liability cases for the defendant parent companies to contend that they could not have foreseen (the standard is an objective one) the human rights-related risks inherent in their operations or in those of their local operators. At the same time, the corporate responsibility to take adequate preventive, mitigating and, where appropriate, remedial measures with respect to human rights-related risks that are identified in this way may also raise the bar when it comes to the precautionary measures that the parent companies in these cases may be expected to have taken in order to prevent those risks from materializing. Combined, these two indirect effects of the UN policy framework on business and human rights may have a significant impact on the feasibility of holding (parent companies of) multinational corporations accountable for harm caused to people and planet in host countries through foreign direct liability cases.

7.4 Concluding remarks

This chapter has sought to outline the wider societal, political and legal context that frames the contemporary socio-legal trend towards foreign direct liability cases. To this end, the main actors, interests and principles that play a role in the contemporary trend towards these cases have been identified, and the contemporary socio-political movement towards international corporate social responsibility and accountability has been further explored.

From what has been discussed in this chapter, it is clear that those pursuing and/or promoting foreign direct liability claims generally do so with a view to promoting

consistent best practice by internationally operating business enterprises. Their interests contrast starkly with those of the corporate actors involved in these cases, which are typically interested in seeking out operating environments where local rules allow them to undertake their business activities at low costs, thus enabling them to optimize their competitiveness and profitability. Home country governments are faced with increasing domestic calls for regulatory action aimed at promoting international corporate social responsibility and accountability. At the same time, however, they need to be mindful of the economic interests of their business communities, as well as of their international relations with the host countries involved.

Still, the number of regulatory initiatives aimed at internationally operating business enterprises with a view to preventing or reducing the detrimental impacts of their operations on people and planet around the world is growing fast. Cautious state based initiatives at the domestic and the international level are complemented by a multitude of private and self-regulatory initiatives in this respect. It is increasingly recognized that the fact that many of the initiatives involved are non-binding and/or based on corporate discretion does not prevent them from having certain legally binding obligations on the corporate actors involved. As internationally operating business enterprises are not (or only to a very limited extent) recognized as subjects of international law, legal enforcement of these obligations, where applicable, typically takes place at the domestic level.

There are a variety of drivers behind the contemporary CSR movement, including consumers, labour organizations, institutional investors, insurers, the media, the public at large and business actors themselves. The increasing focus on the application of legal measures in order to promote socially responsible business practices not only at home but also abroad has been fuelled in particular by a growing number of increasingly active NGOs in CSR-related fields such as human rights, labour and the environment. Another major source of impetus for the contemporary debates on international corporate social responsibility and accountability has come from the development at the UN level of a policy framework on business and human rights.

Although criticized by some NGOs for not creating binding corporate obligations or new corporate accountability mechanisms, this framework is of great significance as it authoritatively sets out and delineates the duties and responsibilities of states and corporate actors when it comes to protecting human rights. At the same time, it gives the initial impetus to a further embedding of the socio-legal trend towards foreign direct liability cases in the contemporary debates on international corporate social responsibility and global business regulation more generally. In the next chapter, the potential role of foreign direct liability cases in the broader field of global business regulation will be further explored.

8 Global business regulation and the law

8.1 Regulating internationally operating business enterprises

8.1.1 From responsibility to regulation

As has been discussed in the previous chapter, there seems to be growing consensus in Western societies on a less non-committal and open-ended approach to the concept of international corporate social responsibility and accountability. This has led to increasing socio-political pressure on internationally operating business enterprises to adopt socially responsible business practices in their global operations, in the sense that they are increasingly expected to make their contribution to society in each of the countries in which they operate. The main way in which they are expected to do so is by internalizing awareness and consideration of local private third party and public interests that lie within their sphere of influence and by preventing, addressing and where necessary redressing any adverse consequences that their operations may have on those interests. At the same time, there is also increasing socio-political pressure on home country policymakers to take measures that actively promote socially responsible business practices by 'their' internationally operating business enterprises and to make sure that those companies account for or can be held accountable for any adverse impacts that their operations abroad have on people- and planet-related interests in host countries. In turn, these socio-political developments have led to a growing interest in ways in which the law can be used to regulate the behaviour of these internationally operating business enterprises, not only at home but also abroad.

These developments connect the contemporary socio-political debates on international corporate social responsibility and accountability with the scholarly discourse on global governance in general and on global business regulation more particularly that brings together disciplines such as economy, political science, sociology and the law. Sparked by the recognition that globalisation has led to significant regulatory gaps with respect to the transnational activities of non-state actors such as internationally operating business enterprises as those actors and activities increasingly fall outside the reach of traditional, state-based modes of regulation, this discourse deals with more general questions pertaining to the regulation of transnational (business) actors and transnational (business) activities in a globalizing world.[1] This has given rise to the critical evaluation of existing forms of global business regulation and the exploration and application of new ways to regulate the behaviour of internationally operating business enterprises in a wide

1 See, for instance: Koppell 2010; Teubner 1997.

variety of subject matter areas also outside the context of international corporate social responsibility and accountability.[2] As such, the discourse on global governance and global business regulation provides more general insights into the regulatory options, both legal and non-legal, that are available when it comes to the promotion of international corporate social responsibility and accountability of internationally operating business enterprises.[3] Within this particular context, the recent proliferation of foreign direct liability cases in Western societies adds a new dimension as it brings into view one particular potential avenue for global business regulation, namely that of regulation through domestic private law systems in general and domestic systems of tort law in particular.

8.1.2 To regulate or not to regulate?

The first question to arise when it comes to the issue of global business regulation in general and in the context of international corporate social responsibility and accountability in particular, is whether further regulation of the transnational actors and activities involved is really necessary and/or desirable, in view of the regulatory options that already exist in this respect. Regulation in this sense may be understood to refer to principles, rules or laws prescribed by authority that are designed to influence, control or govern conduct.[4] According to the particular definition adopted, the notion may refer for instance to specific, binding sets of rules that are applied by specific regulatory bodies, in a somewhat broader sense to all types of state action that are designed to influence industrial or social behaviour, or even more broadly to all mechanisms that affect the behaviour of societal actors, whether state-based or not and whether with a deliberate regulatory objective or not.[5] It has been noted that:

> "*At its simplest, regulation refers to the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with those rules*".[6]

As such, global business regulation, as any type of regulation, can in the end be said to involve three distinct but interrelated types of activity: standard-setting with respect to particular transnational business actors and/or business activities; monitoring whether

2 See, for instance: Braithwaite & Drahos 2000, who distinguish in this respect the subject matter areas of financial regulation, corporations and securities, trade and competition, labour standards, the environment, nuclear energy, telecommunications, drugs, food, sea transport, road transport and air transport.

3 Compare also: Zerk 2006, pp. 7-59.

4 See sub-section 7.2.3.

5 Baldwin & Cave 1999, pp. 1-2. In the following, the focus will mainly be on regulation in the broadest sense, although all of the regulatory initiatives and/or mechanisms discussed here do indeed have specific regulatory objectives to a greater or lesser extent.

6 Baldwin & Cave 1999, p. 3.

the standards set are complied with by the actors and activities they seek to regulate; and enforcing those standards where necessary.

A typical justification for regulation is that "[...] *the uncontrolled market place will, for some reason, fail to produce behaviour or results in accordance with the public interest*".[7] As has been discussed in the previous chapter, there may be different reasons why markets may be thought to lead to socially undesirable behaviour and/or socially undesirable results; the decision to regulate the activities of business actors will usually be based on a combination of such reasons.[8] However, even though situations in which markets may not be relied on to provide socially desirable outcomes may provide a rationale for regulation, this still leaves the question whether the introduction of regulatory measures with respect to corporate behaviour that is perceived to run counter to what is in the public interest in particular subject matter areas is considered to be necessary and desirable. After all, each regulatory measure comes with its own administrative burdens and costs, and just like market mechanisms any regulatory strategy also has its inherent weaknesses.[9] This means that the introduction of any kind of regulatory measure in the end requires socio-political support for the measure itself as well as for its effects and possible side-effects, especially from those societal groups that will ultimately be financing it for instance through taxes, higher prices and lower investment returns.

As discussed, the contemporary debates on (international) corporate social responsibility and accountability reflect a growing concern that the unregulated pursuit of private self-interests by corporate actors, in line with ideas of free market processes, free trade, privatization and deregulation, do at some specific points conflict with the private interests of others in society and/or with the public interest, not only at a societal level but in particular also at a global level.[10] Especially in Western societies, the traditional belief that the only societal responsibility of corporate actors is to generate maximum profits is giving way to the contemporary idea that business enterprises have responsibilities not only with respect to the financial interests of their shareholders, but also with respect to the people- and planet-related interests of a broadening range of stakeholders that may be affected by their business operations.

This notion is particularly relevant in a global setting, where internationally operating business enterprises operating out of developed home countries are free to have part or all of their business operations carried out in developing host countries where regulatory standards pertaining to those activities with a view to protecting local people- and planet-related interests are less strict and/or poorly enforced. This brings with it the possibility that the internationally operating business enterprises involved externalize the costs

7 See, with further references: Baldwin & Cave 1999, p. 9.
8 See also Baldwin & Cave 1999, pp. 9-19.
9 Baldwin & Cave 1999, pp. 9, 16.
10 See further chapters 1 and 7.

of their production processes on host country third parties and/or the environment in the host countries in which they operate, as well as that the price of the products manufactured and/or services delivered by these companies does not reflect the true costs of their production. In view of the challenges posed to global objectives of sustainability, equality, fairness and justice by such double standards, a mixture of paternalism, altruistic concerns, social policy considerations and an awareness of the demands of future generations are now leading to increasing socio-political calls in Western societies for further-reaching regulatory intervention in order to promote international corporate social responsibility and accountability. It is through such regulatory intervention that internationally operating business enterprises should be encouraged and/or obliged to incorporate considerations of relevant societal (or global) interests into all aspects of their corporate activities.[11]

However, the necessity and desirability of further regulatory intervention with the transnational activities of internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability has not gone unchallenged. As discussed, the debates on international corporate social responsibility and accountability have long been dominated and virtually eclipsed by a stand-off between those advocating a voluntary, self-regulatory approach to the matter and those advocating more mandatory, externally imposed regulatory approaches.[12]

The former advocate the business-friendly neo-liberalist view that the combination of local regulatory standards and free market processes, business self-regulation on the basis of corporate ethics, the abundance of voluntary and/or soft law instruments that are currently available and consumer and investor scrutiny would suffice to bring about socially responsible business practices worldwide. In what is commonly referred to as 'the business case for corporate social responsibility', they hold that market mechanisms already provide companies with sufficient incentives to adopt socially responsible business practices, as doing so will increase their productivity and profitability in the long run and allow them to distinguish themselves from their competitors vis-à-vis consumers and investors.[13] According to this view, which tends to be expressed by business actors and those representing them, further regulatory intervention is not only unnecessary but would also detrimentally affect the profit margins and competitiveness and profitability of the internationally operating business enterprises involved and stifle innovation.[14] Western society policymakers, in view of domestic economic and trade interests and international relations, have long supported this voluntary approach to the issue of international

11 Compare Baldwin & Cave 1999, pp. 9-17, where they discuss typical rationales for regulation. See also section 1.2 and chapter 7.
12 See further chapter 7.
13 See, for instance, on the business case for CSR and with further references: Zerk 2006, pp. 16-17, 32-33.
14 See, for example: Zerk 2006, pp. 32-33; Muchlinski 2007, pp. 113-114.

corporate social responsibility and accountability. As mentioned before, until very recently the European Commission, for example, defined corporate social responsibility as:

> "*a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis*".[15]

On the other side of the debate are those who hold that regulatory action is necessary in order to compel socially responsible behaviour by internationally operating business enterprises and to be able to hold accountable those companies with sub-standard international business practices. They tend to argue that the incentives emanating from market mechanisms and consumer and investor pressure (the business case for corporate social responsibility) are not sufficient in this respect, not even when combined with corporate self-regulation and adherence to CSR-related voluntary initiatives and soft law mechanisms. Instead, they advocate a more mandatory regulatory approach, preferably through the imposition of a domestic or international regulatory framework setting detailed, mandatory normative standards for internationally operating business enterprises and their transnational activities, accompanied by monitoring and enforcement mechanisms on the basis of which non-complying business actors can be identified and effectively dealt with. Proponents of such more broad-based and tough regulatory measures in the context of international corporate social responsibility and accountability are likely to be found especially among environmental and human rights NGOs, which will often get some support from those on the left of the political spectrum.[16]

As discussed in section 7.3, debates on international corporate social responsibility and accountability have now moved way beyond the mandatory vs. voluntary debate, especially under the influence of the UN policy framework on business and human rights.[17] In its recently published CSR strategy 2011-2014, the European Commission has adopted a new definition of and approach to corporate social responsibility, while also making clear that although companies should have the lead in CSR strategies, public authorities should play a supporting role in this respect through a mix of voluntary policy measures and complementary regulation where necessary.[18] This clearly reflects that there is an

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15 See, for instance: Commission of the European Communities Green Paper, 'Promoting a European framework for Corporate Social Responsibility', COM(2001) 366 final (18 July 2001).

16 Compare: Zerk 2006, pp. 33-34; Muchlinski 2007, p. 119.

17 In a 2009 address to the European Parliament, UN Special Representative John Ruggie remarked that the mandatory vs. voluntary-debate had become "[...] *so stale as not to warrant much further discussion*"; see Prepared Remarks by SRSG John G. Ruggie, Public Hearings on Business and Human Rights, Sub-Committee on Human Rights, European Parliament, Brussels (16 April 2009), available at <www.reports-and-materials.org/Ruggie-remarks-to-European-Parliament-16-Apr-2009.pdf>, pp. 4-6.

18 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011) (hereinafter: EC Communication CSR 2011). See

increasing realization among Western society policymakers that there is a need and in some cases even an obligation, moral or legal (under international law), to regulate 'their' internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability.

However, the recognition that states do have a regulatory role to play in this context under certain circumstances does not directly answer the question what the particular role of state-based regulation should be alongside the abundance of examples of private regulation and self-regulatory initiatives in the field of international corporate social responsibility and accountability. At the same time, even if with respect to any particular CSR-related issue it is clear that state-based regulatory intervention would be justified, opinions may still be divided on the means by which the particular internationally operating business enterprises and/or transnational activities involved should be regulated. Disagreement may exist, for instance, over whether potential measures should be designed to pursue short-term or long-term objectives, whether they should be broad, flexible and open-ended or rather specific, stable and clear-cut, whether they should be prescriptive or repressive, whether they should be based on a broad basis of support or a high aspiration level, and whether they should be based on more economic, market-oriented instruments or on legal instruments.[19] It is these issues that will be discussed in the following sub-sections.

8.1.3 Exploring the regulatory spectrum

Private versus state regulation

Traditionally, the nation-state is seen as the focal point of regulatory activity, both in its capacity as a sovereign domestic regulator and in its capacity as a participant in regional or international regulatory regimes. This notion is changing, however, as globalization is increasingly challenging the traditional idea of an international legal order based on a system of independent, sovereign nation-states. Over the past decades, it has not only exposed the traditional state-based system's inadequacy in dealing with a growing number of transnational actors and activities, but has also given rise to alternative, non-state-based regulators and regulatory systems. The domestic, state-based legal order has become just one of an increasingly diverse range of sometimes competing and sometimes co-operating legal and functional orders. Especially in the field of global business regulation, where it is generally recognized that globalization has caused significant regulatory gaps (or governance deficits), serious alternatives to state-based regulation have emerged at

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further sub-section 7.3.2.

19 See, very generally on different theories on and types of regulation and with further references: Baldwin, Scott & Hood 1998, pp. 1-55.

alternative regulatory sites such as the corporate, market, industry, civil society, regional and international level.[20] It has been noted in this respect that:

> "[t]*oday, companies are 'regulated' (in the widest sense of the word) by a hugely diverse group of actors who may include shareholders, public authorities, inter-governmental bodies, trade unions, NGOs, insurers and consumer groups*".[21]

As has been discussed in the previous chapter, there are a number of CSR-related subject matter areas in which states have collectively set mandatory standards through multilateral treaty regimes on matters such as corruption, environmental dumping (whether at sea or cross-border in developing countries), the use of child labour, etc. These international regimes do contribute to global business regulation, albeit in an indirect manner, as they are typically directed at state actors rather than the corporate actors involved themselves, and as such remain dependent in principle on the implementation and enforcement of the regulatory standards involved by their individual member states. Furthermore, a number of international soft law instruments have been developed by intergovernmental organisations such as the OECD Guidelines for Multinational Enterprises and the ILO Declaration of Principles Concerning Multinational Enterprises and Social Policy, which do address internationally operating business enterprises directly and provide them with some (non-binding) guidance and recommendations as to the way in which they are expected to deal with CSR-related issues that may arise in the context of their transnational business practices. The UN 'Protect, Respect and Remedy' policy framework on business and human rights is another important instrument in this respect.[22] In addition, intergovernmental organisations have promulgated a variety of voluntary initiatives and instruments that internationally operating business enterprises may freely choose to join, adopt and/or follow and that aim to provide further direction on CSR matters generally or on sub-issues in the field. These include for instance, among many others, the UN Global Compact and the EU Ecolabel scheme. Furthermore, as has been discussed before, a number of states, particularly in the Western world, have by now started to introduce a variety of unilateral measures aimed at promoting socially responsible corporate behaviour both at home and abroad, in particular in the form of reporting and disclosure measures aimed at internationally operating business enterprises located within their territory and/or jurisdiction.[23]

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20 See, for instance, Willke 2009, pp. 12-14; Muchlinski 2007, pp. 112-121; Teubner 1997.

21 Zerk 2006, p. 41.

22 See further sub-sections 7.2.2 and 7.3.2.

23 See further sub-sections 7.2.2 and 7.3.2. See also, for a more detailed overview and classification of initiatives and instruments relevant to corporate social responsibility: P. Hohnen, 'Overview of selected initiatives and instruments relevant to corporate social responsibility', in: Annual Report on the OECD Guidelines for Multinational Enterprises 2008, OECD, 2009, pp. 235-260.

As has also been discussed, however, these state-based regulatory initiatives in the field of international corporate social responsibility and accountability have remained few and far between and have only been able to address to a limited extent the regulatory gaps that exist with respect to the global activities of internationally operating business enterprises. In reaction to this, a plethora of alternative, 'private' initiatives dealing with internationally operating business enterprises' global business practices have emerged that have been of particular significance in this context.[24] These involve informal (*i.e.* non-state-based) types of regulation that set principles, requirements and behavioural standards with respect to potential business impacts in particular CSR-related subject matter areas, both in the form of corporate self-regulation and in the form of civil regulation set up by those representing CSR-related stakeholders.[25] Corporate self-regulation refers here to norms, standards, guidelines and/or best practice governing the transnational activities of internationally operating business enterprises that are created, implemented and, in some cases, monitored and/or enforced 'internally' by the business actors and/or industries in question themselves.[26] Civil regulation, on the other hand, involves 'external' business regulation through domestic and international NGO/civil society action that addresses the business practices of internationally operating business enterprises in a cooperative or in a more critical manner.[27]

At present, there are countless examples of private CSR initiatives, which may roughly be classified into seven categories: corporate codes of conduct; multi-stakeholder initiatives; certification and labelling initiatives; model codes of conduct; sectoral or industry-wide initiatives; international framework agreements; and socially responsible investment initiatives.[28] The defining feature of these forms of private regulation, which may alternatively be referred to as private governance, private rule-making or private lawmaking, is that they originate not with states or state-based international or transnational organizations, but rather with private actors.[29] As such, their "[...] *legitimacy, governance and implementation is not rooted in public authority*"; they represent bottom-up rather than top-down forms of regulation.[30] This also means that they principally rely on voluntary participation and cooperation by the internationally operating business enterprises that are their regulatory addressees. Whether and how compliance by corporate participants with the principles, requirements and behavioural standards set out in these private regulatory mechanisms is monitored and/or enforced is dependent on the specific

24 See further sub-section 7.2.2.
25 See, for example, Snyder 2003, and, with many further references, Vogel 2008.
26 Compare Witteveen 2007, pp. 29-31. See also Baldwin & Cave 1999, pp. 124-137.
27 See, for instance: Vogel 2006; Muchlinski 2007, p. 114.
28 Hohnen 2009, pp. 237-239, 246-247.
29 For a more detailed discussion of private regulation in the CSR context, albeit with a slightly different definition of the concept of private regulation and the initiatives covered by this concept:. Lambooy 2010, pp. 227-276.
30 See, with a focus on civil regulation: Vogel 2006, p. 5. Compare also, with a focus on so-called 'alternative regulation', Witteveen 2007, pp. 23-42.

set-up of each individual initiative. Generally speaking, however, compliance is voluntary and mainly achieved by reputation and peer pressure, which puts these private CSR-related regulatory mechanisms at the more discretionary end of the regulatory spectrum.[31]

Although none of these private regulatory initiatives can boast the same measure of democratic legitimation and authoritativeness that state regulation inherently possesses, some of them, such as for instance the Global Reporting Initiative and the standards developed by the International Organization for Standardization, have explicitly been recognized and endorsed by (the international community of) states, which obviously enhances their status and credibility.[32] Furthermore, these initiatives and the behavioural standards which they set with respect to the business practices of internationally operating business enterprises do tend to have some binding force on their corporate participants/addressees, even if only because of the reputational risks that may ensue from companies' non-compliance with the (self-)imposed behavioural standards, or of their 'dropping out'.[33] That such concerns may be valid is illustrated for example by recent news coverage of the fact that Shell was dropped from the Dow Jones Sustainability Index.[34] At the same time, it is broadly recognized, outside the CSR context, that private regulation and self-regulatory initiatives may have legal consequences. Such legal consequences may result for example from statutory or contractual provisions to that effect, from the fact that the private or self-regulation reflects a general consensus among the actors involved, or because they come about through the application of open norms especially in the field of private law.[35]

The significant and still growing influence of private regulatory initiatives and private actors, not only NGOs, citizen groups and individual citizens in their capacities as consumers or shareholders but also internationally operating business enterprises themselves, trade unions and industry organizations, on global business regulation is seen by many as one of the defining features of globalization.[36] It has been noted in this respect that:

> "[...] *whereas first the long-term historical trend was one of public authorities coming to aid private regulation in civil society; in the era of globalisation, private actors come to the aid of public authorities.*[37]

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31 Vogel 2006, pp. 5-6.
32 Hohnen 2009, p. 241.
33 See Kerr, Janda & Pitts 2009, pp. 476-479.
34 See, for instance: 'Shell and Oracle: Sustainability's ashoka chakra' (8 April 2011), available at <www.corporate-eye.com/blog/2011/04/shell-oracle-sustainability/>.
35 See, for instance, in more detail: Witteveen, Giesen & De Wijkerslooth 2007 and, particularly, Giesen 2007, pp. 91-116. See also sub-section 7.2.2.
36 See generally, for instance, Muchlinski 2007, in particular pp. 82-85, 471-574; Braithwaite & Drahos 2000; Teubner 1997.
37 Van Waarden 2008, pp. 90-92.

This development ties in with the increasing socio-political calls especially in Western societies for further-reaching regulation in order to address the regulatory gaps that exist with respect to the transnational activities of internationally operating business enterprises, and an increasing civil militancy to make sure that those calls are heard by those in a position to effectuate adequate regulatory measures in this respect.[38] At the same time, this new type of regulation may also be seen as resulting from a general decrease in public trust in state governments in general and more particularly in their ability and will to come up with adequate regulatory responses in the international CSR context, especially when it comes to imposing regulatory measures that address the behaviour of powerful, rich and profitable internationally operating business enterprises. Accordingly, in the face of the incapacity of public (state) regulation to effectively deal with global issues such as those pertaining to international corporate social responsibility and accountability, private actors have stepped in and assumed a more active role in the context of global business regulation, a role that used to be reserved for public authorities.[39]

It seems, however, that despite its increasing popularity in areas where public (state-based) regulation does not come up to the mark when it comes to regulating transnational business actors and business activities, private regulation cannot yet be considered a full equivalent or an adequate functional alternative to public regulation.[40] These non-state-based regulatory initiatives face issues especially with respect to their representativeness and legitimacy. After all, private regulation is typically initiated, shaped and, where applicable, monitored and/or enforced by bodies with no legitimacy or democratic accountability, sometimes including the regulatory addressees themselves. As such, private regulators are in principle not accountable through public, democratic channels and are as such not likely to be subject to any effective control other than that applied by its members. At the same time, societal actors that are not directly involved in a private regulatory initiative may have poor or no access to and/or say in its rulemaking procedures but may nonetheless be affected by the resulting private law-based regulatory framework. This creates risks of regulatory capture, of poor regulatory quality and effectiveness, as well as of insufficient regard to the interests of third parties and/or the public interest.[41]

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38 See sub-section 7.3.2.

39 See, for instance: Vogel 2006, pp. 11-18. Compare also Zerk 2006, pp. 22-25, who notes (p. 23) that "'[g]*lobalisation' is giving rise to a new political struggle, not between states and multinationals or, necessarily, between North and South, but between 'people and corporations*'".

40 Compare, with a focus on consumer actions, Newell 2001, p. 913. See also, for instance, Van Waarden 2008, pp. 90-92, where it is noted that even though: "[...] *private and semi-private international organisations help solve governability problems for national governments* [...] *their involvement and responsibilities add to or create new problems of legitimacy and democratic accountability*".

41 See, with a focus on self-regulation: Baldwin & Cave 1999, pp. 129-133. In recognition of these issues, the UN policy framework on business and human rights for example provides a number of benchmark criteria that non-judicial grievance mechanisms for corporate human rights violations (both state-based and non-state-based ones) should comply with in order to ensure their effectiveness. These include: legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, learning potential as well as (when it comes to operational-level mechanisms) a basis in engagement and dialogue. See UNHRC Report

Private regulatory mechanisms are challenged not only when it comes to setting legitimate standards, but also and even more so when it comes to their ability to monitor and review the results of such standards and in particular to enforce those standards where necessary. Due to their inherent voluntary and discretionary nature, which undeniably also involves various potential benefits such as flexibility, suitability, responsiveness to the specific regulatory issues and concerns involved and better acceptance among their regulatory addressees, they may struggle to set measurable and/or enforceable targets.[42] Problems may arise especially when it comes to so-called 'corporate rogues' (*i.e.*, "*criminals and those with malicious intent*") and 'corporate laggards' (*i.e.*, "*the negligent or consistently poor performers*") as these companies are not intrinsically motivated to integrate awareness and consideration of people- and planet-related interests throughout their corporate policies, management decisions and operational practices, and so will seek to duck rules and cut corners where they can in their pursuit of profits.[43] This may be tempting especially for corporate actors that have a low public profile in the Western societies where the call for international corporate social responsibility and accountability is strongest, and so are impervious to the reputational pressure to join and/or comply with the private regulatory mechanisms involved. At the same time, companies may choose to participate in these initiatives only in order to enhance their public image (a practice often referred to as 'greenwashing') and/or to prevent more far-reaching regulation, without any real commitment to the regulatory objectives involved.[44]

It is obvious that effective enforcement mechanisms are essential especially in these cases, which are arguably the ones in which global business regulation with a view to the promotion of international corporate social responsibility and accountability is most important. Vogel notes in this respect:

> "*In many global industries, a handful of highly visible firms based in* [...] *North America and Western Europe have emerged as CSR leaders, making good faith efforts to comply with relatively high standards for respect of labor, environmental protection, and human rights, and often seeking to persuade other firms in their industries to behave more responsibly. But to the extent that their competitors are either less able or unwilling to effectively comply with the civil regulations to which they have nominally agreed, these firms' own efforts to behave more responsibly are constrained. Peer and public pressures*

(Ruggie) 2011, principle 31, pp. 26-27. See, for an assessment of the successfulness of a number of private regulatory initiatives on the basis of their quality, enforcement, legitimacy and effectiveness: T.E. Lambooy, CORPORATE SOCIAL RESPONSIBILITY, Kluwer, 2010, pp. 250-270. Note, however, that Lambooy works with a slightly different definition of the concept of private regulation and the initiatives covered by this concept than is adopted here.

42 See, for instance: Vogel 2006, who notes that: "[...] *for many civil regulations, implementation, and effective monitoring and enforcement represent a serious structural weakness*" (p. 43).

43 Kerr, Janda & Pitts 2009, pp. 98-99.

44 See, for instance: Vogel 2006, pp. 43-48.

> *have promoted business adoption of many civil regulations, but in most cases such pressures have not been an effective tool for promoting compliance with them*".[45]

Ultimately, it is states in general and Western society home countries in particular that are the only actors that can, with the backing of their domestic legal systems, effectively compel corporate leaders and laggards alike to participate in or comply with private and/or self-regulatory regimes. This also means that:

> "[u]*ntil the world's rich countries are willing to integrate civil regulations into their domestic and international regulatory strategies, the global regulatory failures civil regulation was intended to redress will persist*".[46]

In the end, even though private regulatory initiatives are a welcome and maybe even necessary addition, especially in areas where traditional state-based regulation is unable to adequately respond to contemporary regulatory challenges, they arguably remain too non-committal and open-ended to replace state-based regulatory measures and/or enforcement altogether as the primary mode of regulation, at least for now. And indeed, notwithstanding the perceived shift away from nation-states as the world's primary regulators, it is generally agreed that, at present, the state remains the main regulator and the state level the main level of regulation.[47] As has been noted in this respect:

> "*Undoubtedly, global governance has become more pluralistic: a variety of non-state actors now play an unprecedented role in global affairs. There is, however, considerable evidence that the regulatory state is anything but dead. Notwithstanding the impossibility of state regulation assuming a perfectly comprehensive form, the state – particularly large and wealthier states overseeing large internal markets – remains nonetheless the primary actor writing and enforcing the formal rules governing corporations, markets, and the global economy. The key difference now is not that state authority has vanished, but rather, that its authority is more systematically influenced by non-state actors than ever before*".[48]

Accordingly, despite the growing importance of non-state actors as would-be regulators, the state remains the principal player and main bearer of rights and obligations in the international arena and the main creator and enforcer of rights and obligations for private actors, whether operating domestically or transnationally. This also means that state regulation remains, at least for now, the main way to impose binding and enforceable obligations on internationally operating business enterprises with respect to international corporate social responsibility and accountability; after all, the state distinguishes itself

45 Vogel 2006, p. 46.
46 Vogel 2006, p. 47. See also sub-section 7.2.2.
47 Compare, for instance: Kerr, Janda & Pitts 2009, pp. 479-484; Willke 2009, p. 13; Vogel 2006, pp. 43-48.
48 Kerr, Janda & Pitts 2009, p. 480.

not only through its historical legitimacy, but also through its legal power and monopoly of publicly sanctioned force.[49] It is for this reason also that the focus of the UN 'Protect, Respect and Remedy' policy framework on business and human rights, for example, is first and foremost on the role of states in fostering "*a corporate culture respectful of human rights at home and abroad*" as part of their duty to protect against human rights abuses by non-state actors, a duty that includes the institution of effective mechanisms to investigate, punish and redress corporate human rights abuse.[50] As such, it is recognized that the legal effectuation, where necessary, of the corporate responsibility to respect human rights and of international corporate social responsibility and accountability more generally, remains primarily a state matter, since even behavioural standards set by private regulatory initiatives at any sub-state or supra-state level in practice still typically need to rely on public instruments at the domestic level for their legal enforcement.[51]

Reflexive regulation

The decline of the mandatory/voluntary dichotomy has created space for the recognition that in between these two opposites lie a large variety of state-based regulatory instruments that may potentially play a role where it comes to the regulation of internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability. A number of these instruments rely more or less directly on legal mechanisms for the imposition, monitoring and enforcement of regulatory standards aimed at transnational business actors and business activities. Also, in view of the economic benefits involved in leaving corporate actors at least some freedom to conduct their activities in ways that they see fit, the question remains, however, how strictly states should seek to regulate their behaviour.

The most direct way of regulating the behaviour of particular societal actors is through so-called 'command and control' regulation, which refers to public law behavioural standards prescribed by a country's government or other public authorities and backed up with legal sanctions. An example is the field of criminal law, where the rules are imposed by the legislature, monitored by the police and enforced by courts which, through the imposition of sanctions, punish violations of the rules and provide incentives for compliance.[52] However, recent years have seen a move away from this traditional style of regulation, due both to the rise of economic liberalism and also to the realization that in some contexts it may be ineffective or even counter-productive. Particular points of criticism include the facts that this type of regulatory technique can be imprecise, that the regulatory authorities involved often lack the information necessary to set appropriate behavioural standards, that the costs of monitoring and enforcement are typically high,

49 Similarly: Kerr, Janda & Pitts, pp. 493-494.
50 See UNHRC Report (Ruggie) 2008, pp. 7-8, 9-14, 22-27. See also further sub-section 7.3.3.
51 Compare also: Vranken 2006, pp. 79-80.
52 See, for instance: Zerk 2006, p. 38; Collins 1999, p. 65.

as well as the fact that it lacks flexibility, which may result in the regulatory standards involved falling behind changing societal needs and expectations and/or technological developments. Furthermore, it invites its regulatory addressees to avoid "[...] *the intention of the law without breaking the terms of the law*";[53] where it is used to regulate business activities it runs the risk of stifling innovation and of fostering strict rule compliance by the corporate actors involved instead of motivating them to incorporate in their corporate policies, management decisions and operational practices an awareness and consideration of the principles and policy aims underlying the regulatory schemes involved.[54]

Accordingly, governments around the world have sought in recent years to regulate business behaviour in other ways than merely through the promulgation of traditional command-and-control type regulation that sets strict, authoritative, detailed legal standards accompanied by penalties that may be imposed on regulatory addressees that do not live up to them. Alternative regulatory techniques that have been explored in this respect include, for example, corporate self-regulation with an element of governmental oversight, incentives or rewards to encourage good business behaviour for instance through the tax system or in public procurement processes, and/or transparency initiatives that require business actors to disclose information on their performance in subject matter areas such as health and safety, labour standards, the environment and human rights.[55] These alternatives to command-and-control type regulation may be referred to as examples of responsive or reflexive regulation, which "[...] *seeks to achieve the collaboration and co-operation of those subject to regulation*". The general idea behind reflexive regulation is that the use of self-regulation is favoured in the setting of behavioural standards, which means that within the broad requirements set out by the law private actors are left considerable freedom to determine the detailed rules that govern their private interrelationships and transactions.[56] These more reflexive forms of regulation allow states to address the behaviour of business actors not only directly through externally imposed, monitored and enforced top-down regulatory standards but also indirectly by legally promoting, requiring, and/or enforcing internally developed (bottom-up) self-regulatory behavioural standards.

Thus, when it comes to global business regulation, states now have a choice between adopting a more supportive and/or persuasive role, leaving a good deal of space for corporate discretion, voluntariness and self-regulation, or adopting a more mandatory and/or repressive role, involving a less non-committal and open-ended intervention with the business practices of internationally operating business enterprises.[57] A benefit

53 Baldwin & Cave 1999, p. 38.
54 Compare Zerk 2006, pp. 36-37.
55 See, in more detail and with further references: Zerk 2006, pp. 36-41.
56 See, for instance: Collins 1999, pp. 65-66 (quote p. 65). See also, for a more comprehensive discussion: Ayres & Braithwaite 1992.
57 Compare Braithwaite 2008, pp. 88-94.

commonly associated with regulatory initiatives that leave more space for corporate discretion, voluntariness, and self-regulation, such as guidelines or best practice, labelling schemes and corporate codes of conduct, is that "[t]*hey place responsibility where the information and ability to influence outcomes is often the greatest* [...]". Furthermore, they are fast to implement, since they do not necessarily involve lengthy legislative processes, and flexible, since processes and targets may easily be adapted to changing needs and interests of the stakeholders involved and to changing CSR-related issues. In addition, the responsibility and thus also the costs for their design, implementation and/or administration may be shifted at least partly onto the regulatory addressees themselves and so do not necessarily lie with the state or the general public. This may also create a sense of ownership, internalization and acceptance among (those directing, managing or working for) the internationally operating business enterprises involved, while at the same time generating regulatory solutions that are more sensitive to industry practices and constraints. Combined, these circumstances are likely to generate higher levels of regulatory compliance and overall better substantive results.[58]

However, despite their obvious benefits, these more reflexive state-based regulatory initiatives also have a number of inherent limitations or drawbacks, especially as their emphasis shifts more towards the discretion and/or cooperation of the internationally operating business enterprises whose behaviour they seek to address. After all, the more they rely on their regulatory addressees to decide whether or not to partake in them, to set behavioural standards, and to monitor and enforce those standards, the more they move back to the realm of self-regulation, which as discussed involves inherent drawbacks especially where corporate rogues and corporate laggards are concerned.[59] Like private regulatory initiatives, these state-based reflexive regulatory mechanisms are unlikely, when used in isolation, to be effective in actually producing business behaviour that is more in line with societal notions of corporate social responsibility, and may even work counter-productively where the internationally operating business enterprises involved cooperate merely to stave off more mandatory regulatory intervention.[60] Accordingly, there is a case to be made for relying on state-based regulatory instruments that represent a higher degree of directiveness and external regulatory interference than those focusing on corporate cooperation and self-regulation.

These more directive regulatory mechanisms also come with certain benefits. First of all, they may have the effect of levelling the playing field as all regulatory addressees, both corporate leaders and corporate laggards, are forced to live up to the same behavioural standards. They may thus prevent their regulatory addressees from competing with one another on the basis of (locally imposed and/or enforced) operating standards. Furthermore, more directive regulatory instruments may be needed where a result is

58 Compare, for instance: Kerr, Janda & Pitts 2009, pp. 95-96. Compare also: Collins 1999, pp. 65-66.
59 Kerr, Janda & Pitts 2009, pp. 97-98.
60 Compare Kerr, Janda & Pitts 2009, pp. 98-99.

aimed at that clearly runs counter to corporate self-interest and so is unlikely to be reached by allowing corporate behaviour to merely be defined by market mechanisms and non-committal regulatory regimes. Another argument in favour of adopting more directive regulatory instruments is that they may increase legal certainty as to the way in which the internationally operating business enterprises concerned are expected to behave. As has been noted in this respect:

> "[...] *regulation can be used to establish a clearer and more consistent standard of conduct that could reduce transaction costs for business while giving business the confidence to invest in making the necessary changes to its operating procedures and implement new practices – a confidence it may not have within the unpredictability of pluralistic and often contradictory voluntary frameworks*".[61]

However, one of the pervasive problems facing these more directive, externally imposed, state-based regulatory regimes is corporate non-compliance as a result of regulatory evasion, inadequate sanctions, limited enforcement resources and/or a lack of political will to enforce them. These issues have arguably only been exacerbated with the increase of global corporate power and decrease of state power that characterizes the globalization era. Furthermore, as opposed to more reflexive regulatory techniques, these mandatory regulatory measures generally take quite a lot of time to develop and implement, partly due to the fact that they are likely to invoke more socio-political dissension, which makes them inflexible and slow to adapt to changing societal notions and circumstances. This also makes it more difficult to tailor these more directive regulatory mechanisms to individual cases and needs and specific circumstances, something that may become especially problematic in individual cases not anticipated at the time of their development and coming into force. Finally, this type of mechanism is likely to confront its regulatory addressees with additional bureaucratic and compliance costs, which means that especially if these more directive regulatory measures are introduced selectively, targeting only a specific group of companies, and/or at a lower regulatory level, they may have significant detrimental impacts on the domestic and/or international competitiveness of the internationally operating business enterprises whose behaviour it seeks to regulate.[62]

As the above overview of benefits and limitations of various kinds of state-based regulatory techniques shows, there is no single 'silver bullet' response to the issues arising in the context of global business regulation with a view to promoting international corporate social responsibility – at least not one that all parties to the debate can agree would provide an adequate and acceptable regulatory solution. It is not possible to come up with any single approach in this context that does not involve inherent limitations and drawbacks

61 Kerr, Janda & Pitts 2009, pp. 99-101.
62 Compare Kerr, Janda & Pitts 2009, pp. 101-102

and/or that can by itself provide a conclusive and exhaustive solution to the great variety of complicated CSR-related issues.[63] Instead, it seems that the regulatory focus should be on identifying and developing different potential regulatory solutions in this respect, both of a more discretionary and more mandatory nature, that may complement and reinforce one another.[64] Similarly, the UN 'Protect, Respect and Remedy' policy framework on business and human rights notes that states under their duty to protect human rights "[...] *should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights*".[65]

In line with the contemporary trend towards reflexive regulation, the point of departure here should be that "[...] *regulators should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed*"; they should always allow for more voluntary, self-regulatory solutions in the first instance and only when regulatory goals are not met should they escalate their approach through enforced self-regulation to command-and-control regulation.[66] At the same time, however, the seemingly incessant stream of tales of corporate misconduct in host countries around the world that are currently surfacing due to NGO vigilance and modern media reporting makes clear that a big stick is needed at the same time in order to ensure that corporate rogues and corporate laggards can be held accountable for their impacts on people- and planet-related interests where those impacts are considered to be socially irresponsible. Thus, even where states choose to promote international corporate social responsibility and accountability through more reflexive regulatory regimes that leave more space for the internationally operating business enterprises themselves to participate in setting, monitoring and/or enforcing the standards guiding their transnational conduct, this should be done 'in the shadow of the law', in the sense that the corporate actors involved are left to "[...] *self-regulate in the shadow of either the potential of legal prosecution or the prospect of new, more stringent regulations*".[67] In the end, irrespective of the specific combination of state-based regulatory approaches that is advocated or adopted with respect to any particular CSR-related issue, it seems clear that international corporate social responsibility and accountability in general are ideally to be promoted through a mix of more mandatory and more discretionary/reflexive regulatory approaches.[68]

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63 Similarly, the UN Special Representative on the issue of business and human rights, John Ruggie, has repeatedly stated that there is no silver-bullet solution to business and human rights challenges. See, for example: Remarks by SRSG John Ruggie "The 'Protect, Respect and Remedy' framework: Implications for the ILO", International Labour Conference, Geneva, 3 June 2010, available at <www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/@multi/documents/genericdocument/wcms_142560.pdf>.

64 See, for instance: Vogel 2006, p. 48. Compare also Kerr, Janda & Pitts 2009, pp. 103-104, who also conclude that there is no single optimal policy choice in this context and that "[...] *both the mandatory and voluntary approaches have a complementary role to play in promoting CSR*".

65 UNHRC Report (Ruggie) 2011, principle 3, p. 8.

66 Compare Braithwaite 2008, pp. 88-94; Baldwin & Black 2007; Ayres & Braithwaite 1992.

67 Kerr, Janda & Pitts 2009, pp. 103-104, 471-493.

68 Prepared Remarks by SRSG John G. Ruggie, Public Hearings on Business and Human Rights, Sub-Committee on Human Rights, European Parliament, Brussels (16 April 2009), available at <www.reports-

8.1.4 In pursuit of an international treaty regime?

Due to the transnational nature of the actors and activities involved in the contemporary debates on international corporate social responsibility and accountability, the question arises whether states seeking to pursue regulatory responses to the issues arising in this context should do so on a unilateral or a multilateral basis. It may be argued that issues of international corporate social responsibility and accountability would ideally be addressed at the international level, through a multilateral agreement laying down (minimum) rules and standards that the international community of states agrees would constitute a desirable standard of conduct for internationally operating business enterprises in particular CSR-related subject matter areas. After all, such a multilateral instrument would level the playing field for companies around the globe, thus preventing regulatory evasion, competitiveness issues, regulatory races to the bottom and international friction. In recognition of this, since the mid 1970s there have been attempts, especially at the UN level, to "[...] *find an international regulatory solution for the social and environmental problems posed by multinationals*".[69]

Despite these efforts, however, the international regulatory framework addressing CSR-related issues remains underdeveloped at present. Instances of binding international regulatory regimes in CSR-related subject matter areas of human rights, the environment, health and safety and labour standards remain few and far between and the ones that do exist are in most cases highly subject-specific rather than broad-based. At the same time, in line with the traditional but still dominant view that states are the primary players in the international arena and the only real subjects of international law, these instruments tend to address states rather than private actors and so only indirectly impose behavioural standards on internationally operating business enterprises when it comes to their conduct and their impacts on the people- and planet-related interests of other private actors. Furthermore, due to the difficulties involved in reaching the international consensus necessary for their implementation, many of these instruments contain aspirational language and broad semi-legal frameworks more than anything else. Also, regardless of the particular rights and duties they may impose on particular actors, the geographical scope of these international instruments, which are based on their Member States' consent to be bound, is typically limited to actors and activities within the territories of the Member States. And finally, next to the fact that international treaty regimes yield behavioural standards for internationally operating business enterprises only to a very limited extent, they typically rely on their Member States' domestic legal systems for the enforcement of such standards.[70]

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and-materials.org/Ruggie-remarks-to-European-Parliament-16-Apr-2009.pdf>, p. 5. See also, for instance: Kerr, Janda & Pitts 2009, pp. 103-104.

69 See, in more detail: Zerk 2006, pp. 244-262.

70 See further sub-sections 1.1.4 and 7.2.2.

Apart from the fact that broad-based and effective international regulatory regimes dealing with issues of international corporate social responsibility and accountability are unavailable at present, opinions also vary on whether such regimes should be pursued at this point. Importantly, the UN Special Representative on business and human rights, John Ruggie, has indicated that in his opinion, such consensus should not be sought at present, as the resulting instrument might well make things worse rather than better as regards furthering business respect for human rights, as well as the promotion of international corporate social responsibility and accountability more generally. The failure of the previously mentioned UN Norms, which sought to provide a comprehensive and mandatory set of international standards laying down the international human rights responsibilities of business enterprises, seems to provide proof of his point. Accordingly, the UN policy framework on business and human rights does not include a recommendation "[...] *that states negotiate an overarching treaty imposing binding standards on companies under international law*".[71]

Ruggie expresses three main reservations about recommending states to enter into a treaty process now. Firstly, he notes that the treaty-making process is notoriously slow, whereas "[...] *immediate solutions to the escalating challenge of corporate human rights abuses*" are needed. Secondly, starting a treaty-making process now while at the same time taking practical short-term measures would be a bad idea as this would jeopardize meaningful outcomes in both endeavours. After all, for states that are reluctant to take far-reaching measures in this context in the first place, treaty negotiations might serve as an excuse for taking other regulatory steps. In addition, the attention and resources of the main actors – states, civil society actors and companies – in the political process on business and human rights matters are likely to be focused on the treaty-making process, to the detriment of the interim measures. Furthermore, the standards that would eventually be laid down in the treaty as representing the common denominator on business and human rights issues risk being so low as to be counterproductive, considering the lack of international consensus that currently exists on matters relating to business and human rights. A new treaty laying down such minimum standards would in turn be likely to undermine social pressure on internationally operating business enterprises to adopt consistent best practice (in the sense of better than that laid down in the treaty). Thirdly, even if treaty obligations were imposed on companies, serious questions are likely to remain about their enforcement, affecting the treaty's legitimacy. Already existing enforcement problems, such as the unavailability of an international court dealing with claims against companies, the inability or unwillingness of host countries to enforce regulations vis-à-vis corporate actors, the reluctance of home countries to extraterritorially enforce regulations, even those based on treaty obligations applicable both in home and in host countries, would be likely to be merely perpetuated rather than solved. The establishment of a new

71 For a more comprehensive discussion, see Ruggie 2008. See also sub-section 7.3.3.

treaty body to which companies would report on their human rights performance and which would express its views on compliance seems unrealistic in view of the enormous number of internationally operating business enterprises worldwide and the wide range of human rights that could potentially be affected by their business practices.[72]

Ruggie's reservations about the current feasibility and desirability of pursuing an international treaty imposing binding standards with respect to business and human rights matters on companies under international law, are shared by various legal commentators partly in connection with the question whether international treaties should be pursued that may govern the more general issue of international corporate social responsibility and accountability. It has been noted in this respect that:

> "*An overarching multilateral treaty on CSR seems an unlikely prospect at present.* [...] *this is an area still in its infancy. States are only just beginning to develop their policies on international CSR regulation and most of these have yet to be tested properly, even at national level. More time is needed for states to experiment with different kinds of regulatory strategies and to observe their effects. Even if broad agreement could be reached about what such a treaty should contain, reconciling the competing interests of different states (particularly as between developed and developing countries) would be extremely difficult*".[73]

Others have underlined the advantages that a global treaty or an international court might bring, in the sense that those would provide an "[...] *even clearer, more detailed and authoritative regulatory floor* [...]" for promoting CSR-related consistent best practice by internationally operating business enterprises, but have also conceded that:

> "[t]*he reality is that the political will does not exist at present for a treaty or enhanced enforcement by an International Court or the UN treaty bodies, either on behalf of states or on behalf of most corporations*".

Further obstacles to a global treaty or an international court dealing with issues of international corporate social responsibility and accountability include:

> "[...] *the persistence of entrenched interests opposed to the idea, conceptual blinders regarding CSR being strictly 'voluntary', resistance to any enhanced 'regulation' of any kind, and cross-sectoral challenges of creating rules valid for industries as different as finance, apparel, media, and technology*".[74]

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72 Ruggie 2008.

73 For more detail, see: Zerk 2006, pp. 243-298 (quote p. 297). See also, for instance: Wai 2005, p. 253, who notes that "[...] *the international system is plagued by the near impossibility among sovereign states of achieving the underlying consensus required for more collective forms of regulation and distribution*" (citations omitted).

74 Kerr, Janda & Pitts 2009, pp. 605-606.

In the end, it seems that especially in light of the widely divergent interests and ideas of different states across the globe when it comes to the behavioural standards that should apply to internationally operating business enterprises with respect to CSR-related matters such as health and safety, the environment, labour and human rights, in combination with the significant issues of interpretation and delineation that would exist in this respect, the pursuit of an international regulatory regime laying down clear, detailed and authoritative standards on these matters is, in practice, unfeasible at the moment. At the same time, even where it would be possible to come to a meaningful multilateral regime in this context, the standards set out in it would be likely to be dependent on domestic legal systems for their practical implementation and/or enforcement. This means that the regulatory centre of gravity when it comes to global business regulation on matters of international corporate social responsibility and accountability currently remains at the domestic level. After all, the nation state remains the regulatory focal point as the prime source of democratically set up, singular, authoritative, encompassing and collectively binding behavioural norms and standards and as the main site for the enforcement of such norms and standards, no matter what their origins.[75]

8.2 Home country regulation of internationally operating business enterprises

8.2.1 A regulatory role for home countries

Although in the contemporary international legal order the regulation of internationally operating business enterprises is in principle an exclusive task for the different states within whose territories their business operations take place, it is increasingly believed that Western society home countries have a pivotal role to play in filling the regulatory gaps that may arise in this respect.[76] As has been discussed in the previous chapter, those driving the socio-political debates on international corporate social responsibility and accountability that are currently ongoing in most Western societies are increasingly calling for regulatory intervention in the transnational activities of internationally operating business enterprises by Western society governments in their capacity as home countries. It has been noted in this respect that:

> "[…] *increasing attention is being paid to the duties of investors towards the countries in which they invest under the rubric of 'international corporate social responsibility'. Equally, it is possible to expect home states to undertake certain responsibilities.* […] [T]*he home states' legal and regulatory system might be used to ensure that* [internationally

75 Compare Willke 2009, p. 63.
76 See, for example: Zerk 2006, pp. 145-240, 300-304.

> operating business enterprises] *based there conform to certain standards of good corporate citizenship through the sanction of home country laws and regulations, and through the provision of legal redress for claimants from outside the home country who are in dispute with the parent company for the acts of its overseas subsidiaries*".[77]

Similarly, the UN policy framework on business and human rights, as discussed, places certain duties and expectations on home countries to make sure that internationally operating business enterprises within their territory and/or jurisdiction respect human rights abroad and to hold accountable those that do not.[78]

Some commentators have gone as far as suggesting that home countries are legally obliged under public international law to prevent human rights violations perpetrated abroad by 'their' internationally operating business enterprises.[79] It is important to note, however, that the UN framework does not formulate an absolute duty for home countries to extraterritorially regulate the transnational activities of their internationally operating business enterprises with a view to protecting the human rights-related interests of host country citizens. Instead, it more cautiously states in this respect, among other things:

> "*There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses*".[80]

Similarly, other commentators have also been cautious about assuming the existence of positive legal obligations on home countries to extraterritorially regulate the performance of 'their' internationally operating business enterprises in CSR-related subject matter areas such as the environment, health and safety, labour standards and human rights outside the home country.[81] It has also been noted in this respect, however, that public international law in general and international human rights law in particular are continually under development, which means that it is possible that sufficiently consistent and general state practice, in combination with *opinio iuris*, may eventually evolve into an obligation under customary international law for home countries to extraterritorially regulate the activities of 'their' internationally operating business enterprises in CSR-related subject matter areas.[82]

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77 Muchlinski 2007, p. 84 (citations omitted). Similarly, Ruggie notes with respect to the state duty to protect that "[…] *there is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas*"; UNHRC Report (Ruggie) 2008, pp. 7-8.

78 See in particular UNHRC Report (Ruggie) 2011, principles 2, 7 and 26, pp. 7, 10-11, 23-24. See also sub-sections 7.3.3 and 7.3.4.

79 See, for instance: Sornorajah 2001. Compare also: Zerk 2006, pp. 85-86.

80 UNHRC Report (Ruggie) 2011, principle 2, p. 7. See also sub-section 7.3.4.

81 Compare Zerk 2006, pp. 85-91, 158-160.

82 Zerk 2006, p. 89.

The focus on Western society home countries as the principal site for regulatory intervention with a view to promoting international corporate social responsibility and accountability is due not only to the fact that the principal thrust towards such intervention originates there, but also to the fact that they seem to be the only ones currently that can come up with an authoritative and coherent policy response to the specific challenges involved in global business regulation in this context. After all, the main issue underlying the contemporary debates on international corporate social responsibility and accountability is the fact that the standards regulating (the consequences of) business activities set by developing host countries in CSR-related subject matter areas such as the environment, human rights, labour standards and health and safety tend to be far less strict than the standards imposed for similar activities in developed home countries. As the heightened risks of corporate-induced harm to people and planet locally that may result from this are increasingly viewed as morally and potentially even legally unacceptable, the existence of such double standards is more and more commonly perceived as a lack of capacity and/or willingness by the host countries involved to 'adequately' regulate (the CSR aspects of) the activities undertaken by internationally operating business enterprises within their territories. And thus the Western society actors driving these debates on international corporate social responsibility and accountability are increasingly looking to their own governments to fill the regulatory gaps that are perceived to exist in this respect.[83]

One of the reasons why Western society home countries may indeed be considered to be well-placed to regulate the transnational activities of internationally operating business enterprises operating out of their territory is that they are likely to have jurisdiction over the corporate actors and/or individuals that are in charge of the transnational corporate groups, production chains and/or activities involved. After all, most internationally operating business enterprises today have their operational centre, from where the international activities are coordinated, managed and/or controlled, in Western society home countries. Especially when it comes to multinational corporations, there will usually be some form of centralized management and control, but in other types of internationally operating business enterprises as well *de facto* control relationships may exist between Western society-based business enterprises and their host country business partners and/or sub-contractors. These control structures, at least in theory, enable the Western society home countries involved to prescribe behavioural standards that will be adopted throughout the entire transnational corporate group and/or transnational production chain.[84]

At the same time, as developed Western societies these home countries are most likely to have the institutional, legal and financial capacity necessary to be able to come up with the potentially complicated and far-reaching policy measures that may be necessary in

83 See further sub-sections 1.1.4 and 7.2.3.
84 See further sub-section 1.1.2.

this context, as well as to back them up where necessary with appropriate enforcement mechanisms.[85] Furthermore, as rule makers rather than rule takers within the international community of states, these Western society home countries are pre-eminently capable of taking a leading role in the regulation of the transnational activities of internationally operating business enterprises. This is important as the imposition of regulatory measures in this context that have an extraterritorial dimension or extraterritorial implications may encounter opposition both from the regulatory addressees themselves and from other states, in particular the host countries involved, which means that in the end the international political acceptance of such measures will to a large extent depend on the balance of power between the (home and host) countries involved.[86]

A more moralistic reason for looking to the Western society home country governments for the introduction of regulatory measures in this respect is that these societies may be considered to be "[...] *in a unique position of responsibility, as the key architects and beneficiaries of 'globalisation'*". In this view, the contemporary international economic system is inherently unfair due to the fact that the benefits of the transnational activities of internationally operating business enterprises are generally enjoyed by investors and consumers in developed home countries, whereas the costs involved in generating those benefits are often left to be borne by people and planet in host countries. This may be said to give rise to a responsibility for Western society home countries to promote a more fair global distribution of costs and benefits in this respect, as well as an obligation to make sure that there is a 'moral bottom line' below which 'their' internationally operating business enterprises are not permitted to go in their pursuit of profits, even where this moral bottom line is not imposed and/or enforced locally in the host countries where the business operations involved are carried out.[87]

As discussed, a number of Western societies have now cautiously started to introduce a variety of regulatory measures that, with varying degrees of compulsion, seek to promote socially responsible business practices not only at home but also abroad and require some form of corporate accountability in this respect.[88] So far, home country-based regulatory initiatives have focused mainly on enhancing transparency on the CSR performance of internationally operating business enterprises, in particular through disclosure requirements on their social and environmental impacts not only at home but also abroad. Another mechanism that has been employed by home countries with a view to promoting international corporate social responsibility and accountability is that of social and environmental screening in export assistance procedures and public procurement. In addition, the OECD Member States have instituted National Contact

85 See further section 7.1.
86 Compare Enneking 2007, pp. 162-167.
87 Zerk 2006, pp. 46-47, 157-158 (quote p. 157).
88 See further section 7.3. See also: Zerk 2006, pp. 145-197.

Points where individuals and organisations may raise issues relating to non-compliance with the OECD Guidelines by multinational enterprises operating out of those states.[89] These measures have mainly been a result of the increasing socio-political pressure in these societies for regulatory initiatives aimed at promoting international corporate social responsibility and accountability, possibly mixed to some extent with considerations of political and economic self-interest, ethical concerns and development goals.[90]

As discussed, the regulatory arsenal that home countries may have at their disposal in this respect is potentially much broader than that, including not only transparency-enhancing measures (e.g., reporting and labelling schemes, trade marks, best practice, due diligence, comply or explain) and financial incentive measures (e.g., subsidies, charges, taxes or tax incentives), but also behavioural-guidance measures (e.g., model codes, behavioural guidelines) and prior approval measures (e.g. licences), as well as more traditional command-and-control type regulatory measures that set strict, detailed, authoritative regulatory standards accompanied by penalties that may be imposed on regulatory addressees that do not live up to them.[91] Another type of regulatory strategy that arguably holds promise in this respect is that of enforced self-regulation, in the sense of self-regulation that is subject to governmental structuring or oversight, market-harnessing controls such as competition laws and tradable permits, the allocation of rights and imposition of mirroring liabilities, and the imposition of public compensation or social insurance schemes.[92]

However, the actual adoption by home countries of any one of these potentially available regulatory measures aimed at internationally operating business enterprises is by no means self-evident. As discussed, home countries cannot be said at the moment to be under an international obligation to adopt regulatory measures aimed at ensuring corporate social responsibility and accountability of 'their' internationally operating business enterprises with respect to their operations abroad. In the absence of such an international obligation, the domestic socio-political support required may be lacking, considering the potentially far-reaching consequences as regards both the administrative burdens and the costs such measures may involve for home country regulators, which will ultimately be passed on to the home country general public in their capacity as tax payers. In addition, any measures proposed are likely to face resistance by home country business communities in light of the potential impacts of such measures on their international competitiveness

89 See, more extensively: Zerk 2006, pp. 171-182.

90 Compare Zerk 2006, pp. 151-158.

91 See, for a general discussion of different forms of social regulation, *i.e.*, state regulation that deals with matters such as health and safety, environmental protection, and consumer protection and that is justified largely by externalities and information deficits, Ogus 1994, pp. 121-261. See, for a more specific discussion of the potential role of one of these measures, the trade mark (as the main legal platform for branding), in the promotion of corporate social responsibility, Griffiths 2008, pp. 193-220.

92 See, for a general overview and discussion of regulatory strategies available to states: Baldwin & Cave 1999, pp. 34-62.

and profitability. At the same time, the intended introduction and application of any of these regulatory measures will also raise questions as to their expected feasibility and/or effectiveness. The question what is 'good' regulation can be approached and answered in many different ways, which will not be further discussed here.[93]

What does need to be mentioned here, however, is that there are a number of specific challenges that arise in the particular context of global business regulation which are likely to impair significantly the feasibility and/or effectiveness of any regulatory measures that home countries may seek to implement with a view to promoting international corporate social responsibility and accountability. The main challenge in this context however lies in the inherent extraterritorial nature of any such measures. After all, they do not only pertain in whole or in part to the activities undertaken abroad of internationally operating business enterprises, but may also involve foreign regulatory addressees, particularly host country-based subsidiaries, business partners and/or sub-contractors carrying out activities locally under the authority of, in concert or cooperation with, or in the course of contractual agreements with the internationally operating business enterprises that are the primary regulatory addressees. In an international society of states that, at least for the time being, remains predicated on the Westphalian state system and accompanying notions of territoriality, state sovereignty and state autonomy, the unilateral exercise of extraterritorial prescriptive, adjudicative and/or enforcement jurisdiction over foreign actors or foreign activities is by no means self-evident.

Another major challenge, related to the first one, arises from the fact that in order to promote corporate social responsibility and accountability effectively not only at home but particularly also abroad in developing host countries, home country regulatory measures will need to establish a link between the home country-based internationally operating business enterprises that are the primary regulatory addressees and their foreign business partners and/or affiliates that often carry out the activities locally. This may be problematic especially in light of the fact that the companies involved are in principle considered to be separate legal entities, each with their own rights and duties, with respect to which the basic assumption is that they do not and are not under an obligation to control and/or influence one another's behaviour. A final, again related, challenge pertains to the possibilities for these internationally operating business enterprises, due to their inherent lack of transparency, organisational flexibility and geographical mobility, to circumvent any such unilaterally imposed home country regulatory measures. It is these challenges that will be further explored in the next two sub-sections.

93 See, for instance, Baldwin & Cave 1999, pp. 76-85, who advance five criteria for assessing regulation: the legislative mandate, accountability or control, due process, expertise, and efficiency.

8.2.2 Regulating transnational business actors and activities

As has been discussed, the UN policy framework on business and human rights does suggest, albeit cautiously, that there may be 'strong policy reasons' for home countries to regulate the transnational activities of 'their' internationally operating business enterprises with a view to preventing those activities from detrimentally affecting the human rights-related interests of host country citizens.[94] The framework notes in this respect that although states at present are "[...] *not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction*", they are also not "[...] *generally prohibited from doing so, provided there is a recognized jurisdictional basis*". It also notes that some human rights treaty bodies have recommended home countries to take steps to prevent human rights abuse abroad by internationally operating business enterprises within their jurisdiction, as well as that a range of regulatory approaches have already been adopted in this respect by home countries including both domestic measures with extraterritorial implications and direct extraterritorial legislation and enforcement.[95] In view of the increasing calls in Western societies for home country regulatory intervention in the transnational activities of 'their' internationally operating business enterprises, the question arises under what circumstances the unilateral exercise of extraterritorial jurisdiction in this context is both admissible under public international law and politically acceptable within the international community of states.

State sovereignty and extraterritoriality

One of the traditional pillars of the international legal order is the idea of state sovereignty, according to which every state has the sovereign right to regulate actors and activities within its own territory without any outside interference.[96] When a state exercises jurisdiction over actors and/or activities within another state's territory, this may amount to an exercise of extraterritorial jurisdiction.[97] According to Meessen:

> "*Extraterritoriality can be broadly defined as the enactment and enforcement (this latter term also including adjudication by courts and administrative tribunals as a form of law enforcement) of laws, regulations, court judgments or orders or administrative decisions aimed at controlling the conduct of entities abroad, thus overriding the power of the foreign territorial sovereign to regulate the same course of conduct*".[98]

94 See further sub-sections 7.3.3 and 7.3.4.
95 UNHRC Report (Ruggie) 2011, principle 2, p. 7.
96 See, for instance: Nollkaemper 2009, pp. 62-65. See also: Enneking 2007, pp. 120-123.
97 See generally: Enneking 2007, pp. 115-123.
98 Meessen 1992, p. 373.

Generally speaking, countries are left a wide measure of discretion when it comes to the exercise of extraterritorial jurisdiction; the concept in itself is not contrary to public international law, although there are certain limitations to its lawful exercise.[99] Examples of such limitations are the requirement that assertions of extraterritorial jurisdiction over actors and/or activities abroad should be reasonable; the international prohibition on states to intervene directly or indirectly in the domestic affairs of other states, especially through methods of coercion; the absence of any genuine link between the state exercising extraterritorial jurisdiction and the actor or activity it seeks to regulate; as well as the exercise of extraterritorial jurisdiction in contravention of WTO rules or fundamental norms of public international law.[100] Within these wide boundaries, the exercise of extraterritorial jurisdiction by one state over actors and activities within another state's territory is in principle not unlawful as long as there is some connection between the would-be regulating state and the actors or activities that it seeks to regulate, for instance on the basis of territoriality, nationality, protection of vital interests, passive personality and/or universality.[101]

However, the international legal order in general and the field of international jurisdiction in particular are highly politicized.[102] This means that even if a particular exercise of extraterritorial jurisdiction in itself is not unlawful, it may nonetheless give rise to an international dispute between the state exercising extraterritorial jurisdiction and the state within whose territory the actors and activities are located that are sought to be regulated, if the latter state considers the interference with its domestic policies and/or interests to be (politically) unacceptable.[103] Often, such international disputes will come to the surface where regulatory addressees find themselves faced with conflicting regulatory requirements as to their activities in any one country.[104] Sporadically, such disputes may

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99 Compare also the Lotus case of the Permanent Court of International Justice, PCIJ 7 September 1927, Series A, No. 10 (The S.S. Lotus), in which the Court determined, *inter alia*, that: "[f]*ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable*".

100 For a more in-depth discussion, see Enneking 2007, pp. 123-129. See also, on the concepts of reasonableness and interference: Zerk 2010, pp. 20-21, 215-216.

101 Zerk 2010, pp. 18-20. See also Enneking 2007, pp. 129-136.

102 See also: Muchlinski 2007, pp. 114-117; Enneking 2007, pp. 118-199.

103 For further detail, see Enneking 2007, pp. 136-141.

104 A well-known case is the Dutch *Sensor* case, in which a Dutch company (Sensor Nederland BV) on the basis of a US trade boycott against Russia was forced by its US parent company to commit a breach of contract vis-à-vis a French company that was to export the goods that Sensor was to deliver to Russia; the French company challenged the breach of contract before a Dutch court and won the case, as the Dutch court refused to give extraterritorial effect to the US trade boycott against Russia on the basis of which Sensor claimed it was prohibited from delivering goods that were destined to be sent to Russia without a special permit. See *Compagnie Européenne des Pétroles SA v. Sensor Nederland BV*, President Rechtbank Den Haag, 17 September 1982, RvdW KG 1982, 167. Another famous case in which private parties and domestic courts became involved in international jurisdiction conflicts is the US *Hartford Fire Insurance* case, which revolved around the extraterritorial imposition of US law on English insurance companies: *Hartford Fire*

lead to international legal measures and/or to the adoption domestically of so-called blocking statutes in order to fend off the unwanted extraterritorial interference; in most cases, however, the dispute will be solved through diplomatic channels.[105] At the same time, however, the lawful exercise of extraterritorial jurisdiction over actors and/or activities abroad by one state does not necessarily constitute a politically unacceptable interference in the internal affairs of the state that has territorial jurisdiction over those actors and/or activities; conflict may not be an issue, for example, where the latter state does not itself have a policy interest in regulating the subject matter involved.[106] Generally speaking, the more the exercise of extraterritorial jurisdiction by one state infringes on the ability to freely set and pursue domestic policy objectives and/or the fundamental values of another state, the more likely it is to be perceived as an impermissible infringement of the latter's sovereign right to regulate actors and activities within its territory as it sees fit.[107]

Extraterritoriality in state practice

In today's globalizing world, where actors and activities are increasingly likely to have effects beyond the societies in which they operate or take place, and where there is a growing realization that societies may have certain common values and interests and face shared challenges, states' extension of their regulatory ambit to private actors and activities abroad is becoming commonplace.[108] Thus, states more and more often exercise some type of extraterritorial jurisdiction by prescribing laws for actors and conduct abroad (prescriptive jurisdiction), enforcing compliance with their laws and judgments abroad (enforcement jurisdiction) and/or adjudicating on and resolving private disputes with a foreign element (adjudicatory/adjudicative jurisdiction).[109] Zerk notes that:

> "[t]*he use of extraterritorial jurisdiction has been growing fast across different domains. And the different ways states use and respond to extraterritorial jurisdiction are changing too. Although still controversial in many areas, some forms of extraterritorial jurisdiction are increasingly recognised as legitimate and, in many cases, necessary responses to global threats and problems*".[110]

Of the three types of extraterritorial jurisdiction, exercises of extraterritorial prescriptive and/or adjudicatory jurisdiction are most common; the exercise of extraterritorial enforcement jurisdiction (*i.e.*, the enforcement of compliance with laws and judgments abroad), on the other hand, is highly controversial as it risks exceeding the

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Insurance Co. v. California, 509 U.S. 764 (1993).

105 Enneking 2007, pp. 142-146.

106 Similarly: Enneking 2007, p. 122.

107 Similarly: Enneking 2007, p. 151.

108 See already: Gerber 1984. Similarly: Enneking 2007, p. 117.

109 See, for instance: Zerk 2010, pp. 13-14. See also, with further references: Enneking 2007, pp. 119-120.

110 Zerk 2010, p. 217.

limitations set by public international law in this respect when it comes to the intervention in the domestic affairs of another state through methods of coercion.[111] Thus, unilateral exercises of extraterritorial enforcement jurisdiction, which in principle come down to the physical exercise of state power within the territory of another state, for instance through criminal investigations conducted and/or criminal suspects arrested in the latter state by police forces of the former state, are generally considered to be illegitimate, unless based on express provisions of public international law or the express consent of the state within whose territory the enforcement action is taken.[112]

As is further explained in this study, there are a number of policy domains, including anti-corruption, anti-trust, securities regulation, environmental protection and general civil and criminal jurisdiction, in which states have been known to extend their public policies and prescriptive regulations beyond their own territories to encompass actors and/or activities abroad. Since World War II, it has been the US in particular which has claimed the right as well as the capacity to impose its economic regulation on foreign actors and transactions, much to the dismay of other Western societies, but in recent decades more and more states have sought to extend their laws and regulations extraterritorially in various subject matter areas.[113] In some cases, this is done with a view to protecting interests within the territory of the regulating state ('inward-looking regimes'), in particular where foreign actors or activities are perceived to pose threats to national security, national markets, national reputation or national resources. In other cases, the purpose is to improve standards or the protection of resources outside the regulating state ('outward-looking regimes'), in particular either where foreign actors or activities are perceived to pose a threat to global resources, or out of a sense of shared responsibility.[114]

There are a number of examples of regulatory measures that states have unilaterally imposed with the aim of regulating the transboundary activities of internationally operating business enterprises by directly addressing foreign actors and/or activities abroad. One of them is the US Foreign Corrupt Practices Act, "*aimed at the bribery of foreign public officials, including bribery taking place outside the US*"; similarly, the antitrust laws of many states "*create the possibility of* direct *assertions of extraterritorial jurisdiction over foreign parties and activities*".[115] Furthermore, states may under some circumstances unilaterally assert criminal jurisdiction over criminal activities or behaviour abroad, for instance where a company has participated in a criminal organization abroad, or when

111 The Permanent Court of International Justice has held in this respect in the *Lotus* case that "[...] *the first and foremost restriction imposed by international law upon a state is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State*"; PCIJ 7 September 1927, Series A, No. 10 (*The S.S. Lotus*).

112 See, more extensively: Enneking 2007, pp. 123-125.

113 See for instance: Stephan 2011.

114 Zerk 2010, pp. 25, 206-208.

115 Zerk 2010, pp. 30, 33 and 92, 109-111.

it has engaged in or been involved in certain serious human rights violations or money laundering abroad.[116] The previously mentioned study on extraterritoriality reveals, however, that states usually only take unilateral extraterritorial measures with respect to private actors and activities abroad if there are very strong reasons of national self-interest; outward-looking regulatory measures tend to be taken only under international treaty regimes or on the basis of international cooperation with the host countries involved.[117]

Home country regulatory measures that seek to extraterritorially regulate the behaviour of 'their' internationally operating business enterprises with the objective of promoting international corporate social responsibility and accountability are clear examples of outward-looking regimes, as they are primarily concerned with the promotion of people- and planet-related interests in the developing host countries in which these companies operate in particular and/or at a global level more generally. This means that the unilateral adoption by home countries of extraterritorial measures in this international CSR context remains unlikely at this point, even where there is strong international consensus on the underlying norms and issues, as is the case for instance in the business and human rights context.[118] In line with the findings of the study on extraterritoriality, it is to be expected that home countries will only adopt such measures on the basis of existing international treaty regimes or with the express consent of the host countries involved.

As has been discussed before, however, the pursuit of an international regulatory regime that authoritatively and effectively addresses issues of international corporate social responsibility and accountability is problematic at present.[119] Similarly, getting the host countries involved to consent to unilateral home country extraterritorial measures that seek to promote consistent best practice by 'their' internationally operating business enterprises, for instance through binding regimes of minimum standards that are directly aimed at actors (host country-based subsidiaries, business partners and/or sub-contractors of the internationally operating business enterprises involved) and activities abroad, may also prove problematic. After all, as is obvious from what has been discussed in the previous chapter, in many cases it is precisely these host countries' relatively less-demanding regulatory standards that allow them to attract much-needed foreign direct investments by the internationally operating business enterprises involved. This means that unilateral home country attempts to raise those standards of conduct extraterritorially may encounter resistance by the host countries involved, which may view those measures as unwanted interferences in their domestic policies, as forms of paternalism or neo-imperialism or even as disguised trade measures.[120]

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116 See, with respect to Dutch criminal law, Kristen 2010, pp. 145-155; see also Zerk 2010, pp. 115, 117.
117 Zerk 2010, pp. 25, 206-208.
118 See also UNHRC Report (Ruggie) 2010, p. 11.
119 See further *supra* sub-section 8.1.4.
120 See further section 7.1.

And indeed, it is true of course that the line between inward-looking regulatory regimes, aimed at promoting or protecting the interests of the regulating state itself, and outward-looking regulatory regimes, aimed at promoting or protecting interests that go beyond the immediate self-interests of the regulating state, is a thin one. With respect to each of the examples of unilaterally imposed regulatory measures given above, for instance, the question may be raised whether they are in fact concerned with the protection of interests and/or resources outside the regulating state, or rather with the protection of interests of the regulating state itself. The same can of course be said of home country measures aimed at internationally raising the standards of conduct for internationally operating business enterprises; after all, a levelled international regulatory playing field would be likely to remove most of the incentives for companies to outsource their activities to host countries for reasons of cost-efficiency. As has been discussed, political and/or economic self-interest may be as much a motivation for home countries to undertake regulatory initiatives aimed at promoting international corporate social responsibility and accountability as ethical concerns and development goals.[121] This again underlines that the introduction of global regulatory regimes pertaining to international corporate social responsibility and accountability would indeed be a highly desirable solution to the global problem posed in this respect, but is at the same time most unlikely at this point.

8.2.3 Addressing the challenge of extraterritoriality

Domestic measures with extraterritorial implications

With respect to the challenge of extraterritorial jurisdiction that is inherent in states' attempts to address issues of business and human rights abroad, UN Special Representative John Ruggie has stated:

> "[...] *extraterritoriality is not a binary matter: it comprises a range of measures.* [...] *Not all are equally likely to trigger objections under all circumstances*".[122]

As discussed, the exercise of extraterritorial *enforcement* jurisdiction, for example, will generally constitute the most significant and therefore the most objectionable infringement of another state's sovereignty and will in many cases even be impermissible under public international law.[123] Depending also on the particular circumstances, the exercise of extraterritorial *adjudicatory* jurisdiction, *i.e.*, the exercise of jurisdiction by a state's domestic courts over cases involving foreign actors and/or activities abroad, will generally be least likely to be politically unacceptable, although foreign direct liability

121 Compare Zerk 2006, pp. 151-158. See also sub-section 8.2.1.
122 UNHRC Report (Ruggie) 2010, p. 11.
123 See also *supra* sub-section 8.2.2.

cases such as the Apartheid litigation, as discussed in Part II, show that this type of extraterritorial jurisdiction may also cause friction among the different states involved.[124] Similarly, the exercise of extraterritorial jurisdiction is less likely to constitute a legally impermissible and/or politically unacceptable interference in the domestic affairs of the state that has territorial jurisdiction over the actors and/or activities involved if it takes place in the domain of private law rather than public law. After all, in the field of public law state policies and state interests play a much stronger role than in the field of private law, which is concerned primarily with the interplay between private actors and their private interests.[125]

Another important distinction that can be made in this respect is between regulatory measures that directly target actors or activities abroad (extraterritorial measures), and domestic measures directed at actors present and/or activities undertaken within the regulating state that have implications for related actors, activities and/or interests abroad (domestic measures with extraterritorial implications).[126] The latter rely on territory as the basis for the exercise of international jurisdiction, and as such *stricto sensu* do not involve an exercise of extraterritorial jurisdiction, although they may have extraterritorial implications.[127] When it comes to the extraterritorial regulation of multinational corporations, the US approach has traditionally been one of direct extraterritorial measures targeting the foreign subsidiaries of US-based companies, whereas European policymakers have been more reluctant than their US counterparts to apply extraterritorial measures and have mainly resorted to indirect extraterritorial measures (domestic measures with extraterritorial implications) where they have sought to apply such measures to 'their' multinational corporations.[128]

In practice, it is more common for states to attempt to regulate the transboundary activities of internationally operating business enterprises through domestic measures that have extraterritorial implications for actors and/or activities abroad, than on the basis of 'direct' extraterritorial measures. It has been noted in this respect that, "[…] *there are many different ways that states have acted to try to influence conditions, standards and behavior in other countries using* domestic *measures*".[129] Examples of such domestic measures with extraterritorial implications can be found in the field of securities laws where provisions

124 For a more detailed discussion, see Enneking 2007, pp. 149-154. See also sub-section 3.2.2.

125 Compare Enneking 2007, p. 139.

126 This distinction is also commonly referred to as the distinction between direct and indirect extraterritorial measures. See, in more detail and with further references: Enneking 2007, pp. 147-162.

127 UNHRC Report (Ruggie) 2010, p. 11. According to Zerk, a state exercises extraterritorial jurisdiction where it directly exercises authority, via various legal, regulatory and judicial institutions, over actors and activities outside its own territory. However, domestic measures, *i.e.*, "*measures based on the territorial jurisdiction of a state over people or activities located within its own territorial boundaries*", may also have extraterritorial implications, *i.e.* "*implications (including the potential impacts) of a domestic regulatory initiative beyond the territorial boundaries of the regulating state*". Zerk 2010, pp. 11-29.

128 Enneking 2007, p. 148.

129 See Zerk 2010, pp. 15-16.

may be stipulated with respect to corporate reporting, auditing and corporate governance for domestic and foreign companies wishing to trade securities on domestic markets, such as the well-known US Sarbanes-Oxley Act.[130] Further examples include for instance domestic subsidy schemes that make the availability of financial support for domestic companies conditional on good environmental performance abroad, as well as import bans on "*products made or harvested in ways that the regulating state deems environmentally harmful*".[131] Similarly, domestic companies may be held responsible in the regulating state for the involvement of their foreign subsidiaries or foreign business partners in criminal activities abroad, such as bribery of foreign officials, or in wrongful activities abroad that cause damage to local third parties.[132]

Parent-based regulatory measures

One particular type of domestic measure with extraterritorial implications is 'parent-based' regulation, on the basis of which states subject parent companies of multinational corporations within their territory and/or jurisdiction to certain domestic requirements, "[…] *which the parent is then required, as a matter of law, to implement throughout a multinational group* […]".[133] In the antitrust field, for example, corporate control links between parent companies and their subsidiaries have been used to obtain information from foreign entities.[134] A state may also make a parent company responsible for "*gathering and disclosing financial information relating to the whole group*"; as part of the group disclosure regime it may impose, for instance, obligations to report on environmental issues or CSR-related issues more generally that are relevant to the group as a whole.[135] Especially with respect to preventative parent-based measures such as reporting and due diligence requirements, it has been noted that this type of regulatory measure "[…] *can be a very effective method of exerting influence over the foreign activities of foreign subsidiaries of parent companies which are based in the regulating state*".[136]

In the field of anti-corruption regulation parent companies have been held responsible in various ways in relation to the activities of their foreign subsidiaries or agents abroad: on the basis of primary liability (*e.g.*, the parent makes a payment knowing that it may be used to bribe a foreign official); on the basis of negligent supervision (the parent company allowed a situation to arise where bribery of foreign officials was possible and failed to take sufficient corrective action); on the basis of secondary liability (the parent company

130 Zerk 2010, pp. 62, 66-69, 86.

131 Zerk 2010, pp. 176-177 and 177, 185. Note that such unilateral trade measures may raise issues under international trade regimes, as is evidenced by the well-known *Tuna-Dolphin* cases where unilateral restrictions on the import of tuna on the basis of concerns over the way in which the fish were caught, gave rise to international proceedings under the GATT between Mexico and the US. *Ibid.*, pp. 187-188.

132 Zerk 2010, pp. 51-53, 166-172.

133 Zerk 2010, p. 16.

134 Zerk 2010, p. 111.

135 Zerk 2010, pp. 51-53, 177-178.

136 Zerk 2010, p. 58.

aided and abetted, directed or encouraged an act of bribery by a foreign actor); or on the basis of reporting failures (the parent company failed to comply with its obligations to gather and disclose financial information relating to the whole corporate group).[137] In the same vein, it may also be possible to hold parent companies responsible under domestic criminal law for other types of criminal behaviour, such as money-laundering or grave breaches of human rights law, which have been perpetrated by foreign subsidiaries or business partners, even though parent companies will usually not be held directly liable for the criminal acts of their foreign subsidiaries on the basis of the parent-subsidiary relationship alone.[138] Similarly, as is clear from the discussions in this study on foreign direct liability cases, interesting developments with respect to these parent-based types of extraterritorial regulatory measures are currently taking place in the civil law domain in particular, which will be further discussed below.[139]

All in all, the fact that some degree of extraterritoriality is inevitably inherent in home country regulatory measures aimed at promoting international corporate social responsibility and accountability need not be an obstacle *per se* to their adoption.[140] However, the paramount need for any state to avoid, where possible, international conflict compels home countries with regulatory aspirations in this respect to take into account the particular degree of extraterritoriality inherent in each of the various regulatory options available to them. Ruggie notes in this respect that the measure of extraterritoriality inherent in home country public policies aimed at influencing the business practices of internationally operating business enterprises abroad (such as CSR-related considerations in public procurement policies), for instance, may be different from that inherent in home country prescriptive regulations adopted in this respect (*e.g.* a regime of binding minimum standards), or from that inherent in home country enforcement action (which encompasses the adjudication of alleged norm violations and the enforcement of judicial and executive decisions).[141] Much will depend on the particular features of the regulatory measure adopted, and on the particular circumstances within which they are adopted.

Generally speaking, an exercise of extraterritorial jurisdiction needs to be reasonable; the previously mentioned study on extraterritoriality yields a number of factors that may indicate whether or not this is the case. These include, *inter alia*, the fact that there is a multilateral regime in place that authorizes or requires the measures, the fact that there is international concern about the issue that the regulatory measure seeks to address, or that there is international consensus on the wrongfulness, undesirability or offensiveness of

137 Zerk 2010, pp. 51-53.

138 See Zerk 2010, pp. 51-55, 117, 139-140. See, however, Kristen 2010, pp. 155-174, who argues that under certain circumstances it would be possible under Dutch criminal law to hold the Dutch parent company of a multinational corporation liable for the criminal acts of its foreign subsidiary.

139 See generally: Zerk 2010, pp. 144-175.

140 See, for a more comprehensive discussion: Enneking 2007, pp. 115-167.

141 UNHRC Report (Ruggie) 2010, p. 11.

any behaviour that is to be regulated. Furthermore, a regulatory measure is more likely to be considered reasonable if its substantive standards of conduct are internationally agreed, where the measure is flexible, principles-based and outcomes-oriented, as well as where it is based on a strong territorial connection between the regulating state and the regulated actor and/or activity and confines its substantive obligations to those actors and activities. In addition, the measure should not lead to barriers to trade or distort competition in favour of the regulating state, it should take account of the interests of foreign states and be sensitive in particular to the developmental needs and aspirations of other states, including developing states, and it should seek to avoid, minimize or address resulting regulatory conflicts for individuals or companies, as well as leave a margin of discretion to those executing it in individual cases (e.g., enforcement bodies and courts).[142]

It seems clear that domestic measures with extraterritorial implications, whether parent-based or not, offer the best prospects at this point when it comes to addressing the challenge of extraterritoriality that is inherent in the application of home country measures seeking to regulate the behaviour of 'their' internationally operating business enterprises. It has been noted in this respect that:

> "[...] *the importance of domestic measures with extraterritorial implications is often overlooked. Such measures can do much to influence actors to conduct their activities at home in such a way as to also facilitate responsible and legally compliant behaviour overseas, by them as well as their private foreign partners, often without the attending controversy that can accompany exercises of direct extraterritorial jurisdiction*".[143]

As mentioned before, however, the international legal order in general and the field of international jurisdiction in particular are highly politicized.[144] This means that even when it comes to domestic regulatory measures that are *stricto sensu* not extraterritorial at all but that may have extraterritorial implications, they may still be perceived by the host countries involved as (politically) unacceptable and so raise objections. It has been noted in this respect that "[i]*t is very possible that domestic measures will generally be assumed to be more reasonable than exercises of direct extraterritorial jurisdiction* [...], but that "[...] *this does not mean the former are without controversy or that they should be pursued in a vacuum*".[145]

In the end, international cooperation remains key to overcoming some of the potential objections to and enhancing the effectiveness of both direct exercises of extraterritorial jurisdiction and domestic measures with extraterritorial implications.[146] However, where such cooperation is a long-term ideal rather than a realistic short-term objective, there

142 Zerk 2010, pp. 216-217.
143 UNHRC Report (Ruggie) 2010, p. 11.
144 See *supra* sub-section 8.2.2.
145 Zerk 2010, pp. 215-217.
146 Zerk 2010, pp. 213-217.

is nothing in principle to stop home countries from adopting (parent-based) domestic measures with extraterritorial implications with a view to promoting international corporate social responsibility and accountability by internationally operating business enterprises within their territory and/or jurisdiction.

8.2.4 Further challenges

Establishing a link

As has been discussed in the previous sub-section, the possibility of adopting domestic measures with extraterritorial implications provides an opportunity for home countries to regulate the global business practices of 'their' internationally operating business enterprises, while at the same time avoiding some of the international controversy that may result from exercises of extraterritorial jurisdiction that directly target foreign actors and/or activities. However, this type of global business regulation largely loses its point where it fails to reach effectively beyond the home country actors and their activities within the territory of the regulating home country, to encompass as well the host country-based subsidiaries, business partners and/or sub-contractors of these domestic actors and the activities undertaken by them locally. After all, internationally operating business enterprises as discussed typically have their activities and production processes carried out through complicated transboundary webs of foreign buyers, suppliers, joint venture partners, subsidiaries and/or other affiliates, which allow them to produce efficiently and cost-effectively.[147] And it is exactly those activities in host countries that tend to be carried out by local operators, but are within the sphere of influence of the home country-based internationally operating business enterprises involved, which home country policymakers are asked to influence through domestic measures with extraterritorial effects so as to diminish and/or prevent any detrimental impacts of those operations on people and planet in the host countries concerned.[148]

As has been mentioned in the previous sub-section, one type of domestic measure with extraterritorial implications is that of parent-based regulation. When adopting parent-based regulatory measures, regulating states rely on their jurisdiction over multinational corporations' parent companies that are based and/or present within their territories in imposing domestic measures on those parent companies that pertain to the operations of the multinational group both at home and abroad. Those measures may be specifically

147 See further sub-sections 1.1.2 and 3.2.3.

148 It should be noted however, that the concept of 'sphere of influence' is subject to some controversy and has deliberately not been used as one of the guiding concepts in the UN policy framework on business and human rights. See, for more detail: "Clarifying the concepts of 'sphere of influence' and 'complicity'", Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/16, 15 May 2008, available at <www.reports-and-materials.org/Ruggie-companion-report-15-May-2008.pdf>, pp. 3-6.

aimed at regulating the behaviour of foreign corporate entities or foreign individuals that are related to the parent companies located within the regulating states' territories, but the regulatory impacts on these foreign actors may also be a mere side-effect of regulation imposed on the parent companies involved for other purposes.[149] The point of departure for most of these parent-based regulatory measures is the assumption that a parent company has the authority and management control over its foreign subsidiaries that is necessary to make them comply with the requirements set by the home country.[150] As such, they offer interesting prospects for home countries that seek to regulate the behaviour of their multinational corporations abroad, along with that of their foreign subsidiaries, by effectively extending the regulatory reach of domestic home country measures to host country actors and activities. These measures to some extent remove the incentives for the multinational corporations involved to engage in regulatory evasion by outsourcing their operations to host countries with less demanding regulatory regimes where they are carried out by foreign subsidiaries that may or may not have been specifically set up for that purpose: "[t]*he usefulness of corporate manipulation to prevent implementation of the* [regulatory] *purpose comes to an end*".[151]

At the same time, in order to be even more inclusive, parent-based regulatory measures may (need to) go even further and seek to establish a link not only between home country-based parent companies and their foreign subsidiaries, but also with foreign business partners and/or sub-contractors. After all, control-based relationships may not only exist between parent companies and their subsidiaries, but also between, for instance, franchisors and franchisees, licensors and licensees, parties in joint ventures, as well as other parties that may be involved in international production chains, such as manufacturers, distributors, wholesalers and retailers.[152] It is very possible, for example, that a company that has a long-standing and close working relationship with its foreign suppliers will in practice have more say over the way those suppliers conduct their local operations, than a parent company over any of the foreign subsidiaries to which it is directly or indirectly linked.[153] As has been noted in this respect:

> "*Companies can also control each other in other ways. Franchising and distribution agreements will often contain very detailed provisions as to how the contacted-out business is to be run, the performance of which is closely monitored by the grantor of the franchise or distribution rights. The need to manage risks associated with a long-term supply agreement may lead to a purchaser being given rights to be consulted on and to participate in certain of its supplier's business decisions, arguably another form of*

149 Zerk 2010, pp. 16, 27.
150 See, generally on control in corporate groups and with further references: Blumberg 2001. See also further sub-section 2.2.3.
151 Blumberg 2001, pp. 311-316, in particular p. 315.
152 See, in more detail and with further references: Blumberg 2005, pp. 613-617.
153 See further sub-sections 1.1.2 and 2.2.3.

> *'control'. 'Control' relationships may exist even in the absence of any express provisions in a contract: relative bargaining positions, surrounding market conditions such as the availability of alternative resources or suppliers, and the practicalities of enforcing laws and agreements may all affect the dynamics of commercial relationships*".[154]

In this sense, it may arguably not only be ineffective but also inherently unfair for home countries to impose parent-based domestic measures with extraterritorial effects only on parent companies of multinational corporations with respect to the control and/or influence that they are assumed to have over the activities of their foreign subsidiaries and not on other types of home country-based internationally operating business enterprises with respect to the control and/or influence that they may *de facto* exercise over the activities of their foreign business partners and/or sub-contractors.[155]

Parent-based home country regulatory measures may not remain undisputed, either by the host countries involved or by their regulatory addressees. As has been discussed in the previous sub-sections, even domestic measures with extraterritorial implications may raise controversy and the line between a true outward-looking regulatory regime aimed at promoting or protecting interests that go beyond the immediate self-interests of the regulating state and for instance a disguised trade measure is a thin one in this respect. In fact, outside the field of anti-corruption, parent-based home country regulatory measures aimed at setting behavioural standards for internationally operating business enterprises with a view to protecting people- and planet-related interests in host countries have so far been scarce.[156] Even where there is sufficient socio-political support for indirect parent-based home country regulatory measures, the challenge remains that some sort of link will need to exist, to be assumed or to be established between the home country-based parent companies (or other type of internationally operating business enterprises) that are the direct target of the regulatory regime, and the foreign actors and/or activities abroad that the regime indirectly seeks to regulate. Under what circumstances and to what extent may the home country-based parent company of a multinational corporation or another type of internationally operating business enterprise be able and/or be expected to exercise the control or influence over host country actors or activities necessary to carry out any obligations that may be imposed on it by such parent-based home country regulatory measures?

In principle, parent-based domestic measures with extraterritorial implications will take as their point of departure the assumption that a control-based relationship exists between the parent companies and/or other types of internationally operating business

154 Zerk 2006, p. 53.

155 In practice, such issues would be likely to arise when a legal definition is sought to be constructed of the regulatory addressees of any intended parent-based home country regulatory measures in this respect. See for further discussion of the issues of definition that may arise in this respect: Zerk 2006, pp. 49-54.

156 Similarly: Kerr, Janda & Pitts 2009, pp. 306-310.

enterprises that are located within the territory and/or jurisdiction of the home countries involved, and the foreign subsidiaries, business partners and/or sub-contractors they (also) seek to regulate. However, whereas it is very possible that internationally operating business enterprises may under some circumstances have considerable influence over their foreign business partners and/or sub-contractors, for instance where there are long-standing and close working relationships with foreign suppliers, this will not always be the case. Even parent companies of multinational corporations may in reality not always (be able to) influence, direct or control the day-to-day activities of their foreign subsidiaries; the extent to which they may actually do so depends on the group's particular institutional set-up and internal policies and practices.[157] In fact, it has been argued that as a result of globalization the organization of multinational groups is actually shifting from vertically integrated, large-scale organizations to more horizontally organized economic units.[158]

This means that parent-based regulatory measures with extraterritorial implications may be controversial in the sense that they pass over the fact that the entities involved in principle are, both in law and in fact, separate legal entities with separate rights and duties that are under no obligation to exercise control over one another. Accordingly, there arguably need to be strong policy rationales for introducing such regulatory measures, especially if they involve generalized *ex ante* statutory assumptions of the existence of control-based relationships that cannot be rebutted, rather than *ex post* judicial determinations of whether such control-based relationships did indeed exist in any particular case. An argument that may be raised in this respect is that in order to be truly effective, home country measures seeking to regulate the global business practices of 'their' internationally operating business enterprises should focus on the economic reality behind transnational corporate groups and/or transnational supply chains rather than on the formalistic legal separations between the various business enterprises involved. In light of the increasing recognition that traditional notions of separate juridical corporate personality and limited liability may lead to socially undesirable and/or unjust results in the contemporary reality of corporate groups and global business operations, the question may be raised whether these notions should be allowed to impede the pursuit of legitimate policy objectives such as the promotion of international corporate social responsibility and accountability. However, the adoption of regulatory measures in this respect on the basis of 'enterprise' rather than 'entity' theories, not only within corporate groups but also in supply chains, is so far off the beaten track that it is likely to be highly controversial and to raise a whole set of new definitional issues at the same time.[159]

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157 See, for a discussion of the degree of control that the head office of a multinational enterprise may exercise over foreign affiliates, with further references, Muchlinski 2007, pp. 50-51.

158 For a comprehensive discussion of this matter, see Eroglu 2008, pp. 42-69.

159 Compare Zerk 2006, pp. 54-56; Blumberg 2005; Blumberg 2001. See also further sub-section 4.4.3.

Notwithstanding any potential controversy, however, the notion of imposing parent-based regulatory measures that require home country-based parent companies of multinational corporations or other internationally operating business enterprises to keep informed on, to influence or to control the activities of their foreign subsidiaries, business partners and/or sub-contractors so as to reduce their detrimental impacts on host country people- and planet-related interests, or that hold them responsible for such impacts, may not be as outlandish as it seems. In fact, it actually seems to be in line with currently developing ideas on the responsibility of internationally operating business enterprises to prevent and/or address any adverse consequences that their global operations may have on people- and planet-related interests both at home and abroad, as well as with the developing ideas on the role that states and home countries in particular may have to play in promoting international corporate social responsibility and accountability of 'their' internationally operating business enterprises.

According to the UN policy framework on business and human rights, for example, all business enterprises (whether transnational or domestic and whether multinational corporations or other types of internationally operating business enterprises) are required, by virtue of their responsibility to respect human rights, not only to "[a]*void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they do occur*", but also to "[s]*eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts*".[160] The question may be raised whether this responsibility goes as far as to require the business enterprises involved to actively seek information on and/or pursue control or influence over the activities of their (foreign) business partners in order to prevent, mitigate and/or address any detrimental impacts of those activities on people- and planet-related interests in the host countries in which they are carried out, even where such involvement does not already exist.

The UN policy framework makes clear that, at least when it comes to the potential human rights impacts of those activities, companies are indeed required to actively engage with their business relationships through processes of human rights due diligence in order to assess actual and potential human rights impacts that are somehow related to their activities or linked to their operations, products or services through their business relationships, even where there is no formal control-based relationship with those business relationships.[161] It does not rely on the notion of 'control', however, as this might "[...] *wrongly limit the baseline responsibility of companies to respect human rights*", as this notion "[...] *could imply, for example, that companies were not required to consider the human rights*

160 UNHRC Report (Ruggie) 2011, principle 13, p. 14, where it is noted that 'business relationships' in this sense "[...] *are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services*".

161 UNHRC Report (Ruggie) 2011, principles 17-21, pp. 16-22.

impacts of suppliers they do not legally control, or situations where their own actions might not directly cause harm but indirectly contribute to abuse".[162] Instead, it uses the notion of leverage; it requires any company that has established that it is at risk of contributing to adverse human rights impacts to:

> "[...] *take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm*".

Depending on the circumstances, similar responsibilities may exist where the (potential) human rights impacts are directly linked to the company's operations, products or services by its business relationships with other entities. The policy framework makes clear that where companies have leverage to prevent or mitigate such adverse human rights impacts, they should exercise it. If they lack leverage over their business relationships, they should seek to increase it; where this is not possible, they may have to consider ending those relationships.[163]

Clearly, according to the UN policy framework on business and human rights, internationally operating business enterprises do have a responsibility not only to prevent, mitigate and/or address the human rights impacts of their own activities, but also to actively use their leverage over their foreign subsidiaries, business partners and/or sub-contractors to prevent and/or mitigate any potential human rights impacts of their activities. The question remains, however, to what extent states are required under their duty to protect human rights to make sure that 'their' internationally operating business enterprises do indeed live up to their responsibilities in this respect, not only at home but also abroad. The Guiding Principles state that under international human rights law states are not generally required to extraterritorially regulate the activities of 'their' internationally operating business enterprises abroad, but that they are also not prohibited from doing so, provided there is a recognized jurisdictional basis. They do not pronounce any 'new' obligations for states in this respect, but merely establish that all states are under a duty to clearly set out "[...] *the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations*".[164]

The Guiding Principles do indicate that under certain – exceptional – circumstances (a risk of corporate complicity in gross human rights violations in conflict-ridden host

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162 "Clarifying the concepts of 'sphere of influence' and 'complicity'", Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/16, 15 May 2008, available at <www.reports-and-materials.org/Ruggie-companion-report-15-May-2008.pdf>, p. 6.

163 UNHRC Report (Ruggie) 2011, principle 19, pp. 18-19.

164 UNHRC Report (Ruggie) 2011, principle 2, p. 7. See also sub-section 7.3.4.

states), home countries may be expected to prevent 'their' internationally operating business enterprises from becoming involved in human rights abuses locally and to impose civil, administrative or criminal liability on those that do.[165] Considering the fact that in such conflict areas local state authority will generally be absent or very weak, however, the extraterritorial involvement by home country authorities can hardly be said to constitute an infringement in the sovereignty of the host country involved under such circumstances. Accordingly, true to its objective of creating "[...] *a platform for generating cumulative and sustainable progress without foreclosing further development of international law*", the UN policy framework does not seek to alter the international legal regime on (extra) territorial jurisdiction. However, in light of the fact that this regime is more political than legal in nature to begin with, the framework does seem to provide some authoritative support for what may be a cautiously developing state practice of home country parent-based regulatory measures with extraterritorial effects, aimed at promoting international corporate social responsibility and accountability.[166]

Regulatory evasion

In effect, home country domestic measures that are aimed at home country-based internationally operating business enterprises with a view to regulating their behaviour and activities abroad, as well as the behaviour and activities of their foreign subsidiaries, business partners and/or sub-contractors abroad, restrict the discretion of the companies involved in setting up, organizing and directing their international operations as they see fit. As such, these measures pose a regulatory burden that grows heavier as the sphere of influence expands within which these companies are expected to take responsibility with respect to any adverse consequences of those operations. This in turn may provide the internationally operating business enterprises that are the regulatory addressees with incentives for (further) regulatory evasion and strategic behaviour. Due to their inherent lack of transparency, organisational flexibility and geographical mobility, parent companies may potentially, if provided with enough of an incentive, seek to circumvent any unilaterally imposed home country parent-based regulatory measures. After all, overly burdening home country regulatory measures that have significant adverse effects on the profitability of the international activities of the internationally operating business enterprises which they target and put those enterprises at a significant disadvantage vis-à-vis their foreign competitors, risk providing these parent companies with an incentive to relocate altogether to less intervening jurisdictions.[167]

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165 See further sub-section 7.3.4.

166 Note that further international political acceptance of such unilaterally imposed extraterritorial measures may flow from the fact that such measures are taken in pursuit of common (outward-looking) policies and/or objectives, such as the protection of internationally recognized rights, the protection of fundamental values, as well as, arguably, the protection of people and planet-related interests more generally across the globe. Compare, with further references: Enneking 2007, pp. 140-141.

167 See also further section 7.1 and sub-sections 1.1.2 and 3.2.3.

The risk of causing regulatory evasion and strategic behaviour by the internationally operating business enterprises that are the regulatory addressees of home country regulatory measures aimed at promoting international corporate social responsibility and accountability should motivate those home countries to adopt well-balanced regulatory measures in this respect that also enjoy a certain measure of support among the companies they seek to regulate. After all, such strategic/evasive behaviour would be the exact opposite of the behaviour that such measures in the end seek to promote, in other words the internalization by internationally operating business enterprises in their management and operational practices of an awareness of and respect for societal interests that lie within their sphere of influence. At the same time, it could prove disastrous for the economic self-interests of the home countries involved. In this sense, the challenge would be to come up with regulatory measures that motivate these companies to embrace and embody the spirit of the law by actively seeking ways to internalize the objectives of the measures involved, rather than to seek ways to skirt the letter of the law. At the same time, such measures will need to be drafted heedful of the fact that there may be strong (financial) incentives for corporate laggards to seek to avoid them. Here again, the advantages in seeking international cooperation and harmonization with respect to the intended regulatory course of action are obvious.

The UN policy framework on business and human rights may prove to be of crucial significance in dealing with this issue, as it may play a role in levelling the playing field and thus reducing the incentives for those business enterprises to engage in strategic/evasive behaviour in this respect. After all, the framework does not only address the duties to protect human rights against corporate abuse that international human rights law imposes on states around the world, it also addresses the responsibilities that rest on business enterprises themselves, both those that operate domestically and those that operate internationally, to prevent, mitigate and/or address the adverse impacts that their activities and/or those of their foreign subsidiaries, business partners and/or sub-contractors may have on the human rights-related interests of others. Those responsibilities exist irrespective of whether they are reflected in the local regulatory standards in the countries in which those activities are carried out.[168] Accordingly, these corporate responsibilities to respect human rights exist regardless of the country in which the business enterprises are located.

Of course, especially where corporate rogues or corporate laggards are concerned, it is important that non-compliance with those responsibilities and resulting detrimental impacts on people- and planet-related interests can be legally addressed. It is these corporate actors in particular and their transnational activities that underline the importance of monitoring and enforcement not only of state-based regulatory standards (including both domestic host country standards and extraterritorial home country standards), but also

168 Compare sub-sections 7.3.3. and 7.3.4.

of existing corporate responsibilities to respect the people- and planet-related interests of others. Considering the fact that one of the underlying issues in the contemporary debates on international corporate social responsibility and accountability is that developing host countries in particular are often unwilling or unable for various reasons to impose and/or enforce adequate regulatory standards in CSR-related subject matter areas, home country adjudication of foreign business actors and/or business activities abroad plays a crucial role in this respect. After all, in view of the growing opportunities for host country victims to seek redress for any detriment caused to people and planet locally before domestic courts in a growing number of Western societies, it seems that the prospects for multinational corporations of outrunning (enforcement of) their responsibilities in this respect are fast diminishing.[169]

8.2.5 A regulatory role for home country courts

Arguably, the judicial enforcement by home country courts of state-based regulatory standards and/or societal norms pertaining to companies' responsibilities to respect the people- and planet-related interests of others both at home and abroad, may influence the transnational business practices of internationally operating business enterprises. After all, it may provide them with behavioural incentives not only to integrate into their corporate policies, management decisions and business practices an awareness and consideration of those interests but also to minimize the detrimental impacts of their business operations on those interests. To the extent that judicial procedures become systematically relied on by the home countries involved to further the policy objective of promoting international corporate social responsibility and accountability, this may be referred to as regulation through litigation.[170] Depending also on the behavioural standards that are sought to be judicially enforced, home country adjudication in this sense may involve both (a measure of) extraterritorial prescriptive jurisdiction to the extent that the home country seeks to pursue public policies through such litigation by prescribing behavioural standards for foreign actors and/or activities taking place abroad, and (a measure of) extraterritorial adjudicative jurisdiction to the extent that home country courts decide private disputes that involve foreign actors and/or activities taking place abroad.[171]

The pursuit of home country policies through home country litigation may be perceived as a direct exercise of extraterritorial jurisdiction where the objective is to regulate the behaviour of foreign business enterprises, and may be perceived as indirect exercises of extraterritorial jurisdiction where the objective is to regulate the behaviour of

169 See also *infra* sub-section 8.2.5 where the increasingly popular notion of universal civil jurisdiction is discussed.

170 See, for further discussion of the phenomenon of regulation through litigation or regulatory litigation: Luff 2011; Viscusi 2002. See also, for instance: Stephan 2011, p. 17 and compare section 1.3.

171 Compare, for instance: Stephan, p. 17. See also further sub-sections 4.1.3 and 7.2.2, as well as chapter 9.

home country-based business enterprises. Here again, the measure of extraterritoriality inherent in such home country regulation through litigation and the extent to which it may constitute a permissible or impermissible infringement of the sovereignty of the host countries involved is dependent on a variety of circumstances and in the end will revolve around the reasonableness of the exercise of extraterritorial jurisdiction in light of the policy interests of the different states involved with respect to the actors and activities that are (to be) regulated.[172] At the same time, it is also closely connected to the type of judicial procedure through which the home countries involved seek to pursue their policy objective of promoting international corporate social responsibility and accountability; the two main types of judicial procedure in this respect are criminal procedure and civil procedure.[173]

International criminal jurisdiction

First of all, there is the possibility of home country courts imposing criminal liability on corporate rogues or corporate laggards. However, for various reasons the role of criminal law when it comes to addressing the detrimental impacts on host country people- and planet-related interests of the transnational activities of internationally operating business enterprises has remained limited so far. In line with the principle of legality, criminal sanctions can only be imposed for behaviour in violation of pre-existing, well-defined statutory norms:

> "*The principle that there must be no crime or punishment except in accordance with fixed, predetermined law, finds its Latin expression as* nullum crimen sine lege, nulla poena sine lege. *It is at the very heart of many constitutions, domestic codes and has also been included in most of the human rights instruments as one of the basic rights and as a self-evident principle of justice. The maxim has different aspects. It includes the prohibition against* ex post facto *criminal laws and its derivative rule of non-retroactive application of criminal laws and criminal sanctions. It has four important corollaries: penal statutes must be strictly construed, the prohibition or limitation on the use of analogy in judicial interpretation, the requirement of specificity and the prohibition of ambiguity in criminal legislation*".[174]

Generally speaking, however, such statutory provisions of criminal law will only address actors and/or activities within the territory and/or jurisdiction of the state imposing them. As a result, the number of extraterritorially applicable domestic behavioural standards in the field of domestic criminal law is relatively limited, although there are subject matter areas in which (some) states have applied criminal provisions extraterritorially, for

172 See further *supra* sub-section 8.2.2.
173 Compare also Zerk 2010.
174 Mokhtar 2005, p. 1.

instance to conspiracies to commit criminal acts abroad, sexual offences against children, and foreign acts of terrorism.[175]

Issues of extraterritoriality tend to play a far smaller role when they are based on international treaties or international consensus more generally. Such consensus may be said to exist in the field of international criminal law on a limited number of very serious human rights violations, such as war crimes, genocide and crimes against humanity. This may also have implications for corporate actors that become involved in international crimes perpetrated abroad.[176] Under the Rome Statute of the International Criminal Court, for instance, it is possible to bring individuals such as corporate executives and/or employees before the International Criminal Court (ICC) on charges of their involvement in particular international crimes (genocide, war crimes and crimes against humanity). Although the ICC does not have jurisdiction over corporate actors, most Western societies do allow for the prosecution of corporate actors before domestic courts on this basis.[177] However, due to the highly limited number of norms of international criminal law that are so universally recognized as to render the exercise of extraterritorial jurisdiction by states acceptable internationally, this type of litigation will only play a marginal role when it comes to regulating the behaviour of multinational corporations with a view to promoting international corporate social responsibility and accountability.[178]

Furthermore, even where domestic or international criminal norms are available on the basis of which internationally operating business enterprises may be held criminally liable before home country courts for infringements of people- and planet-related rights and interests abroad, the decision to prosecute the corporate actors involved for their involvement remains in principle at the discretion of the home country public prosecutor, who is obliged to act in the national public interest in determining whether prosecution is opportune.[179] The fact that criminal procedures pursued with a view to promoting international corporate social responsibility and accountability are primarily aimed at protecting foreign rather than domestic rights and interests, and also give rise to international controversy in light of the extraterritorial nature and/or effects of the measure, may cause home country public prosecutors to be hesitant in deciding to prosecute, under criminal law, the internationally operating business enterprises involved. Another major threshold in this respect is the fact that, due to the restrictions imposed on exercises of extraterritorial enforcement jurisdiction, the possibility of seizing suspects or witnesses and/or gathering evidence abroad is rendered completely dependent on the

175 See further Zerk 2010, pp. 115-143. Compare also Kristen 2010 on the possibilities for holding Netherlands-based parent companies of multinational corporations criminally liable under Dutch criminal law for violations of CSR-related norms perpetrated abroad.

176 Compare Zerk 2010, pp. 115-143.

177 For a comprehensive study of corporate criminal liability under international law, see Stoitchkova 2010, who also notes that "[...] *most national jurisdictions nowadays recognise legal persons, corporations in particular, as capable of incurring culpability in terms of criminal law*" (p. 7).

178 Compare also sub-section 4.4.1.

179 Compare for instance Kristen 2010, pp. 174-183.

existence of international treaties regulating this matter and/or on the local authorities' willingness and ability to cooperate. This, in combination with the costs that are likely to be involved in prosecuting corporate entities and/or corporate executives or employees for their involvement in crimes perpetrated abroad will, in many cases, prevent home country public prosecutors from doing so. A case in point is the Trafigura case, in which Dutch oil trader Trafigura Beheer BV was prosecuted in the Netherlands, under criminal law, for (*inter alia*) exporting toxic substances from the Netherlands/the EU in violation of international and domestic legal norms in this subject matter area, but not for its involvement in the dumping of those materials in the Ivory Coast and the harmful consequences for people and planet locally.[180]

International civil jurisdiction

In recognition of the limited possibilities when it comes to imposing criminal liability on internationally operating business enterprises for harm caused to people- and planet-related interests abroad, there has been increasing attention in recent years to the possibilities offered by civil litigation in this respect.[181] After all, exercises of extraterritorial jurisdiction that take place in the domain of private law rather than in that of public law are in principle less likely to cause controversy as public policies and state interests tend to play more of a background role in this field which is concerned first and foremost with the interplay between private actors and their private rights and interests. Connected to this is the fact that the decision to initiate civil liability proceedings, whether in a transnational or domestic setting, is in principle left to the discretion of the private parties involved themselves.[182]

Similarly, the mechanism for determining whether a state through its courts may exercise jurisdiction over a dispute with international aspects, and thus potentially also over foreign actors and activities carried out abroad, is completely different in the field of private law. After all, as is also clear from what has been discussed in part II, whereas the exercise of international jurisdiction in the public law field is governed by rules of public international law, the exercise of international jurisdiction in the field of private law is governed by domestically applicable regimes of private international law. These tend to focus on connecting factors between the actors and activities in dispute with the forum country, rather than on the geographical scope of the conduct-regulating rules involved. Generally speaking, the exercise of a certain measure of extraterritorial jurisdiction by a court adjudicating a transnational civil dispute between private actors tends to be acceptable internationally, as long as there are sufficient circumstances that connect the

180 See further sub-section 3.2.2.

181 Compare Kerr, Janda & Pitts 2009, pp. 303-306. See also: Zerk 2010, pp. 144-175.

182 Compare, for instance: Zerk 2010, pp. 144-145; Enneking 2007, p. 139. See also sub-sections 4.1.3 and *infra* 8.3.1.

dispute with the forum country.[183] This also explains why in foreign direct liability cases, which typically pertain to activities and/or events that have (largely) taken place abroad, civil jurisdiction of the home country courts involved is often far more easily established over home country-based parent companies than over host country-based subsidiaries and/or business partners.

As is also clear from what has been discussed in part II, there are a number of commonly accepted grounds on the basis of which civil courts in most states may assume jurisdiction over transnational tort-based civil disputes. The exercise of jurisdiction over torts that have been committed in the forum country is generally accepted, for instance, although approaches differ with respect to transboundary torts that cannot exclusively be located in the forum country. Civil courts' jurisdiction over transnational tort cases is also generally accepted where the defendant is domiciled or resident within the forum country. A final, commonly accepted ground for jurisdiction is the fact that the parties to a dispute consent to the assumption of jurisdiction over that dispute by the civil courts involved, especially where this is done explicitly through a choice of forum agreement that has been agreed between the parties before the coming into existence of the dispute itself, and even where the dispute has no real connection to the forum country legal order.[184] Apart from these generally accepted grounds for civil jurisdiction over transnational tort cases, there is no general agreement internationally over the connections that need to exist between a country's domestic legal order and the actors and activities involved in a transnational tort dispute for that country's civil courts to assume jurisdiction over the case. More controversial bases of jurisdiction include, for instance, the exercise of jurisdiction over corporate defendants on the basis that they are doing business in the forum state or have subsidiaries that are domiciled there. Another point of divergence is the discretion that civil courts have in declining jurisdiction, for instance on grounds of *forum non conveniens* where they feel that civil disputes that have limited connections to the forum state could be more conveniently tried elsewhere, or on the basis of *lis alibi pendens* where similar proceedings are already pending in another forum.[185]

There are some exceptions to the rule that states will not allow the exercise of international adjudicative jurisdiction by their civil courts over transnational civil disputes that have no connection at all with their legal orders and where parties have not consented to jurisdiction. An example is the *forum necessitatis* doctrine on the basis of which courts may exercise jurisdiction over cases where the plaintiffs' right to a fair

183 See also Zerk 2010, who notes that in today's globalized world assertions of extraterritorial jurisdiction in private law cases are now commonplace and that "[t]*he challenge for domestic legal systems is to manage this in a way: (a) that is fair to the parties; and (b) that takes proper account of the sovereign interests of other states*" (p. 145).

184 For a more comprehensive discussion, see: IBA/EJ Report 2008 pp. 97-125. See also Zerk 2010, p. 146. Compare section 4.2.

185 See, in more detail: IBA/EJ Report 2008, pp. 97-127. Compare section 4.2.

trial or access to justice so requires, for instance because there are no other fora where they can (feasibly) bring their claims. Even here, however, courts' discretion to exercise jurisdiction may be contingent on the existence of at least some connection between the dispute and the forum state.[186] At a more conceptual level, there is debate over the concept of 'universal civil jurisdiction', on the basis of which domestic courts should be allowed to exercise international jurisdiction over civil claims addressing violations of human rights and other fundamental norms of international law by private actors, even if there is no real link between the forum country's legal order and the subject matter or the private parties involved in the dispute. This concept is seen as the civil dimension of the public international law notion of universal criminal jurisdiction, on the basis of which states may prosecute individuals who have engaged in the most heinous of international crimes such as genocide, torture and crimes against humanity, even when those crimes have taken place outside their territories and do not involve their nationals.[187]

The US Alien Tort Statute which, as has been discussed in detail in part II, has provided an important legal basis for foreign direct liability claims, is often depicted as a form of tort-based universal civil jurisdiction.[188] It owes this characterization to the fact that, in combination with the lenient US rules on personal jurisdiction, it allows US federal courts to exercise jurisdiction over civil claims that have only minimal connection with the US legal order. Accordingly, the mere presence in the US, however brief or insignificant, of the defendant (or, in the case of corporate defendants, the fact that the defendant is doing business in the US or has subsidiaries there) may potentially be the only link of an ATS-based claim with the US legal order.[189] As a result as well of the proliferation of ATS-based civil claims, there has in recent years been a significant development of states' practice and understanding of universal civil jurisdiction.[190] A number of commentators have pointed out the potential of and the need for the exercise of universal civil jurisdiction by domestic courts, especially in view of the need to address and provide redress for international crimes and fundamental human rights violations perpetrated abroad by private actors, the dearth of alternative instruments to address such abusive behaviour, and the relative advantages of the exercise of civil rather than criminal jurisdiction in this context.[191] However, the status of universal civil jurisdiction remains uncertain for now, as state

186 This is the case for instance in the *forum necessitatis* provision that is included in the European Commission proposal for a revised Brussels I Regulation. See further sub-section 4.2.2.

187 For more detail, see Van Hoek 2008, pp. 154-156; Donovan & Roberts 2006. See also further sub-section 6.3.3.

188 See, for instance: IBA/EJ Report 2008, pp. 112-117, 128-130. Other examples of universal civil jurisdiction arguably include Article 14 of the Convention against Torture, which may require states to provide for universal civil jurisdiction with respect to claims of torture, as well as the civil actions accompanying exercises by states of universal criminal jurisdiction (*action civile*).

189 See, for instance: Mills 2009, pp. 1347-1349. See further sub-section 4.2.1.

190 IBA/EJ Report 2008, p. 129. Another factor that is mentioned in this respect is the fact that many of the countries that allow for *actiones civiles* have incorporated into their domestic laws the provisions on (the prosecution of private perpetrators of) international crimes of the International Criminal Court's Rome Statute.

191 See, for instance: Mills 2009; Donovan & Roberts 2006.

practice on the concept has been mixed and as scholarly opinions on its interpretation and desirability have varied widely. Still, as it is a relatively new, evolving and arguably expanding concept, its development holds great potential significance for the extent to which domestic courts may in the future assume jurisdiction over civil claims against the foreign perpetrators of international crimes or human rights abuses perpetrated abroad, also with a view to deterring further corporate abuse.

Global business regulation and private international law

Home country regimes of private international law play a pivotal role in determining the feasibility of global business regulation through civil litigation before home country courts. It is clear, however, that the notion of regulation through civil litigation raises novel and interesting questions in this respect. After all, where transnational civil litigation is resorted to and/or relied on not only to protect or promote the private interests of the parties involved in the dispute, but also or rather to protect and promote more public interests, this raises issues of international adjudicative and prescriptive jurisdiction. After all, private law and civil litigation are assigned a more public role where they are viewed and applied as mechanisms for the enforcement of existing (public law) norms and/or the creation of behavioural incentives beyond the parties involved in the particular dispute at hand

In the end, home country public policies aimed at regulating the transnational activities of 'their' multinational corporations can only properly be advanced through this civil litigation if home country courts have jurisdiction over a transnational dispute in this context and can apply home country tort standards. Accordingly, it is increasingly argued that better account should be taken by legal scholars and policymakers alike of the role that private international law mechanisms may play, via the pursuit of (transnational) regulation through litigation, in the context of global governance.[192] Wai concludes in this respect:

> "*Private international law and domestic private laws can play a role in the development of an effective pluralistic conception of regulatory governance that mixes international governmental treaties and institutions, states, transnational NGOs, and local private actors. To achieve that role, however, a more sophisticated internationalism in private international law requires that non-state actors, courts, and legislators expressly recognize the regulatory function that private international law has played, and should continue to play, in decisions regarding particular doctrinal reforms. In the broader context of changes in the global system that challenge traditional state roles, it becomes even more crucial that the regulatory aspect of private laws – something that all legal scholars understand – is emphasized and creatively utilized*".[193]

192 See, for instance: Muir Watt 2011; Wai 2005; Scott & Wai 2004; Wai 2002.
193 Wai 2002, pp. 273-274.

The inherent public interest nature of foreign direct liability cases derives largely from the fact that they are typically relied on by host country plaintiffs and home country NGOs not only to obtain remedies for harm caused to people and planet in host countries as a result of the transnational activities of multinational corporations, but also to get the corporate defendants and those like them to change their ways in the future. This role may be further expanded where this type of transnational tort-based civil litigation becomes more structurally relied on by home country policymakers to promote international corporate social responsibility and accountability. A more regulatory role for tort law in this context, however, also means more risk of infringing host country sovereignty as civil procedures before home country courts are used to enforce existing international or domestic (home or host country) conduct-regulating rules and/or to create new private law standards out of existing societal norms and practices, even where host country policies would dictate otherwise.

In the Bhopal litigation, one of the arguments raised by the plaintiffs in favour of the claims being litigated in the US court system (and, potentially, on the basis of US tort standards) was that if US courts would not administer justice to the victims of the Bhopal disaster as they would to American potential victims of industrial accidents, this would result in a 'double standard' of liability for multinational corporations. The New York District Court seized of the matter disagreed, however. It felt that it was "[...] *not the appropriate tribunal to determine whether the Indian regulations were breached, or whether the laws themselves were sufficient to protect Indian citizens from harm*" and that "[i]*t would be sadly paternalistic, if not misguided, of this Court to attempt to evaluate the regulations and standards imposed in a foreign country*", that it "[...] *should avoid imposing characteristically American values on Indian concerns*" and that the focus should be on "[...] *the interest of India in applying Indian law and Indian values to the task of resolving this case*". In conclusion, it held that:

> *"In the Court's view, 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*".[194]

In the next section, the regulatory role that domestic systems of private law in general and home country systems of private law in particular may play in regulating internationally operating business enterprises will be further discussed.

194 *In re Union Carbide gas plant disaster at Bhopal, India in December 1984*, 634 F.Supp. 842 (S.D.N.Y. 1986), pp. 862-867.

8.3 Global business regulation through transnational civil litigation

8.3.1 Private incitement of home country regulation

Despite increasing socio-political pressure by those who advocate more forceful home country regulatory action concerning internationally operating business enterprises and their transnational activities in order to promote responsible business behaviour abroad, this has so far not resulted in any broad-based, authoritative unilateral or multilateral home country regulatory initiatives. In response, domestic and international NGOs in the environmental, labour and human rights fields, which were already active in the field as initiators of private regulation and as lobbyists for further public regulation, have started to pursue a third tactic, which has brought them onto the plane of intersection of private law regulation and public interest litigation. In what has been referred to as a trend towards 'transnational private litigation', 'transnational human rights litigation' or 'transnational public law litigation', these civil society actors are now seeking to promote international corporate social responsibility and accountability by exploring the possibilities offered by home country tort systems in this respect, through the active encouragement and/or pursuit of foreign direct liability cases.[195] Their main aims in doing so have been not only to help those adversely affected by the activities of internationally operating business enterprises to hold these companies accountable, but especially also to induce home country regulatory action in this respect where those home countries themselves remain unwilling or unable to initiate such action.[196]

A very important side-effect of this type of litigation is that it may also elicit a political or regulatory response by the host countries involved, whose perceived unwillingness or inability effectively to regulate business activities locally and to protect local people- and planet-related interests is the reason for addressing matters outside the host country in the first place.[197] It has been noted in this respect that:

> "[t]*here is good reason to believe that (many) states take very seriously their own failure to respond to corporate harms when proceedings in a foreign court begin to spotlight both that harm and the state's inadequate response*".[198]

As well as their encouragement and support of foreign direct liability cases and those pursuing them, these civil society actors, sometimes with the support of legal commentators, are also trying to persuade the home countries involved to take public action to foster this type of transnational tort-based civil litigation, in the sense of

195 See for three similar but slightly different approaches in this respect, for instance: Wai 2005; Zumbansen 2004; Koh 1991.
196 See further sub-sections 1.3.3, 3.2.3 as well as *supra* sub-section 8.2.5.
197 Compare, for instance: Anderson 2002, p. 409.
198 Scott & Wai 2004, p. 317.

taking legislative action to increase the feasibility of these cases. Proposals have been put forward, for example, for home countries to provide foreign direct liability cases with a firmer and more authoritative legal basis, either at the national level or at a supra-national level, whether by the enactment of Alien Tort Statute-like legislation outside the US or by the introduction of statutory duties of care or strict liabilities for parent companies with respect to the activities of their (foreign) subsidiaries.[199] In addition, civil society actors have been actively lobbying home country governments to get them to endorse this type of litigation by removing or reducing existing barriers to it in substantive home country laws, home country civil procedural law and practical circumstances in the home countries involved that affect the feasibility of bringing transnational civil claims there. An example is the proposal that was advanced in the Netherlands to introduce a legal aid fund for victims of violations by Dutch multinational corporations of people- and planet-related interests abroad, intended to financially assist host country plaintiffs in foreign direct liability cases.[200]

Firm support for their endeavours especially in this latter respect has come from the UN 'Protect, Respect and Remedy' policy framework on business and human rights, which underlines the state obligation to provide victims of corporate human rights abuses that occur within their territory and/or jurisdiction, with access to remedy through judicial, administrative, legislative or other appropriate means.[201] Under this duty, states are obliged to ensure the effectiveness of such remedies for corporate human rights abuse, by "[...] *considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy*" and by refraining from erecting new barriers that may "[...] *prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable*".[202] As discussed, the framework distinguishes a number of particular barriers in this respect that may prevent legitimate cases involving corporate human rights violations from being addressed through domestic judicial mechanisms, including *inter alia* the situation where "[...] *claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim*."[203]

Through their active promotion and support of foreign direct liability cases, civil society organisations are putting existing tort law mechanisms to creative use. In doing so, they encourage not only the retrospective settlement by home country civil courts of private disputes between multinational corporations and those suffering damage as a result of their activities in host countries, but also the prospective setting of behavioural standards

199 See, for instance: ECCJ Report (Gregor) 2010; FNCM/Sherpa Report (Bourdon/Queinnec) 2010; ECCJ Report (Gregor/Ellis) 2008. See also *infra* sub-section 8.3.3 and sub-section 12.2.2.

200 See further sub-section 6.4.1.

201 UNHRC Report (Ruggie) 2010, pp. 20-22. See further sub-sections 7.3.3 and 7.3.4.

202 UNHRC Report (Ruggie) 2011, principle 26, pp. 23-24.

203 UNHRC Report (Ruggie) 2011, principle 26, p. 23.

by the civil courts involved for internationally operating business enterprises that may prevent such damage from arising in the first place. In this sense, foreign direct liability claims may be viewed as seeking to combine the pursuit of private interest-related aims, *i.e.* the attainment of satisfaction for the host country victims involved in the case at hand, with the pursuit of public interest-related aims, *i.e.* the promotion of socially responsible behaviour abroad by internationally operating business enterprises.[204] Their endeavours in this respect may be qualified as privately initiated attempts to provoke public regulation through private law mechanisms.

Accordingly, the question arises to what extent these cases have the potential not only to provide *ad hoc* remedies for the host country victims directly involved but also, in a wider sense, to address the regulatory gaps with respect to internationally operating business enterprises and promote international corporate social responsibility and accountability. Or, in a more general sense, to what extent may home countries' domestic systems of tort law play a regulatory role when it comes to regulating the transboundary behaviour of internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability? This question, which will be discussed further in chapters 9 and 10, is not an isolated one and should be viewed against the background of contemporary developments in Western societies towards private law regulation and private enforcement, which are both forms of privately initiated public regulation through civil courts. It is these developments that frame contemporary ideas on the way in which private law in general and tort law specifically may act as a regulatory mechanism that has the potential to influence the behaviour of corporate actors, not only at home but potentially also abroad.

8.3.2 The growing interconnectedness between public and private spheres

Blurring boundaries between public and private law

For many years, a distinction has been made between public law and private law. Public law is generally seen as the body of rules that regulates the vertical relationships between a state and its citizens as well as between and within public entities, with the primary aim of promoting public interests. Private law, however, focuses on the horizontal relationships between those citizens among themselves. It organises their interrelationships on a bilateral basis and is primarily concerned with the constitution and protection of their private rights and interests. As opposed to public law, which generally has a mandatory, centralized and directive nature, private law has a more facultative, decentralized and supplementary character, as it largely leaves it to the private parties involved to arrange their private interrelationships.[205] Where the rights and interests of two private parties

204 See *supra* sub-section 8.2.5 as well as sub-sections 1.3.3 and 3.2.3.

205 See, for instance: Wilhelmsson 1999, pp. 23-25 and p. 253, respectively; Kortmann & Sieburgh 2009, pp. 254-256.

do not correspond, private law provides for dispute resolution mechanisms, aimed at restoring justice in the private interrelationships between the private actors concerned, which may ultimately be enforced through recourse to state courts. Whereas the initiative for the enforcement of public law rules lies with the state, private law is typically enforced only at the instigation of the private parties whose interrelationships it addresses.[206] As such, private law is traditionally understood "[...] *as a mechanism for supporting the private ordering of civil society without seeking to organize or steer it*".[207]

This longstanding distinction between public law and private law, however, has become increasingly blurred over past decades.[208] Arguably, it was already less sharp in practice than in theory, since the so-called public/private divide has always been limited both geographically and historically, in the sense that it is a predominantly continental European construct and in the sense that it only arose with the advent of the modern nation state and, after reaching its peak in the 19th century, already started to decline in the early 20th century.[209] One of the consequences of this development has been that public norms, values and policies have increasingly made their way into the field of private law.[210] A significant example is the constitutionalisation of private law, which can be described as:

> "[...] *the increasing influence of fundamental rights in relationships between private parties, fundamental rights being those rights that were originally developed to govern the relationships between the State and its citizens*".[211]

Accordingly, not only constitutional rights but particularly also human rights ensuing from international human rights treaties such as the European Convention on Human Rights and from customary international law, are increasingly directly and/or indirectly affecting the horizontal relationships between private parties.[212]

Private law regulation

Another important example of the blurring distinction between public and private law is reflected in the growing attention of both scholars and policymakers to the prospects of private law regulation.[213] Legal regulation has generally been thought of as the control and

206 See, for instance: Cane 1997, pp. 10-12.

207 Collins 1999, p. 56.

208 See, for example, contrasting the role of and the challenges to the public/private distinction in the US and in Germany: Michaels & Jansen 2006, pp. 856-860.

209 Wagner 2006, pp. 422-423.

210 See, for instance: Collins 1999, pp. 31-55, who asserts that "[...] *instrumental purposes increasingly steer private law discourses*" (p. 57).

211 Smits 2006, p. 10. Note, however, that it is also possible to argue that what makes fundamental rights fundamental is that they precede the distinction between public and private law: Nieuwenhuis 2006, p. 5.

212 See generally, for instance, Barkhuysen & Van Emmerik 2006, pp. 43-57. For an in-depth discussion, see also: Smits 2003.

213 See, for instance, in more detail and with a focus on contracts: Collins 1999, who *inter alia* discusses the way private law reasoning is currently being reconfigured to encompass instrumental or policy concerns within

direction by the state and its agents of societal actors and activities by means of publicly imposed and enforced rules and standards of conduct, and thus a matter of public law.[214] Accordingly, traditional, command-and-control type public law regulation, which may be defined as "*the setting of standards by government, and public monitoring and enforcement of compliance therewith*", was long seen as the principal form of regulation.[215] However, with the decline of the Western world's welfare states and the attendant trends towards free market processes, deregulation and privatization on the one hand, and globalization and the ensuing weakening of the sovereign nation state on the other, has come the realization that traditional regulatory mechanisms alone do not meet the needs of our increasingly multiform contemporary Western societies anymore and that there is a need for a more diverse range of regulatory instruments.[216] As a result, contemporary conceptions of regulation are broadening to encompass alternative types of state regulation and even forms of non-state regulation, meaning that regulation may now potentially refer to any mechanism of social control, with the concept of legal regulation potentially encompassing any system of legal norms that is capable of modifying the behaviour of those it addresses.[217]

Connected to these developments is a growing interest in the prospects for protecting and realising public interests, public values and public policy aims through private law, reflecting a move away from the common understanding of private law as the law concerned with the market system and private interests rather than with the collectivist system and public interests.[218] This shift coincides with and is reinforced by a growing tendency towards viewing private law from an instrumentalist perspective, as a tool or a resource that can be used to achieve ends or objectives that go beyond the field of private law itself.[219] The most influential instrumentalist views on private law are currently those of legal economists, who analyse the law in general and private law and its constituent legal fields in particular from an economic perspective.[220] For instrumentalists, the focus is not on the moral quality of behaviour in itself, but on the way in which societal actors can be made to behave in such a way as to maximize societal welfare or promote other societal aims.[221] The idea of private law regulation builds on the instrumentalist idea that private law in general and private law litigation in particular provide private actors with certain behavioural incentives, and recognizes that as such private law may be actively deployed to

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its normative orientation (pp. 31-55).

214 Compare Van Boom 1994, pp. 1-54.

215 Cane 2002b, p. 308, in particular footnote 8. See also *supra* sub-section 8.1.3.

216 See generally: Wilhelmsson 1999, pp. 3-36 and pp. 51-82, respectively.

217 Compare Van Boom 2007, pp. 419-420; Cane 2002b, pp. 307-309; Baldwin, Scott & Hood 1998, pp. 2-4. See also *supra* sub-section 8.1.3.

218 See, for instance: Wagner 2006; Wightman 1999, pp. 253-276; Collins 1999.

219 Compare, with a focus on tort law: Cane 2002b, pp. 309-312; Cane 2002c, p. 430.

220 See generally Posner & Parisi 2002.

221 See, on the more general debate on fairness versus welfare, for instance: Kaplow & Shavell 2001 and (in reply) Dorff 2002. See also sub-section 7.2.3.

get those private actors to behave in what is considered to be a socially desirable manner, particularly through deterrence of socially undesirable behaviour.[222]

Private law enforcement

A closely related concept is that of private law enforcement (or private enforcement of law, private enforcement), originally a US phenomenon, which relies on civil vigilance in assigning the public role of monitoring and enforcing compliance with existing behavioural standards to private actors.[223] In the US, where the distinction between public and private law has always been far less significant than on the European continent, private litigation has traditionally played an important public role in this respect:

> "*American judicial institutions, unlike those in most other countries, were not designed merely to resolve civil disputes, but were fashioned for the additional purpose of facilitating private enforcement of what in other nations would generally be denoted as public law*".[224]

For a number of reasons that are deeply imbedded in the US legal system and legal culture, much regulation takes place by means of *ex post* enforcement of public regulations through private litigation, with claimants and their lawyers acting as private attorney generals.[225] Accordingly:

> "[...] *substantial reliance for the regulation of business is placed on private plaintiffs. Much regulation is done ex post the regulated business conduct in the form of civil money judgments rather than ex ante in the form of official approval or disapproval.* [...] *Its aim is to keep business executives alert to the risks their business decisions may impose on others*".[226]

This phenomenon goes hand in hand with the distinctively plaintiff-friendly US litigation culture, which is shaped by a unique combination of legal and procedural features. Examples are the liberal rules on personal jurisdiction and pre-trial discovery, the absence of loser-pays liability for attorneys' fees and the possibilities for entering into contingency fee agreements, the possibilities for jury trials as well as for the aggregation of various small claims into class actions that are financially worthy of pursuit, and the potential award of punitive damages if the defendant has behaved recklessly or maliciously.[227] A

222 See, for instance: Wagner 2006. See also, generally, for instance: Cafaggi & Muir Watt 2009.

223 See, for instance: Engelhard, Giesen *et al.* 2009; Kortmann & Sieburgh 2009.

224 Carrington 2004, p. 1413.

225 See generally: Brand 2005, pp. 115-121; Carrington 2004, pp. 1413-1415. See also Kagan 2001, pp. 181-206, who notes that generally speaking "*American forms of regulatory law, processes for making regulatory policy, and methods of enforcing regulatory rules are more legalistic and more adversarial*" (p. 182) and observes that one of the distinctive features of American regulatory law is "[...] *the unique extent to which it encourages* private *enforcement of* public *law*" (p. 193).

226 Carrington 2004, pp. 1413-1414.

227 See, for instance: Brand 2005, pp. 121-131; Carrington 2004, pp. 1415-1428. See also further sub-section 4.5.1.

separate but related practice concerns US statutory provisions, especially in the field of environmental law, for private enforcement of public law regulatory standards by means of so-called 'citizen suits', which:

> "[...] *enable private individuals and groups (such as Friends of the Earth) to bring actions* [...] *against both regulators and polluters for injunctions and statutory (civil) penalties*".

It is important to note, however, that these statutory citizen suits are fundamentally different in a number of ways from private law enforcement in a more general sense, as claimants need not have suffered harm to their person or property and damages can generally not be claimed under such statutes, as they are based on alleged breaches of concrete statutory standards, duties and prohibitions only, and as they are specifically meant to complement enforcement by a public regulator.[228]

Outside the US as well, there is now a growing tendency,[229] especially among European scholars and policymakers, towards viewing private law from an enforcement perspective, both in the sense of enforcement of private law and in the sense of enforcement by means of private law.[230] From the 1960s onwards, many European countries had already adopted national legislation in the field of consumer law allowing, in particular, consumer organisations "*to seek* injunctive *relief from courts in order to defend general consumer interests by means of a single collective procedure*".[231] More recently, the European Commission, as has been discussed before, has started to actively seek to employ private enforcement mechanisms that can be used by private parties to bring actions for damages against those acting in contravention of EU law in fields such as competition law and consumer law.[232] Especially in fields where traditional public enforcement mechanisms are for some reason unable to produce the desired results or unavailable – the latter being very relevant in the EU-context as in principle the EU has only limited competences[233] – the prospect of using private law enforcement mechanisms is proving to be tempting.[234] Accordingly, the potential of private law litigation as a way to further compliance with both public and private law norms is increasingly being recognized.[235] Still, in view of the particular design of the private law system and the functions traditionally ascribed to it, as well as in the absence in most non-US legal systems of many of the features that shape the

228 See Cane 2002c, pp. 451-458.
229 See, for example: Engelhard 2009, pp. 12-14.
230 See, generally, for example: Engelhard, Giesen *et al.* 2009; Cafaggi 2009; Van Boom & Loos 2007; Basedow 2007.
231 Hodges 2008, pp. 4, 9-50.
232 See, for instance: European Commission, 'White Paper on Damages actions for breach of the EC antitrust rules', COM(2008) 165 final (2 April 2008); European Commission, 'Green Paper on Consumer Collective Redress', COM(2008) 794 final (27 November 2008). See also sub-section 4.5.3.
233 See, for instance: Van Hoek 2006a, pp. 141-160.
234 Wagner 2006, pp. 446-447.
235 Similarly: Van Hoek 2006b, p. 315.

US litigation culture and make it uniquely suitable for private litigation in this sense, this development has remained in dispute, especially outside the US.[236]

Shifting responsibilities from state to private actors

In the end, even though states bear the principal responsibility for the regulation of the behaviour of private actors, both in the domestic and in the international sphere, and remain the principal authorities when it comes to the establishment of regulatory mechanisms that seek to align the behaviour of those actors with the interests of other private actors as well as with public interests, the distinction between states as rule makers and private actors as rule takers is becoming increasingly blurred. Especially when it comes to the regulation of business enterprises and commercial activities, states have assumed a more background role, partly deliberately in favour of free market processes, deregulation and privatization and partly out of necessity where they have been faced by the challenges posed by globalization. With this more hands-off role for states has come a more hands-on role for the private actors that are the principal regulatory beneficiaries as well as for those that are the principal regulatory addressees.[237] This is one of the messages that very clearly resound through the UN 'Protect, Respect and Remedy' policy framework on business and human rights, for example.[238]

Private actors are increasingly taking on a more public role where it comes to the regulation of their own behaviour or that of other private actors. As has been discussed, private actors have of their own accord actively been putting up responses to the regulatory gaps caused by globalization in the field of global business regulation, through the promotion of private forms of regulation, both in the form of corporate self-regulation by (groups of) internationally operating business enterprises themselves and in the form of civil regulation by domestic and international NGOs and other civil society actors.[239] These private regulatory initiatives have directly been linked to the perceived incapacity of states to come up with regulatory responses that adequately deal with internationally operating business enterprises and their global business practices, especially with respect to issues of international corporate social responsibility and accountability. At the same time, as has been mentioned here, Western society governments are more and more often relying on private actors to enforce public regulation through private law mechanisms.

Closely connected to these developments is the increasing awareness of and interest in the potential of private law regulation as a supplement to or even a substitute for more traditional public law regulatory measures, as already mentioned. The idea of private law regulation is similar to that of private regulation in the sense that it is largely shaped by the regulatory addressees themselves, is highly responsive to societal norms

236 See, for example: Kortmann & Sieburgh 2009; Cane 2002c.
237 Compare also Wagner 2006, p. 450.
238 See further sub-sections 7.3.3 and 7.3.4.
239 See *supra* sub-section 8.1.3.

and developments, and largely dependent for its effectuation on private initiatives. Unlike privately made law, however, which may be created by private actors without any interference by and/or reference to any public (state) authorities, private law has a state connection as it is based upon, defined through and circumscribed by rules of private law that have been publicly set, through legislation and/or adjudication, and as it is applied, developed and enforced by state courts. As such, private law, while sharing some of the benefits of privately made law such as flexibility, suitability, responsiveness to the specific regulatory issues and concerns involved and better acceptance than publicly set standards among its regulatory addressees, lacks a number of the drawbacks of privately made law, like issues of legitimacy, accountability, arbitrariness as well as its in principle non-binding nature. The different concepts come together where private actors seek to have privately made law, for instance in the form of corporate codes of conduct, guidelines, model codes or best practices, enforced by civil courts through private law mechanisms such as tort law or contract law.[240]

In contrast, public interests play an increasing role in the private interrelationships between private actors, for instance where specific groups of private actors, such as business enterprises, are charged with increasing responsibilities to consider societal interests in their operations and other activities. As has been discussed in the previous chapter, the notion of corporate social responsibility revolves around the responsibility of business enterprises to contribute to the public good by internalizing awareness and consideration of people- and planet-related societal interests that lie within their sphere of influence and by preventing and/or addressing any adverse consequences that their operations may have on those interests. This is not a new idea, as it has long been inherent in the concept of corporate citizenship. However, changing societal expectations especially in Western societies have given it new impetus, a broader reach and a less open-ended and more compelling meaning, which resounds in contemporary debates on corporate social responsibility and accountability.

Accordingly, business enterprises, when operating at home but especially also when operating abroad, are charged with a responsibility to consider the private interests of a broadening group of corporate stakeholders as well as a broadening range of public interests, and to incorporate respect for those interests into their corporate policies, management decisions and operational practices even where this goes beyond or even conflicts with their own corporate self-interests and/or local regulatory requirements. In this sense, the notion of corporate social responsibility can be seen as involving increased societal responsibilities for business actors in line with their relatively more prominent contemporary societal and global role in comparison with states' relatively more withdrawn role. Whereas states remain ultimately responsible for the active protection of the private interests of all societal actors as well as society's public interests, and the overall

240 See, for instance: Cafaggi 2009b; Snyder 2003, pp. 373-377. See also *supra* sub-section 8.3.1.

advancement of the public good, corporate actors are now increasingly charged with derivative but separate obligations to refrain from adversely affecting those interests.[241]

8.3.3 Exploring private law regulation

All in all, it seems that what was once considered the private sphere is slowly but surely becoming less private, while what was once considered the public sphere is gradually becoming less public. This development is particularly visible in the field of global business regulation, where the need for alternatives to traditional command-and-control style state-based regulation is arguably most pressing at this point. The developments described here suggest that one of the regulatory options that home countries may look at when seeking new, alternative or additional ways of regulating the behaviour of 'their' internationally operating business enterprises is that of private law mechanisms. At the same time, however, the field of private law, with its focus on the horizontal relationships between private actors *inter se* and on interpersonal justice, its bilateral nature and its primary occupation with private rather than public rights and interests, is not primarily geared towards the regulation of the behaviour of private actors beyond those directly involved in a specific private relationship or a specific private law dispute. The question arises, therefore, whether and to what extent private law may be able to fulfil a regulatory role, both in general as well as specifically in the context of global business regulation. The focus in addressing this question will in particular be on private law regulation through litigation, bearing in mind that home country statutory norms of private law (*e.g.*, strict liabilities) have only played a limited role so far in the context of foreign direct liability cases.[242]

Private law defined

As has already been described in the previous sub-section, private law,[243] as opposed to public law, tends to have a facultative, decentralized and supplementary nature, to focus on the horizontal relationships between private parties, to be primarily concerned with the promotion of private interests, and to be enforced only at the instigation of the private parties to whom it applies themselves. Rather than being based on bright-line, *ex ante* rules set by the legislature, private law is based largely on standards (whether laid down in civil codes or developed through case law), such as for instance good faith, due care, fairness

241 For more detail, see sections 7.2 and 7.3.

242 See further sub-sections 4.4.2 and 5.3.2.

243 The term 'private law' will be used here in a narrow sense, as encompassing the legal fields of tort law, contract law, the law of unjust enrichment or restitution, and the law of real and personal property. It can be understood as encompassing not only substantive but also procedural law, but where more explicit reference is meant to be made to both aspects the term 'private law system' may be used. The focus here will be on private law regulation through litigation rather than through legislative intervention.

and reasonableness. This allows courts seized of private law matters to *ex post facto* give content to the law by assessing the behaviour of private actors in terms of the purposes and/or social values embodied in the applicable standards.[244] Their judgments are in principle binding only on the parties involved, but may have broader effects where novel legal norms are formulated out of existing societal norms and where existing legal norms are interpreted in novel ways and/or applied to novel factual situations.[245] Accordingly, civil courts, next to their role as conflict settlers through the application of existing legal norms, have a role to play as developers of the law, even though this standard-setting role is generally considered to be a supplementary one to their primary role as dispute settlers in individual cases.[246]

Private actors who feel that their rights or interests are unlawfully infringed by the activities of other private actors may bring a legal claim before a civil court on the basis of a private law cause of action. The court will judge their claim with the primary aim of resolving the legal dispute that has arisen between the particular plaintiffs and defendants in the case at hand. It will do so by assessing the behaviour or situation complained of on the basis of applicable standards of private law, which, due to their typically highly abstract nature, generally leave ample space for consideration and balancing of the competing rights and interests in light of the legal and societal norms and practices that applied at the time when the behaviour or situation complained of occurred. If, on the basis of these norms and practices, the court finds the behaviour or situation in question to be below standard in the sense that it constitutes an unlawful infringement of the rights or interests of the plaintiffs, and if those plaintiffs can show that they have suffered damage as a result, it will grant them a remedy that is linked to the nature of the infringement and that is to be satisfied by the defendants.

Private law remedies usually consist of a damages award aimed at providing the plaintiffs with compensation for the wrong done by the defendants and restoring them to the position they would have been in but for the behaviour or situation in question; as such these remedies are primarily backward looking. Although awards of compensatory damages are the standard remedy for private law wrongs, plaintiffs may also request alternative or additional remedies, such as injunctions, orders of specific performance,

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244 For a detailed discussion of the difference between rules and standards and their comparative advantages and disadvantages, see, for instance: Posner 1997; Kaplow 1992; Kennedy 1976.

245 Under certain circumstances, civil court judgments may set legal precedents that are to be followed or at least considered in subsequent cases in which similar factual and/or legal issues are raised. The circumstances under which civil judgments may have precedential effect vary with each legal system. Traditionally, the binding force of legal precedent tends to be stronger for instance in the English common law system than it is on the European continent. See, in more detail: Zwalve 2008, pp. 74-82; Van Dam 2006, pp. 119-125.

246 Note that the potential, scope and desirability of this standard-setting role for civil courts remain contentious. A more detailed discussion of the general debate on the lawmaking capacities of courts goes beyond the scope of this study, however, for which reason I will confine myself here to some references to the debate on this matter in the Netherlands, which focuses on the potential law development role of the Dutch Supreme Court: Hammerstein 2009; Schutte 2009; Keukens & Van Den Nieuwenhuijzen 2008.

declaratory judgments and even punitive or exemplary damages in some legal systems. The latter are specifically designed "[...] *to punish and 'make an example of' the defendant where the level of wrongdoing has been particularly serious*", and as such also to deter others from engaging in similar behaviour.[247] Similarly, some of the other available remedies may also have a more prospective nature, like *quia timet* injunctions, which seek to restrain a specific type of wrongful behaviour that threatens to interfere with the plaintiffs' rights or interests, or prohibitory injunctions, which restrain private actors from doing or continuing certain defined acts.[248]

Standard-setting, monitoring and enforcement

In line with its inherent nature as set out here, private law is often thought of as being principally or exclusively concerned with the consideration of the individual rights and responsibilities of two particular private parties towards one another and, where necessary, the correction of any injustice that the defendant in a private lawsuit may have inflicted on the plaintiff, through the provision of monetary compensation that restores both parties to the position they would have been in but for the injustice.[249] However, in line with the growing interest in the prospects for realising public interests, public values and public policy aims through private law, as well as with the growing tendency to view private law from an instrumentalist perspective, there is an increasing emphasis on the way in which and the extent to which private law may prospectively guide the behaviour of private actors.[250] In this view, private law is not primarily about the protection of private interests and retrospectively doing justice in individual cases, but rather about providing incentives to private actors engaging in similar activities to behave in what is considered to be a socially desirable manner, particularly through deterrence of socially undesirable behaviour.[251] Individual private law cases are then seen not so much as retrospectively-oriented legal conflicts in which justice needs to be done through the application of private law, but rather as models for future conflicts of interests of a similar nature; court judgments in these cases can be seen as providing guidelines to which those engaged in similar activities or situations should tune their behaviour.[252] Even for those who do not subscribe to the instrumentalist view of private law as a system of behavioural regulation, it is hard to deny that this field of law has certain regulatory effects.[253] This raises the question whether systems of private law can be attributed a regulatory role, just like public law.

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247 Zerk 2010, p. 162. See further section 4.5.
248 Compare, for instance: Lucy 2007, pp. 14-15; Van Boom 2006a, pp. 12-14. See also sub-section 4.5.1.
249 See generally, for instance: Weinrib 1995.
250 See *supra* sub-section 8.3.2.
251 See, generally: Posner & Parisi 2002. Note, however, that most of these theories analyse different legal fields that may be seen as forming part of private law, such as tort law, contract law and property law, separately.
252 Wagner 2006, pp. 424-426.
253 See, for instance: Giesen 2009b; Wagner 2006.

Legal regulation is traditionally seen as encompassing three separate but connected activities: standard-setting, monitoring and enforcement.[254] Accordingly, the concept of private law regulation may be seen as involving the potential use of private law in performing these activities. Firstly, private law may act as a standard-setting mechanism where it is itself a source of behavioural standards, set and/or elaborated by the courts in civil cases that come before them, against the background of existing judicial precedents and/or of general statutory provisions laid down by the legislature, for instance in civil codes (in civil law systems). Secondly, it may act as a monitoring mechanism where it is used to monitor the compliance of private actors with behavioural standards that have been set either through private law or through public law standard-setting mechanisms. And thirdly, in line with the notion of private enforcement, private law may act as an enforcement mechanism through which both private law and public law behavioural standards can be enforced at the instigation of those private actors whose interests are sought to be protected through those standards.[255]

Generally speaking, the behavioural standards set by civil courts in private law disputes do not apply publicly but are only binding between the parties involved in each particular case; however, civil judgments may find more general application where they may be considered to set a legal precedent from which civil courts in future cases pertaining to similar legal questions and/or factual circumstances cannot deviate, at least not without proper motivation. Due to private law's retrospective nature, these behavioural standards are usually only set *ex post facto*, which means that it may be difficult for the (potential) regulatory addressees concerned to anticipate the actual standards that the courts will come up with, something that may lead to legal uncertainty as to the applicable law.[256] Other factors that may detrimentally affect private law's standard-setting potential include the fact that courts "[...] *are neither expert in relevant areas of regulatory activity nor politically responsive*", the fact that they are generally dependent on the litigants for information on the activity that is to be regulated, and the fact that civil procedures generally exclude participation by third parties that may be affected by the regulated activity. On the other hand, courts are generally seen as expert, independent decision makers that are above the political fray, potentially even more so than other public regulators. At the same time, whereas the functioning of public law is generally restricted to the regulating state's territory, private law-based regulatory standards may typically, to the extent provided for by the applicable rules of private international law, extend beyond domestic actors and activities over behaviour engaged in abroad and/or by foreign actors.[257]

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254 See, for instance: Cane 2002b, p. 309.

255 See, for instance, with a focus on tort law: Cane 2002b, pp. 309-319; and with a focus on contract law: Collins 1999, pp. 62-65.

256 Compare for instance: Van Boom 2006a.

257 Compare Wagner 2006, p. 449. See also *supra* sub-section 8.2.5.

The behavioural standards set through private law mechanisms are usually not shaped as specification standards that prescribe or prohibit a well-defined pre-established course of conduct, nor as performance standards that require a specific outcome. Private law standards will for instance generally not require the factory that dumps polluting materials into the river as a by-product of its production processes (see sub-section 7.3.3) to perform its operations using specific technologies, such as pollution filters, or to achieve or avoid a certain performance output, for instance by setting an upper limit on the amount of polluting materials it is allowed to dump into the river. Instead, private law standards more closely resemble target standards, which "[...] *state the regulatory goal but do not address the nature either of inputs to or outputs of the regulated activity*". They may require private actors to perform their activities with due care for the rights and interests of others, without specifying how they should perform them, or what conduct would satisfy the requirement of due care.[258]

This specific shape of private law standards has both advantages and disadvantages. It leaves the private actors that are its regulatory addressees much freedom of action in general and freedom in determining how to organize their activities so as to avoid detrimental outcomes for third parties in particular. This may be beneficial especially where those undertaking the activities in question have the skills and resources to determine how best to avoid such detrimental outcomes and are capable of adapting their behaviour accordingly. It also encourages regulatory addressees to internalize regulatory objectives and align their conduct with the spirit of the law, *i.e.*, to incorporate a measure of awareness and/or consideration of third party rights and interests rather than blindly following the letter of the law. It motivates them to continually improve their performance and allows for a measure of flexibility that will be crucial especially in those areas of society where the state of science and technology is subject to rapid change.[259] At the same time, however, the fact that behavioural standards set through private law mechanisms will often take the shape of target standards, introduces a measure of legal uncertainty among (potential) regulatory addressees that may significantly curb economic developments and societal life in general. This objection is reinforced by the fact that private law standards are typically set *ex post facto*, which means that (potential) regulatory addressees may never be completely certain of what behaviour is expected of them under private law regulation.[260]

Also, where the fulfilment of private law's remaining two potential regulatory roles is concerned, namely the monitoring and enforcement of existing behavioural standards, private law regulation has both advantages and disadvantages. In principle, civil courts are not equipped to monitor the compliance of private actors with behavioural

258 Cane 2002b, p. 314.
259 Compare Wagner 2006, pp. 436-441; Cane 2002b, pp. 313-315.
260 Compare, in a very general sense: Vranken 2006, pp. 64-81. See also: Van Boom 2006a.

standards that have been set either through private law or through public law standard-setting mechanisms. Instead, private law relies on those private actors which have been detrimentally affected by (suspected) violations of regulatory standards by other private actors, and which will generally both be best able to detect those breaches and well-motivated to report them to the courts. This means that private law's monitoring role is primarily reactive, although in some cases potential victims may request the court to intervene in a more proactive manner through injunctions, so that impending or further (in the case of continuing behaviour) breaches can be prevented. It also means, however, that the monitoring of compliance with behavioural standards by private actors through private law is rendered decentralized and uncoordinated to some extent. At the same time, neither courts nor private actors are likely to be particularly well-equipped for and/or adept at assessing whether particular activities engaged in by particular private actors are in compliance with or in breach of existing regulatory standards.[261]

When it comes to its potential role as an enforcement mechanism through which existing behavioural standards can be enforced, private law is also able to rely on those private actors whose interests are sought to be protected through those standards. Next to the fact that it is these private actors that are likely to have the best access to information and evidence relevant to the breach in question, this also allows the state to save most of the costs that are involved in public (monitoring and) enforcement of compliance by private actors with regulatory standards. Through its remedies, private law may either directly (in the case of injunctions) or indirectly (in the cases of damages awards) provide regulatory incentives to private actors to comply with private law or public law behavioural standards, usually by deterring them from engaging in certain behaviour. At the same time, these remedies motivate private actors, whose rights and/or interests are (in danger of) being violated by other private actors' activities which are likely to be in breach of regulatory standards, to turn to civil courts to enforce those standards. Depending on the possibilities offered in this respect by the applicable rules of private international law, domestic and foreign private actors alike may seek to enforce the behavioural standards in question.[262]

Limitations and benefits

From the foregoing, it is clear that although private law does have a role to play as a mechanism for the regulation of the behaviour of private actors through standard-setting and the monitoring and enforcement of existing behavioural standards, this role is necessarily limited by its inherent structure. The fact that private law is privately initiated, reactive and predominantly concerned with outcomes and in particular with harmful outcomes, limits its potential when it comes to addressing the social desirability

261 Cane 2002b, pp. 315-317.
262 Compare Wagner 2006, p. 449.

of particular behaviour and therefore its potential as a regulatory mechanism.[263] After all, there may be countless examples of behaviour engaged in by private actors that is considered to be undesirable, but that does not fall within the regulatory ambit of private law as it does not result in any harmful consequences, or at least not in any harmful consequences that have a monetary equivalent. Accordingly, whether a private actor has acted with due care in undertaking a certain activity is generally assessed *ex post facto* on a case-by-case basis and in light of the specific circumstances of each particular case, and only where the activities in question have resulted in detriment for other private actors.

Even in those instances where socially undesirable behaviour has resulted in harmful consequences with a monetary equivalent, private law is dependent for its regulatory role on whether those who are detrimentally affected by such behaviour actively pursue a lawsuit to have their rights and interests protected and enforced by private law. Private law remedies may act both as an incentive for private actors not to engage in behaviour that violates existing behavioural standards, and as an incentive and a reward for those who seek to have their private rights and interests protected against such unacceptable behaviour to have those standards enforced by civil courts.[264] However, the primarily restorative nature of private law remedies limits private law's regulatory potential, since this links those remedies to the amount of damage caused rather than to the nature of the behaviour in question and/or the incentives required to get the private actors whose rights and/or interests have been detrimentally affected by breaches of regulatory standards by other private actors to report those breaches through civil lawsuits.[265] At the same time, applicable rules of civil procedure (costs, prescription periods, standing, etc.) and litigation practices (duress, costs and availability of legal representation, etc.) may significantly affect the willingness of private actors to take up their role as private enforcers of the law in this respect.[266]

In the end, the main limitation of private law's regulatory potential lies in the fact that it is organized as "*a system of rules and principles of interpersonal responsibility to repair harm*", and as such has a bilateral, responsibility-based and correction-oriented nature.[267] Rather than providing generally applicable, forward-looking, concrete and knowable behavioural standards, private law primarily yields very general, norm-neutral standards that are only given content *ex post facto* in concrete cases, with the primary objective of retrospectively doing justice in each individual case considering the particular circumstances and the particular interests of the particular parties involved. As has been noted in this respect:

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263 Compare Van Boom 2006a.
264 Compare Cane 2002b, p. 316.
265 See also Van Boom 2006a.
266 See, for instance, for an economic analysis of the litigation factor: Kaplow & Shavell 1999, pp. 45-63.
267 Cane 2002, p. 310. For a more comprehensive discussion, see also Cane 1997.

> "*Courts obviously consider it to be their task to adjudicate rights and duties to the parties present in the procedure instead of delivering broadly phrased decisions that may surpass the interests implicated in the procedure*".[268]

Generally speaking, civil procedure reflects the traditional notion that behavioural regulation is only a by-product (if even that) of private law's primary focus on resolving bipolar disputes between private parties, and as a consequence is not very well equipped for performing regulatory tasks. This is exemplified by the fact that third parties that are not directly involved in a civil dispute that has been brought before a civil court but that may be affected by the broader regulatory consequences of the court's judgment, will generally not be able to present evidence and arguments as to the likely effects of that judgment on their rights and interests.[269] All in all, whether civil courts have the democratic legitimacy, political responsiveness, technical expertise and institutional capacity necessary to come up with generally binding legal rules reflecting a well-considered, well-informed and equal *ex ante* balance of the entire range of societal interests involved in any regulatory issue, remains a matter of debate.[270]

Despite the limitations to private law's regulatory role that are inherent in its innate structure, the fact remains that even if private law as a legal system is not primarily geared towards the regulation of the behaviour of private actors, it does have certain regulatory effects.[271] It seems that this is being increasingly recognized by civil courts, which are the designated private law regulators. It has been stated in this respect that:

> "[...] *courts have become more aware of (and more willing to acknowledge) the distributional and instrumental effects of private law rules of responsibility, and have been prepared to alter those rules with a view to modifying the law's effects in such a way as to reflect changing views about distributional justice and the good society*".[272]

The fact that private law simultaneously allows for behavioural regulation on the one hand and corrective action (through monetary compensation) where the balance of private rights and interests in the private interrelationships of two private parties is disturbed on the other, may actually under certain circumstances be considered to be an important advantage that may arguably exceed the difficulties inherent in this double role.[273]

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268 Van Boom 2006a, pp. 13-14.
269 Cane 2002, pp. 328-330.
270 See, for instance: Hartlief 2008; Van Boom 2006a, p. 47; Cane 2002b, p. 313.
271 Similarly, for instance: Cauffman & Weyts 2009, pp. 303-366; Hartlief 2008; Wagner 2006, pp. 422-450.
272 Cane 2002, p. 330.
273 Wagner 2006, pp. 436-441; Cane 2002b, pp. 447-449.

In the end, private law's potential as a regulatory mechanism will have to be considered in view of the particular subject matter area in which its regulatory capacities are sought to be relied on and on the particular regulatory objectives that are sought to be achieved. At the same time, its actual potential in this respect can only be assessed in light of the regulatory alternatives that are available in the subject matter area concerned and their comparative effectiveness when it comes to reaching the regulatory objectives concerned. Next to Western society civil courts, regulators in most Western societies are now waking up to the potential of private law regulation, which may be exploited in subject matter areas where public law regulation (alone) does not come up to the mark. In those fields, they may seek to employ private law as part of a mix of complementary public and private law-based regulatory mechanisms, in recognition of the fact that all regulatory mechanisms come with their own inherent advantages and disadvantages and that any one regulatory mechanism alone will generally not be capable of attaining particular regulatory objectives that are sought to be achieved.[274]

There are certain circumstances under which private law, due in particular to its generality, flexibility, responsiveness, open texture standards and transboundary potential (as will be discussed further in the next sub-section), may provide an adequate substitute for or a valuable supplement to public law regulation. This may particularly be the case where the law in certain subject matter areas is in a state of flux and not yet ready to be laid down in bright-line rule-based public law standards, for instance because societal norms and values and/or scientific and technological knowledge on the matter are rapidly developing. As a result of their standard-based and judge-made nature and their resulting connection to actual societal norms, values and common practices, private law mechanisms are able to adequately reflect societal trends and are highly responsive to societal change. Similarly, private law may be the regulatory mechanism of choice in a range of other situations where the government lacks the funds or the capacity to set effective, well-balanced behavioural norms and adequately enforce them, for example because the legislature or other public law regulators are sensitive to regulatory capture, or because the regulatory addressees themselves have the best access to the necessary information. Finally, in a transnational context, private law may be looked at to regulate actors or activities that fall outside the public law regulatory ambit due to, for instance, their transboundary nature.[275]

274 See, for instance: Van Boom 2006a, p. 30; Wagner 2006, pp. 434-435, 438-441.

275 Compare generally, for instance: Van Boom 2006a, pp. 30-32; Wagner 2006, pp. 445-449. See also sub-sections 1.3.3 and 8.2.5.

8.3.4 Global business regulation through private law mechanisms

Even though it is primarily geared towards the promotion and protection of the interests of private actors vis-à-vis one another, private law, by setting, monitoring and enforcing behavioural standards with respect to past behaviour, may simultaneously provide certain incentives for future behaviour that go beyond the private actors directly involved in any specific case. This means that private law, although arguably in practice not primarily aimed at steering the behaviour of large groups of potential regulatory addressees, undeniably has potential when it comes to its application as a regulatory mechanism. When used as a mechanism for home country regulation of internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability, it has a number of distinct advantages, when compared with other, more public forms of home country behavioural regulation.[276]

The advantage of private law regulation in a transnational context

The first and foremost advantage of private law regulation in this context is its suitability to application beyond the regulating home countries' territories. In contrast to public law regulatory measures, which usually apply only within the regulating state's territory (although assertions of extraterritorial jurisdiction are becoming more commonplace in certain subject matter areas even here),[277] private law-based regulatory measures may in principle more easily be applied beyond the regulating state's territory. Of old, transboundary relationships, obligations and issues have been very common in this private sphere, although they have definitely sharply increased in significance as a result of globalization. Zerk has noted in this respect that:

> "[o]*ne of the consequences of 'globalisation' is that assertions of extraterritorial jurisdiction in private law cases, also referred to as 'civil cases', are now commonplace. The ability of people to travel to different countries and purchase products from abroad; the speed and versatility of modern telecommunications; and of course the presence of complex cross-border networks of international corporate groups, mean that there are many and varied cases in which it will be necessary for courts to take jurisdiction over foreign parties, or foreign activities or both, in order to hear and determine a case. The challenge for domestic legal systems is to manage this in a way: (a) that is fair to the parties; and (b) that takes proper account of the sovereign interests of other states*".[278]

276 A more detailed discussion and comparison of the prospects offered by specific types of home country public law regulation, such as administrative law and criminal law, with the prospects offered by private law in this respect, although undeniably interesting, goes beyond the scope of this study.

277 See Zerk 2010 and *supra* sub-sections 8.2.2 and 8.2.5 (with respect to the field of criminal law).

278 Zerk 2010, pp. 144-145.

Issues of sovereignty and extraterritoriality play a far less prominent role when it comes to the extension by countries of their civil procedures and private laws to transnational civil disputes, than when it comes to the extension by countries of their public laws and public law (e.g., criminal or administrative) procedures to foreign actors and/or activities undertaken abroad. After all, the emphasis in private law is in principle on private actors, rights and interests, rather than on public ones; state interests in the resolution of civil disputes between private parties, whether domestic or transnational, are generally weaker and more indirect. This is already apparent from the fact that the initiative for pursuing civil claims is with the private actors involved themselves, as well as from the fact that these private actors are usually left with a considerable amount of discretion to privately agree on the forum before which and the law on the basis of which their existing or future disputes are to be resolved.

Over time, comprehensive systems of private international law have been developed with a view to facilitating the smooth operation of law in transnational civil cases by setting out the legal parameters for the exercise by domestic courts of international civil jurisdiction over claims that touch the domestic legal spheres of more than one country and so may be subject to conflicting jurisdictional claims.[279] Whether pre-established by a legislature or judicially made, these rules of private international law rely on so-called 'connecting factors', *i.e.*, specifically selected factors that may connect the various types of transnational civil disputes to the domestic legal spheres of any of the different countries involved, to determine whether or not any particular transnational civil dispute should be decided by the forum country's civil courts and if so, whether it should be decided on the basis of the rules of private law of the forum country or of any of the other countries involved. As part of a country's domestic legal system, rules of private international law may differ from country to country, although cooperation between states in this field has resulted in the harmonization of rules of private international law within an increasing number of subject matter areas, especially within but also outside the EU context.[280]

As discussed before, the exercise of international jurisdiction by home countries over transnational civil disputes brought before their courts inherently involves some measure of extraterritoriality. The extraterritoriality inherent in the exercise of international jurisdiction may be strong where the dispute exclusively involves foreign actors and activities undertaken outside the home country that have minimal or no connection to the home country's legal order. However, where the transnational civil disputes in question

279 Compare De Boer 2001, pp. 204-205. See also: Strikwerda 2005, pp. 15-25.

280 See, generally: De Boer 2001, pp. 199-205, who predicts that "[...] *it will not take long* [...] *before the national conflicts laws of Europe will have been reduced to a few scattered rules covering singular topics of relatively minor importance*". Further, more internationally oriented attempts at harmonization of private international law rules have come especially from the Hague Conference on Private International Law, which has yielded numerous international conventions on matters of private international law. See for more information as well as an overview of the different treaties and their status the HccH website: <www.hcch.net>.

primarily pertain to home country-based actors and/or activities, their connection with the home country legal sphere is much stronger, meaning that the measure of extraterritoriality inherent in the exercise of international jurisdiction is much smaller. In such cases, the involvement of home country civil courts is likely to be qualified at most as a home country domestic measure with extraterritorial implications; those implications may be said to lie for instance in the fact that home country remedies are made available to foreign private parties, or in the possibility that the adjudication of a transboundary civil dispute by home country courts may change the way in which those involved, or other private actors, conduct their activities abroad.[281]

At the same time, however, interesting questions arise where boundaries between public law and private law become blurred and private law is given a more public role as a mechanism to enforce existing public law provisions, to generate behavioural incentives and/or to bring about societal change more generally.[282] In some legal systems, such as the US, existing private international law regimes are more geared towards accommodating the public interests that may be at stake in the application of private law mechanisms in a transnational setting.[283] Elsewhere, the potential public role of private law mechanisms in this context is not as explicitly recognized and/or supported by private international law regimes. This is exemplified for instance by the Rome II Regulation on the law applicable to non-contractual obligations, which leaves almost no space for European domestic systems of tort law in a transnational setting to have a role beyond that of a compensation mechanism, albeit with some notable exceptions, for instance where it comes to the realization of EU environmental policy objectives.[284]

Many of the questions that may arise in this context have remained relatively unexplored so far.[285] In view of the increasing popularity in Western society legal systems of instrumental approaches to the field of private law, and in view of the increase in transnational actors, activities, disputes and litigation as a result of globalization, these questions require further research; seeking to provide further answers here, however, would go beyond the scope of this study. For now, it suffices to conclude that the deployment of private law-based regulatory mechanisms in a transboundary context is in principle far less likely to raise international controversy than the deployment of public law regulatory measures aimed at regulating internationally operating business enterprises with a view to promoting corporate social responsibility and accountability not only at home but also abroad.

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281 See further *supra* section 8.2 and sub-section 8.2.5 in particular. See also Zerk 2010, pp. 144-146.
282 See *supra* sub-section 8.2.5.
283 Compare sub-sections 4.3.2 and 6.3.2.
284 For an in-depth discussion, see Enneking 2008a. See also further sub-sections 4.3.3 and 6.3.2.
285 Similarly, for instance: Boskovic 2009, p. 188.

Further advantages

There are also other advantages of home country private law regulation when compared with other, more public forms of home country behavioural regulation, particularly in the context of global business regulation with a view to promoting international corporate social responsibility and accountability.[286] One of them is the fact that private law simultaneously allows for both behavioural regulation and corrective action (primarily through monetary compensation) where the balance of private rights and interests in the private interrelationships of two private parties is disturbed. It may be argued that this double role of private law fits in very well with the notion of international corporate social responsibility and accountability. After all, this notion encompasses a preventive, behavioural component which seeks to make internationally operating business enterprises internalize awareness and consideration of societal interests that lie within their sphere of influence with a view to the alignment of their corporate self-interests with broader societal interests and the prevention of adverse consequences of their operations on those interests, and also encompasses a more reactive, corrective component, which seeks to correct the (mis)behaviour of corporate rogues and corporate laggards in this respect and to enable stakeholders to address and seek remedy for adverse consequences that may arise. This is an approach that corresponds very well with the duty of states in general and the home countries of internationally operating business enterprises in particular under the UN policy framework on business and human rights to protect human rights against corporate abuse through both preventative and repressive/remedial means.[287]

Another important advantage of private law regulation is linked to the fact that it is a prime example of responsive or reflexive regulation, which, as has been discussed, relies to a considerable extent on the collaboration and co-operation of its regulatory addressees in performing its standard-setting, monitoring and enforcement functions.[288] By leaving the interpretation and operationalization of private law behavioural standards to a large extent to its regulatory addressees, and by leaving the monitoring and enforcement of both private law and public law behavioural standards through private law to a large extent to the discretion of its regulatory beneficiaries, "[i]*t devolves an extensive discretionary power of self-regulation* [...]" to the private actors whose interrelationships it seeks to regulate.[289]

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286 Extensive literature exists, especially within the field of law and economics, on the comparative effectiveness in this regard of liability rules on the one hand and public law regulatory measures on the other. See, for instance, with a focus on environmental pollution and with further references: Faure 2009, pp. 139-144. A further discussion of this literature and/or of the prospects of specific types of home country public law regulation, such as administrative law and criminal law, with the prospects offered by private law in this respect, would go beyond the scope of this study, however. Such a discussion would arguably not be very relevant at this point, considering the fact that these studies usually involve the comparative effectiveness of liability rules and public law regulatory measures in a domestic setting, whereas the discussion here focuses in particular on a transnational setting where public law regulation, as has been set out extensively above, is potentially highly problematic and therefore relatively scarce.

287 UNHRC Report (Ruggie) 2011, principle 1, p. 7. See also sub-sections 7.3.3 and 7.3.4.

288 Collins 1999, pp. 65-69.

289 Collins 1999, p. 67.

This decentralized form of regulation allows private actors a considerable amount of freedom and autonomy, while at the same time giving them tools to address and correct situations in which this freedom and autonomy of some is exercised at the expense of the rights and interests of others. This fits in with the emphasis of the UN policy framework on business and human rights not only on the state duty to protect human rights against infringements by corporate actors but also on the responsibilities that corporate actors themselves have in this respect, as well as on the role that both victims of corporate human rights abuse and civil society organisations can play in addressing the detrimental impacts of business operations on human rights-related interests.

Due to its reflexive nature, private law regulation has an inherent flexibility in adapting to changing societal practices, needs and expectations that is of particular importance when it comes to home country policies aimed at promoting international corporate social responsibility and accountability. After all, as has been discussed before, the field of international corporate social responsibility and accountability is in a constant state of flux, as it is constantly reshaped and remodelled by changing notions of what makes the international business practices of internationally operating business enterprises socially responsible.[290] As such, the changing and developing legal and societal norms in this field are arguably by no means 'ripe' enough yet to be laid down in authoritative, exhaustive, specific, bright-line rules, bearing in mind that the societal and/or international consensus that is necessary to come to any kind of meaningful regulatory scheme in this field seems far off.[291] Any attempts, nonetheless, to set up such a regulatory scheme are likely to result in regimes involving compromise-based minimum standards which, if interpreted as binding and exhaustive, run the risk of preventing the development of further regulatory measures, of being so low as to be counterproductive, and of undermining social pressure on internationally operating business enterprises to adopt better practices.[292] Private law standards, by contrast, due to their open, flexible, standard-based, judge-made and case-specific nature, are arguably better suited to the contemporary dynamics of this field. They may, on an issue-by-issue basis, 'fill in' the grey area between legal standards and societal expectations and as such provide their regulatory addressees with a measure of behavioural guidance in a field where legal uncertainty seems inevitable due to the unsettled nature of its constituent legal and societal norms.

At the same time, in line with their reflexive nature, private law-based regulatory mechanisms when applied in the context of international corporate social responsibility and accountability leave the internationally operating business enterprises at which they are aimed a measure of freedom in choosing the means by which they are to comply with

290 See further sections 1.2 and 7.2.

291 Compare also section 1.3 as well as *supra* section 8.1.

292 Compare also what has been said on the drawbacks of entering into a treaty process in the field of business and human rights: *supra* sub-section 8.1.5.

the behavioural standards set. As such, these measures are likely to be far less intrusive than public law measures that set specification or performance standards rather than target standards.[293] This arguably also makes them better suited to motivating internationally operating business enterprises to internalize the regulatory objectives involved than more exhaustive, specific, bright-line public law rules, which may induce them to align their behaviour with the letter rather than the spirit of the law. As has been mentioned, through its standard-setting role private law may typically impose behavioural standards that are higher than those embodied in existing legislation and/or case law, in those situations where societal notions of what constitutes socially acceptable behaviour exceed the standards set by pre-existing (public law or private law) regulation, or pertain to situations that are not yet covered by regulatory standards. Obviously, this is of crucial importance in the context of international corporate social responsibility and accountability, which revolves around issues arising from situations where regulatory standards on human rights, the environment, health and safety and labour standards, that are locally imposed and enforced in the host countries in which internationally operating business enterprises conduct their activities, are much lower than those imposed in the home countries from which they operate, and home country societal expectations that they should adopt consistent best practice in such situations.

When it comes to monitoring and enforcement, a major advantage of private law regulation particularly in the transnational setting of global business regulation is the fact that it relies for its monitoring and enforcement purposes on those best placed to have the information and evidence necessary to report breaches of regulatory standards and best motivated to do so, in this context usually host country stakeholders that have suffered detriment as a result of the local activities of the internationally operating business enterprises involved. This is highly important considering the fact that the host countries in which internationally operating business enterprises conduct their activities are themselves typically unable or unwilling to monitor and enforce, as well as the fact that the possibilities of the home countries involved also tend to be limited due to particular restrictions on extraterritorial *enforcement* jurisdiction (*i.e.*, the exercise of coercive measures by one state within the territory of another) under public international law.[294] As a result, home country would-be regulators seeking to promote corporate social responsibility and accountability not only at home but also abroad are typically constrained when it comes to monitoring the behaviour of 'their' internationally operating business enterprises abroad and enforcing regulatory standards with respect to foreign actors and activities abroad. This renders them dependent on the information passed to them by others, something that is facilitated by private law-based regulatory mechanisms that enable host country

293 See, for instance, with further references: Faure 2009, pp. 139-140.

294 See, for instance, Anderson 2002, p. 409. See also *supra* sub-section 8.2.2, as well as sub-sections 1.2.3, 3.2.3 and 7.2.3.

private parties, whose people- or planet-related interests have been detrimentally affected by home country-based internationally operating business enterprises, to address those matters before home country civil courts.

It has to be noted in this respect that the fact that private law-based regulatory mechanisms in effect devolve the discretion to enforce standards of socially responsible business behaviour to private stakeholders, presupposes that those stakeholders have the capacity and the knowledge and information necessary to monitor and enforce the corporate behaviour in question. As is clear from what has been discussed before with respect to the lack of transparency that typically surrounds the internal group structures and the transnational activities of multinational corporations, however, and the inequality of arms that tends to exist between host country plaintiffs in foreign direct liability cases and their corporate opponents, an effective regulatory role for private law mechanisms in this context requires facilitation, for example by rules of civil procedural law. Of particular significance in this respect are rules pertaining to the collection of evidence, disclosure and the burden of proof. In a somewhat broader context, corporate reporting and transparency requirements with respect to for instance holding interests, intra-group control structures, and impacts on people and planet may also play an important role. At the same time, the role of civil society actors such as NGOs that are able to independently gather, assess and reveal information on the transboundary business practices of internationally operating business enterprises, including possible breaches of behavioural standards, and to act upon such information by either, where possible, instigating transnational civil claims themselves or encouraging host country private actors to do so, is a crucial one in this context. Accordingly, procedural provisions on representative actions are also likely to have a crucial impact on the effectiveness of global business regulation through private law mechanisms.[295]

A role for tort law in regulating internationally operating business enterprises

Arguably, the fields of private law most suitable for the pursuit by home countries of regulatory policies aimed at promoting international corporate social responsibility and accountability by regulating the behaviour of 'their' internationally operating business enterprises are those of corporate law, contract law and tort law. As is clear from what has been discussed in this chapter and the preceding one, all three fields of law have played a role in promoting international corporate social responsibility and accountability. The field of corporate law, for instance, is centre stage when it comes to attempts to create more transparency about the transnational activities of Western society-based internationally operating business enterprises and the impacts that those activities have on people and planet around the world, through reporting and disclosure requirements.[296] The field of

295 Compare, with a focus on the Dutch legal, procedural and practical context in this respect: Enneking, Giesen *et al.* 2011. See also further sub-section 3.2.3 and section 4.5.

296 For a detailed discussion of regulatory initiatives taken in this context, see, for instance: Kerr, Janda & Pitts

contract law is receiving attention both for the possibilities for internationally operating business enterprises to promote socially responsible business practices in their supply chains,[297] and for the possibilities for consumers to demand insight into the circumstances under which the products and/or services they purchase have been manufactured and/or realized.[298] As is clear from what has been discussed in the previous two parts, the field of tort law has been put in the spotlight in this respect in particular by the contemporary socio-legal trend towards foreign direct liability cases, which demonstrate its potential when it comes to holding multinational corporations legally accountable for harm caused to people- and planet-related interests in host countries.

Of these three fields of law, the field of tort law is the one that is arguably best equipped to address any detrimental impacts that the transnational activities of internationally operating business enterprises may have on the people- and planet-related interests of host country third parties. After all, the field of corporate law is primarily aimed at governing the interrelationships between those directly involved in its control, management and functioning. Its main preoccupation is with preventing and/or resolving possible conflicts between the corporation's management and its shareholders, between its majority and minority shareholders and between its management/majority shareholder and outside creditors. Furthermore, particularly in the more stakeholder-oriented models of corporate governance on the European continent, corporate law is also concerned with providing some protection for other non-shareholder corporate constituencies such as employees. Its ultimate objective in regulating these interrelationships, however, is to guarantee the continued existence of the corporation itself.[299] At the same time, the role of the field of contract law is limited to those in a direct contractual relationship with the corporate actors involved, such as business partners, sub-contractors, employees, consumers, etc. As is clear from what has been discussed in the previous part, however, those suffering harm as a result of the detrimental impacts of the activities of internationally operating business enterprises on people and planet are in most cases not in a direct contractual relationship with the corporate actors that are ultimately sought to be held accountable for the harm caused.[300]

Although all three fields of private law may as such determine to a significant extent the limits of a company's freedom of action and the extent to which it needs to consider interests other than those of its shareholders in its pursuit of profits, the field of tort law is the only one that directly deals with the legal relationships that may arise out of the detrimental impacts that a company's activities have on the people- and planet-related interests of third parties, whether at home or abroad. As such, it is pre-eminently suitable

2009, pp. 241-284. See also, for instance, on the role that annual reporting requirements can play in this context: Lambooy 2010, pp. 147-169.

297 See, for instance: Cronstedt 2011, pp. 452-454.

298 See for instance: Castermans 2009, pp. 20-21.

299 For a more detailed discussion, see, for instance: Kraakman 2009.

300 See further sub-section 3.2.3 and section 4.4.

for providing the proverbial big stick for corporate rogues and laggards, by allowing those third parties to hold companies whose operations cause socially unacceptable detrimental impacts on their people- and planet-related interests accountable for the resulting harm, which is likely to motivate those companies and others like them to integrate awareness and consideration of those interests into their corporate policies, management decisions and business practices. At the same time, the question as to the regulatory potential of this particular field of private law when it comes to promoting international corporate social responsibility and accountability is also rendered highly relevant as a result of the contemporary socio-legal trend in Western societies towards foreign direct liability cases.

However, the particular role that the field of tort law in general and home country systems of tort law more specifically may play when it comes to promoting international corporate social responsibility and accountability, as well as the limitations to their role in this respect, are defined largely by the inherent characteristics of this particular field of private law as well as its role in society. In turn, these factors are closely connected to the historical development of the field of tort law in Western societies. In recognition of this, the following chapter will provide a bird's eye view of the development of Western society systems of tort law, their main characteristics and their contemporary role in society, before returning to the question how and to what extent the field of tort law may be relied on by home country policymakers seeking to promote international corporate social responsibility and accountability.

8.4 Concluding remarks

In this chapter, the possibilities and challenges inherent in global business regulation have been further explored, with a focus on contemporary attempts to promote international corporate social responsibility and accountability. Apart from some cautious attempts in the field of transparency, state-based regulatory initiatives have been slow to develop in this particular subject matter area.

At the international level, the realization of regulatory initiatives has been hampered by a lack of state consensus, partly due to the strong and diverging economic and political interests that play a role in this context. Domestic initiatives have been slow due to competitiveness concerns and the accompanying recognition of the importance of a level playing field, something that can only be attained through international cooperation. A multitude of private and self-regulatory initiatives have sought to fill the regulatory gap, some with more success than others. Still, whereas these initiatives work well for corporate leaders, they lack the capacity to authoritatively deal with corporate laggards in the CSR field.

This puts the focus back on state-based regulatory initiatives and in particular on the feasibility of home country-based regulation of internationally operating business

enterprises and their transnational activities. The main challenge for such measures is that of extraterritoriality. This challenge can be addressed, however, by relying on domestic measures with extraterritorial implications rather than on direct extraterritorial measures; particularly promising in this context is the possibility of imposing parent-based regulatory measures. In doing so, two further challenges will also have to be addressed namely: the establishment of a link between the parent companies involved and the local host country actors and their potentially harmful activities; and the prevention of regulatory evasion.

Potential regulatory measures may include the *ex ante* imposition of conduct-regulating rules and/or the *ex post* judicial review of behaviour that has caused harm to people and planet abroad. In the latter case, criminal or civil liability may be imposed for behaviour that is in violation of legal and/or (in the case of civil liability) societal norms. When it comes to regulating internationally operating business enterprises, regulation through civil litigation seems to hold particular promise due to its suitability to application in a transnational context. This idea is reinforced by contemporary developments towards a more instrumental approach to the field of private law and an accompanying tendency to see civil litigation as a behavioural and/or enforcement mechanism. Other characteristics that make the field of private law very suitable for application as an instrument for global business regulation include, among other things, its flexibility, its open norms, and the fact that its reflexive nature leaves a good deal of room to its regulatory addressees to develop their own standards and best practice.

The contemporary socio-legal trend towards foreign direct liability cases indicates that the field of tort law in particular may have a role to play when it comes to redressing and possibly also preventing people- and planet-related harm as a result of the transnational activities of internationally operating business enterprises. In the next chapter, the tort system will be further explored so as to be able to determine what particular part tort law may play in promoting international corporate social responsibility and accountability.

9 Exploring the role of tort law

9.1 History and development of Western society systems of tort law

9.1.1 The essence of tort law

As a basic principle, in Western societies at least, anyone confronted with adversity will have to shoulder that burden himself.[1] However, sometimes there may be good reasons for alleviating a burden of adversity placed on a person, either by making another or others help carry the load, or by shifting it from the injured party onto another or others altogether. It is up to the law, as defined by the legislature and by the courts, to establish the circumstances under which such a shift may be called for. Tort law comes into play whenever the adversity suffered by one private actor can be said to be a direct result of another private actor's acts or omissions; its main task is to determine under what circumstances and to what extent the latter may be held liable for the damage suffered by the injured party.[2] The point of departure is that liability in tort will arise only where the tortfeasor can be said to have been at fault in the sense that the conduct he intentionally or negligently engaged in falls below socially accepted standards of due care for another's legally protected rights and interests, standards that may or may not be reflected in written legal norms, but exceptions to this general rule do exist.[3] As such, the tort system may be viewed as "*a system of ethical rules and principles of personal responsibility (and freedom) adopted by society as a publicly enforceable statement about how its citizens may, ought and ought not to behave in their dealings with one another*".[4] It is in essence about balancing one private actor's autonomy, *i.e.*, the freedom to act as one pleases, against another private actor's right to be protected from the adverse consequences of such acts; the way this balance is struck by legislators and civil judges may vary in time and according to place, depending on the ideas and needs that prevail in society at any given time.[5]

As has been discussed in the preceding chapters, the recent proliferation of foreign direct liability cases and the contemporary call for global business regulation have raised questions as to whether there is a role for home country tort systems in promoting international corporate social responsibility and accountability, what this role could or should look like and whether and how this role may be further expanded. On the one hand,

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1 See generally, for instance: Hartlief 1997.
2 Note that certain other fields of the law, such as social security law and insurance law, deal with adversity regardless of whether or not it can be traced back to another's actions or inactions.
3 See, generally on non-fault-based liability in tort: Van Dam 2006, pp. 255-265.
4 Cane 1997, p. 27.
5 See, for instance; Van Dam 2000, pp. 1-3; Fleming 2002, pp. 6-7.

this role may be said to lie in the tort system's capacity to provide redress retrospectively for the adverse consequences of the transnational activities of internationally operating business enterprises on the people- and planet-related interests of particular host country citizens and host country societies in general. On the other hand, this role may also be said to lie in the tort system's capacity to prospectively motivate these companies to adopt socially responsible business practices in their global operations, by incorporating into their corporate policies, management decisions and operational practices an awareness and consideration of private third party and public interests in the countries in which they operate that may be detrimentally affected by their activities and/or by the activities of their local subsidiaries, business partners, sub-contractors or of others that lie within their sphere of influence. In addition, the tort system may be asked to play a number of other roles in this respect, including for instance as transparency mechanism or as a way to punish corporate wrongdoers and/or to deter further misconduct. The question arises how well-suited Western society systems of tort law, as systems of ethical rules and principles of personal responsibility and freedom, are to the performance of any of the roles they may be given in this particular context, in light of the history, development, structure and dynamics of these systems as well.

9.1.2 Early history

Tort law originated even before Roman times as a mechanism of private retribution for individuals who had been wronged by others. As such, it provided an alternative to the rudimentary 'eye for an eye' way of exacting revenge on one's wrongdoer. It offered individuals who had been wronged by others the option of allowing their wrongdoers to buy off the act of revenge with a pre-determined sum of money, rather than with life, limb or property. In early Roman times, the Roman authorities became involved by defining in written statutes the sum of money that was to be paid for particular transgressions. Later on, the task of determining the sum to be paid was mandated to judges who would render decisions on a case-by-case basis. The money to be paid by the wrongdoer to the victim was seen as punishment, a form of retribution for the injustice done, and as such the actual amount was unrelated to, and usually exceeded, the monetary equivalent – if any – of the damage done. In some cases, however, the penalty (*poena*) would also contain a compensatory element, meant to correct the actual harm suffered by the victim.[6]

There was no such thing as a general law of tort that defined the circumstances under which a third party, whose non-contractual interests had been negatively impacted by another, could claim money in return. Roman law recognized only a limited number of causes of action (*formulae*), applicable to a number of well-defined factual situations, on the basis of which an individual who had incurred a loss as a result of another's actions

6 See, for example: Lokin 1995, pp. 319-320; Dondorp 1998, pp. 10-11.

(or omissions), could bring a claim against his injurer. Apart from being a fact-oriented and, consequently, fragmented field of law, tort law was also a pragmatic field of law; even though in Roman times a distinction was already made between intention (*dolus*), fault (*culpa*), and purely accidentally inflicted harm (*casus*), wrongfulness and thus liability in tort were not necessarily connected to any particular frame of mind or blameworthy action on the side of the wrongdoer.[7] In practice, due to the fact that these were harsh and uncompromising times in which individuals were expected to fend for themselves and compassion was a luxury only few could afford, the majority of tort procedures would have been brought for harm caused by intentional, possibly criminal, or at least grossly negligent conduct, as opposed to harm caused purely accidentally.[8]

Towards the end of the Middle Ages, particularly under the influence of the Church, liability in tort started to be equated with moral blameworthiness. While some jurists continued to study the old Roman law, others focused on the growing body of canon law, issued by the Church. While the former (the 'legists') continued to look at the different causes of action that made up tort law from a procedural point of view, the latter (the 'canonists') looked at them from a more moral point of view inspired by their religious beliefs. As they linked the worldly tort to the religious sin, a shift of emphasis took place from wrongdoers' external acts to their internal consciences. Increasingly, the focus in determining whether an act (or omission) was wrongful and should lead to liability of the wrongdoer for the damage caused as a result, came to be on the wrongdoer's frame of mind and his blameworthiness.

The canonists asked themselves the question whether the different Roman law causes of action might have some characteristics in common. Eventually, this led them to believe that a general obligation existed to compensate the damage caused by one's fault. As a consequence of the way they linked tort to sin, they also took the view that such compensation had a restorative purpose, rather than a punitive one. After all, for a sin to be forgiven, that which had been taken away had to be restored or returned (*restitutio*). According to these medieval canonists, by compelling a wrongdoer to return that which had been wrongly taken from another or, rather, its monetary equivalent, the balance was restored and justice was done.[9] At the same time, they were opposed to the idea of penal actions initiated by individuals and pleaded for a system in which penalties could only be imposed by the authorities – whether worldly or ecclesiastical.[10] They did, however, take the view that sometimes damages for pain and suffering had to be paid to the victim, on

7 Fleming 1985, pp. 2-3; Spruit 2003, pp. 7-9. According to Schrage, Roman lawyers did distinguish between fault and wrongfulness, but did not separate the two concepts: Schrage 1999, p. 30; Dondorp 1998, pp. 21-23.
8 Fleming 1985, pp. 2-3.
9 Dondorp 1998, pp. 25-59; Schrage 1999, pp. 30-33.
10 Dondorp 1998, pp. 47-50.

top of the material damages paid to him, and started to qualify as such those damages that were still seen by jurists as a private penalty.[11]

The Age of Enlightenment in the 17th and 18th centuries, during which a profound belief in rationality prevailed, inspired legal scholars to build on the ideas of the late medieval jurists and systematically reflect on the constituent elements and background shared by the various causes of action that made up (Roman) tort law. The focus of legal studies and education, which had until then principally been on Roman law and, to some extent, canon law, shifted to contemporary and future law. Propagators of the modern school of natural law looked to natural law in an attempt to discern the great, unchangeable principles of law, with the aim of constructing a whole and complete system of law.[12] With regard to tort law, the general idea took hold that every act that is contrary to that which people in general, or considering their special qualities, ought to do or ought not to do, and that causes damage, potentially gives rise to an obligation under civil law to compensate such damage.[13] The concepts of wrongfulness, fault (culpability), causality and damage came to be seen as the general foundations of tort law.[14] The natural law jurists did not agree on everything, however, especially not on the question of whether the true foundation of tort law was the concept of fault or that of causation. Eventually, this disagreement was decided in favour of the idea that the basis of liability in tort was that of fault, in the sense of blameworthiness, of the wrongdoer. Around the mid 19th century, this point of view had developed into a new paradigm of no liability in the absence of fault (culpability) by the wrongdoer, turning moral blameworthiness into the exclusive basis of liability in tort.[15]

Another development that took place, one that also built on medieval legal thought, was the gradual separation of the fields of tort law and criminal law with the rise of the strong central powers of both state and church. As the idea took hold that only the government could, with a view to the protection of the public interest, punish wrongdoers, the field of criminal law came to exclusively govern the vertical relations between the state and private wrongdoers. The horizontal relations between private wrongdoers and their victims became the province of tort law. As a result, punishment and retribution on the one hand and restoration (correction) and compensation on the other hand were gradually separated into two separate but adjoining legal fields.[16] The former became the focal point of the field of criminal law, whereas the latter became the focal point of the field of tort law.[17]

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11 Feenstra & Winkel 2002, p. 11, see also pp. 24-26; De Smidt 1977, p. 127; Dondorp 1998, pp. 56-58.
12 Lesaffer 2009, pp. 448-452.
13 See, with further references: Feenstra & Winkel 2002, pp. 4-5, 16.
14 Schrage 1999, pp. 33, 37.
15 Fleming 1992, pp. 6-7; Verheij 2005, p. 12.
16 Asser/Hartkamp & Sieburgh 6-IV* 2008, nr. 4; Schrage 1999, pp. 26-27.
17 See, for an in-depth discussion of the developments in this regard: Dondorp 1998; Feenstra 2002.

The natural law movement, spurred on by a growing dissatisfaction with the dispersed nature of legal rules and the ensuing legal uncertainty, eventually inspired the European continental codification movement of the late 18th and early 19th century. Consequently, the design of these codifications reflected, in one form or another, the new developments and ideas that had formed during the Age of Enlightenment.[18] In these codifications, the field of tort law became classified as part of a more general law of obligations, which also encompassed other grounds for liability, such as contract and unjustified enrichment, and was accompanied by a general compensation law. As such, tort law came to form part of the broader field of private law and was completely separated from criminal law; its classification and wording in the various codifications reflected the principles of correction/compensation and fault-based liability.[19] By the end of the 19th century, most of continental Europe's legal systems featured private law codifications that included a general action for liability in tort.[20]

Meanwhile, on the other side of the Channel, the law of non-contractual liability had developed in a completely different way. Here, the early development of a common law obviated the need for a strong reliance on Roman law as was the case on the European continent.[21] Whereas within the European continental civil law systems a general body of law of non-contractual obligations gradually formed and developed, along with a more general law of obligations and compensation law, such generic bodies of private law did not develop within the common law. Instead, the common law traditionally recognized a number of 'writs', each of which applied to a different factual situation and each of which came with its own specific remedies. These writs, or 'torts' as they came to be known, developed individually and separately and it was not until the second half of the 19th century that the existence of a general 'law of torts' was recognized.[22]

As opposed to the situation on the continent, where tort law and criminal law had definitively been separated, the law of torts in the common law retained its connection to the field of criminal law.[23] The state monopoly on criminal prosecution developed much later in the common law than it did on the continent. Furthermore, whereas legal thought on the continent focused on compensation as the sole purpose of tort law, the Anglo-American tort systems, especially the US tort system, saw the admonitory or deterrent effect exerted by tort sanctions as an important function of tort law, alongside compensation.[24] Generally, the common law field of tort law, with its separate torts and accompanying remedies, kept more of a focus on the tortfeasor's specific conduct and its

18 See, for instance: Schrage 1999, p. 33.
19 Zwalve 2008, p. 415.
20 Dondorp 1998, p. 83.
21 See, for a concise description of the historical development of the common law: Zwalve 2008, pp. 25-68.
22 Zwalve 2008, pp. 411-427; Schrage, 1999, p. 35.
23 Schrage 1999, pp. 33-34; Zwalve 2008, pp. 414-415, 418-419.
24 See, for instance: Fleming 1985, p. 6; Zwalve 2008, p. 418.

particular measure of wrongfulness than the European continental civil law systems, where, as a result of tort law's merger into a general law of obligations, the focus gradually shifted to compensation. This explains why, in contrast to the European continental systems, the common law did retain some of its punitive elements, such as a distinction between intentionally caused harm and negligently caused harm, and the ensuing possibility of claiming punitive or exemplary damages in cases of particularly objectionable conduct.[25]

The codification movement that transformed the European continental civil law systems did not take root in the common law system. Here, as a result of an early organisation and centralisation of the administration of law, legal culture had traditionally been dominated by judge-made law, based on unwritten law and customs. Even though, in the course of the 19th century, the need for legal reformation did become apparent in the common law as it did in the civil law systems on the European continent, in England this led to changes in the judicial system and procedural law, rather than in substantive law.[26] Consequently, the common law field of non-contractual obligations materially remained the same; a limited number of separate torts for specific factual situations, all with their own requirements and diverging legal effects, the contents of which were determined by a long line of judicial precedent, rather than by legislative interference.

9.1.3 The Industrial Revolution

As the Industrial Revolution took off in the late 18th, early 19th century, mechanised production processes replaced manual labour, clearing the way for unprecedented economies of scale. People moved into cities and into factories and as a result came into much closer and much more frequent contact with machines and with one another. At the same time, pre-existing social networks such as family, church and neighbourhood were weakened, leaving individuals to fend for themselves.[27] Modes of transport also changed, with railways and later on cars entering the fray.

These developments led to a sharp increase in the number of accidents. This, in turn, prompted the emphasis of the tort system to shift from harm caused by some form of intentional or grossly negligent conduct to accidentally caused harm.[28] However, the general view was that the importance of stimulating the advancing economy and protecting free enterprise surpassed the importance of protecting the security of those unfortunate enough to fall victim to the new production processes, machines, techniques and lifestyle. The costs of industrial accidents were seen as the price society must pay – through the individuals suffering those costs, rather than through the particular enterprise involved –

25 Zwalve 2008, pp. 469-471.
26 Zwalve 2008, pp. 51-66.
27 Compare, for instance: SER Report 2000, pp. 19-23.
28 Fleming 1985, pp. 1-3.

for the benefits of economic growth and increasing welfare. This attitude is expressed very clearly in the following excerpt from an 1873 US tort case:

> "*We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lie at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands.*"[29]

The strong societal tendencies towards individualism and economic liberalism that expedited and characterized the Industrial Revolution brought the 'no liability without fault' principle to fruition.[30] Only the presence of fault on the side of the tortfeasor was believed to justify a shift of the burden of adversity. The tortfeasor could avoid liability by proving that he had lived up to the applicable standards of care, which would leave losses resulting from 'inevitable accidents' with the victim.[31] The shifting of a loss from victim to tortfeasor in cases where the latter had been at fault was primarily regarded as an admonition of the tortfeasor and a warning to others like him of the consequences of not exercising due care.[32]

It was only in the course of the 19th century that this societal climate of extreme liberalism and harsh individualism began to soften and give way to a more sympathetic approach towards those suffering the downsides of industrialization.[33] Working conditions in factories and mines became the subject of research, which exposed them as being appalling.[34] Academics started to challenge the continued unqualified adherence to the 'no liability without fault' principle.[35] Workers started to unite and form trade unions, giving them a collective voice.[36] The growing number of sources of danger created by industrialization had led to a dramatic increase not only in the number of accidents, but also in their severity and scale. Most of the incidents causing damage to the life, limb and property of workers, neighbours or other third parties were not easily attributable

29 *Losee v. Buchanan*, (1873) 51 N.Y. 476, 484, derived from Kötz & Wagner 2006, p. 13.
30 Feenstra & Winkel 2002, pp. 18-20.
31 Feenstra & Winkel 2002, pp. 9-10, 18-19; Fleming 1985, pp. 3-6.
32 Fleming 1985, pp. 5-6.
33 See, for a description of this development through a discussion of the rise and fall of the 'fellow servant rule' in US courts: Friedman & Ladinsky 1967.
34 An example is the 1842 *Report on the Employment of Children in Mines*, see Robinson, Fergus & Gordon 2000, p. 292.
35 See, for example, the contemporary dissertation of the well-respected Dutch scholar Scholten: Scholten 1899.
36 Robinson, Fergus & Gordon 2000, pp. 294-297.

to anyone's fault. Realization started to dawn of the toll these accidents were taking on human life and on society as a whole.[37]

This led to a gradual abandonment of the strict adherence to the fault requirement. On the European continent, legislators and judges started to favour, albeit reluctantly at first,[38] stricter forms of liability in specific situations in which the 'no liability without fault' principle seemed to lead to particularly unjust results. This resulted in the introduction of a range of strict liabilities (*i.e.*, liability that is not contingent on the presence of fault on the side of the tortfeasor), albeit in different forms and through different legal instruments and/or interpretations of pre-existing statutes and case law, for situations such as railway incidents,[39] industrial accidents, and accidents involving motor vehicles.[40] Those benefiting from activities that involved certain inherent risks to others, such as employers, industrialists, and drivers of motor vehicles, were increasingly asked to bear the societal costs associated with those activities, irrespective of whether or not it would have been possible to avoid those societal costs by exercising due care.

Across the Channel, the Industrial Revolution also resulted in substantive legal changes in tort law, albeit not in the form of the introduction of statutory rules laying down strict liabilities.[41] As socio-economic developments gave rise to situations that could not be adequately covered by the existing torts, the need arose for a new tort that could deal with damage caused by careless behaviour, rather than intentional acts. After all, the majority of the 'new' accidents, such as industrial accidents and traffic accidents, did not result from an intention to cause harm, but from a general lack of care for the interests of third parties like employees and fellow road users. The courts responded to the new societal reality through the gradual development in case law of the tort of negligence.[42] Unlike its predecessors, the tort of negligence had a more general character. On the basis of this tort, liability existed whenever one party owed another a duty of care but had acted in breach of that duty, resulting in damage to the other party. The general character of its constituent elements turned the tort of negligence into a flexible instrument with a broad potential ambit, which could potentially encompass a great variety of situations. As such, it soon developed into the common law's most widely used tort. Through its general concepts, it created a greater homogeneity in the common law field of tort law, as well as being capable of filling the gaps left by the other torts. In addition, it led to a certain measure of rapprochement between the Anglo-American and European continental systems of tort law.[43]

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37 See, for instance: Verheij 2005, pp. 12-13.
38 See, rather cynically: Fleming 1985, pp. 3-5.
39 As early as 1838 a Prussian law was introduced that imposed a strict liability on railway companies for damage caused in the course of the use of the railways. See Kötz & Wagner 2006, pp. 15-16.
40 See, for instance: Feenstra & Winkel 2002, pp. 19-20.
41 See Van Dam 2007, p. 59.
42 Schrage 1999, p. 37.
43 Zwalve 2008, pp. 426-427; 442-446; 472-473.

9.1.4 *The modern history of tort law: socio-legal background*

The gradual development of a more sympathetic approach towards those suffering the downsides of industrialization, which had started in the course of the 19th century in reaction to the injustices caused or exacerbated by the Industrial Revolution, carried through into the 20th century. Governments felt forced to assume a more actively protective role, initially mainly under pressure of the increasing organization of workers[44] and the rise of the socialist movement, but later on more out of a genuine concern with the serious societal issues of the time.[45] Consequently, throughout the 19th and early 20th century, in most of the industrialized countries of Europe, laws were passed that addressed the worst excesses that had been spawned by industrialization and its accompanying attitudes of individualism and laissez-faire. These laws dealt with issues such as child labour, maximum working hours, minimum wages, safety at work and public health. Also, the first insurance schemes were introduced against sickness and accidents at work, as well as old age pension schemes.[46]

In the course of the 20th century, it became clear that these early labour laws and insurance and pension schemes were mere precursors of a growing body of legislation aimed at protecting society's marginalized against society's powerful.[47] As individualism gave way to more solidarity in societal attitudes, Western states, and their societies as a whole, became more inclusive, in the sense that they no longer solely represented the interests of the rich upper classes, but rather the interests of all of the members of a state's society.[48] This development was accompanied by the gradual abolition of the many forms of discrimination that were deeply ingrained in society; previously subordinated groups like the working classes, the poor and women slowly but surely became more fully-fledged members of society, with the accompanying rights and duties.[49] It did not end there, however; from the 1920s onwards, state intervention in general grew further. Western states, some more so than others, slowly turned into welfare states, providing a minimum standard of living and some minimum benefits for everyone living within their borders.[50] Comprehensive systems of social security were introduced, along with extensive tax systems to fund them. An increasing number of rules and regulations were put in place that regulated an ever-growing range of (natural and legal) persons, activities and situations, both within the social sphere and within the private sphere.[51] Especially

44 Robinson, Fergus & Gordon 2000, pp. 294-297.
45 Van den Bergh 2007, pp. 102-103.
46 Robinson, Fergus & Gordon 2000, pp. 291-293.
47 Van den Bergh 2007, p. 104.
48 See for instance: Van den Bergh 2007, pp. 109-111.
49 Robinson, Fergus & Gordon 2000, pp. 304-306.
50 Friedman 1977, p. 57. See, for a description of the advent and development of the British social security system: Cane 2006, pp. 328-362.
51 Lesaffer 2009, pp. 510-511.

after the Second World War, public expectations of the state's interventionist capacities soared and so did the number of rules and regulations imposed on the public.[52]

However, the limits imposed by the state on autonomy, individual choice and personal and entrepreneurial freedom of action for the sake of the protection of the rights and benefits of others, never went unchallenged. In some states, such as the US, there was traditionally more suspicion of the state's intentions and resistance against government interference, than in others, like the Netherlands.[53] Towards the end of the 1960s, it had become clear across the board that the welfare state, along with its bureaucratic machinery, was fast becoming unsustainable because of the enormous costs involved in running it.[54] This led to a partial dismantling of the welfare state, and a gradual retreat of government regulation in many areas of society. In its place came movements of deregulation and privatization, which favoured market regulation and other (self-)regulatory mechanisms instead.[55]

Long before the start of the 20th century, Western states had been trading amongst themselves, as well as with their overseas colonies. However, it was only after the Industrial Revolution, as increasingly sophisticated modes of transportation became available and breakthroughs in the fields of telecommunication and information technology happened in quick succession, that international trade seriously gained momentum. This led to a dramatic increase in the size and scale of international connections, internationally operating enterprises and transboundary production processes, which, in turn, brought about a process of global integration, economically and politically as well as culturally. It took the horror and devastation of two World Wars, combined with the international political uncertainty of the Cold War, however, to make the Western world fully realise the need for active international cooperation in the pursuit of world peace and global stability.

This gave rise to Western aspirations to ensure human rights and civil liberties for all of mankind. Many of those same human rights and civil liberties had already been fought for (on occasion literally) and secured in Western societies during the preceding centuries. As the standard of living rose in those societies, however, and traditional forms of discrimination were abolished, perspectives broadened with the assistance of the modern media. Concerns of the general public and policymakers for private or societal interests were complemented by an awareness of global issues, such as the environment, poverty and exploitation, and a general concern for the interests of the world's less fortunate. These developments resulted in the establishment of a growing number of powerful international governmental organisations with a focus on a huge range of different global

52 See, critically: Lesaffer 2009, pp. 510-511.
53 See, in more detail: Kagan 2001, pp. 34-58. Compare also: Van Dam 2009.
54 Van den Bergh 2005, pp. 106-107.
55 See, for instance: Kötz & Wagner 2006, pp. 21-23.

and regional issues.[56] Important intergovernmental organisations that were founded during the 20th century include the United Nations, the World Trade Organisation and the Organisation for Economic Co-operation and Development. Influential international non-governmental organisations that joined the scene were for example the International Committee of the Red Cross, the World Bank, the International Monetary Fund and Médecins sans Frontières.

The establishment of these international organisations, along with the conclusion of a growing number of international treaties intended to regulate an increasing variety of transboundary issues, significantly increased the size and importance of the field of international law. More and more issues that had previously been within the exclusive domain of individual states now became the subject of some international regime. The concept of the unassailable sovereign state, which until then had been the basic tenet of the international legal order, slowly but surely caved in.[57] Domestic legal systems were increasingly affected by a growing number of norms of public international law.[58] The field of private international law gained significance in an increasingly interconnected world, as part of a trend towards an ever larger body of law, sometimes referred to as transnational law, that deals with a rising number of activities of a transboundary nature, resulting from the increasing transboundary movement of people goods and services.[59]

As early as the 1950s, a number of Western European countries decided to establish closer economic and political ties amongst themselves. They founded the European Communities, which consisted of the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community. Over the years, the scope, significance and organization level of the European Communities grew, along with the number of participating European countries and the economic, political and legal integration between the participants. In 1992, the European Communities merged into a new umbrella organization: the European Union. As the organization expanded, so did its legal order, which has a partly supranational nature and a partly international nature. Its impact on the legal systems of its Member States has been enormous and continues to grow. The body of primary and secondary EU law has grown ever larger, covering more and more ground that was previously covered by the domestic law of the Member States.[60] Today, there is almost no field of domestic law left within the Member States that has not been affected to a greater or lesser extent by EU law.[61]

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56 Lesaffer 2009, pp. 506.

57 See, for instance: Lesaffer 2009, pp. 506-509; Van den Bergh 2005, pp. 101-102, 106, 107-109.

58 See, on the current trend towards monist attitudes towards international law and its effects on the national legal order: Lesaffer 2009, pp. 508-509.

59 See, for instance: Lesaffer 2009, p. 509.

60 Van den Bergh 2005, p. 114.

61 See, for a more detailed overview of the nascence and development of the European Union: Robinson, Fergus & Gordon 2000, pp. 308-319.

9.1.5 *The modern history of tort law: the expansion of tort law*

Against this background, the 20th century witnessed an unprecedented expansion of the field of tort law. As the tide of economic, social, technological and scientific progress kept rising, the boundaries of the field of tort law were continually pushed back. New machines, techniques and modes of transport created new risks, many of which only manifested themselves at some later stage, after they had already become widely used by businesses and/or distributed among consumers. As industries and businesses grew, along with their technological and scientific know-how, so did the groups of people, employees, consumers, as well as other third parties that were exposed to the risks of faulty products, hazardous materials or potentially harmful production processes. Modes of transport became more advanced, faster, and easier to afford, resulting in an unprecedented number of traffic accidents, which were far more severe than the carriage accidents of the old days. The advance of the information age, with modern communication devices, and, later on, computers and the internet, not only connected people and businesses around the globe in ways previously unimaginable, but also raised a whole new set of challenges to the field of tort law.[62]

The increase in welfare and the expanding state intervention on protective grounds in Western countries led to a growing prosperity for their inhabitants. Consequently, throughout these societies levels of tolerance for infringements of life, limb or property declined. This sentiment was intensified by a progressive secularisation in Western societies,[63] as well as a growing emancipation of individuals in the various roles they occupied in society, such as employee, consumer, patient.[64] As people grew more used to the protection of their interests by the government, it became less and less self-evident that the burden of any adversity they suffered was theirs, and theirs alone, to carry. The tendency towards individualism that had characterized societal attitudes in the era of the Industrial Revolution gave way to a social tendency towards security and communitarianism.[65] As the idea took hold that the downsides of socio-economic progress, enjoyed by all, should not be borne by an unfortunate few, tort law became increasingly called upon whenever one's damage was in some way reducible to another's activities, status, or sphere of influence.[66]

As discussed, from around the mid 20th century, Western societies were forced to gradually cut back on the welfare state, as it had become far too large and costly and was as such imposing a heavy burden on society.[67] Especially in countries like the US, where tendencies towards liberalism and individualism had continued to exert a strong influence on society, the tort system increasingly functioned as an alternative to an unavailable or

62 See generally, with a focus on American personal injury law: Friedman 2002, pp. 349-376.
63 Hartlief & Tjittes 1999, pp. 12-13.
64 Hol & Loth 1991, pp. 4-5.
65 Fleming 1985, p. 10.
66 Compare Van Dam 2000, pp. 3-6.
67 Compare Kötz & Wagner 2006, p. 23. See also: Englard 1993, p. 110.

non-existent system of social security. The same was true, albeit to a lesser extent, of other Western societies. At the same time, however, private insurances entered the fray. On the one hand, private insurance, especially first party ('loss') insurances, taken out for instance against damage to property such as houses or cars, provided an alternative to both social security and tort law.[68] On the other hand, the increasing demands on the tort system and, consequently, on an expanding range of wrongdoers, were enabled by and fuelled the demand for private insurance, especially third party ('liability') insurances, taken out against the risk of liability for another's damages.[69] In many Western societies, liability insurances for common occurrences such as traffic accidents and industrial accidents were made compulsory, so as to make sure that the victim would receive compensation regardless of the actual financial capacity of the wrongdoer. Thus, complex interrelationships developed over time between social security, private insurance and tort law as three partly complementary and partly competing compensation systems.[70]

Accordingly, private relationships of individuals and businesses that had hitherto mainly been left to the private sphere and its accompanying informal societal norms and compliance mechanisms, now increasingly became subjected to private law standards. At the same time, private or public forms of legal aid made litigation affordable to a wider group of potential claimants. Improved education levels, modern media and the advent of more and increasingly active and effective public interest groups also helped to open up civil procedures to the general public. This resulted in an increasing juridification of societal relationships between private actors in Western societies and a further increase in the prevalence of tort procedures.[71] In the US especially, a veritable claim culture came into existence from the 1960s onwards.[72]

Throughout the 20th century, it became clear that the tort systems laid down in the European continental civil codes that had been drafted in the 18th and 19th centuries did not always provide lawmakers and courts with the necessary tools to respond to these changes. For one thing, they were not very suitable for dealing with collective actors as opposed to individual actors, or with complex harmful activities and causal connections stretched in both time and place.[73] In some cases, legislators were able to fill the gaps by adding some new strict(er) liabilities to the already existing ones; the enactment of rules

68 See, for a discussion of first party insurance and its relationship with tort liability and social security: Cane 2006, pp. 291-299.

69 Cane 2006, pp. 250-251.

70 See, on the three types of compensation system and their complex interrelationships, Cane 2006, pp. 11-18, 377-393.

71 See, for a discussion of this and other factors that have resulted in an increasing reliance on the tort system: Hartlief & Tjittes 1999, pp. 11-13.

72 See, for a general discussion of the claim culture phenomenon and its socio-economic and legal determinants: Bauw, Van Dijk *et al.* 1999, pp. 11-56. See also sub-sections 4.5.1 and 8.3.2.

73 Hol & Loth 1991, pp. 2-3.

on liability for defective products is an example.[74] However, as neither the traditional legal dogmas, nor the legislature were able to cope with the pace at which new developments presented themselves, the task of dealing with the changing realities was principally left to the courts.[75] This tied in with the fact that the 20th century saw a shift in all Western societies from a more legalist view of the role of the courts, which required a strict, literal adherence to the laws laid down by the legislature, towards more judicial freedom for courts in their interpretation of the law. On the European continent, it became increasingly accepted that the courts had a role in filling legislative gaps, interpreting open norms and adapting law to social developments.[76] In the common law systems, where the courts had traditionally been more strongly bound by precedent and an accompanying gradual development of the law on a case-by-case basis than their comparatively more conceptually oriented civil law counterparts,[77] the judicial answer to the changing demands on tort law lay in the further development of the tort of negligence. As discussed, this particular tort, unlike its predecessors, had such a general scope that it was able to cover a wide range of different factual situations while providing the courts with considerable leeway to respond to new situations or new insights.[78]

Consequently, it was up to civil courts throughout the Western world not only to deal with the increase in tort claims, but also to deliver judgments that were responsive to the evolvement of societal reality and the ensuing changing demands on tort law. The open structure of the tort system, along with its "*pliable conceptualistic apparatus*" that includes flexible notions like reasonableness, foreseeability and risk,[79] provided the courts with the room needed to do so. This led to a process in which modern tort law's core concepts, such as negligence, duty of care, reasonableness and proximity (in the common law systems) and wrongfulness, fault, causation and damage (in the civil law systems) were incessantly tested and reinterpreted and developed further. New types of liability were developed by the courts, such as environmental liability, professional liability and liability of public bodies. Concepts such as foreseeability were increasingly interpreted in an objective rather than a subjective way – the question becoming what the wrongdoer ought to have foreseen, rather than what he had actually foreseen – that allowed for the inclusion of policy considerations. This tendency towards the expansion and objectivization of tort law was most acute in personal injury cases, as personal damages were felt to represent the most severe type of harm.[80]

As the general prevalence of legal rules, both domestic and international, increased, a growing number of these rules qualified for indirect application through tort law's open

74 See, generally on the development of product liability, from a comparative perspective: Whittaker 2010.
75 See, for instance: Lesaffer 2009, pp. 511-512; Van den Bergh 2005, pp. 111-112.
76 Van den Bergh 2005, pp. 111-112, 128-138, 152.
77 See, for instance: Van Dam 2000, pp. 105-106.
78 Compare Zwalve 2008, pp. 74-82; Van Dam 2006, pp. 119-125.
79 Fleming 1985, p. 12.
80 Compare, for instance: Englard 1993, pp. 175-176.

norms. Appeals to fundamental principles, human rights norms and (other) norms of public law and public international law in tort procedures became more common.[81] With the increase in numbers, scale and complexity of tort procedures, existing rules of civil procedure were also put to the test. This prompted the (further) development of rules on collective actions, evidence gathering, burden of proof, etc.[82] Furthermore, as the number of transboundary civil procedures grew, so did the importance and the prevalence of rules of private international law. Both in domestic law and in international treaties, a growing body of such rules was enacted to deal with matters like the jurisdiction of civil courts in transboundary tort procedures, the law applicable to a transboundary tort procedure, the recognition and enforcement of foreign judgments, and the taking of evidence abroad.[83]

Finally, EU law has played an increasingly important role in the development of domestic European systems of tort law.[84] Over the years, the European Union has issued a large number of directives and regulations aimed at unifying or harmonizing Member States' legal practices in fields that are within the European Union's competences, *i.e.*, that affect the common market and the free movement of goods, services and persons. In principle, the field of material tort law lies outside the European Union's regulatory competences. In reality, however, EU legal intervention with respect to certain specific subjects pertaining to or related to substantive tort law and with respect to international civil procedures has had an impact on the domestic rules of tort law and especially civil procedure in the EU Member States. Important examples of EU rules that affect substantive rules of tort law are the EU directive on liability for defective products[85] and the EU directive on environmental liability,[86] although their actual impact must not be overstated.[87] In the field of (international) civil procedure, the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[88] and the Rome II Regulation on the law applicable to non-contractual obligations[89] are of particular

81 See, on the ongoing, more general trend towards constitutionalization of tort law, for instance: Verheij 2005, pp. 189-192. See also sub-section 8.3.2.

82 See, for instance, on the development of collective actions in Europe: Hodges 2008, pp. 4-5. See also, more generally: Van Rhee 2008.

83 For a more detailed discussion of the development of the field of private international law, see, for instance: Strikwerda 2005, pp. 15-25.

84 Compare for instance, with a focus on the Dutch system of private law: Keirse 2010; Hartkamp, Sieburgh & Keus 2007.

85 Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 85/374/EEC, *OJ* L 210, (7 August 1985), p. 29.

86 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, 2004/35/EC, *OJ* L 143 (30 April 2004), p. 56.

87 Verheij 2005, pp. 192-193.

88 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 12/1, 16 January 2001.

89 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law

significance.[90] Furthermore, as has been discussed before, the European Commission is increasingly setting its sights on domestic systems' private law and tort law in particular when it comes to the enforcement of EU (competition and consumer) law and is currently exploring the possibilities for improving the pursuit of collective actions in this respect.[91]

In line with this development, there has been a tendency in academic circles to look for a common core of European private law and/or European tort law. This has given rise to several projects aimed at discerning such a common core, by laying bare both the similarities and the differences of the various European private law and/or tort law systems.[92] For example, the Study Group on a European Civil Code, together with the Research Group on EC Private Law, has come up with a Draft Common Frame of Reference containing principles, definitions and model rules of European private law,[93] while the European Group on Tort Law has drafted a collection of Principles of European Tort Law.[94] Although these projects show clear support for a potential future unification of the systems of private law of the different Member States and/or a common European civil code, there are others who question or even strongly oppose these ideas.[95] They state that the undeniable convergence of the European legal systems on some points may hide from view an underlying cultural diversity that is not to be underestimated.[96]

9.2 The role of tort law in Western societies

9.2.1 Tort law's evolving nature

The process towards a continuous reinvention of tort law that has characterized the first 2000 or more years of its existence, is still ongoing today. In line with the development in Western societies over the past century towards a more protective society and a more prominent role for tort law in providing such protection, the focus of this judicial exercise has strongly been on victims' interests, rights and needs and on providing just compensation for harm suffered, especially in personal injury cases.[97] This tendency has been reinforced by the fact that the focus of tort systems is predominantly on accident law today, since most accidents are the result of an unfortunate turn of events rather than

applicable to non-contractual obligations (Rome II), *OJ* L199/40, 31 July 2007.

90 See further sub-sections 4.2.2 and 4.3.3, respectively.

91 See further sub-section 4.5.3.

92 See, for example: Verheij 2005, p. 193.

93 See the European Commission website for the full text of the Draft Common Frame of Reference: <http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf>.

94 See, in more detail and with further reference to the text of the Principles the website of the European Group on Tort Law: <www.egtl.org/>.

95 See, amongst others: Verheij 2005, pp. 193-194;

96 See, for instance: Van Dam 2009; Van Dam 2007, pp. 53-76.

97 Van Dam 2000, p.p. 2-3.

morally reprehensible conduct on the part of the tortfeasor. Juries – in those common law countries where juries still feature in civil trials – and, to a lesser extent, courts, have seen fit to interpret tort law's open-ended concepts in the spirit of today's tendency towards "*socialized loss-bearing*".[98] In a growing number of situations, courts are basing their interpretations of tort law's constituent elements on objective interpretations, rather than subjective ones, if it is felt that the burden of damages should be shifted from the victim onto the tortfeasor.[99] At the same time, rules of civil procedure, for example with regard to burden of proof, are often construed in a plaintiff-friendly way, especially in cases where victim and tortfeasor are not on an equal footing.[100]

As such, especially on the European continent, liability in tort seems to have become increasingly disconnected from the moral blameworthiness of the wrongdoer and the wrongfulness of the tortious act or omission. Although in principle the fault requirement remains at the basis of modern tort systems, the notion of fault has been stretched to such an extent that nowadays "*we don't really think this man is guilty, we only call it guilt to give compensation*".[101] As a result of this focus on compensation and on victims' rights and interests, considerations pertaining to the wrongdoer and the wrongful conduct, along with any lingering ideas of punishment, retribution and moral reproach, seem to have taken a backseat in comparison.[102] This development has been further stimulated in two ways by the growing prevalence of liability insurance. Firstly, the existence of liability insurance has made courts in general more willing to shift damages from the victim to the wrongdoer.[103] The same holds true for legislators; an increasingly popular consideration when adopting a new strict liability is the fact that the tortfeasor is the party best suited to take out insurance against the risk of damages.[104] Secondly, the existence of liability insurance insulates the wrongdoer to a certain extent from the tort procedure and its effects. On the one hand, the liability insurer will often take the wrongdoer's place in a tort procedure and battle things out with the victim or the victim's insurer. On the other hand,

98 Fleming 1985, p. 12.

99 See, for instance, with respect to Dutch tort law: Bolt & Spier 1996, p. 393, where one of the conclusions drawn with respect to the question whether Dutch tort law is indeed expanding is that in many tort decisions in Dutch personal injury cases (outside the purely private sphere) an important underlying consideration seems to be that it is no longer deemed acceptable to send victims of personal injuries home empty-handed. See *id.* pp. 371-377. The report also indicates that the open-ended concept of foreseeability [*voorzienbaarheid*] frequently allows Dutch civil courts to reach the result that is considered just in the case at hand, *id.* pp. 382-383. Similarly, the calculation of the actual damages, as well as the establishment of causation between the tort and the damage suffered, are increasingly based on far-reaching objectifications of reality. See also Van Dam 2006, pp. 219-222.

100 Compare, for instance, with a focus on the Dutch system of civil procedure: Giesen 2009a.

101 See, similarly: Schrage 1999, pp. 44-45, quoting Atiyah.

102 Similarly: Van Dam 2006, pp. 219-220; Fleming 1992, pp. 1-2.

103 See, for instance: Cane 2006, pp. 250-253.

104 Fleming refers to insurance in this regard as a "hidden persuader"; Fleming 1992, p. 10. In the Netherlands, and probably also in other western legal systems, insurance-related considerations have played an important role in the design and adoption of legal regimes pertaining to strict liabilities such as product liability and liability for dangerous substances. See Hartlief & Tjittes 1999, pp. 1-2.

the fact that the wrongdoer is insured and thus will not have to pay any damages resulting from his tortious acts or omissions out of his own pocket, gives rise to a certain so-called moral hazard, as any admonitory effect that liability in tort may have as a sanction for wrongful conduct is greatly diminished.[105]

In line with this tendency towards socialized loss-bearing, and a shift in focus from the moral quality of the allegedly tortious behaviour to tort victims' rights, interests and needs, has been the advent, as discussed above, of an increasing number of stricter – as opposed to purely fault-based – liabilities. It has been noted in this respect that "[a]*lthough initially rules of strict liability were considered to be exceptions to the rule of fault liability, they have gained a firm foothold in continental tort law during the 20th century*".[106] It has become increasingly common for legislators (*ex ante*) or courts (*ex post*) under certain circumstances to make those parties best placed to internalise the social costs associated with certain activities and/or to distribute them through product pricing or insurance over a larger segment of society (*i.e.*, consumers and co-insured, respectively) shoulder the losses resulting from those activities.[107] Closely related to this are considerations of risk allocation, according to which those benefiting from certain inherently risky activities or situations, and/or those best able to control potentially harmful behaviour or situations and prevent or insure against potential losses, should be the ones to bear the resulting costs.[108] Accordingly, considerations of moral blameworthiness have in some subject matter areas been abandoned altogether in favour of more pragmatic and/or policy-oriented considerations. In many cases, this has led to the civil liability of business enterprises, as those are, in their capacity as employers, principals, producers, owners of production facilities, managers of potentially hazardous production processes, holders of potentially hazardous substances, etc., often the ones benefiting from potentially harmful activities, and/or best placed to control those activities or to internalise and spread their resultant social costs.[109]

The increasing abandonment of the idea of tort law as a system of subjective, interpersonal morality has opened the door to the tendency, as has also been described in sub-section 8.3.2 with respect to the broader field of private law, to abandon the traditional idea of tort law "[...] *as a mechanism for supporting the private ordering of civil society without*

105 Note, however, that this moral hazard inherent in liability insurance is slightly attenuated by the fact that these insurances usually exclude damage resulting from intentional conduct from their coverage. See, for instance: Verheij 2005, p. 11.

106 Van Dam 2006, p. 116. Note, however, that across the Channel, rules of strict liability have remained rare, and "[t]*here is a tendency to consider negligence to be the only sound basis for liability*".

107 Fleming 1992, pp. 8-9.

108 Fleming 1985, p. 13. For a brief discussion of the concept of allocation of risks/risk spreading, see Cane 2006, pp. 418-419.

109 This would of course be different where the wrongdoer is not in a position to distribute the loss or to insure himself against it, or if the plaintiff happens to be the better loss-distributor. See Fleming 1985, pp. 14-15.

seeking to organize or steer it",[110] and to view tort law as a means of social engineering, an instrument for actively intervening in and changing society and promoting the public good.[111] Accordingly, here too legal scholars, policymakers, and pressure groups are exploring the use of the tort system as an instrument for the achievement of certain 'greater good' through the regulation of the behaviour of social actors.[112] Similar to that which has been discussed before, propagators of such instrumentalist approaches to tort law, many of whom are legal economists, view tort law as having a societal impact that is broader than just the two parties involved in any particular tort case. They see it as a conduit for the achievement of a range of goals that are beneficial to society as a whole. This involves a dissociation from the retrospective context of the individual tort case and the private interests of the private parties involved in it, and instead a focus on the way in which tort law, through the behavioural standards that are set, monitored and/or enforced in each individual case, can act as a tool to produce certain future effects by influencing the future behaviour not just of the parties involved, but also of others in society similarly placed, mainly by deterring socially undesirable behaviour.

In these accounts of the tort system, the focus is put back on behaviour, albeit not in the sense of retrospectively judging the moral quality of specific acts or omissions but in a prospective, policy-oriented sense. The victim is principally seen as the party that initiates tort procedures; compensation is primarily viewed as providing the victim with an incentive to do so and as providing not only the tortfeasor but a broader group of actors engaging in similar activities with incentives to adapt their behaviour so as to avoid causing similar loss in the future. Accordingly, these instrumentalist approaches to tort law would have courts overlooking the interpersonal morality of the specific case and abandoning the fundamental bipolar and corrective nature of tort law itself for the benefit of enabling the pursuit of public values, public interests and/or public policies reflecting notions of societal rather than interpersonal justice.[113]

The developments described here are – once again – dramatically changing the way people perceive tort law. However, they are also giving rise to fundamental challenges to the rationale of tort law's existence.[114] On the one hand, the greater focus on the victim's interests and needs and on compensation raises the question whether tort law has become just another compensation scheme, and, arguably, a relatively inefficient one at that.[115] After all, tort procedure is inaccessible, expensive and lengthy when compared

110 Collins 1999, p. 56.

111 See also: Lesaffer 2009, p. 515; Friedman 1977, pp. 59-60. See also section 1.3.

112 See, for instance: Cane 1997, pp. 226-228. See also, for a discussion of the development of tort philosophies in recent history, including the advent of instrumental approaches and with further references: Englard 1993, pp. 93-105.

113 See, for instance, critically, Weinrib 1989.

114 See, for an in-depth discussion of the dissatisfaction with the operation of the tort system: Cane 2006, pp. 461-498. In even more detail – and with a very critical outlook on the tort system: Atiyah 1997.

115 See, for a general discussion of alternative compensation systems and further references: Englard 1993, pp. 109-120.

with alternative compensation schemes such as social security, first party insurance and government funds.[116] Furthermore, it is also arbitrary, as it singles out certain victims whose loss happens to be the provable result of another's activities. On the other hand, the greater focus on the policy objectives that are to be achieved through tort law raises the question whether the tort system is actually really capable of achieving those goals. Here, a comparison is often made between tort law and public law mechanisms that are directed at specific behavioural control, such as criminal law or publicly imposed safety regulations, as well as between tort law and non-legal regulatory mechanisms, such as market mechanisms and private regulation; the outcomes of such comparisons are generally not in favour of tort law.[117] As both developments are leading away from the interpersonal morality that has long provided the tort system's *raison d'être* and that may arguably still lie at the heart of the way in which it is consciously or unconsciously perceived by courts, lawyers and legal subjects, an unequivocal answer to the question as to what constitutes the essence of tort law does not seem to exist at this point.[118]

Next to these challenges to the uncertain contemporary rationale of the tort system's existence, a more general concern exists in many Western countries over the expanding reach of tort law, which is connected to the persistent aversion particularly outside the US to (the introduction of) a US-style claim culture.[119] Some fear that allowing the tort system to play a more dominant role might impose too heavy a burden on society in general and on economic and social life in particular, as a fast rising rate of litigation risks disrupting the orderly administration of justice, ordinary processes of government, normal social relations and the economy.[120] They foresee a range of potential negative effects such as an undue curtailment of personal and corporate freedom and autonomy, overly risk-averse behaviour by individuals but especially by the business community, a slowing down of innovation and technological advancement, insurability issues and an excessive caseload in civil courts.[121] An important consequence of this general concern is that legislators as well as courts in Western societies have on occasion made well-considered choices to draw the line at certain points. Legislators may try to keep in check the numbers of tort cases brought, as well as the amounts of damages claimed, for instance by limiting the categories of interested parties with standing to file a claim, or the possibilities for bringing class actions, as well as through the imposition of caps or ceilings and by not allowing exemplary or punitive damages claims.[122] Furthermore, civil courts themselves do, on occasion, attempt to 'keep the floodgates shut' by interpreting some of tort law's

116 See, for instance, Fleming 1992, p. 8. See, especially on the costliness of the tort system: Cane 2006, pp. 395-407.
117 Similarly: Verheij 2005, p. 197; Cane 1997, pp. 24-25.
118 Compare, for instance: Cane 1997, p. 24.
119 See further sub-sections 1.3.2 and 4.5.1, as well as *supra* sub-section 8.3.2.
120 See, on the perceived 'litigation explosion' in the US: Friedman 1998, 321-329.
121 Verheij 2005, pp. 194-197; Hartlief & Tjittes 1999, pp. 17-20.
122 Compare, on the different approaches in this respect: section 4.5.

core concepts such as causation, relativity (*Schutznorm*), or duty of care elements such as proximity and foreseeability, in a restrictive manner.[123]

9.2.2 The tort system: fundamentals

Despite some of the challenges it faces, the field of tort law continues to expand and its nature keeps evolving. The direction in which it does so is ultimately determined by legislators and by the courts. They, however, do not operate in a vacuum, but rather form part of, represent, respond to and, in the end, have to answer to the societies within which they operate. Over time, societies evolve and so do their values, interests, policies, needs and expectations. As part of the field of private law, the tort system features an open structure, pliable concepts and considerable room for judicial discretion, which make it a flexible legal system that is particularly responsive to social change. With respect to the common law, it has been mentioned that "[n]*ew and innominate torts have been constantly emerging in the long course of our history and the courts have shown no inclination at any stage to disclaim their creative functions, if considerations of policy pointed to the need for recognising a new cause of action*".[124] In civil law systems, legislators have consciously left ample room for courts to 'fill the gaps' and to develop the law in accordance with changing societal needs and demands.[125]

This does not mean, however, that legislators and courts are completely free to bend and shape tort law any way they want in the pursuit of justice and/or social policies. The tort system is a product of over 2000 years of societal and legal development and as such has its own structure and dynamic, which delimit the room for manoeuvre that legislators and civil courts have in applying tort law in new ways in reaction to new societal realities. Of course, there are also other reasons for courts to be somewhat reticent in devising new uses for existing tort rules, standards and principles, as they lack the democratic legitimacy, political responsiveness, technical expertise and institutional capacity that legislators have.[126] Especially in the common law, but also in civil law systems, they are required in principle to apply tort law in ways that are in line with the tort system as a whole and that are closely connected to existing legal rules, standards, principles and precedents as laid down in statutory law and/or case law.[127]

Although specifics may vary from country to country and notwithstanding current developments such as those described in the previous sub-section, the contemporary

123 See, for a comparative report on the way in which civil courts in various Western countries have attempted to 'keep the floodgates shut': Spier 1996.
124 Fleming 2002, p. 5.
125 Compare generally, with a focus on the broader field of civil law: Vranken 2006, pp. 64-81.
126 See generally, for instance: Broers & Van Klink 2001.
127 Compare, generally: Van Dam 2006, pp. 119-129.

tort systems of Western societies remain, at least for the time being, characterized by the essentially bipolar, specific, backward-looking and restorative nature that is the result of their historical development. Their point of departure is the resolution on a case-by-case basis of civil disputes between two private parties, typically in response to a civil claim brought by the plaintiff requesting monetary compensation for damage allegedly suffered as a result of acts or omissions by the defendants or of events or situations that are somehow linked to them. The court will order the defendant to compensate the plaintiff's damage only if the loss suffered by the plaintiff is a direct result of circumstances related to the defendant and/or his activities and if there are sound legal justifications, on the basis of written and/or unwritten legal norms, for shifting the loss from the plaintiff onto the defendant; in all other cases, the loss remains where it lies.

As such, the focus is primarily on restoring the tort victim to his status quo ante by providing him with the monetary equivalent of the loss he has suffered as a consequence of certain harmful events that have occurred in the past and that can be somehow attributed to the tortfeasor. Although the legislator (at least in civil law countries) may set certain general standards, it is up to the civil court seized of a matter to determine *ex post* (*i.e.*, after a harmful event has occurred) whether the law, including general considerations of justice, fairness and reasonableness, warrants the shifting of the actual loss suffered by this particular victim onto the particular tortfeasor under the specific circumstances of the specific case. The starting point in determining the amount of compensation, if any, that the tortfeasor is to pay to the victim is the principle of *restitutio in integrum*, meaning that as a general rule the amount of compensation awarded should put the victim in the position he would have been in if not for the tort.[128] Although in the end of course there are many and varying exceptions in practice to the basic features set out here, it is these common fundamentals that underlie most Western society systems of tort law.

Despite these common basic features of Western society tort systems, fundamental (and mainly theoretical) differences of opinion may exist on the underlying principles that should inform legislators and civil courts when applying contemporary tort law in practice, especially when it comes to establishing under what circumstances one party may be held liable in tort for the detriment suffered by another as a result of his actions or omissions or of events or situations that are somehow linked to him.[129] Underlying the contemporary theoretical debates on tort law are three fundamental dichotomies reflecting diverging ideas on how tort law should be applied and/or on what constitutes justice in this respect.[130] These are the dichotomy between social utility and moral responsibility, which flows from

128 Compare Van Dam 2006, pp. 301-302, 316-318.

129 For more detail on the variety in legal rules and in legal scenes behind the rules in European tort systems, see, for instance: Van Dam 2006, pp. 113-131. Compare also Van Dam 2009.

130 See, for a more detailed discussion of different types of justice: Sandel 2007. See also, generally, on the theoretical debate on justice (fairness) v. welfare: Kaplow & Shavell 2001.

the more general contrast between instrumentalist and non-instrumentalist approaches (or, in philosophical terms, between utilitarianism and Kantianism); the dichotomy between corrective and distributive justice, as derived from the mental legacy of Aristotle; and the dichotomy between fault-based liability and strict liability, which dominates most theoretical accounts of the substantive principles of liability.[131]

Social utility vs. moral responsibility

According to utilitarians, the moral value of an action (or of a practice, institution, law, etc.) is defined by its utility, *i.e.*, its effect in promoting a certain ultimate goal. This ultimate goal is generally thought to lie in the aggregate happiness, or pleasure, or intrinsic good, of everyone in society. Therefore, it is everyone's moral duty to advance that which increases social utility, even if that entails a limitation of one's freedom of action.[132] In tort law, this means that the foundation of liability or, more specifically, the answer to the question whether or not a party has acted unlawfully, is or should be determined in light of the extent to which that activity increases social utility. The rights or interests that are to be protected through tort law are balanced against the rights or interests that will have to be sacrificed to realise such protection. On the basis of this balance of rights and/or interests, the legislature, in the abstract, or the judge, in a concrete case, will or should then give precedence to those rights and/or interests that are comparatively most advantageous to social utility. This means that the protection of individual rights and interests and the extent to which one has to exercise care when acting, is contingent upon the relative social utility of those rights, interests and activities.[133]

Related to the idea of utilitarianism is the trend of the economic analysis of law in general and of tort law more specifically, which emerged in the 1960s and early 1970s as a number of legal economists sought to construct a comprehensive and systematic theory of (tort) law on the basis of modern economic concepts and models of explanation.[134] These economic theories of tort law are aimed at providing the theoretical tools necessary to analyse the way in which a particular liability rule or balancing of interests affects the behaviour of private actors, and through them society as a whole. In doing so, the focus is not on the resolution of past tort disputes between the private parties involved, but rather on the future behavioural effects which the rule or judgment will have on those engaging in similar activities. According to the dominant view, the ultimate aim to be pursued in so doing is the maximisation of societal welfare, which coincides with an optimal ('efficient') balance between societal benefits and societal costs. This means that each tort standard, whether formulated by the legislature or by the courts, should be arranged so as

131 Englard 1993, pp. 1-27.
132 Hol 1993, pp. 32-36. See also: Posner 1979, pp. 104-105.
133 Hol 1993, pp. 43-50.
134 See, for instance: Postema 2001, pp. 3-5. Note that the exact relation between utilitarianism and economics is not as clear-cut as it may seem, see: Posner 1979.

to encourage future behaviour the societal benefits of which exceed its societal costs, and to deter future behaviour the societal costs of which are larger than its societal benefits.[135] Consequently, according to law and economics scholars, the purpose of the tort system is not to right any past wrongs or to correct injustices done, but rather to realise (more) socially efficient behavioural patterns by private actors in the future.[136]

Opposed to those who view tort law as an instrument of societal utility are legal theorists who focus on the moral foundations of tort law, instead of on its consequences.[137] These legal theories are sometimes referred to as Kantianism, not because they are directly based on the mental legacy of Immanuel Kant, but rather because fundamentally they all adhere to Kant's idea that the essence of the human existence lies not in the achievement of some goal or the attainment of some desirable state, but rather in equal individual freedom and autonomy.[138] In these theories, the autonomy and rights of individuals have an absolute, primary status, rather than the contingent, derivative status they have in utilitarian theories. Individuals are seen as ends in themselves, rather than as means to be used for the benefit of others, or of society as a whole.[139] The protection offered by the law is a function of personal freedom, not of social utility.[140] Liability in tort or, more specifically, the answer to the question whether or not a party has acted unlawfully, is or should be determined not in light of the extent to which that action increases societal utility, but rather in light of whether that action is compatible with the freedom of anyone else to act in the same way. The rights and interests that are to be protected through tort law are only limited to the extent necessary to harmonize them with the idea of equal freedom for all.[141]

Overall, the principal difference between instrumentalist and 'moral' approaches to tort law can be said to lie in the fact that whereas the former focus on general societal objectives, with a corresponding language of policies and behavioural incentives, the latter focus on individuals, with a corresponding language of justice, rights and moral or

135 More specifically, this means that in any tort case the damages, i.e. the social costs that result from certain behaviour, must be allocated in a way that will lead to cost-efficient behaviour in the future and will thus presumably optimize social welfare in the long run.

136 See, for an in-depth discussion: Kaplow & Shavell 2001.

137 See, for instance: Owen 2001, pp. 1-6, as well as, in great detail: Weinrib 1989.

138 Kant believed that the moral value of one's actions should not be judged according to the consequences of those actions, nor according to the actor's intentions, but on the basis of the rationality of the act itself. Rational beings derive an absolute moral worth from the fact that they possess a free will, or freedom; this freedom is equal for all rational beings. Therefore, any rational being should treat humanity, be it himself or another, as an end in itself rather than as a means to an end. The law creates the conditions for the protection of human freedom; it coordinates human activity, so that the freedom of each individual is reconciled with or balanced against the freedom of all others. The existence and protection of rights as well as the existence and enforcement of duties are all derived from the general notions of equal individual freedom and autonomy. See, for instance: Hol 1993, pp. 32, 37-42; Wright 2001b, pp. 161-163.

139 Wright 2001b, pp. 161-163.

140 Hol 1993, p. 44.

141 Hol 1993, pp. 44-45.

legal principles.[142] Thus, the distinction between social utility and moral responsibility in the theoretical tort debate lies in the difference between theories according to which the unlawfulness of an action is or should be judged on the basis of its compatibility with certain moral or ethical rules or duties, and theories according to which the unlawfulness of an action is or should be judged on the basis of the consequences of that action.

Corrective justice vs. distributive justice

When describing the function of tort law, tort theorists often fall back on the centuries-old Aristotelian distinction between corrective justice and distributive justice, even though it is generally agreed that these notions have a formal nature and in themselves do not represent or generate any substantive criteria for the determination of an action's lawfulness or unlawfulness.[143] They do, however, serve as organizing concepts that reflect the different theorists' views on the inherent or ideal form and nature of the law, the actual process through which it functions or should function, and the type of justice that should be strived for by those applying it. According to these notions, a distinction is to be made between situations where justice is or should be oriented towards creating a new state of affairs when it comes to the distribution of goods between the members of society (distributive justice), on the one hand, and situations in which justice is or should be oriented towards restoring a prior state of affairs between two private parties when this status quo has been disrupted, for instance as a result of the infliction of losses by the one party on the other (corrective justice), on the other hand.[144] The substantive standards defining the way those goods should be distributed, or the circumstances under which a disruption of the status quo should be corrected, are external to the concepts of corrective and distributive justice, and can be found in moral concepts such as utility, autonomy, fairness, etc.[145]

In modern tort theorizing, the corrective/distributive justice paradigm has been highly influential. Generally speaking, distributive justice has been identified with the fair apportionment of the burdens and benefits of risky activities, whereas corrective justice has been identified with questions of wrongdoing and reparation.[146] Whereas the former has a focus that goes beyond the parties involved in any tort dispute, the latter focuses exclusively on the two parties involved in a particular tort dispute and their private

142 However, this distinction is by no means absolute. Most 'moral' theories do ascribe certain aims to the tort system, although none of these theories will go as far as to abandon the primacy of the individual for the achievement of those aims. At the same time, there are utilitarian theories that present the aims to be achieved by the tort system as the (moral) foundations of tort law or that incorporate notions of morality. See, for instance, Posner & Shavell 2003.

143 See, for a general description and an overview of the use and interpretation of the concepts of corrective and distributive justice from Aristotle to modern times, and further references: Englard 2009. See also Englard 1993, pp. 11-12.

144 See, in more detail: Englard 2009, pp. 1-10.

145 Englard 1993, pp. 11-13.

146 See, for instance: Keating 2000, pp. 194-195.

interrelationships. In reaction to the advent of more instrumentalist theories with their notions of cost-spreading and risk-distribution, some non-instrumentalist tort theorists have strongly emphasized corrective justice as providing the sole rationale of the tort system's structure.[147] According to them, distributive justice and tort law do not match,[148] and the instrumentalist theories do not fit the corrective justice underpinnings of tort law as they cannot adequately explain the distinctive bilateral structure of the tort system.[149] However, this strict adherence to corrective justice is problematic as it sits uneasily with the fact that in practice both legislators when adopting (for instance) strict liabilities and civil courts when deciding tort disputes often do take account, and increasingly so, as discussed in the previous sub-sections, of considerations that go beyond the two parties involved in any tort dispute and/or the mere correction of the harm done. There are others, therefore, who maintain that notions of equality and distributional fairness do have a place in the tort system.[150]

Fault-based liability vs. strict liability

The positive legal concepts of fault or fault-based liability and strict liability are the key concepts in many tort theories. Fault-based liability refers to liability rules on the basis of which tortious liability arises because the behaviour of the alleged tortfeasor falls short of a written or unwritten standard of behaviour (usually due care). This standard can be pre-set by the legislator, for example in the form of safety regulations pertaining to the activity concerned, or it can flow from unwritten standards of proper social conduct pertaining to the activity concerned that may or may not have previously been laid down in case law. The alleged tortfeasor will not be held liable if he can prove that his behaviour satisfied or even exceeded the behavioural standard in question. Strict liability, by contrast, refers to liability rules under which liability in tort arises even when the alleged tortfeasor was not at fault. This means that strict liability is established independent from the tortfeasor's conduct and whether it was intentionally or negligently wrongful or not; it is sufficient for the tort victim to prove damage and causation. The tortfeasor is held liable even if he can prove that he satisfied all of the applicable standards of care. Under a rule of strict liability, the alleged tortfeasor can only escape liability if he either proves that there was no damage, or that the damage was not caused by any occurrence or activity that can be attributed to him.[151]

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147 See, for instance: Fletcher 1972; Weinrib 1995. See, more generally: Englard 2009, pp. 186-190.

148 Another reason why distributive justice and tort law are sometimes considered not to match, is that the distinction between corrective and distributive justice has for long been equated with the distinction between private law and public law, respectively, leading to the belief that notions of distributive justice did not have a place in private law theorizing. See, for instance, Englard 2009, pp. 177-182.

149 See, for instance: Postema 2001, p. 5.

150 See, for example: Keating 2000; Cane 2002a, pp. 186-190.

151 See, generally on the differences between fault and strict(er) liability, in a comparative perspective: Van Dam 2006, pp. 113-118; 255-265, who notes, however, that "[t]*he dichotomy between negligence and strict liability is outdated*" (p. 264).

In reality, most liability rules set by legislators or civil courts combine elements of both types of liability. The concepts of fault-based liability and strict liability are not opposites; rather, they form part of a continuum between no liability on the one side, and absolute liability on the other, with fault liability gradually fading into strict liability at some point between the two extremes. The point of departure is that of no liability. After all, in the majority of situations, losses, whether caused by another or not, will not be shifted and thus remain where they have fallen. It is only through intervention by the law that deviations from this basic principle are made possible. At the other extreme lies absolute liability, which is the strictest form of liability, as it does not allow for any defence against liability once damage and causation are proved. The way in which any particular rule of fault or strict liability is drawn up and interpreted by the legislature and/or by the courts, as well as the particular procedural setting in which it is imbedded, defines its place on the continuum. Some rules of strict liability, for example, do require some act of negligence to have been committed somewhere down the line, while others allow for defences which bear traces of negligence. At the same time, fault-based liability rules often feature concepts that go more in the direction of strict liability, such as objective standards of care and opportunities to shift (part of) the burden of proof onto the defendant. The more the standards that constitute fault in a particular rule of fault-based liability, such as foreseeability and reasonableness, are framed or interpreted in an objective rather than subjective way, detaching the standard of liability from the actual intentions and capacities of the wrongdoer, the closer that rule shifts towards the realm of strict liability.[152]

In most Western society legal systems, fault-based liability is still generally seen as tort law's point of departure, meaning that liability is established only where one party negligently or intentionally causes another harm by behaving in a way that is contrary to written or unwritten legal norms meant to protect the latter from harm (or, in other words, by acting in breach of a duty of care it owed to the latter). Under the general rule of fault-based liability, it is usually up to the victims to prove that the defendant has acted negligently. Especially on the European continent, rules of strict liability, once a rare exception to this general rule, are becoming increasingly prevalent; in English tort law, by contrast, rules of strict liability remain rare.[153] Strict liability is usually imposed by legislators with respect to particular situations in which it is felt that rules of fault liability lead to unsatisfactory results and that there are good policy arguments for making sure that the burden of adversity can be shifted nonetheless. There may be various policy arguments for the imposition of strict liability to a particular type of actor or activity. These may include, for instance, the fact that particular objects or activities represent a higher than average risk, the idea that the actor who benefits from certain activities should also carry the societal costs that are associated with it, and, more generally, "[...] *the idea*

152 See generally Van Dam 2006, pp. 255-265; Englard 1993, p. 21.
153 Van Dam 2006, pp. 116-118.

that the costs of socially valuable but dangerous activities (driving, mass production) should not be borne by the unlucky and arbitrary individual who suffers damage from them".[154]

In the end, the different approaches in this respect by different legal systems may be traced back to different policy approaches to the tort system. Van Dam notes in this respect that "[t]*he English reluctance towards rules of strict liability is related to the concern for unfathomed economic consequences for society*". The greater willingness in legal systems such as the French and the German ones to accept rules of strict liability is connected to the fact that notions of equality and solidarity put the focus more strongly on concerns of distributive justice and victim protection there.[155]

9.2.3 The many faces of tort law

The tort system: a wide variety of roles

Due to its mutability, flexibility and responsiveness, the tort system has raised widely divergent expectations and views on its proper function in society. Leaving aside the fundamental dichotomies, the historical development of tort law seems to have resulted in three distinct views of what the tort system's primary role in society is. There are those who see tort law primarily as a compensation system, on the basis of which damage suffered by one is compensated by shifting the loss onto another or others, requiring them to indemnify the injured party.[156] Others see tort law primarily as a mechanism for behavioural regulation, which deters private actors from behaving in a manner that is considered to be socially undesirable.[157] Finally, there are those who view tort law as a system of interpersonal morality, which provides a set of ethical principles of personal responsibility and freedom.[158] These three views of what constitutes the *raison d'ĕtre* of tort law overlap or complement one another at certain points; at other points, however, they contradict and potentially even exclude each other. Between these three fundamental and fundamentally different views lie a widely diverging range of more specific contemporary ideas on the tort system's foundations, functions, aims and effects, which are invoked by legal scholars and lawmakers such as legislators and courts to justify and/or explain their interpretation and application of the tort system.[159]

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154 Compare Van Dam, pp. 256-258.

155 Van Dam 2006, pp. 125-129 (quote p. 127).

156 See, for instance, Cane 2006.

157 See, for instance, Faure 2009.

158 See, for instance, Cane 1997.

159 For present purposes, foundations can be understood as the underlying values and/or the overarching principles that inform, or provide the input to, the tort system as a whole, or, in a more normative sense, that ought to do so. The function of tort law then describes the form and the nature of the system itself, the actual process through which it functions or should function, why the system is there, its raison d'ĕtre, which imbeds it in between its foundations on the one hand, which provide the general context within which the system is supposed to function, and its aims and effects on the other hand. The aims of the tort system state

Some of the most popular foundational concepts in this respect remain those of compensation and reparation.[160] According to Atiyah, "[t]*o compensate a person is to make good an undesirable aspect of their circumstances or situation in life which falls below some pre-determined benchmark of acceptability*".[161] As has been mentioned, the tort system only provides compensation for a claimant's material and/or non-material damage if those can be proved to have been caused by the defendant's acts or omissions. Its general point of departure in doing so is the principle of *restitutio in integrum*, according to which the victim should, as far as possible, be put back in the situation in which he would have been but for the tortious act or omission, meaning that in principle the compensation paid to the victim may not exceed that which is necessary to repair the damage done. The compensation provided by the tort system is primarily financial in nature, even when the adverse changes for which compensation is provided are not. A distinction can be made in this respect between equivalent compensation and compensation as substitute and solace. Primarily, tort law provides compensation for material damage, *i.e.* the victim's loss of money or of some other asset that can be fully replaced by money, costs the victim has incurred as a result of the tortious act, and lost expectations with respect to future earnings or financial profits. However, the tort system also provides compensation for non-material damage, *i.e.* pain and suffering and the loss of amenities that cannot be expressed in financial terms. In such cases, compensation can obviously not provide a monetary equivalent to what is lost, but it can provide a substitute source of satisfaction or pleasure, or a measure of solace for what has happened.[162]

A more policy-oriented way of looking at the tort system is to move away from its role in determining whether to provide compensation to a specific victim in each specific case, and to focus instead on the tort system's role in selecting those cases in which the burden of adversity should be shifted from the victim onto the tortfeasor.[163] Instead of compensation, which is concerned with shifting the loss in one direction, from victim to tortfeasor, the heart of tort law then becomes loss allocation to either one of the parties, allowing room for concepts and policy arguments that go beyond compensation and the individual victim to (co-)determine the outcome of tort cases. Along the same lines, the tort system may be viewed as a system of loss spreading or loss distribution, meaning, as mentioned in the previous sub-section, that the burden of adversity is taken off the shoulders of any one person, and collectivised – made into a shared burden – by allocating

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what its pursuit is and thus its expected or intended output, whereas its effects reflect its actual output, the consequences it produces in practice. This interpretation of these terms is far from universal, however; one and the same concept, for example wealth maximization/economic efficiency, may be seen as the tort system's main aim by one, but may at the same time be characterized as a foundation, function or effect by others.

160 See, for instance: Kötz & Wagner 2006, pp. 25-26; Viney 2008, pp. 76-81; Deakin, Johnston & Markesinis 2008, pp. 52-54.

161 Cane 2006, p. 411.

162 Compare, for instance: Van Dam 2006, pp. 301-318; Cane 2006, pp. 412-413.

163 See, for instance: Kötz & Wagner 2006, pp. 25-26.

it to the party best able to spread it over a large number of people, and over a period of time, through insurance or through the market.[164]

Another way of looking at the tort system is by portraying it as a system that deals with the risks that are inherent in most activities and the costs that those activities may impose on others than those who undertake them and/or on society as a whole. As has been mentioned before, legislators or courts may under certain circumstances decide to allocate (*ex ante* or *ex post*) an activity's risks and its costs if the risk materializes to a (potential) tortfeasor. A reason for so doing may be the fact that the (potential) tortfeasor is in a better position than the (potential) victims to assess the risks inherent in an activity, situation or event and to prevent them from materializing, and/or control them. A further rationale may be the idea that the party that benefits or profits from a certain activity, situation or event should also be the one to carry its costs. A related consideration is the 'deep pocket' argument, which holds that in the case of a significant inequality in the financial capacities of the two parties, the costs will be allocated to the party with the deepest pocket. When the party with the deepest pocket holds insurance against such costs, this of course brings us full circle to considerations according to which risks, costs or losses are to be allocated to the party that is best able to spread those risks, costs or losses through insurance or through the free market system. As has been mentioned, these more policy-oriented approaches to the tort system typically provide a rationale for adopting strict(er) liabilities in certain fields, especially when it comes to activities, situations or events that involve special risks.[165]

Alternatively, the tort system may be seen as having special significance when it comes to protecting and enforcing private rights and interests.[166] The connection is most obvious in a system like the German tort system, for example, where the application of fault-based liability is guided by a semi-exhaustive list of rights and interests that are to be protected, which is laid down in the German civil code.[167] Still, in all Western tort systems considerations of protected rights and interests do play a role as they provide protection

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164 See, for instance: Cane 2006, p. 415-418; Kötz & Wagner 2006, pp. 37-39.

165 Compare generally, for instance: Van Dam 2006, pp. 125-129; Cane 1997, pp. 226-231. Arguments such as these are typically relied on to justify the imposition of strict liability for defective products. It is especially compelling when the activity, situation or event involved imposes a special risk, such as in the case of a transport of dangerous substances, or the operation of a nuclear plant; compare for instance Cane 2006, pp. 418-419. See also *supra* sub-section 9.2.2.

166 See, for an example of a rights-based approach: Stevens 2007; according to Stevens, the tort system is primarily concerned with the infringement of rights rather than with the infliction of loss, in the sense that it creates a mechanism for the enforcement of such primary rights through secondary obligations. See, for an example of an interest-based approach, Cane 1997, pp. 66-95. See also Coval & Smith 1983, pp. 239-268; Viney 2008, pp. 122-127.

167 These include life, physical integrity, health, personal liberty, property rights and other rights, including the right to business (*Recht am Gewerbebetrieb* / *Recht am Unternehmen*) and a general personality right (*algemeines Persönlichkeitsrecht*). See, for a further elaboration of the German tort system: Van Dam 2006, pp. 61-79.

to rights and interests pertaining to life, bodily integrity, physical and mental health, personality and property, as well as pure economic interests, although the extent to which and the way in which this is done varies; generally speaking, life and bodily integrity are especially strongly protected, whereas pure economic interests are usually afforded less than average protection.[168] Even in common law tort systems, where the connection may arguably be seen as awkward because of the focus on remedies in these systems,[169] a rights-based approach does comport well with the existence of certain torts that are actionable per se, meaning they provide an action in tort even if the tort does not result in loss; the main point of these torts can be said to lie in the protection of certain rights or interests against unjustified interference.[170]

A modern tendency that is related to this rights/interests-based view on tort law is the idea that the tort system may be used for the protection and enforcement of certain fundamental rights. As mentioned in Chapter 8, there is an increasing influence of fundamental rights (and freedoms) on the horizontal interrelationships between private parties, which is also affecting the field of tort law. These fundamental rights include not only constitutional rights enshrined in national constitutions, but also human rights embodied in international human rights treaties or flowing from customary international law. In certain systems, especially those with constitutional courts and/or a strong tradition of constitutional litigation, such as Germany and the United States, respectively, the development towards the constitutionalisation of private law may have come more naturally than in other systems. But the rise of a growing number of increasingly authoritative international human rights instruments has forced governments as well as civil courts in all Western societies to deal with questions regarding the direct or indirect application of fundamental rights in the horizontal relationships between private individuals and/or entities. In Europe, the European Convention on Human Rights, in combination with its interpretation through the decisions of the European Court of Human Rights, has proved particularly influential in this regard. Accordingly, the invocation of fundamental rights by those involved in tort procedures is becoming more and more commonplace.[171]

Another, more traditional perspective on the tort system is that it is "*a system of ethical rules and principles of personal responsibility (and freedom) adopted by society as a publicly enforceable statement about how its citizens may, ought and ought not to behave in their dealings with one another*".[172] This idea of the tort system as a system that allocates

168 Van Dam 2006, pp. 142-143. See, for a general overview of the French and the English tort systems: Van Dam 2006, pp. 41-60 and pp. 80-105, respectively.

169 See Van Dam 2007.

170 See, for instance: Cane 1982, p. 31.

171 See, for example: Schultz 2009; Fletcher 2008; Wright 2001; Friedmann & Barak-Erez 2001; Scott 2001. See, for an in-depth treatise on the constitutionalisation of contract law: Cherednychenko 2007. See, for a discussion of the impact of the ECHR – through the Human Rights Act – on English tort law: Wright 2001.

172 Cane 1997, p. 27.

responsibility to those whose intentionally or negligently wrongful behaviour has caused another harm and in doing so provides moral condemnation of that behaviour, comports particularly well with tort law's traditionally chiefly fault-based nature. Arguably, it is this particular view of the tort system that still directs to a large extent the way in which tort cases are decided and the way in which liability in tort is generally perceived.[173] Although on the basis of this view, the tort system is primarily geared towards assessing in retrospect the ethical quality of the way in which specific private actors behave vis-à-vis one another, this does not necessarily exclude the idea of it also having more general effect and significance. After all, by identifying the different ethical standards that may apply in the societal interactions of private actors, by considering their application in specific fact situations and by rendering judgment accordingly, civil courts on the basis of tort law are charged with determining, enouncing and enforcing social morality, in the sense of any society's contemporary ideas of how private actors ought to behave towards one another. As such, through the establishment on a case-by-case basis of what does and what does not constitute socially desirable behaviour (or of the extent to which private actors acting in their own self-interests have a responsibility to take into consideration the interests of other private actors), the tort system itself is a source of behavioural standards that represent a society's view at any given time of what constitutes morally responsible conduct by private actors and which as such may also guide future conduct.[174]

When the idea of tort law as the retrospective allocation of responsibility to those whose behaviour has fallen short of certain moral standards is taken further, it may be transformed into the viewpoint that the tort system's essence is that of retribution for or punishment of socially unacceptable conduct. This perspective on tort law, which seems to have been the prevailing view in its early days, is generally rejected in modern legal thought.[175] Nowadays, punishment is almost exclusively associated with the field of criminal law and its accompanying institutional legitimacy and procedural safeguards. Still, in the common law systems and especially in the US part of the tort system's more retributive/punitive roots have remained, notably in the form of punitive damages, which are designed to punish the tortfeasor rather than to compensate the victim.[176] In other tort systems as well, however, punitive elements are present, particularly when it comes to

173 See, for instance: Cane 1997, pp. 24-25, 205-238.

174 Similarly: Cane 1997, pp. 24-27. See also, in more detail on the interplay of law, morality and responsibility: Cane 2002.

175 See, for instance: Cane 2006, pp. 419-421; Engelhard & Van Maanen 2008, pp. 16-17.

176 Related concepts are those of aggravated damages (which focus on compensation of the victim's mental distress, where the tortfeasor's wrongful conduct has outraged or upset the victim) and exemplary damages (which focus more on deterrence than on punishment). See, for a detailed discussion of the interpretation and application of these concepts in English tort law, The Law Commission, 'Aggravated, exemplary and restitutionary damages', Item 2 of the Sixth Programme of Law Reform: Damages, 1997, available at <www.lawcom.gov.uk/docs/lc247.pdf>. Even though these forms of damages occupy an exceptional position and have been widely criticized both within and outside the common law, they do seem to fulfil a useful role in cases where the tortfeasor's conduct is exceptionally reprehensible. See, for instance: Cane 2006, pp. 419-421.

infringements of personal rights such as reputation and privacy.[177] In a more general sense, the tort system can also be seen as providing victims with recognition of and atonement for the harm they have suffered as a result of a tort.[178] In the same vein, it can act as an outlet for feelings of unease or distress that the tortious conduct may have caused the victims or others in society, or realize a certain measure of general appeasement.[179]

As has been mentioned before, the idea of the tort system as being primarily concerned with setting and enforcing standards with a view to influencing private actors' future behaviour has become increasingly popular over past decades.[180] To those analysing the tort system from a more economic/instrumentalist perspective, its main function is not to right any past wrongs or to correct injustices done, but rather to prospectively realise socially desirable (efficient) behavioural patterns by private actors. The general idea is that the role of the tort system is to regulate relationships between private parties for whom the transaction costs of private bargaining are prohibitively high, resulting in externalitities. It fulfils this role by apportioning tortious liability in a way that induces the private parties involved to internalize all of the costs that ensue from a certain situation, activity, event or production process.[181] Accordingly, the tort system may be used to motivate behaviour that is considered to be socially desirable by deterring undesirable behaviour, such as behaviour that causes externalities.[182]

As such, the tort system becomes a regulatory mechanism, *i.e.*, a mechanism for the regulation of human conduct and society, through the way it sets behavioural standards on the one hand, and monitors compliance with and enforces behavioural standards, regardless of whether those standards derive from tort law itself or from some external source, on the other.[183] In line with the general idea that prevention is better than cure, it becomes a way of prospectively keeping others from engaging in harmful behaviour through the tactical imposition of liability retrospectively. Which harmful activities, events, situations or production processes call for the application of which specific types of liability (namely, absolute liability, strict liability, fault liability or no liability) in order to provide the actors involved with appropriate incentives for precaution is left up to the

177 See Van Dam 2006, pp. 303-306.
178 See, for instance: Van Maanen 2003.
179 See, for instance, Engelhard & Van Maanen 2008, pp. 17-19.
180 See further sub-section 8.3.2 as well as *supra* sub-section 9.2.1.
181 To economists, the problem of externalities (or external costs, negative external effects) arises when the bargaining process between private parties inside the market does not encompass the total amount of the costs that a product or activity in reality entails, leaving the costs that are excluded to spill over onto a third party that has not been involved in the bargaining. This results in a failure of the market system, as the bargaining process yields an allocation of costs and benefits between the private parties that are involved in the bargaining process that is not socially efficient, in that it does not maximise social welfare. For more detail, see, for instance, Cooter & Ulen 2004, pp. 44-46, 91-96, 220-221.
182 See, for instance, with a focus on environmental liability, Faure 2009.
183 Cane 2002b, pp. 305, 312-319. See also sub-section 8.3.3.

legislature and/or the civil courts to determine.[184] What is considered appropriate in this respect depends on what type of behaviour is deemed to be socially desirable; this, in turn, is determined on the basis of policy considerations that are extrinsic to the field of tort law in itself. Consequently, in this type of highly abstract, policy-oriented approach, the tort system is typically seen as an instrument aimed at realizing certain pre-determined wider social and economic goals, which also means that its functioning is assessed in light of the extent to which it meets the policy ends that it is intended to serve.

Finally, there are also other ways in which the tort system may be used in a very direct manner to achieve broader, societal aims that are extrinsic to the field of tort law in itself. As has been noted before, the tort system may be brought into action for example in order to create public awareness of societal wrongs and/or to generate public and political support for societal reform. The operation of the tort system in this sense has also been compared to the 'watchdog role' of an ombudsman, as it may bring reprehensible practices and anti-social conduct to light.[185] As such, tort law can create transparency and enable the establishment of the truth, not only for the benefit of the victims involved in any particular case of wrongdoing but also for the public at large, sometimes with the assistance of the media.[186] Especially for corporate tortfeasors, the prospect of bad publicity and the loss of money, support (from shareholders, consumers and employees) and prestige that may be associated with a court judgment holding them liable in tort for particular damage caused by their activities, can be daunting, in particular in light of the accompanying threat of regulatory action and/or further tort claims.[187]

The tort system: glass half empty or glass half full?

It is obvious from the foregoing that the tort system distinguishes itself not only through its mutability, flexibility and responsiveness, but also through its versatility. This specific combination of defining characteristics is arguably one of the tort system's greatest strengths, as this has allowed it to evolve over time and to keep reinventing itself in light of changing societal values, interests and policies, while simultaneously serving a wide range of societal needs and living up to a growing diversity of societal expectations. At the same time, however, it may represent its greatest weakness. None of the theories discussed in the previous sub-section seems to succeed in providing a conclusive justification for and/or explanation of the tort system's set-up, foundations, functioning, aims and effects. The tort system's continuously evolving and multi-purpose nature also makes it fragmented and

184 See generally, for instance: Cooter & Ulen 2004, pp. 320-328. See also Van Dam 2006, pp 255-265, who notes: "*Liability rules are to be found on the continuum between pure subjective negligence liability and absolute liability. Subjective negligence liability requires that the defendant is personally to blame for his conduct, because he personally knew better and was personally able to act differently* [...] *This subjective liability scarcely plays a role in current tort law.* [...] *Absolute liability requires no more than a causal connection between a certain event and the damage; even the defence of* force majeure *is not accepted*" (p. 264).

185 See Linden 1973.

186 Compare also Engelhard & Van Maanen 2008, pp. 19-20.

187 Linden 1973, pp. 156-159.

lacking a clear focus, which prevents it from fully and incontrovertibly fulfilling any one of the various functions, aims and justifications attributed to it. Furthermore, despite its mutable and flexible nature, the tort system does have a number of core features that have resulted from its evolution over time and that put certain restrictions on its functioning. This makes it vulnerable to criticisms with respect to its functioning and efficacy, especially when it is compared with certain other, more specialized legal mechanisms, and gives rise to fundamental contemporary challenges to the rationale of tort law's existence.[188]

As has been mentioned, when it comes to its role as a compensation system, for example, the tort system is arguably inferior to alternative compensation systems, especially in the area of accident law, which has become the tort system's main province. Social security systems, first party private insurance schemes and no-fault compensation schemes are likely to provide accident victims with compensation in a much more fair and efficient manner, bearing in mind that tort procedures are lengthy and expensive and they create inequality between accident victims, in the sense that they are only open to the limited group of victims who can actually prove that their losses result from another's wrongful act.[189] Also the tort system's role in protecting and enforcing private rights and interests requires qualification. As the protection of one's rights and interests automatically involves an infringement of another's freedom of action and other conflicting rights and interests, a tort procedure essentially involves a balancing act between the rights and interests on both sides of the dispute. This means that the tort system does not recognize any rights or interests, and this is true even when it comes to fundamental rights, as absolute; a victim's rights and interests are protected only to the extent that they are not trumped by competing rights and interests on the side of the tortfeasor and whether such is the case will have to be decided on the basis of the facts and circumstances of each individual case.[190] In addition, the role of tort law in protecting and enforcing fundamental rights also remains doubtful for other reasons, such as whether such rights are suitable for translation from their vertical context to the horizontal relationships between private individuals and organisations that are the province of tort law, and if so, how this is to be done.[191]

Furthermore, as discussed, the tort system's function as a system of interpersonal morality is being progressively circumscribed not only by the erosion of the fault principle through its increasing objectivization and the introduction of strict liabilities, but also by the growing prevalence of liability insurance within the field of tort law.[192] The idea of the tort system as having a punitive function has virtually disappeared, save for a few remnants in the common law system, notably the possibility of claiming punitive

188 See, in more detail, for instance: Cane 1997, pp. 231-237; Cane 2006.
189 For an in-depth and authoritative treatise on this issue, see: Cane 2006. See also, for instance: Stevens 2007, pp. 320-321.
190 Compare Van Dam 2006, pp. 179-182.
191 Compare, for instance: Smits 2003.
192 See, for instance: Cane 1997, p. 127.

damages.[193] When it comes to the role of the tort system as a mechanism for the regulation of the behaviour of private parties, it seems that this role is inevitably limited by its innate structure, particularly by the fact that the tort system remains primarily specific, reactive and restorative in nature.[194] These features, combined with the tort system's open, flexible, standard-based and judge-made nature, do not render it pre-eminently suitable for providing generally applicable, forward-looking and precise behavioural guidelines. As such, it is questionable whether the tort system actually provides an independent alternative to more traditional regulatory mechanisms that are institutionally legitimized and specifically equipped for the task of setting, monitoring and enforcing behavioural standards.[195]

At the same time, the tort system's effective functioning as a tool for establishing the truth and creating transparency with respect to societal wrongs is hampered by the fact that neither the private parties involved in civil procedures nor the civil courts have the kind of far-reaching information-gathering competences or investigative tools at their disposal that state officials and state agencies tend to have in public matters. Furthermore, truth finding in civil procedures may be hampered by the fact that the establishment of certain facts or findings as 'true' may have legal, reputational or insurance consequences for the parties involved beyond the particular legal dispute concerned. In cases involving complex matters where economic stakes are high, this may lead to battles of experts in civil procedures, which may not necessarily have a positive effect on transparency and the quality of the information generated.[196] Furthermore, the conscious use of the tort system as a means to raise socio-political awareness of structural wrongs and bring about societal reform remains controversial, particularly in those countries where the introduction of anything resembling a US-style claim culture is seen as a highly undesirable prospect.[197] And, finally, none of the remaining functions, aims and effects that can be attributed to the tort system seem to be able to provide a full, credible, generally accepted justification or explanation of the tort system's continued existence and contemporary functioning.[198]

Still, notwithstanding these limitations, the tort system undeniably plays a significant role in all Western societies and has done so for over 2000 years; the fact that opinions vary on what exactly that role is and/or should be does not alter this. In the end, the tort system's functioning will have to be assessed on whether it meets the specific needs and expectations with respect to any specific subject matter area in which it is brought into action, both in

193 See *supra* sub-section 9.2.3.

194 Compare Van Boom 2006a, pp. 12-14; Cane 1997, pp. 214-225. See also sub-section 8.3.3.

195 See also, with a focus on the broader field of private law: sub-section 8.3.3.

196 See, for instance: Engelhard & Van Maanen 2008. Compare also section 4.5.

197 See further sub-sections 1.3.2, 4.5.2 and 8.3.2.

198 Compare also Cane 1997, pp. 226-237, who notes that: "[...] *the effectiveness of tort law in achieving anything is constrained by its basic nature and structure as a set of ethical rules and principles of personal responsibility. This means that if we try to use tort law for some purpose unrelated to ideas of personal responsibility, it is bound to be more or less ineffective in achieving that purpose*" (p. 231).

theory and in practice. Its performance will to a large extent be dependent on its inherent nature; at the same time, however, this nature is fairly susceptible to change, as it has been in the past. Inherent limitations may be overcome to some extent by reconsideration, qualification, adaptation and/or gradual reinterpretation of tort law's constituent elements and/or of the accompanying factors that shape civil procedure. Legislators, through the introduction of new or the adaptation of existing legislation where necessary, civil courts, through the socially responsive interpretation of legislation and case law, and the general public, through the pursuit of novel tort claims, all have a potential role to play in this respect.

Furthermore, any appraisal of the way in which the tort system performs any of the societal functions that are ascribed to it should be made against the background of the question as to whether there are alternatives that may better fulfil this role. As is evidenced by the continued widespread and even growing use of the tort system, the fact that the reason for its existence and its ability to effectively perform any of the societal functions that are ascribed to it are contentious does not mean that it is not a popular recourse for private actors seeking to address and/or obtain redress for the damaging consequences of infringements on their rights and interests by the activities of other private actors. At the same time, in areas where particular policy objectives cannot, fully, adequately or at all, be realised via alternative legal or non-legal public routes, policymakers are also looking to the tort system as a way of furthering those objectives, be it general ones such as dispute resolution and encouraging or coercing compliance with the law, or more specific ones, such as protecting private rights and interests that are particularly vulnerable to infringements as a result of particular activities by others.

Arguably, even besides the particular value which the tort system may have with respect to particular private and/or public issues that may need to be resolved, part of the appeal of Western society tort systems arguably lies in their versatility, in the fact that they are able to incorporate and perform, however imperfectly, different societal functions at the same time and as such contribute to the societal good at various levels with each single judgment that is rendered. At the same time, the tort system's open structure and standard-based nature leave considerable room for courts' judicial discretion in reaching the most just solution in each individual case brought before them – regardless of whether 'justice' in this sense is interpreted as the promotion of interpersonal morality or of social utility and/or whether their focus in administering such justice should be on correction of the harm done or on a fair societal distribution of the burdens and benefits of risky activities. Those particular features also make the tort system uniquely suitable to deal with societal change, not only in the sense of responding to new risks associated with technological progress, but also in the sense of incorporating changing moral norms and societal conventions. After all, the tort system's open nature enables courts dealing with tort cases to rely for their judgments in individual cases on a variety of relevant legal and societal norms and as such to give voice to the prevailing morals and/or give effect to

intended policies while at the same time remaining neutral in principle with respect to the particular subject matter at issue. This inherent neutrality is reinforced by the fact that, due to the traditional separation of powers, courts in most Western societies operate independently from the legislature and/or the executive and are – at least in theory – relatively immune to socio-political pressure.

Aside from these general virtues of the tort system, its particular (combination of) features may make it pre-eminently suitable for dealing with particular issues that may arise in particular contexts. As is clear from what has been discussed in this study so far, the contemporary socio-legal trend towards foreign direct liability cases is evidence of the fact that, despite the difficulties inherent in bringing this type of transnational tort-based civil liability claim, there is a strong incentive for host country plaintiffs and those supporting and/or representing them to turn to tort law in order to address and seek redress for harm suffered by them as a result of the transnational activities of internationally operating business enterprises. This shows that the tort system in general and Western society home country systems of tort law in particular have a role to play in resolving the issues raised in these cases, which are ultimately issues of international corporate social responsibility and accountability, partly because other avenues for so doing are typically closed off in this particular context, or even more cumbersome or less likely to succeed than the pursuit of civil claims before home country courts against (the parent companies of) the multinational corporations involved. At the same time, the contemporary socio-political pressure on home country governments to take regulatory action with respect to the transnational activities of 'their' internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability seems to be inexorably leading them, partly for lack of better regulatory alternatives, to the field of private law and that of tort law in particular. Consequently, it seems clear that also from a policy perspective the tort system has a role to play in this context.

The next questions that arise, however, are what particular role or roles the tort system is asked to play in addressing issues that arise in the context of international corporate social responsibility and accountability, and how well it is equipped to do so. It is these particular questions that will be discussed in the next section.

9.3 The potential role(s) of tort law in promoting international corporate social responsibility and accountability

9.3.1 A trio of roles

Considering what has been discussed here and in the previous chapters, it seems that there are three main roles that Western society tort systems are currently being asked to play in addressing, resolving and/or preventing issues of international corporate social

responsibility and accountability. These three roles include a role in providing remedies to those who have suffered harm as a result of the transnational activities of internationally operating business enterprises, a role in creating a measure of transparency on the adverse impacts that those activities may have on people and planet around the world, and a role in providing the corporate actors involved with behavioural incentives so as to prevent unnecessary harm from being caused. Whether and to what extent Western society tort systems are equipped to fulfil any of these roles separately is a matter for discussion however.

In this section, a main overview will be provided of the possibilities offered by tort law with respect to each of these roles, along with a discussion of the main structural limitations that are inherent in the contemporary structure and perception of the societal role of these systems, also in view of existing alternatives. In the next chapter, the general framework set out here will be further discussed with a focus on the particular limitations that may arise in the context of international corporate social responsibility in general and foreign direct liability cases particularly. It should be noted in this respect that, in line with the nature and aims of this study, the objective here is to provide an initial exploration of some of the potential roles that Western society tort systems may play in this context that seem to be particularly relevant at this point.[199]

9.3.2 Remedies

First of all, Western society tort systems are currently asked to play a role in this respect by providing remedies to those who have suffered harm as a result of the transnational activities of internationally operating business enterprises. As discussed before, the UN 'Protect, Respect and Remedy' policy framework on business and human rights emphasizes the importance of adequate access to effective remedies for victims of business-related human rights abuse. According to the framework, remedies provided in this context should be aimed at counteracting or making good any human rights harms that have occurred and may take the form of "[...] *apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions* [...], *as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition*". States under their duty to protect human rights must take appropriate steps to ensure that those affected by business-related human rights abuse have access to effective remedies, through judicial and/or non-judicial grievance mechanisms. When it comes to domestic judicial mechanisms, states should ensure that existing legal, procedural and practical barriers that may lead to a denial of

199 A full assessment of the effectiveness of the tort system in fulfilling any of these roles also in comparison with legal and non-legal alternatives goes beyond the scope of this study and may be a bit premature still, considering the limited amount of knowledge and experience that is available on the issues arising and the functioning of the tort system more generally in this context.

access to remedies for victims of business-related human rights abuse are reduced and that new barriers are not created.[200]

As has been discussed, however, host country citizens suffering harm as a result of the adverse impacts of the transnational activities of internationally operating business enterprises on people and planet locally are for various reasons experiencing difficulties in addressing and obtaining redress for their detriment. Particularly in developing host countries and emerging economies and especially in failed states, the degree of regulatory protection of people- and planet-related interests may be poor due to the fact that regulatory standards in subject matter areas such as the environment, human rights, health and safety and labour are very low and/or not (properly) enforced in practice.[201] Due to lower levels of development, corruption, poor governance structures and/or weak rule of law, local authorities are often unable or unwilling to adequately address infringements of people- and planet-related interests of local citizens as a result of local business practices by internationally operating business enterprises and/or their associates. At the same time, in some cases matters are complicated even further for the victims because of the fact that the local authorities are not only turning a blind eye to business-related infringements of their rights and interests, but are also themselves involved in causing them. Other issues may arise for example where recourse against the locally operating subsidiaries, business partners and/or sub-contractors is problematic, for instance because they do not exist anymore or because of solvency issues.[202]

It is this range of issues that citizens from developing host countries, emerging economies or failed states may run into when seeking remedies for harm caused to them by the transnational activities of internationally operating business enterprises that give rise to the socio-legal trend towards foreign direct liability cases. Through these cases, the role that host country systems of tort law may play is to provide host country victims of harm caused to people- and planet-related interests as a result of the transnational activities of internationally operating business enterprises with effective remedies. According to the UN policy framework on business and human rights, home countries have a special duty in this respect, at least when it comes to business-related human rights abuse, to make sure that legal barriers do not prevent host country plaintiffs who face a denial of justice in their own country from accessing home country courts, provided of course their claims have merit.[203] As discussed, it is likely that this duty for home countries extends over many situations of harm to people- and planet-related host country interests caused by 'their' internationally operating business enterprises, as the majority of these situations may be

200 UNHRC Report (Ruggie) 2011, principles 25 and 26, pp. 22-24.

201 The previously mentioned UNEP Report 2011, pertaining to environmental pollution in the Ogoniland region of the Niger delta as a result of oil operations there, for example, finds that the regulatory requirements set by the Nigerian government with respect to the local oil and gas sector are inadequate, as is the monitoring and enforcement of compliance with those requirements. See further the Introduction to Part I.

202 See further sub-sections 1.2.3, 3.2.3 and 7.2.3.

203 UNHRC Report (Ruggie) 2011, principle 26, p. 23.

said to involve violations of human rights in the broad reading of the policy framework on this point.[204] At the same time, even where Western society home countries cannot be said to be under such a duty on the basis of norms of public international law, they are under increasing socio-political pressure to take action in this respect, as is also exemplified by contemporary developments in the fields of international corporate social responsibility and accountability and global business regulation.[205]

Possibilities

As discussed, there is a strong focus on compensation and on victims' rights and interests in Western society systems of tort law today, a focus that has been intensified by a general tendency in those societies towards socialized loss-bearing and a growing prevalence of liability insurance. With respect to various activities that in themselves are beneficial to society but that also involve serious risks of harm to private interests, strict(er) forms of liability have been introduced. These are generally intended to make sure that the price of those socially beneficial yet risky activities is paid by those benefiting from those activities and/or best able to assess and control their risks or distribute their costs, rather than by a few unfortunate individuals. In effect, these developments have led to a higher risk of liability especially for business enterprises, which after all in their capacity as employers, principals, producers, owners of production facilities, managers of potentially hazardous production processes, holders of potentially hazardous substances, etc., are often the ones benefiting from potentially risky activities and the ones best placed to assess and control the risks involved and/or to spread their resultant societal costs. At the same time, in line with the increasing standards of welfare in Western societies, damages awards, both for material and also for non-material damage, are on the increase, although especially outside the US there is a general tendency to keep this increase within certain limits for fear of fostering a US-style claim culture that may paralyse societal interactions and economic development.[206]

As has been discussed, monetary compensation for damage suffered by one private party as a result of the acts or omissions of another, or of events or situations that are somehow within the control or sphere of influence of the other, is (still) generally seen as the core function of Western society tort systems. Due to the central role that the fault principle continues to play in these systems, however, a legal obligation to compensate another's damage in principle only arises where it can be said to be a result of the tortfeasor's intentional or negligent conduct, that is, conduct that falls below the applicable standard of socially acceptable behaviour (or due care). Where such a legal obligation is assumed to exist (the evidentiary burden in this respect in principle lies with the plaintiff), the starting point in determining the amount of compensation to be paid by the tortfeasor is that it

204 See further sub-section 7.3.4.
205 See further sections 7.1 and 7.3 as well as sub-sections 1.2.4 and 8.3.1.
206 Compare, for instance: Hartlief 2009, pp. 4-5. See also further section 4.5 and sub-sections 1.3.2 and 8.3.2.

should put the victim in the position he would have been in but for the tort; compensable harm includes both material and non-material damage.[207]

In some tort systems, especially the Anglo-American common law tort systems, the possibility of claiming punitive or exemplary damages, the aim of which is not to repair the harm caused but rather to punish the tortfeasor and/or to deter him and others like him from engaging in similarly objectionable conduct in the future, still exists. In most other systems, however, this remnant of the tort system's historically retributive nature has been abandoned. As well as or instead of monetary compensation, most Western society tort systems allow those who have suffered detriment as a result of the tortious act or omission of another to claim alternative (non-monetary) forms of relief. Mandatory, prohibitive or *quia timet* injunctions may be requested in order to prevent further or future harm; this type of remedy may be of particular use where harm has been (or is threatened to be) caused to another's rights and/or interests that does not lead to material damage for which compensation can be claimed. Other types of remedy that may generally be claimed include for instance disgorgement of profits and declaratory relief, in the sense of a judgment declaring the rights, duties, or obligations of the parties involved in the tort dispute.[208]

All in all, it seems that Western society systems of tort law potentially offer host country citizens whose people- and planet-related interests have been detrimentally affected by the local business operations of internationally operating business enterprises and/or their local subsidiaries, business partners or sub-contractors, ample opportunities for seeking remedies for the different types of harm that have been caused. And indeed, arguably in line with what has been referred to here as their public interest nature, foreign direct liability claims do tend to make use of the full range of possibilities in this respect, typically requesting the home country courts involved to provide a wide variety of financial and non-financial remedies. Some of these are aimed at retrospectively putting right the wrongs that have been caused, others are aimed more at preventing further wrongs.[209]

In the Dutch Shell cases, for example, the relief sought by the home country plaintiffs includes declaratory judgments holding that both the Shell group's parent company and its Nigerian subsidiary have acted unlawfully and as such are liable for the damage caused to the Nigerian farmers and the local environment, as well as injunctions ordering defendants to repair or bring up to standard the oil pipelines and wellheads involved, to clean up the contaminated areas properly, to exercise diligence and adhere to best practice in future operations in the affected areas and to adopt effective contingency plans in order to limit the risks and consequences of future oil spills. In the US Apartheid litigation, the various forms of relief sought by the various groups of plaintiffs include, *inter alia*, monetary

207 See further sub-section 4.5.3 and *supra* sub-section 9.2.2.
208 See further sub-sections 4.5.3 and 9.2.2.
209 See further sub-section 3.2.3.

relief in the form of compensatory and punitive damages, the creation of a trust fund and restitution and disgorgement of all monies that could be linked to aiding, conspiring with, or benefiting from South Africa under the apartheid regime, equitable relief in the form of the appointment of an independent international historical commission, the creation of affirmative action and educational programmes and production by defendants of documents related to their activities in South Africa during the time of apartheid, and injunctive relief preventing the defendant multinationals from destroying, transferring or modifying such documents.[210]

Due to the fact that only very few judgments on the merits have so far been rendered in these cases and even fewer judgments on the merits have been rendered in favour of the plaintiffs, it remains difficult to tell whether and to what extent Western society home country courts are willing to grant reasonable and practicable requests for remedies made in this respect by host country plaintiffs.[211] What is clear, however, is that Western society systems of tort law do in theory offer a wide range of possibilities for remedies for host country citizens suffering harm as a result of the adverse impacts of the transnational activities of internationally operating business enterprises on people and planet locally. In fact, they may, although to varying degrees, provide and/or contribute to virtually all of the remedies mentioned in the UN policy framework on business and human rights and as such play an important role when it comes to the duty of Western home countries to provide effective remedies for victims of business-related human rights abuse both at home and abroad, as well as for victims of other types of people- and planet-related harm caused by the transnational activities of 'their' internationally operating business enterprises. At the same time, however, Western society tort systems cannot be said to be a cure-all in this respect, as their potential role in providing remedies does have some structural limitations that are connected to its particular nature, historical development and contemporary role in society, when compared as well with other potential judicial or non-judicial grievance systems that may exist in this respect.

Structural limitations and alternatives

The first limitation is that Western society tort systems are primarily aimed at and equipped for providing monetary compensation for losses that have a monetary equivalent, although as discussed there is room in most systems for claiming compensation for non-material harm. Still, the primary remedy to be claimed is a financial one aimed at providing financial compensation for the harm that has been caused, in a way that is somewhat reminiscent

210 See further sub-section 3.2.2.

211 Note, however, that in the ATS-based *Curacao Drydock* case a US court awarded the plaintiffs not only $50 million in compensatory damages but also $30 million in punitive damages, which according to the court were meant to reflect the international revulsion against the human rights violations that the corporate defendant had been found to have been involved in (international human trafficking and forced labour), and to act as a deterrent against such conduct. *Licea v. Curaçao Drydock Company, Inc.*, 584 F.Supp.2d 1355 (S.D. Fla., 2008), at 1366. See further sub-section 3.3.1.

of tort law's historical role in 'buying off' the act of revenge by a pre-determined sum of money following a wrong caused by one private actor to another. In combination with the tort system's corrective nature and the accompanying principle of *restitutio in integrum* (*i.e.*, the amount of compensation paid by the tortfeasor to the victim should not exceed the actual damage suffered by the latter), this means that the amount of money that can be claimed is inherently limited. As a result, the role of Western society tort systems is still primarily a retrospective and restorative one, with a focus on financial compensation. At the same time, it should be noted that Western society tort systems in principle only come into play in cases where one's adversity can be said to be a direct result of another's actions and/or omissions, and usually only the intentional or negligent ones at that. Generally speaking, if the victim's damage cannot be said to be a result of another's fault, the burden of adversity remains to be borne by the victim, unless there are other routes outside the field of tort law through which he can (partly) shift his burden of adversity onto another or others in society. As such, the tort system's functioning as a compensation mechanism is sometimes said to compare unfavourably with alternative compensation systems, such as first party insurance, the social security system and publicly or privately financed compensation funds, due partly to the considerable costs involved, both to the plaintiffs in a tort case and to society as a whole.[212]

However, there is more to the remedial function of Western society tort systems than merely monetary compensation of financial losses that result from another's intentional or negligent omissions, and exceptions to this general framework do exist. Generally speaking, the tort system may be said to distinguish itself in this respect by its judicial nature, the fact that it is aimed at dispute resolution and the fact that despite its increasing objectivization and collectivization, liability in tort as discussed still has a strong moral connotation. At the same time, the range of remedies that can be claimed is, as is also clear from what has been discussed before, broader than mere financial compensation for harm done, but may also include for example court orders and injunctions, which are aimed at preventing future or further harm rather than 'curing' past harm, and punitive or exemplary damages (in common law systems), which are aimed at punishing tortfeasors that have engaged in particularly reprehensible behaviour and/or at deterring them and others like them from engaging in such harmful behaviour in the future. In addition, as has also been mentioned before, the tort system, contrary to most other compensation systems, does seek to provide victims with full compensation not only for their financial losses but also for a range of non-economic losses, such as pain and suffering and loss of amenity in personal injury cases and injuries to human dignity, liberty or other personal rights in other types of tort cases.[213]

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212 For a detailed discussion, see Cane 2006. See also further *supra* section 9.2

213 See *supra* section 9.2.

This means that in the context of international corporate social responsibility and accountability, Western society systems of tort law can indeed play a role in providing remedies to host country victims suffering detriment as a result of the adverse impacts of the operations of internationally operating business enterprises or of their local subsidiaries, business partners and/or sub-contractors on people and planet locally, albeit only to a limited extent and under limited circumstances. Inherent restrictions that may be particularly relevant in this context include the fact that liability in principle will arise only where the host country victims can show that their damage is a result of the intentional or negligent conduct by the internationally operating business enterprises involved, and the fact that in those tort systems that do not recognize punitive damages, the possible reprehensibility of the conduct involved will in principle not be reflected in the financial remedies provided. At the same time, tort systems are not necessarily very well equipped to deal with claims brought for harm caused to more public 'goods', in other words claims concerning, for example, harm caused to the environment that are not as easily reducible to direct infringements of individual private rights and interests.[214]

At the same time, the costs involved in bringing civil claims in general and foreign direct liability cases in particular and the likely length of the proceedings may provide important barriers for host country victims seeking to pursue remedies through Western society systems of tort law. Especially where the economic value of the rights and/or interests that have been infringed is low, the costs involved in bringing foreign direct liability claims may exceed the expected benefits, in the sense of remedies for harm done, and as such prevent the host country victims involved from claiming damages. As has been discussed before, the UN policy framework on business and human rights emphasizes the duty on states to make sure that legal, procedural and practical barriers such as these, including the costs involved in accessing judicial remedies, the difficulties the host country plaintiffs seeking to bring such cases may experience in securing legal representation and inadequate options for aggregating claims or enabling representative proceedings, do not lead to denial of access to remedy for victims of business-related human rights abuse.[215]

On the other hand, the question arises as to what extent alternative judicial and non-judicial, state-based and non-state-based grievance mechanisms exist in this context through which the host country victims involved may claim remedies for the detriment

214 Similarly: Anderson 2002, who notes that "[s]*ince tort law is geared to the protection of persons and property, it is particularly ill equipped to provide compensation where the damaged natural resources are unowned*" (p. 410, citations omitted). Interesting in this respect is a Californian lawsuit brought by natives of an Alaskan village against oil, coal and power companies for their contribution to global warming, the results of which are threatening their livelihood. See further on this case the website of the Business & Human rights Resource Centre: <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/Kivalinalawsuitreglobalwarming>. See also further on liability for climate change: Spier 2007.

215 UNHRC Report (Ruggie) 2011, principle 26, p. 23. See also further section 4.5 and sub-sections 7.3.3 and 7.3.4.

suffered by them as a result of the transnational activities of internationally operating business enterprises. The UN policy framework on business and human rights mentions a number of possible alternatives, including *inter alia* criminal actions, labour tribunals, National Contact Points under the OECD Guidelines, ombudsperson offices and government-run complaints offices. Non-state-based alternatives include, for instance, grievance mechanisms that are administered "[...] *by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group*"; according to the policy framework, under their responsibility to respect the human rights of others "[...] *business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted*" by their operations. At the same time, the framework also foresees a role for industry, multi-stakeholder and other collaborative private initiatives in the field of business and human rights (and, arguably, the field of international corporate social responsibility and accountability more generally) in making available effective grievance mechanisms.[216]

However, as is clear from what has been discussed before and as will be discussed further in the next chapter, the question may be raised as to what extent these alternatives may provide full and adequate substitutes for the role that Western society tort systems may play in providing remedies to host country victims suffering the adverse impacts of the transnational activities of internationally operating business enterprises on people and planet locally. Home country-based criminal law mechanisms could potentially play an important role in this context with their powerful sanctions that are strongly focused on the reprehensibility of the conduct in question and its perpetrator, but are generally not aimed at providing specific remedies for specific victims. Furthermore, criminal procedures are publicly initiated and serve to promote public interests, and as such may not be available to private parties seeking to vindicate their private rights and interests. At the same time, as has been discussed before, the application of domestic criminal law mechanisms to issues arising in a transnational context is likely to be severely restricted by notions of sovereignty and territoriality, with the general exception of a very limited number of international crimes.

Most of the non-judicial state-based grievance mechanisms mentioned here that host country victims may turn to in order to obtain remedies in the home countries of the internationally operating business enterprises whose operations have caused them detriment tend to lack the back-up of state-enforced legal sanctions, legal remedies and/or procedural rights and restrictions governing the authority of courts and the entitlements of the parties involved in criminal and civil cases. Accordingly, they tend to focus more on mediation and informal dispute resolution, and as such usually require the cooperation of the parties involved.[217] Still, decisions by these non-judicial state-based grievance

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216 UNHRC Report (Ruggie) 2011, principles 28-30, pp. 24-26. See also further sub-section 7.3.3.

217 See also, for example, De Bock 2011 p. 50, who notes that mediation, for example, distinguishes itself from judicial mechanisms by the fact that unlike a judicial decision mediation does not authorize the use of state

mechanisms do tend to have authoritative value and may as such effectively address (some of) the grievances of the host country plaintiffs involved. Especially where they involve 'external' (public) rather than internal proceedings, public opinion may act as a forceful big stick.

Non-state-based grievance mechanisms lack the measure of authority that tends to be inherent in state-based judicial and non-judicial mechanisms; in addition, they lack altogether the possibility of enforcing compliance by the actors involved in the issues they seek to address and/or resolve, due to states' monopoly on the use of enforcement. Still, they may offer useful and, importantly, easily accessible mechanisms of first resort for host country citizens seeking to obtain especially 'softer' remedies (apologies, restitution, rehabilitation, guarantees of non-repetition) for the detriment they have been caused as a result of the transnational activities of internationally operating business enterprises. Here as well, mediation and cooperation are key, as most of these non-state-based mechanisms are discretionary in the sense that the corporate actors involved have a choice as to whether or not to participate in them. Again, however, public relations concerns may provide an important incentive for participation and cooperation.

As is also recognized by the UN policy framework on business and human rights, effectiveness issues may arise with respect to all of the grievance mechanisms mentioned here, but especially with respect to non-judicial grievance mechanisms, whether state-based or non-state-based, partly due to their often more informal nature. In view of this, the framework lays down a number of effectiveness criteria that non-judicial grievance mechanisms should meet. These include the need for legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility and learning potential; in addition, operational-level mechanisms (*i.e.*, mechanisms that are administered by the internationally operating business enterprises involved themselves, alone or in collaboration with other companies or stakeholders) should also be based on engagement and dialogue.[218] In the end, it will be interesting to see whether and to what extent any existing or future non-judicial mechanisms may provide an adequate alternative to foreign direct liability cases when it comes to providing remedies, both of a retrospective and of a more prospective nature, to those who have suffered harm as a result of the transnational activities of internationally operating business enterprises. As a more detailed assessment of the comparative usefulness of the different mechanisms in this respect goes beyond the (explorative) scope of this study, however, this remains a matter for further research.

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force and also does not represent the exercise of state authority, and as such does not involve an element of public interest, as judicial conflict resolution does.

218 UNHRC Report (Ruggie) 2011, principle 31, pp. 26-27.

9.3.3 Transparency

Next to providing remedies, Western society tort systems are asked to play a role in addressing, resolving and/or preventing issues of international corporate social responsibility and accountability by providing a measure of transparency on the adverse impacts that the transnational activities of internationally operating business enterprises may have on people and planet around the world. As discussed, transparency on the extent to which and the way in which the transnational activities of internationally operating business enterprises are affecting people and planet in host countries, or rather the lack of such transparency, is one of the major issues in the context of international corporate social responsibility and accountability. With the help of modern media and increasingly advanced communication devices, both internationally operating business enterprises and NGOs are working hard at informing the general public, consumers, investors and policymakers in Western societies on corporate good practice and corporate misconduct in this respect. And, as has also been discussed, it is the particular field of transparency and reporting requirements in which Western society home countries are now taking their first cautious steps towards extraterritorially regulating (mostly through parent-based domestic measures with extraterritorial implications) the transnational activities of 'their' internationally operating business enterprises, with a view to promoting international corporate social responsibility and accountability. These state-based and private attempts at creating transparency in this context have been supported by a growing number of voluntary but influential transparency initiatives such as the Global Reporting Initiative, the UN Global Compact and a wide variety of fair trade and labelling schemes.[219]

However, despite the progress made in this area, it seems that there is still a lot of room for improvement. This is clearly illustrated by the UNEP's independent scientific assessment of environmental pollution in the Ogoniland region of the Niger delta caused by over 50 years of oil operations there.[220] The resulting report is unprecedented in that it provides for the first time clear and scientific proof of the extent and the seriousness of the environmental damage caused by those operations. The question may be raised, however, how it is possible that a scientific, 262-page UN report was necessary to prove something that at some level has already been known for at least two decades to anyone willing to look at it. In recognition of this, a number of NGOs in Western society home countries of internationally operating business enterprises have now started to support transnational tort-based civil liability claims being brought before home country courts against multinational corporations for the detrimental impacts of their activities, or those of their local subsidiaries, business partners and/or sub-contractors, on people and planet in host countries. In some cases, they have acted on behalf of the host country victims in these cases, or as co-defendants on behalf of the broader people- and planet-related

219 See, in more detail: Kerr, Janda & Pitts 2009, pp. 241-284. See also further sections 1.2, 7.2 and 7.3.
220 UNEP Report 2011.

interests involved, as is the case with Milieudefensie in the Dutch Shell cases. It seems that one of their aims in actively supporting and/or pursuing foreign direct liability cases is to contribute to the creation of a measure of awareness in Western society home countries of the costs for people and planet in host countries that may be coupled with the generation of profits and resultant home country societal benefits through the transnational activities of 'their' internationally operating business enterprises.[221]

Possibilities

As is clear from the discussion on the history and development of Western society systems of tort law and of their role in society today, the creation of transparency on any particular subject matter is not one of their primary functions. However, as a largely fact-based and publicly administered legal dispute resolution mechanism, one of the side effects of tort-based litigation is that the issues in dispute will inevitably make their way into the public domain, as they also do as a result of the way in which the courts involved settle those issues. The extent to which the facts presented actually provide a truthful and well-balanced account of the events, activities and interests at issue is a matter for debate however, and may also be dependent on the nature of civil procedure in the Western society home countries involved and the accompanying role of civil courts as administrators of the law, which may determine the emphasis that is put on the importance of whether a court decision is based on 'true' facts.[222]

As has been mentioned before, the US civil litigation system is adversarial in nature, and as such based on the assumption that "[...] *fair competition between the parties is the best way to achieve the just outcome of a lawsuit*". The judge plays a role as arbitrator rather than as active 'truth-finder' and thus it is "[...] *more or less the parties' task to reveal the 'truth' by their arguments, witnesses and ability to exploit the available procedural forms*".[223] One of those procedural forms is the phenomenon of US-style pre-trial discovery, which offers the parties broad possibilities to compel their opposite numbers, or others in possession of information that may be relevant to the case, to disclose this information; as such, "[i]*t provides an opportunity to uncover culpable conduct, including efforts to suppress information about risks and hazards*".[224] As is exemplified for instance by the *Unocal* case, this procedure may in foreign direct liability cases lead to the disclosure of telltale information on the corporate policies, management decisions and/or operational practices of the internationally operating business enterprises involved that would have otherwise never have become known. At the same time, the potential for 'truth finding' in

221 Compare sub-sections 3.2.2, 3.2.3 and 8.3.1.
222 For an in-depth discussion of this matter, see Verkerk 2010.
223 Magnus 2010, p. 110.
224 Magnus 2010, p. 117.

US civil procedures may be significantly affected by the fact that it may be left up to civil juries rather than courts to decide whether the alleged facts have been established.[225]

Across the Atlantic, systems of civil procedure tend to be more inquisitorial in nature, with professional and neutral courts (in most European (civil law) countries, trial by jury does not exist),[226] and there is a growing tendency towards viewing these courts as case managers that should actively pursue the truth.[227] The corollary of the more inquisitorial nature of these systems is that in comparison with the US system of civil procedure the parties themselves tend to have fewer possibilities for unearthing information. A general procedural duty to present all documents that are requested by the other party on the basis of their potential relevance to the case generally does not exist; instead, parties may under certain conditions have a right to request disclosure of documents and courts may also order disclosure where it is considered to be necessary.[228] In connection with the more inquisitorial nature of civil procedure in European systems, the idea has been raised that courts should act as active but neutral 'truth finders', and that establishing 'the truth' is or should be one of the aims of systems of civil procedure. It has been argued in this respect that since the legitimacy of any judicial decision is closely connected to whether it is based on true facts, the establishment in a civil procedure of the material truth is a core principle of civil procedural law. As such, an 'obligation towards truth' can be said to exist in civil procedural law, which requires the parties to a civil dispute to present (their view of) the facts of the case truthfully and as completely as possible; it is then up to the court, which as mentioned has an active and inquisitorial role in civil law systems and may where necessary use its investigative powers to complement the facts stated by the parties, to give, through its judicial decision, the search for truth within a civil procedure a definitive and singular nature.[229]

In the end, grounding judicial decisions as much as possible on a true account of facts is a matter of public interest as it enhances public confidence in the judiciary and also because civil procedures, although primarily concerned with disputes pertaining to the private rights and interests of private parties, are also about public interests. Firstly, as judicial procedures they have a public role in enforcing compliance with existing laws and as such realising the public policies underlying those laws. Secondly, their public role lies in the fact that justice is administered in judicial procedures by public authorities and as such represents the exercise of state power, which in turn imposes requirements of legitimacy. And thirdly, the public role of judicial procedures lies in the role of courts as developers of the law, as any court decision not only settles a conflict but also contributes to and shapes

225 Magnus 2010, p. 111. See further sub-section 4.5.1.
226 Magnus 2010, pp. 111, 116-117. See further sub-section 4.5.2
227 Compare Giesen 2010, p. 154.
228 See further sub-sections 4.5.1 and 5.5.2. See also, in more detail and from a comparative perspective: Verkerk 2010.
229 For an in-depth discussion of this matter, see De Bock 2011.

the existing law.[230] This law formation role seems particularly important in tort procedures due to the tort system's open, standard-based nature and its responsiveness to societal change, thus providing a strong rationale for the importance of a truthful account of the relevant facts in those cases.[231]

All in all, it seems that Western society tort systems do have some potential when it comes to creating a measure of transparency on the adverse impacts that the transnational activities of internationally operating business enterprises may have on people and planet around the world and on the particular legal issues that may arise in this respect. Especially in civil law countries where civil litigation systems are more inquisitorial in nature, it may be argued that courts should take an active role in ascertaining the truth, as the legitimacy of judicial decisions is considered to be closely connected to the extent to which they are able to establish the material truth with respect to the circumstances, events and issues giving rise to the dispute. In systems of civil procedure that are more adversarial in nature, such as in the US, courts play a more passive role as neutral arbiters of that which is advanced by the parties to the dispute; in addition, in the US civil litigation system it is often left up to civil juries to decide on matters of fact, as a panel of laymen is considered to be the ultimate example of neutral and passive decision making. Opinions are divided as to whether in either of these systems civil litigation actually leads and/or should be made to lead to the ascertainment of 'the truth' of the facts and events at issue; in the end, these differences of opinion may be reducible to conceptions of the state, its institutions and democracy that may fundamentally differ depending also on political ideologies.[232] Similarly, varying opinions seem to exist with respect to the question whether Western society tort systems, through the adjudication by Western society home country courts of foreign direct liability cases brought before them, may play a role in providing transparency on issues of international corporate social responsibility and accountability and the performance of (particular) internationally operating business enterprises in this respect.

The Trafigura case, which pertained to the alleged dumping of allegedly toxic waste by a ship operated by international petroleum trader Trafigura, is a good example of a foreign direct liability case that has given rise to mixed feelings in this respect. It definitively created a certain measure of transparency with respect to the Probo Koala incident and its aftermath, for instance through the disclosure of a trail of internal e-mail communications between some of Trafigura's top executives and those responsible for the Probo Koala ship that strongly suggested an awareness on the part of those involved of the potentially harmful nature of the waste, as well as a general belief that the waste should be disposed of as quickly and cheaply as possible, no matter where and no matter how, in order to

230 De Bock, pp. 47-51. See also: Giesen 2010.
231 Compare sub-sections 1.3.3 and 8.3.3.
232 See, for a more detailed discussion of this matter: Verkerk 2010, pp. 301-325.

maximize profits.[233] It should be noted, however, that the disclosure of these documents does not seem to have been realized in the course of the civil procedure itself and/or on the basis of civil procedural rules for instance on disclosure, but rather was brought about by the media. It should also be noted that over the course of the civil proceedings in this case, which caused a true media frenzy, Trafigura on multiple occasions complained of being tried by the media rather than by the courts; even the judge handling the case at some point (after a settlement between the parties had been reached) voiced his concern over the inaccuracy of media reporting on this case and on the events giving rise to it.[234] Furthermore, the fact that many foreign direct liability cases just like the Trafigura case tend to end in out-of-court settlements rather than in court judgments on the facts and issues in dispute, does not necessarily strengthen the case for the role that Western society systems of tort law may play in creating transparency on issues of international corporate social responsibility and accountability in this respect.

Still, it may be argued that the bad publicity and public condemnation resulting from this exposure of what seems to be a structural lack of concern for people and planet in a company's pursuit of profits may induce others to take more care, whether for fear of becoming the target of foreign direct liability claims and/or unwanted media attention, or whether out of a genuine concern to do better. Obviously, the potential role of Western society tort systems in addressing, resolving and/or preventing issues of international corporate social responsibility and accountability would be best served by foreign direct liability cases that actually make it to trial and to a court judgment on the subject matter of the dispute. Going even further, it may be argued that a court judgment holding an internationally operating business enterprise to account for damage caused to people and planet abroad as a result of its transnational activities, although obviously not likely to be welcomed by the corporate actor involved, may be a learning experience for others, in the sense that it may potentially provide them not only with an example of what not to do, but possibly also with some guidance as to the need and the way in which to adequately incorporate an awareness and consideration of people- and planet-related interests in their corporate policies, management decisions and operational practices.

Structural limitations and alternatives

As discussed, Western society systems of tort law may arguably play a role in addressing, resolving and/or preventing issues of international corporate social responsibility and accountability, by providing a measure of transparency on the adverse impacts that the transnational activities of internationally operating business enterprises may have on people and planet around the world. As has also been mentioned, however, this role is

233 See, with a further link to the e-mails concerned: Leigh 2009. See also further sub-section 3.2.2.

234 See the transcript of a hearing in the High Court of Justice, Queen's Bench Division before Judge MacDuff on 23 September 2009, as reproduced on the Trafigura website: <www.trafigura.com/PDF/Official%20TRANSCRIPT%20of%20MacDuff%20hearing%20of%2023.09.09%20OPEN%20SESSION.PDF>.

necessarily circumscribed by the fact that the creation of transparency on any particular subject matter is not one of the primary functions of Western society systems of tort law today. In fact, it is perhaps more of a side-effect, although as discussed there are those who maintain that the establishment in a civil procedure of the material truth is or should be a core principle of civil procedural law, and thus of tort procedures.

Some of the context-related restrictions have already been mentioned; the main one is that most foreign direct liability cases do not make it as far as trial let alone a decision on the merits of the claim. In those cases, the 'transparency' created is mostly that created by the media and by the parties themselves, who may not necessarily be relied on to provide a fair and neutral reflection of the facts and issues in dispute.[235] On the other hand, regardless of the actual merits of the public statements involved, this kind of exposure does play an important role in fuelling the contemporary debates on international corporate social responsibility and accountability in Western societies, as is evidenced for instance by the fact that it is not unusual for these cases to raise socio-political issues that may even lead to parliamentary debate. The Dutch Shell cases, for instance, in combination with a number of dubious media reports pertaining to Shell's operations in Nigeria, in January 2011 led to a parliamentary hearing in the Netherlands.[236] Similarly, the Trafigura case prompted parliamentary debate in the UK, although this debate was primarily focused on the use of so-called super-injunctions by Trafigura in order to seek to bar the British media from reporting on the case.[237]

At the same time, however, there may also be more structural restrictions on the role of Western society tort systems in providing transparency on issues of international corporate social responsibility and accountability. The first is, of course, that these cases are likely to provide transparency only on corporate worst practice and not on corporate best practice in this respect, which may create a distorted image of the performance of internationally operating business enterprises involved in those disputes and/or of the performance of internationally operating business in general. After all, although the principle of truth finding that underlies civil procedures – at least in civil litigation systems that are inquisitorial in nature – requires courts as public authorities to ascertain the material truth in the disputes brought before them, partly with a view to the public interest and their potential role as developers of the law, this obligation pertains only to those facts that are relevant to the resolution of the dispute. At the same time, truth finding in civil procedures is not an absolute concept and must be balanced against other interests, such as the interest in a speedy and efficient administration of justice and the need for

235 See, for instance, with a critical view on (Dutch) media reporting on the Probo Koala incident which gave rise to the Trafigura case: Vink 2011.

236 See, for instance: Max 2011. See also sub-sections 3.2.2 and 6.2.2.

237 See, for instance: Milmo 2010. See also sub-section 3.2.2.

confidentiality of certain information for instance with a view to privacy interests, industrial interests or state interests.[238]

Furthermore, the private law nature of civil procedures and the accompanying principle of party autonomy mean that the truth finding endeavours of courts in civil procedures are dependent in the end on the decision of private parties themselves to bring their cases before a court in the first place, as well as on the way in which those parties choose to frame those claims and the issues raised in them. Also, when it comes to providing the necessary facts and evidence, civil courts are largely dependent on the parties to the case, although they do tend to have, especially in civil litigation systems that are inquisitorial in nature, various procedural options to direct the facts and evidence presented to them, for instance by ordering on their own motion the hearing of witnesses and/or independent experts or through orders to present evidence.[239] However, as private parties in civil disputes as non-state actors do not have the investigative powers that public prosecutors have in criminal procedures, where the principle of truth finding arguably plays an even more prominent role due to the public interest character of such procedures and the seriousness of the sanctions involved, the information made available may not be as accurate and complete as in criminal litigation.[240]

This brings us to the question whether and to what extent there are alternative home country mechanisms that may be much more useful than Western society systems of tort law when it comes to addressing, resolving and/or preventing issues of international corporate social responsibility and accountability by providing a measure of transparency on the adverse impacts that the transnational activities of internationally operating business enterprises may have on people and planet around the world. Examples that come to mind are the criminal law mechanism where, with its strong connection to the public interest and the severe nature of its sanctions, establishing the truth is of overriding importance. An important task in this in this respect is assigned to the public prosecutor and the police, who are allotted far-reaching investigative powers. However, use of those powers in a transnational setting is not only costly and cumbersome but also problematic, due to the restrictions under public international law on the extraterritorial exercise of state powers (international enforcement jurisdiction).[241] Instead, home country authorities are dependent in this respect on the investigative abilities and willingness to cooperate of the host country authorities which, as is made clear for instance by the criminal case against international petroleum trader Trafigura following the Probo Koala incident, are not a given in this context.[242]

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238 See, in more detail: De Bock 2011, pp. 129-185.
239 See, in more detail: De Bock 2011, pp. 83-128.
240 See also on some limitations of the truth finding role of tort procedures: Engelhard & Van Maanen 2008, pp. 19-20 and *supra* sub-section 9.2.3.
241 See further *supra* sub-section 8.2.2.
242 See further *supra* sub-section 8.2.5.

Interesting questions also arise as to the way in which provisions in the fields of contract law and/or corporate law may be applied in this context in order to create more transparency with respect to the way certain products have been manufactured or with respect to the way companies have integrated into their corporate policies, management decisions and operational practices an awareness and consideration of the people- and planet-related impacts of their operations, respectively.[243] As discussed, especially in the field of corporate law Western society home countries are increasingly imposing parent-based home country reporting requirements with respect to the non-financial performance of foreign group companies, non-compliance with which may lead to legal sanctions.[244] Transparency requirements connected to quotation on stock exchanges around the world are another way in which transparency on the CSR performance of internationally operating business enterprises is currently being increased.[245] In addition, there is as discussed a growing range of voluntary but authoritative transparency initiatives such as the Global Reporting Initiative, the UN Global Compact and a wide variety of fair trade and labelling schemes. However, as has been discussed before, the fields of corporate law and contract law are less suited as a basis for civil procedures against multinational corporations brought by those directly affected by the harmful consequences of their transnational activities.[246] Indirectly, however, the transparency created on the basis of provisions in the fields of corporate and/or contract law may play an important role in transnational tort-based civil procedures of the type under discussion here.[247]

All in all, there are plenty of alternatives when it comes to creating transparency on the CSR performance of internationally operating business enterprises and on the impacts of their transnational activities on people and planet around the world. Nevertheless, many of these mechanisms, especially those that are voluntary in nature but even the more mandatory ones, leave internationally operating business enterprises a considerable amount of discretion when it comes to the particular issues they report on, giving them the opportunity to report in particular on their CSR-related feats but not, or only marginally, on their CSR-related failures. This is where the importance in this context of dispute resolution mechanisms becomes clear, as they deal particularly with alleged corporate abuse and/or corporate misconduct. Again, however, most of these non-judicial mechanisms lack the state-enforced legal sanctions, legal remedies and/or procedural rights and restrictions, governing the authority of the arbitrator as well as the entitlements of the parties, that are available in criminal and civil procedures, where they provide

243 Compare, for instance: Castermans 2009, pp. 20-21.

244 For a more detailed discussion of the way that annual reporting requirements under Dutch company law can provide transparency on multinational corporations' CSR practices both at home and abroad, see Lambooy 2010, pp. 147-169.

245 See further sub-sections 7.2.2 and 8.1.2.

246 See further *supra* sub-section 8.3.4.

247 Compare also Enneking, Giesen *et al.* 2011, pp. 545-546, 558.

an important back-up to the public interest-related role of establishing the truth with respect to the facts and issues in dispute. As a result, these non-judicial dispute resolution mechanisms tend to be dependent for their functioning in this context on mediation and on cooperation of the parties involved in the CSR-related dispute.

In line with this dependency on cooperation and in view of the aversion that tends to exist among internationally operating business enterprises towards public and/or media attention for their CSR failures, various of these state-based and non-state-based dispute resolution mechanisms offer the parties involved the opportunity to opt for an internal rather than an external (public) procedure. Furthermore, these mechanisms tend to be dependent on the willingness of the parties involved to cooperate and provide information.[248] Obviously, this may significantly limit the extent to which such mechanisms may serve to provide transparency on issues of international corporate social responsibility and accountability. Even though Western society systems of tort law are backed-up by state powers and so are not similarly dependent on cooperation by the parties involved in their public interest-related role of establishing the truth, systems of civil procedure are based on the principle of party autonomy, which means that the parties may decide to withdraw their case and settle their dispute out of court. In this sense, the truth-finding and transparency-creating function of these systems is strongly dependent not only on the endeavours of the parties in initiating the claim and substantiating it with evidence, but also on their willingness to follow through until the court reaches a judgment on the merits of the claim. In this sense, the prevalence of out-of-court settlements in foreign direct liability cases, which often involve undisclosed settlement agreements, actually counteracts the potential role that Western society tort systems may play in creating transparency on the CSR performance of internationally operating business enterprises and on the impacts of their transnational activities on people and planet around the world. Here again, a more detailed assessment of the comparative usefulness of the different mechanisms that are available in this respect goes beyond the (explorative) scope of this study and remains an interesting matter for further research.

9.3.4 Regulation

As has been discussed in detail in the preceding chapters, Western society tort systems are also currently asked to play a role in addressing, resolving and especially preventing issues of international corporate social responsibility and accountability by prospectively providing internationally operating business enterprises with behavioural incentives to integrate into their corporate policies, management decisions and operational practices

248 This is true also for instance for the complaints procedure of the Netherlands National Contact Point where alleged violations of the OECD Guidelines for Multinational Enterprises can be reported. See the website of the Dutch NCP for more information: <www.oecdguidelines.nl/ncp/filing-complaints/>.

an awareness and consideration of the impacts that their transnational activities may have on people and planet around the world, so as to prevent such detrimental impacts from arising in the first place. Contemporary debates on international corporate social responsibility and accountability are resulting in increasing pressure on internationally operating business enterprises to adopt socially responsible business practices in their global operations by internalizing awareness and consideration of local private third party and public interests that lie within their sphere of influence and by preventing, addressing and where necessary redressing any adverse consequences that their operations may have on those interests. At the same time, however, there is a growing recognition of the fact that there are not only corporate leaders in the CSR context but also corporate rogues and corporate laggards that may require more compulsion than that which is offered by the combination of market mechanisms, self-regulation, private CSR initiatives and societal pressure exercised by shareholders, consumers, the general public and the media in Western societies. Accordingly, pressure is increasing on states in general and on the Western society home countries of those internationally operating business enterprises in particular, to take measures that actively promote socially responsible business practices by 'their' internationally operating business enterprises and to make sure that those companies account for or are held accountable for any adverse impacts that their operations may have on people and planet in host countries.[249] This development is confirmed by the UN 'Protect, Respect and Remedy' policy framework on business and human rights, which suggests that states should set out clear expectations that internationally operating business enterprises operating out of their territory and/or jurisdiction respect human rights abroad, and requires home countries to actively prevent and/or address gross human rights violations perpetrated by 'their' internationally operating business enterprises in conflict-affected areas.[250]

These developments have given rise to a growing interest in ways in which the law may be used to regulate the behaviour of these internationally operating business enterprises, both at home and abroad, with a view to promoting international corporate social responsibility and accountability.[251] As is clear from the scholarly discourse on global governance, adequate regulatory answers to the challenge of global business regulation that has arisen over the past decades with the rise of globalisation and the accompanying increase in power, influence and impacts of internationally operating business enterprises around the world, are highly necessary but also in short supply.[252] Three closely interrelated challenges faced by state-based regulation in this respect are those of extraterritoriality, the need to establish a link between the regulating state and the foreign actors and/or

249 See further sections 1.2 and 7.3.

250 Compare, for instance, UNHRC Report (Ruggie) 2011, principle 2, p. 7 and principle 7, pp. 10-11. See further sub-sections 7.3.3 and 7.3.4.

251 See, on the interplay between the notion of international corporate social responsibility and accountability and the law more generally: *supra* section 7.2.2.

252 See further section 1.1.

activities abroad that are sought to be regulated, and the possibilities for regulatory evasion by the internationally operating business enterprises that are the regulatory addressees.[253] Despite these challenges, however, state-based regulation and in particular home country regulation of the transnational activities of internationally operating business enterprises remains the main and arguably the strongest contemporary option in this respect, considering the even larger challenges involved in coming to comprehensive and meaningful international regimes on CSR-related issues and the limitations inherent in private (non-state-based) regulatory mechanisms.[254]

The contemporary socio-legal trend towards foreign direct liability cases raises the question whether and to what extent home country judicial mechanisms in general and home country civil litigation in particular may play a role in this respect especially where corporate rogues and corporate laggards are concerned, partly with a view to providing a more level playing field for those internationally operating business enterprises that are actively seeking to operate in a socially responsible manner both at home and abroad. It may be argued that the judicial enforcement by home country courts of existing CSR-related international or domestic regulatory standards may provide internationally operating business enterprises with behavioural incentives to minimize the detrimental impacts of their business operations on people and planet in host countries by integrating into their corporate policies, management decisions and business practices an awareness and consideration of the interests of their host country stakeholders in this respect. Furthermore, the potential regulatory role of home country civil litigation in this respect may also be said to extend to their potential for monitoring the compliance with existing standards, which is obviously closely connected to their enforcement role. Finally, home country civil litigation may also have potential when it comes to standard-setting, as civil courts, through their lawmaking powers, may create new behavioural standards for internationally operating business enterprises where existing rules and regulations do not apply or are not adequate at addressing the CSR-related subject matters at issue and where societal norms so require.[255]

In light of this potential regulatory role of home country judicial mechanisms in general and home country civil litigation in particular, the question arises as to what possibilities Western society tort systems, as part of the broader field of private law, offer in this respect, in light of their structural limitations and the available regulatory alternatives.

Possibilities

As has been discussed, legal regulation is generally thought of as a matter of public law, which involves the control and direction by the state and its agents of societal actors and activities through the imposition by the government of rules and standards of conduct

253 See further section 8.2.
254 Similarly, for example: Zerk 2006, pp. 300-304; Muchlinski 2007, p. 84. See also further sub-section 8.1.4.
255 See further section 8.3.

and the public monitoring and enforcement of compliance with them, with the aim of realising public interests, public values and public policies.[256] The field of private law, by contrast, is traditionally thought to be concerned with the interrelationships between private actors and their private rights and interests, and is strongly based on the autonomy of the private actors involved to carry out their activities and interrelate with others as they see fit. Nonetheless, the field of private law is also closely connected to the state and the public interest, as it does set certain boundaries to the freedom of private parties to pursue their private interests and as it relies on state-based judicial mechanisms such as civil procedure to resolve the disputes that may arise between private actors where their private rights and interests collide. As is clear from what has been discussed before, such judicial mechanisms are not only about the vindication of private rights and interests, but also serve the public interest in various ways. They have a role in realising the public policies that underlie the field of private law and/or other fields of law through the enforcement of compliance with existing laws. Furthermore, the administration of justice in judicial procedures brought before state courts represents an exercise of state power, which involves certain entitlements but also certain duties. And lastly, the role that courts play in shaping the law as it exists, of developing it in the course of the settlement of disputes that are brought before them, also may be seen as a public role that is inherent to judicial mechanisms, even those that are concerned with settling private disputes.[257]

However, as has been discussed in detail in Chapter 8, the distinction between public law and private law, if it ever really existed, is becoming increasingly blurred. Closely connected to this is a growing interest in the prospects for protecting and realising public interests, public values and public policy aims through private law, reflecting a move away from the common understanding of private law as the law concerned with the market system and private interests rather than with the collectivist system and public interests.[258] There is a tendency to view private law from an instrumentalist perspective, as a tool or a resource that can be used to achieve ends or objectives that go beyond the field of private law itself. This is also evidenced by the contemporary focus not only in the US but increasingly also in European societies on private law enforcement, in the sense that the monitoring and enforcement of compliance with existing regulatory standards is left to private actors who may address non-compliance with those standards by other private actors through civil procedures (often tort procedures).[259] These developments, as discussed, have paved the way for the more general notion of private law regulation, which builds on the instrumentalist idea that private law in general and private law litigation in particular provide private actors with certain behavioural incentives, and recognizes that as such private law may be actively deployed to get those private actors to behave in what

256 Compare Van Boom 2007, p. 419; Ogus 1994, pp. 1-54. See further sub-section 8.3.2.
257 Compare De Bock, pp. 47-51. See further sub-sections 8.3.2 and 8.3.3.
258 See, for instance: Wagner 2006; Wightman 1999, pp. 253-276; Collins 1999.
259 Compare, for example, Cane 2002b, pp. 309-312; Cane 2002c, p. 430. See further sub-section 8.3.2.

is considered to be a socially desirable manner, particularly through deterrence of socially undesirable behaviour.[260] Accordingly, in view of some of the inherent characteristics of systems of private law and in view of the relative dearth of adequate regulatory alternatives, I have argued that private law regulation has an important role to play at present in the context of global business regulation in general and of home country regulation of 'their' internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability, in particular.[261]

As is clear from the discussion in this chapter on the historical development, structure and contemporary role of Western society tort systems, the tendency towards instrumentalization of private law has also affected the way in which especially legal scholars but to some extent also legislators, courts and legal subjects are viewing tort law in these societies, although more so in some societies than in others. There is an increasing focus on the way in which domestic systems of tort law may act as instruments for intervening in and changing society with a view to protecting and realising particular public interests, public values and public policy aims and promoting the public good more in general through the regulation of the behaviour of societal actors. In theory, this regulatory role of Western society tort systems requires courts to dissociate themselves to some extent from the retrospective context of any particular tort case brought before them as well as from the private parties and the private interests involved. This enables them to set, monitor and enforce behavioural standards with respect to the particular subject matter at issue that provide not only the parties involved in the dispute but also societal actors like them with incentives to act with due care and to avoid engaging in socially undesirable behaviour in the future.[262]

The general idea is that by being obliged to compensate damage after a harmful event that is caused by him, a tortfeasor and others like him are encouraged "[...] *to act with the appropriate level of care before the event in order to prevent the event from happening*". It has been suggested that especially when it comes to 'repeat players' such as business actors which repeatedly engage in the same types of risky behaviour, tort law may have a function in deterring unsafe, careless and/or socially unacceptable behaviour among (certain types of) potential tortfeasors.[263] Its deterrent function may be direct/specific where injunctive remedies are sought in order to prevent the occurrence of impending harm as a result of particular activities, but it may also be more indirect/general where a finding of liability and the accompanying obligation on the tortfeasor to pay damages in a particular case provide regulatory incentives to the tortfeasor himself and/or to others similarly placed

260 See, for instance: Wagner 2006. See further sub-section 8.3.3.
261 See further sub-section 8.3.4.
262 See further *supra* sections 9.1 and 9.2. The tendency to advocate the use of tort law as a mechanism for behaviour modification is particularly prevalent in the US; see, for example, Cane 2002b, p. 305.
263 Van Boom 2006b.

to live up to the applicable behavioural standards when engaging in similar types of risky behaviour in the future.[264] To the extent that it can be said that this deterrent function discourages, in a systematic way, particular types of harmful behaviour for instance by corporate actors, the tort system may be said to fulfil the same function as regulation.[265]

As has been discussed in detail in Chapter 8 with respect to the more general field of private law, this regulatory role of tort law may, just like public law regulation, be said to boil down to three regulatory roles for courts involved in tort proceedings: standard-setting, monitoring and enforcement. On the one hand, through their lawmaking powers, courts may play a role in setting behavioural standards by retrospectively applying societal norms to a particular line of conduct and by passing judgment on whether that conduct was or was not up to standards of due care and socially acceptable behaviour. The standards set in this way typically do not generally prescribe or prohibit particular types of conduct, nor do they prescribe particular outcomes. Instead, the regulatory standards that may be deduced from civil courts' judgments in individual tort cases are likely to state a particular regulatory goal, such as 'reasonable conduct' or 'due care' by a particular type of actor in a particular situation, without precisely specifying the way in which that goal may be reached. As such, they leave those seeking to live up to the standards set out in this way considerable freedom in finding ways in which to comply with the standard by organizing their activities in such a way as to prevent them from detrimentally impacting the legally protected interests of others. In practice, this may limit the infringement that is made on the freedom to act of the potential regulatory addressees, while at the same time motivating them to comply with the spirit of the law rather than merely with the letter.[266]

On the other hand, courts involved in tort proceedings may play a role in monitoring compliance with and enforcing existing behavioural standards. These behavioural standards may be 'internal' to the field of tort law where they have been pre-set by the legislature (for instance in the case of strict liability) or by the courts through prior judgments. The behavioural standards may also be 'external' to the field of tort law, where the tort system is used as a mechanism to enforce, for instance, domestic public law standards or international legal standards.[267] In all cases, the potential regulatory role of Western society tort systems is closely connected to the willingness and/or ability of tort victims to pursue tort claims for the harm caused to them, in line with the fact that civil procedures are typically privately initiated by the parties whose rights and/or interests have been infringed as a result of the harmful actions or omissions of the alleged tortfeasors. In the more instrumental perceptions of the tort system, the remedies these wronged parties may claim through tort litigation are primarily meant to motivate them

264 Compare Cane 2002b, p. 317.
265 See, for instance: Shuman 1993.
266 Compare, for instance: Wagner 2006, pp. 436-441; Cane 2002b, pp. 313-315. See further sub-section 8.3.3.
267 Compare, for instance: Cane 2002b, pp. 309-319, and with a focus on contract law Collins 1999, pp. 62-65. See further sub-section 8.3.3.

to use their right to initiate claims against the perpetrators and by doing so to provide the tort system a chance to play its regulatory role.[268]

All in all, it seems that Western society tort systems do have potential when it comes to prospectively providing internationally operating business enterprises with behavioural incentives to integrate into their corporate policies, management decisions and operational practices an awareness and consideration of the impacts that their transnational activities may have on people and planet around the world, so as to prevent such detrimental impacts from arising in the first place. Intuitively, it seems likely that the threat of being held civilly liable before Western society home country courts (and, potentially, sentenced to pay Western society levels of damages) may deter internationally operating business enterprises from intentionally or negligently allowing their transnational activities or the operations of their local subsidiaries, business partners and/or sub-contractors to cause harm to people and planet in host countries. After all, a finding of liability will not only result in an obligation to pay damages to the host country victims for harm suffered, but will also force the corporate defendant to foot the bill for the true societal costs of the harmful activity involved, and provide incentives for other business actors engaging in such activities to take adequate precautions.[269]

Obviously, especially where corporate rogues and corporate laggards are concerned, this deterrent effect is likely to go only as far as the chance of actually being faced with foreign direct liability claims and/or of actually being held liable. This means that this potential regulatory role is strongly dependent on the legal, procedural and practical barriers that may exist with respect to the ability of host country plaintiffs to pursue this type of transnational tort-based civil claim before Western society home country courts.[270] After all, this type of regulation through civil litigation can only function properly where host country citizens suffering the detrimental impacts of the local operations of internationally operating business enterprises and/or their local subsidiaries, business partners and/or sub-contractors are willing, able and motivated to bring foreign direct liability claims before Western society home country courts against those corporate actors. As has been discussed in the previous part, the feasibility of bringing such claims is dependent basically on four factors, namely: jurisdiction of the home country courts involved; the applicable law; the legal basis upon which those claims may be brought; and the procedural and practical circumstances in the home countries where those claims are instigated. As has already been discussed to some extent and as will be further elaborated in the discussion on this part, the regulatory role that Western society tort systems may play in the context of international corporate social responsibility and accountability is strongly dependent on the system of tort law on the basis of which these types of

268 See further sub-section 8.3.4.
269 See also Anderson 2002, p. 408.
270 Compare also Anderson 2002.

transnational tort-based civil cases are decided, and thus on the applicable rules on choice of law. At present, the tort choice-of-law rules that are likely to be applicable to foreign direct liability cases brought before European home country courts are likely to be less conducive in this respect than their American counterparts.[271]

Nonetheless, Western society systems of tort law and home country civil courts may potentially have an important public role in the context of international corporate social responsibility and accountability. On the one hand, this role consists in ensuring compliance by internationally operating business enterprises with existing international and/or domestic legal standards that seek to regulate their transnational activities with a view to protecting people and planet in host countries and/or around the world. On the other hand, this role consists in creating new legal standards where the regulatory framework that is applicable to those internationally operating business actors and their activities leaves gaps. As discussed, it is the regulatory gaps in the contemporary system of global business regulation that are often seen as the main cause of today's issues of international corporate social responsibility and accountability, issues that are particularly pressing when it comes to the operations of internationally operating business enterprises in developing host countries, emerging economies and/or failed states where the levels of protection of people and planet are generally low.[272] Especially in that particular context, the regulatory potential of Western society tort systems provides home countries seeking to regulate the transnational activities of 'their' internationally operating business enterprises with an important policy tool.

Structural limitations and alternatives

In practice, however, this instrumental view of the tort system as a regulatory mechanism is controversial, as it is fundamentally at odds with the more traditional idea of tort law as a "[...] *system of rules and principles for interpersonal harm done and suffered*".[273] This idea is strongly connected to the still lingering notion of tort law as a system of interpersonal morality aimed at retrospectively correcting the status quo between two private parties that has been disrupted by the harmful event in dispute.[274] At the same time, controversy also exists over the potential that Western society systems of tort law actually have when it comes to adequately regulating the behaviour of any particular group of regulatory addressees with respect to any particular subject matter area. It is important to stress in this respect that although it is generally accepted that private law may under certain circumstances undeniably have regulatory effects on corporate behaviour, there seems to be insufficient evidence available, especially outside the US, to prove that those effects are sufficiently widespread, pervasive and structural to be able to speak of an actual regulatory

271 See further section 4.3.
272 See further sub-sections 1.2.3, 3.2.3 and 7.2.3.
273 Cane 2002b, p. 315.
274 Compare, for instance: Cane 1997, pp. 205-238. See further *supra* sub-sections 9.2.2 and 9.2.3.

role for Western society tort systems in this respect, rather than of coincidental behavioural side-effects of the way in which these systems perform their actual functions in society.[275]

Arguably, there are a number of fundamental weaknesses that are likely to limit the regulatory capacity of private law in general and that of Western society tort systems more specifically.[276] With respect to standard-setting, these include, *inter alia*, the subordinate role of the interests of third parties that are not involved in the civil dispute through which standards are set, the need for harm as a precondition for tort law's ability to play its standard-setting role, and tort law's difficulties in setting standards that are sufficiently specific to provide its regulatory addressees with effective behavioural guidance. In this respect, it is noted that court decisions in tort cases often merely determine that particular behaviour was below standard, ignoring what kind of behaviour would be considered to be lawful under the behavioural standard involved.[277] With respect to monitoring and enforcement, the tort system's dependence on whether the private actors that are to monitor and enforce behavioural standards through private law have the capacity and resources to actually do so, the potential difficulties for them in detecting and proving that a behavioural standard has been violated, and the limited availability of remedies that may provide private law's regulatory addressees with adequate behavioural incentives are clearly potential drawbacks.[278]

In addition, civil courts can also be said to have certain shortcomings when it comes to their functioning as private law regulators, especially where their democratic legitimacy, political responsiveness, technical expertise and institutional capacity are concerned. In this sense, there are a number of inherent restraints when it comes to regulation through litigation before civil courts that may limit especially the potential enforcement role of tort law:

> "*Courts lack important information on other cases and on the effects of their judgements on third parties. Civil courts are not specialised in particular fields of the law but instead they are equipped to judge individual cases of varying nature. Courts cannot choose the cases that are put to them (although most jurisdictions do have some sort of mechanism to refuse unimportant cases).* [...] *most civil courts have not been set up to shift between policy goals and to prioritise. Moreover, courts do not have a feedback system that allows them to respond to calls from society; this is worrying in the sense that contract and tort law are operationalized largely through court decisions but there is no institutional mechanism for measuring quality or 'customer satisfaction'*".[279]

275 Compare, for instance: Cane 2002c, p. 458; Van Boom 2006b.
276 See generally, for example, with a focus on the enforcement role of tort law (and contract law): Van Boom 2006a.
277 Compare, for instance: Cane 2002b, pp. 314-315.
278 Compare, for instance: Collins 1999, pp. 69-93. See also, critically: Cane 2002b.
279 Van Boom 2006a, p. 47 (citations omitted).

In the end, courts may not be particularly adept at and/or adequately equipped for handling the complex and contested factual and sometimes scientific information that they need to evaluate in order to determine whether or not the alleged tortfeasor has performed his activities in compliance with existing behavioural standards.[280] Furthermore, especially when it comes to their role of monitoring and enforcing compliance with existing regulatory standards, civil courts are limited in the sense that they are reliant not on public policing resources, but on the efforts and capacities of private individuals to bring civil claims for the harm they have suffered as a result. It has been noted in this respect that "[o]*n the whole, tort law does not address risks as such or provide* [monitoring or] *enforcement resources to potential victims*".[281] Instead, the remedies that may be claimed by the tort victims will in theory have to be sufficient in providing them with both an incentive and a reward for reporting breaches with behavioural standards, in order to allow those standards to be enforced by the courts. As has been discussed before, however, it remains to be seen whether this is always the case, considering also that tort procedures are notoriously slow and costly for those involved.[282]

Especially where it comes to Western society tort systems' potential regulatory role in the context of international corporate social responsibility and accountability, the cost factor may prohibit host country victims from turning to home country courts in order to address instances of corporate misconduct resulting in harm to people and planet locally. This means that any attempt by Western society home countries to pursue public policies with respect to the adverse impacts in this respect of the transnational activities of 'their' internationally operating business enterprises through this type of transnational tort-based civil litigation, will have to take account of factors limiting the ability of host country plaintiffs to pursue their claims. As has been noted, the UN 'Protect, Respect and Remedy' policy framework on business and human rights mentions a number of particular legal, procedural and practical impediments that may exist with respect to the ability of victims of business-related human rights abuse to get access to remedies; most of those impediments are also likely to restrict the regulatory role of tort law in this particular context.[283]

At the same time, the question may be raised whether the threat of being exposed to liability and the resulting obligation to compensate the harm suffered by host country victims are sufficient in themselves to motivate the corporate defendants and corporate actors like them to take better care in the future. After all, especially where corporate rogues and corporate laggards are concerned, the decision to adopt better standards so as to prevent harm to people and planet from being caused as a result of their operations is

280 Similarly: Cane 2002b, p. 317.
281 Cane 2002b, p. 316.
282 Similarly, for instance: Anderson 2002, p. 409-410.
283 UNHRC Report (Ruggie) 2011, principles 25 and 26, pp. 22-24.

likely to involve a cost-benefit analysis between the risk of being held liable and the expected costs that this may ensue, and the costs involved in taking precautionary measures so as to prevent such harm from arising in the first place. In the particular transnational, North-South context of issues of international corporate social responsibility and accountability where, despite the contemporary socio-legal trend towards foreign direct liability cases, the risk of being held liable in this respect is arguably low, behavioural incentives for these corporate actors to adopt socially responsible business practices not only at home but also abroad may be insufficient.[284] Further problems may arise in this respect where it is possible for the corporate actors involved to insure themselves against the risk of being held liable in this context, as this may render the internationally operating business enterprises judgment-proof. At least when it comes to personal injuries negligently caused in Western societies, it has been noted that "[l]*iability insurance policies still cover most of the personal injury cases involving repeat player corporate tortfeasors*".[285] Whether such insurance coverage also exists for the liability risks that may ensue from the detrimental impacts on people and planet that may be caused in the course of the transnational activities of internationally operating business enterprises is an interesting question that unfortunately cannot be answered here.

At the same time, the prevalence of out-of-court settlements may also thwart the potential role of Western society tort systems in providing behavioural incentives in this context. It has been noted in this respect that:

> "[...] *it is often suggested that one of the reasons why corporate defendants sometimes settle tort claims (and require claimants to keep the terms of the settlement secret) is precisely in order to avoid 'the creation of a precedent' or, in other words, the establishment of a tort standard relevant to the conduct of the defendant's commercial activities. The consensual settlement of a tort claim may be seen as a way of counteracting the behaviour-modification potential of tort law* [...]".[286]

However, as has also been mentioned with respect to the recent settlement in the case brought by the Bodo community against Shell, these settlements may induce more host country victims to pursue foreign direct liability claims against (parent companies of) multinational corporations whose activities have caused them harm. This may in turn provide the business actors that are the potential targets of such claims with behavioural incentives to prevent further harm from being caused to people and planet abroad.

All in all, it is by no means obvious that home country systems of private law would be ideally placed for or ideally suited to regulating the behaviour of internationally

284 See, for instance, with a focus on environmental liability: Faure 2009, pp. 141-142.
285 Van Boom 2006b.
286 Cane 2002b, p. 319.

operating business enterprises. Still, as has become obvious from what has been discussed throughout this chapter, the continued existence of significant regulatory gaps in the field of global business regulation makes clear that there are no ideal solutions in this context and that second-best options will need to be resorted to if regulatory objectives such as the promotion of international corporate social responsibility and accountability are to be pursued successfully and if global issues such as global inequality, population growth, climate change, depletion of resources, poverty, disease, environmental degradation and conflict are to be addressed in the short to medium term. After all, conclusive regulatory alternatives that adequately address the issues at stake have so far failed to materialize in this complex and comprehensive regulatory context, as a result of domestic or international socio-political disagreement and/or states' regulatory unwillingness or incapacity.

As discussed, international behavioural standards directly addressing internationally operating business enterprises, especially mandatory ones, are very limited in number and tend to remain dependent for their implementation and enforcement on the ability and willingness of individual states to do so. As is evidenced by the socio-legal trend towards foreign direct liability cases in general and by ATS-based foreign direct liability cases in particular, it will often take Western society home country systems of tort law to enforce/ensure compliance with such standards by internationally operating business enterprises when it comes to the adverse impacts of their operations in developing host countries.[287] Furthermore, domestic home country-based regulatory alternatives, such as for instance public law command-and-control regulatory standards and criminal law procedures, tend to play a very limited role in this context partly in view of the challenges posed to such standards by the transnational context of issues of global business regulation and international corporate social responsibility and accountability. Similarly, non-state-based behavioural standards set out in private regulatory regimes are also challenged in various ways and in the end also tend to remain dependent for their legal enforcement, where applicable, on domestic systems of private law in general and tort law in particular.[288]

At the same time, the increasing interest in and use of the regulatory capacity of private law not only in the US but also more recently within the EU seems to reflect a growing willingness on the side of policymakers in Western societies to apply private law regulatory measures for instance to prevent unfair business practices or to promote consumer protection. This suggests that a more structural and deliberate application of private law's regulatory potential also in a transboundary context such as that of international corporate social responsibility and accountability is a very real possibility. As is clear from what has been discussed here, however, as well as from what has been discussed in the previous part on the feasibility of foreign direct liability claims, for home country systems of tort law to be able to play a regulatory role in this context a number of adjustments may need to be

287 For more detail, see chapter 3.
288 See further section 8.2.

made. After all, the question may be raised whether existing legal, procedural and practical barriers to feasibly bringing foreign direct liability claims in fact lead to under-deterrence (*i.e.*, insufficient behavioural incentives for the corporate actors involved to change their behaviour). At the same time, the application of Western society systems of tort law in this way in this particular transnational context of international business regulation with a view to promoting international corporate social responsibility and accountability may require a contemporary review of some traditional notions in legal fields such as public international law, private international law, corporate law and tort law.[289]

With respect to the potential regulatory role that Western society private law systems may play more in general in a domestic context, it has been noted that these systems increasingly seem to be developing the capacity to remedy the inherent weaknesses that restrict their regulatory capacities.[290] Various suggestions have been made for possible alterations to Western society tort systems so as to improve their performance as regulatory mechanisms; as a more detailed discussion of all the options that may exist in this respect and their comparative merits goes beyond the scope of this study, only a number of the suggestions for improvement that have been made will be briefly mentioned here. These include for instance the expansion and reinforcement of the role that group and representative actions may have in this respect, especially those with an *ex ante* perspective, and a remodelling of injunctive and declaratory relief. Another suggestion is to rethink the role of civil courts particularly for instance where it comes to:

> "[...] *declaratory judgments and their* ex ante *role in regulating corporate behaviour. In this respect, courts should be challenged to render judgements that surpass the concrete case at hand and that guide future behaviour instead of merely playing the role of condemning past behaviour*".[291]

Finally, another factor that is often mentioned is the possibility that is available for example in common law systems in the US and, to a more limited extent, in the UK for victims of particularly reprehensible misconduct especially by corporate actors to claim punitive or exemplary damages. Arguably, the possibility of being faced with foreign direct liability claims involving a request both for compensatory damages and also for punitive and/or exemplary damages may be a strong deterrent for internationally operating business enterprises to take matters of international corporate social responsibility and accountability seriously. After all, especially in the US the amounts of punitive damages that may be claimed and awarded may be very substantial, due to the fact that these types of damages awards are meant to reflect the reprehensibility of the behaviour in dispute and in a very direct manner realizing more public interest-related objectives such as punishment,

289 See further sub-section 10.2.
290 Collins 1999, pp. 56-93.
291 See, in more detail: Van Boom 2006a (quote p. 50).

retribution and deterrence. Although in most European countries it is not possible for tort victims to claim such punitive and/or exemplary damages, there is ongoing debate over whether the introduction of these types of damages should not be considered, particularly with a view to enhancing the enforcement potential of Western society systems of tort law. It should be noted in this respect that even the European Commission has suggested in the past that aggravated damages should be made available in the field of competition law with a view to strengthening private enforcement in this field.[292] One of the suggestions made is the introduction of particular types of post-facto incentive damages that would exceed the actual loss suffered by the victims and would be aimed at specific deterrence, while at the same time sidestepping some of the drawbacks of US-style punitive damages as they may lead to over-deterrence. A related suggestion that may be considered in this respect is to enable and/or promote claims for disgorgement of profits, "[e]*specially in areas where the calculation of damages is difficult but detriment as such is nevertheless plausible*".[293]

9.4 Concluding remarks

In this chapter, the role that Western society systems of tort law may play in promoting international corporate social responsibility and accountability has been further explored.

From its origins as a mechanism of private retribution tort law has, over the past 2000 or more years in response to changing societal needs and demands, developed into a publicly enforceable system of rules on personal responsibility through which one's freedom to act is balanced against another's right to be protected from the harmful consequences of such acts. Today, there is an increasing tendency to look at the field of tort law from a more instrumental point of view and see it as a mechanism for enforcing societal norms and regulating the behaviour of societal actors.

The contemporary socio-legal trend towards foreign direct liability cases and its broader socio-political context raise the question as to what role Western society tort systems may play in promoting international corporate social responsibility and accountability. In this chapter, three particular functions have been distinguished that the field of tort law, considering contemporary needs and developments, may be asked to fulfil and be capable of fulfilling in this context. These are: the provision of remedies for host country victims who have suffered harm as a result of the transnational activities of multinational corporations; the creation of a measure of transparency on the impacts of such activities on people and planet around the world; and the generation of behavioural incentives for

292 See Commission of the European Communities Green Paper, 'Damages actions for breach of the EC antitrust rules', COM(2005) 672 final (19 December 2005), as well as, more moderately, Commission of the European Communities White Paper, 'Damages actions for breach of the EC antitrust rules', COM(2008) 165 final (2 April 2008).

293 See, for instance: Van Boom 2006a, pp. 35-37, 50.

internationally operating business enterprises to operate in a socially responsible manner both at home and abroad.

With respect to each of these functions, the field of tort law offers possibilities but, due to its intrinsic dynamics, also presents structural limitations. In view however of the limited number of alternatives that are available to fulfil any of these functions, let alone all three of them, it seems that Western society tort systems provide an indispensable second-best option in this respect.

In the next chapter, the findings of this chapter as well as of the preceding two chapters will be further discussed.

10 Discussion

10.1 Foreign direct liability cases in a broader societal context

10.1.1 Seeking protection of people- and planet-related interests abroad

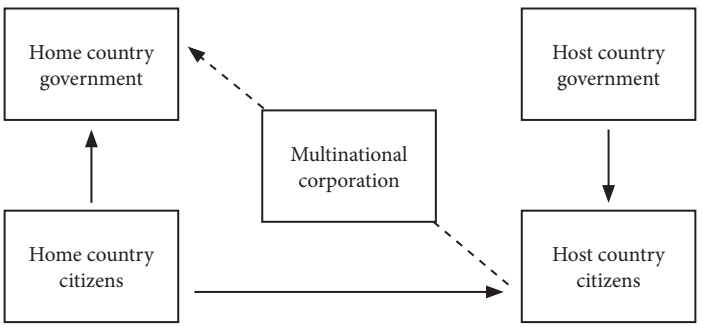

Figure 6. Seeking protection of people- and planet-related interests abroad

As has been discussed throughout this study, over the past decade-and-a-half a socio-legal trend towards foreign direct liability cases has manifested itself in Western societies around the world. So far, a considerable number of these cases have been brought against (parent companies of) multinational corporations before civil courts in various Western societies, and more claims are expected to be brought in the (near) future.[1] In part II of this study, the rise of this type of transnational tort-based civil litigation has been discussed, as well as its legal aspects. Truly understanding this trend, however, including the issues giving rise to it and the broader socio-political and legal issues that are raised by it, requires putting it into its broader societal context; this is exactly what this third part has sought to do. Accordingly, the socio-legal trend towards foreign direct liability cases has been placed into the context of the contemporary socio-political debates in Western societies on international corporate social responsibility and accountability. In these debates, one of the main questions raised is whether the law and home country legal systems in particular can and should play a role in regulating internationally operating business enterprises and their transnational activities, with a view to protecting people and planet in host countries.

The perceived need for such regulatory interference by home countries with respect to the transnational activities of 'their' internationally operating business enterprises is connected to the growing numbers, size and influence of business actors around the world

1 See further section 3.3.

and the increasingly pervasive and widespread impacts that their operations may have on people and planet around the world. In combination with a general tendency over past decades towards liberalization, deregulation, privatization and free trade, which has seen governments around the world taking a step back and leaving business regulation as much as possible to free market processes, this is causing a shift in perception especially in Western societies as to the responsibilities of corporate actors towards society. Increasingly, they are expected to take into consideration the potential impacts of their corporate activities on the people- and planet-related interests of a growing range of stakeholders, even where existing regulatory standards do not compel them to do so.

This is especially relevant where it comes to internationally operating business enterprises and the activities they undertake, or have undertaken by their local subsidiaries, business partners and/or sub-contractors, in host countries where regulatory protection of people and planet locally is very limited in practice. After all, especially in developing countries, emerging economies and failed states, local authorities may be unwilling to impose and/or enforce adequate regulatory standards in subject matter areas such as human rights, the environment, health and safety and labour standards, or even incapable of doing so. However, although there are plenty of examples of internationally operating business enterprises seeking to apply good or best practice in this type of operational context, there are also examples of indifference and/or corporate malpractice leading to substantial harm to people and planet in the host countries involved. In many cases in which business-related harm is caused to people- and planet-related interests in the course of operations undertaken in 'permissive' regulatory environments, local remedial mechanisms are also likely to prove inadequate.[2]

It is in this particular context that the host country victims involved may turn to home country civil courts to seek redress for the harm caused. Their aims in doing so often go beyond merely obtaining financial compensation for the material and non-material damage allegedly suffered as a result of the multinational corporations' harmful practices, although this does tend to be the primary motivation behind the pursuit of foreign direct liability claims. Additional motivations may include a desire to expose the corporate abuses which have been perpetrated and as such create a measure of international transparency, publicity and/or awareness with respect to local corporate practices in the host countries involved and their potentially harmful consequences. A closely related motivation may be the hope of preventing further or future damage, either through specific court orders prohibiting certain activities or mandating specific behaviour or, more generally, by providing the multinational corporations involved with powerful incentives to abstain from further behaviour that may have a negative impact on the interests of the citizens of the host countries involved. Other, more supplementary aims pursued through this type

2 Compare UNHRC Report (Ruggie) 2008, p. 3. See further sub-sections 1.2.3, 3.2.3 and 7.2.3.

of litigation by the host country victims may include punishment of the multinational corporations involved for their wrongful behaviour, as well as the obtainment of a measure of justice, atonement and/or satisfaction.

Thus, from the perspective of the host country plaintiffs the pursuit of this type of transnational tort-based civil litigation primarily represents a way of indirectly acquiring a measure of (*ex post facto*) protection for their people- and planet-related interests from home country governments, through the judicial system, that exceeds the level of protection provided by their own governments. Being affected by the adverse consequences of multinational corporations' local activities, which are in some cases conducted in cooperation with host country state actors, and faced with poor prospects for having those consequences adequately addressed and redressed locally by host country legislative, administrative or judicial intervention, these plaintiffs take matters into their own hands by bringing foreign direct liability claims before home country courts. They turn to home countries to have home country courts administer justice through civil proceedings with respect to the private relationships between them and the multinational corporations whose activities affect them, where possible on the basis of home country systems of tort law. This enables them to benefit to some extent from the higher level of protection that is typically granted to people- and planet-related private third party and public interests in the home country legal system.[3]

The plaintiffs in these cases are often assisted practically and/or financially by home country public interest organisations that are dedicated to defending host country and/or international environmental, labour or human rights interests. In addition, many of these cases involve representative actions by NGOs on behalf of groups of host country plaintiffs, and/or claims where these organizations join the plaintiffs on behalf of more public interests such as the environment. Furthermore, the public interest organisations involved sometimes also act as plaintiffs' legal representatives; in the US, in particular, with its strong tradition of public interest litigation, this is not unusual. This assistance from home country public interest organisations is generally essential in foreign direct liability cases. After all, these cases are typically drawn-out, costly affairs that involve not only complex legal issues but also complex practical and organizational issues, due to their transboundary nature, the fact that they generally involve larger groups of victims, and the difficulties associated with fact-finding in developing host countries that are often in a state of political and socio-economic disorganization.[4]

Through the involvement of these public interest organizations as well as through the involvement of an increasing number of law firms specializing in this type of litigation, a growing, increasingly transparent and coherent body of knowledge and legal and practical expertise on foreign direct liability cases is slowly developing in various Western

3 See, more elaborately, section 3.2.
4 See further section 3.2.

societies.[5] Most importantly, however, it is also because of these organizations that the societal stakes of these cases are raised, as publicity is generated for the societal causes that are sought to be furthered and/or as the interests for which protection is sought through these cases are broadened beyond the private interests of the host country plaintiffs who bring them. Through the involvement of these public interest organisations, the objectives sought to be achieved through these cases are connected to more general policy objectives such as environmental protection, respect for human rights, the improvement of health and safety and/or labour standards, and the promotion of international corporate social responsibility and accountability more generally. As such, these foreign direct liability cases are presented as a potential way of changing corporate cultures in this respect by motivating internationally operating business enterprises to incorporate into their corporate policies, management decisions and operational practices an awareness and consideration of the potentially adverse impacts of their operations on people and planet in host countries.

The efforts of public interest organisations in this respect seem to have been reinforced by the UN 'Protect, Respect and Remedy' policy framework on business and human rights that has been drawn up and promulgated over the past few years. This policy framework has made clear that states have a duty under international human rights law to protect against business-related (and other types of) human rights abuse within their territory and/or jurisdiction, including by providing judicial remedies to the victims of such abuse. This duty also involves states addressing existing legal, procedural and practical barriers that may lead to a denial of justice in this respect for the victims involved, and refraining from creating new ones. A particular duty is said to exist for the home countries of the internationally operating business enterprises involved to address legal barriers that may prevent legitimate cases involving business-related human rights abuse from being addressed where the host country plaintiffs "[...] *face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim*".[6]

Obviously, this conclusion is highly significant for host country plaintiffs seeking to bring human rights-related foreign direct liability claims before home country courts, as it puts beyond doubt that if their claims may *prima facie* be considered to have merit and if it is clear that justice cannot be done with respect to those claims in the host countries

5 Some of these public interest organizations, such as the US-based Earthrights International, <www.earthrights.org/>, the Center for Constitutional Rights, <http://ccrjustice.org/>, and International Rights Advocates <www.iradvocates.org/>, have by now become specialists in bringing these kinds of lawsuits. Law firms specialized in bringing these cases in the US include, *inter alia*, Schonbrun DeSimon Seplow Harris & Hoffman LLP, <www.sdshh.com/>, and Hausfeld LLP, <www.hausfeldllp.com/>, whose chairman, Michael Hausfeld, is a household name in this context (he was previously associated with Cohen Millstein Hausfeld & Toll PLLC, now Cohen Millstein Sellers & Toll PLLC, <www.cmht.com/home.php>). In the UK, the law firm Leigh Day & Co, <www.leighday.co.uk/> is well-known for representing plaintiffs in these kinds of cases.

6 UNHRC Report (Ruggie) 2011, principles 1, 25 and 26, pp. 6-7, 22-24.

involved, the governments of the home countries involved are obliged to make sure that they have access to home country courts. After all, as has been discussed before, these cases are typically brought before home country courts in view of often insurmountable difficulties faced in the host countries involved when it comes to addressing and/or obtaining redress for adverse human rights-related impacts of the local activities of the defendant multinational corporations and/or their locally incorporated subsidiaries, business partners or sub-contractors. Difficulties in obtaining justice locally that are typically faced by the host country plaintiffs in these cases are often connected to the difficulties in bringing their claims before local courts in the first place, due to lack of funds and expertise, as well as to the unwillingness and/or inability of local courts to adequately address issues of this nature that are brought before them. This unwillingness may be a result of local corruption and/or of the fact that the dispute may be politically charged, for instance where local state actors have been involved in the human rights abuses in dispute or where they seek to shelter the multinational corporations involved from liability with a view to protecting local economic interests. The inability to adequately administer justice may be connected to weak rule of law locally, including a lack of institutional capacity to adequately deal with the legal issues that may arise in this respect. Another reason that the host country plaintiffs involved may not be able to obtain effective remedies in the host countries involved for their human rights-related detriment is because the corporate perpetrators are in many cases hard to reach due to their ability to hide behind the corporate veil, shut up shop, relocate to other jurisdictions and/or shift assets outside the reach of local court judgments, something that may be particularly attractive in cases potentially involving large amounts of damages.[7]

Dispute may exist of course over what particular circumstances may be said to amount to a denial of justice for the host country plaintiffs in their own countries. Still, it seems clear on the basis of the UN policy framework that home state governments have a duty under international human rights law to give host country plaintiffs access to home country courts, when those plaintiffs are seeking to bring foreign direct liability claims against home country-based internationally operating business enterprises for their involvement in human rights abuses perpetrated in the course of or in furtherance of their business operations in host countries (or those of their local subsidiaries, business partners and/or sub-contractors). Gaining access to home country courts should not merely be a theoretical option but a practical reality, which means that Western society home countries will have to address the existing legal, practical and procedural barriers that may keep the host country plaintiffs involved from bringing their foreign direct liability cases before home country courts. When it comes to claims brought before European home country courts,

7 See further sub-sections 1.2.3, 3.2.3 and 7.2.3.

note should also be taken of the requirements with respect to a practical and effective access to court that result from Article 6 ECHR.[8]

As is clear from what has been discussed with respect to the feasibility of foreign direct liability cases under the legal status quo in both the US and in European countries, it seems that there is considerable room for improvement here. As mentioned, the UN policy framework on business and human rights points out a number of specific problem areas in this respect, including the costs of bringing claims, difficulties in securing legal representation and the possible lack of options for aggregating claims or enabling representative proceedings.[9] This means that the framework in effect obliges Western society home country policymakers to address existing legal, procedural and practical barriers to legitimate foreign direct liability claims brought before their courts; it will be interesting to see to what extent this obligation will effectively lead to a change in the legal status quo in those countries where it comes to the feasibility for host country plaintiffs to bring foreign direct liability claims against home country-based internationally operating business enterprises.

10.1.2 Defending entrepreneurial freedom at home

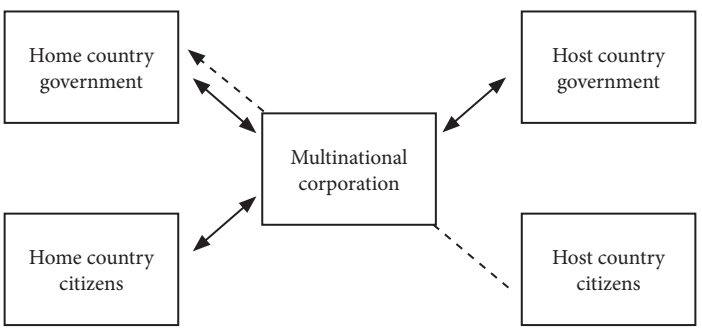

Figure 7. Defending entrepreneurial freedom at home

In the end, probably the most fundamental problem posed to the defendant multinational corporations by these foreign direct liability cases is the fact that they are confronted with a tangle of conflicting demands made by different actors. Through these cases, multinational corporations run the risk of *ex post facto* incurring liabilities for their activities abroad even where local rules have strictly been complied with, and so these liabilities may therefore be difficult to anticipate. The main issue faced by multinational corporations in this

8 Compare Enneking 2009, pp. 919-921. See further sub-section 4.5.3.
9 UNHRC Report (Ruggie) 2011, principle 26, pp. 23-24. See further sub-sections 7.3.3 and 7.3.4.

respect is the increasing variety of societal demands from an increasingly diverse group of stakeholders as to the behavioural standards adopted in their transnational operations.

At one end of the expectational spectrum, there is pressure from their shareholders/investors to maximize profits. After all, multinational corporations just like other corporate actors exist in the end by the grace of their investors, to whom they have a duty to yield optimal returns, although it is questionable whether that optimum should be determined by the shorter term interests of shareholders only or also take into consideration the longer term interests of a broader group of stakeholders. Obviously, one of the main ways of realizing optimal returns is by attracting customers (in the case of business-to-consumer production) or buyers (in the case of business-to-business production) through competitive price levels, which can be maintained by keeping down production costs. As has been discussed, the principal reason for exporting production processes in whole or in part to host countries is the fact that the costs of producing there are lower than they are elsewhere, which is often connected with the relatively lower levels of welfare and accompanying less demanding regulatory standards on matters such as labour, health and safety, human rights and the environment in these host countries.[10]

At the other end of the expectational spectrum, there is increasing societal pressure from the general public, NGOs and policymakers especially in Western society on multinational corporations' home countries to go beyond local rule compliance and adopt consistent best practice with respect to certain private third party and public interests in their transnational activities. It is from these societies that calls emanate for more socially responsible behaviour by internationally operating business enterprises, both at home and abroad. These calls grow stronger every time that host country plaintiffs seek to hold a multinational corporation accountable for the adverse consequences of their overseas activities. In response to these calls, policymakers are starting to come up with policy measures aimed at ensuring international corporate social responsibility and accountability. Furthermore, press coverage in these Western society home countries of perceived corporate malpractice abroad has the potential to severely tarnish corporate images, something that is highly undesirable since it is these societies where these multinational corporations tend to have their main markets as well as their main sources of investment capital, highly educated personnel, knowledge and innovation.[11]

In the end, one way or another, the increasing demands with respect to the way in which business enterprises, whether operating internationally or domestically, conduct their business affairs are likely to lead to higher prices and/or lower returns. After all, where it is no longer acceptable for those costs to be externalized, they will have to be internalized and may thus raise production costs. A valid issue that may be raised in this respect, therefore, is to what extent stakeholders in developed Western societies are actually willing to pay higher prices for their products (in the case of buyers/consumers)

10 See further sections 1.1 and 7.1.
11 See further sections 1.1, 1.2 and 7.3.

and/or accept lower returns on their investments (in the case of investors) for the sake of protecting people and planet in particular host countries or around the world against the potential adverse consequences of multinational corporations' transnational activities.[12] Where such willingness does not exist, Western society-based multinational corporations are bound to suffer significant competitive disadvantages vis-à-vis other, less restricted business enterprises that are based elsewhere. An argument often advanced in this respect is that there will always be multinational corporations operating out of other, less demanding home countries willing to 'do the dirty work' instead, which are likely to pay even less heed to the broader interests potentially affected by their operations abroad.[13]

As a result of the proliferation of foreign direct liability cases, multinational corporations find their entrepreneurial freedom increasingly threatened, that is to say, their freedom to set up, conduct and manage their international activities as they see fit as long as they stay within the confines of locally enforced regulatory standards. They face a number of particular challenges in this respect that are all connected to the risk of being held liable and the nature, origins and content of the legal standards upon which such liability may be based, as well as the direct and indirect consequences of such (potential) liabilities. Most importantly, these cases introduce a measure of legal uncertainty with respect to the behavioural standards that multinational corporations should adhere to when operating abroad, as the companies involved are confronted with the risk of being held liable for violating behavioural standards that go beyond those imposed and enforced locally in the host countries where the activities take place. Home country courts may be more willing and/or able than host country courts to enforce host country standards, or may judge the local business practices involved according to international or home country standards that are more demanding than the standards that apply in the host country. The resulting legal uncertainty may force multinational corporations to adopt higher behavioural standards with respect to their host country activities than those strictly required locally, so as to avoid the risk of being held liable for not doing so. As discussed, this is likely to raise production costs and affect bottom lines, with direct results for product prices, competitiveness and investor returns.

Related to this is the fact that in these cases multinational corporations' parent companies are held accountable for the harmful effects of activities that they generally do not consider themselves responsible for, since the responsibility for the way in which those activities are carried out lies primarily with local subsidiaries and/or business partners.

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12 Compare Dine 2005, pp. 1-40.

13 See, for instance, Brief for the National Foreign Trade Council *et al.* as *Amici Curiae* in Support of Petitioner (23 January 2004), 2004 WL 162760 (US), in which it is stated (pp. 12-13): "*Abusive ATS litigation ultimately deters investment by the very companies that are most likely to adhere to high standards of responsible conduct in their operations. U.S. companies are among the most exemplary global corporate citizens, but they can be driven out of the countries that could most benefit from their example and the economic advantages their presence brings.*" (citations omitted).

This is an unusual situation, as on the basis of the principles of separate legal personality and limited liability that lie at the heart of modern corporate and group law, parent companies are considered to be separate legal entities within their corporate groups that in principle cannot be held liable for the debts of the companies they have invested in beyond the amount of their investment, nor for any actions undertaken by those subsidiaries. As a rule, it is only in very exceptional circumstances that the veil separating parent companies from their subsidiaries is pierced, leading to the liability of the parent company for the debts of the subsidiary.[14] The same is true outside the group context; one entity or actor will normally not lightly (that is without a firm legal basis) be held liable for the actions of another.

The fact that many of these cases revolve around the alleged liability of the parent companies of the multinational corporations involved for their alleged contributing to, stimulating, condoning or simply not intervening in the harmful activities engaged in by others (subsidiaries, local business partners, host country state actors) means that they do not constitute cases of piercing the corporate veil. However, depending on the circumstances, they may create a certain tension with traditional corporate law notions of separate legal personality and limited liability. This is especially the case where it is sought to hold parent companies liable not for their active involvement in the harmful activities, but rather for their failure to step in and make sure that the group's operations abroad are conducted with due care for local people- and planet-related interests. Such tension may also arise where the fault requirement in this respect is replaced by stricter forms of liability, meaning that the parent company is not held liable anymore for a lack of care in conducting its activities that results in harm, but rather for the harmful consequences of the multinational corporation's activities regardless of the moral quality of its own behaviour.[15] The increasing expectations under the Ruggie framework that internationally operating business enterprises must inform themselves, through due diligence procedures, of the practices of local subsidiaries, business partners and/or sub-contractors, plays an important role in this respect.[16] At the same time, there are some who suggest that the envelope should be pushed even further by introducing strict parent company liability and/or multinational enterprise liability in this context, ideas that pose even bigger challenges to fundamental notions of separate legal personality and limited liability.[17] As such, this type of transnational tort-based civil litigation tends to explore the boundaries between the fields of corporate law and tort law.[18]

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14 See further sub-section 4.4.3.
15 See further sub-section 6.4.2.
16 See further sub-sections 7.3.3 and 7.3.4.
17 Compare, for instance: ECCJ Report (Gregor) 2010; Dearborn 2009.
18 Compare Enneking, Giesen *et al.* 2011, pp. 546-551. See further sub-section 4.4.3.

A further complicating factor in this respect is the retrospective nature of the tort system in general, which means that the possible liability of the multinational corporations involved is only established *ex post facto*, after the allegedly wrongful behaviour has taken place. The time span between allegedly wrongful behaviour and the ensuing liability claim may be especially wide in cases pertaining to so-called historical injustices, in which the corporate defendants involved are held liable for wrongful conduct engaged in by foreign subsidiaries or business partners long after it has taken place. This may make it very difficult for the multinational corporations involved to anticipate the potential legal and financial consequences of their behaviour at any point in time and to control the risks involved. This is especially true when considering the potentially large groups of host country individuals that may come forward and claim compensation for the damage allegedly suffered as a result of the multinational corporations' past actions or inactions, as is exemplified for instance by the Apartheid litigation.

In addition, even where foreign direct liability cases do not involve historical injustices, they do represent a highly novel type of litigation, on which there is a dearth of authoritative precedent at present. This means that for those multinational corporations that are targeted by foreign direct liability claims, the legal and/or financial risks involved will be difficult to gauge. Many legal issues in this context remain to be clarified, such as questions pertaining to multinational parent companies' duties of care vis-à-vis host country third parties, the (in)violability of the corporate veil in this respect, the circumstances under which a corporation can be held liable for another's acts or omissions, and the nature and origins of the standards that may be applied to assess the legal admissibility of the multinational corporations' activities abroad. Furthermore, next to these legal risks, another important risk factor in this respect is that of the reputational damage that may potentially ensue from being targeted by foreign direct liability claims. This reputational risk is especially relevant for those multinational corporations producing consumer goods for Western society markets, as it may affect market share and diminish sales. More generally, however, reputational damage may lead to reduced shareholder confidence, lower stock prices and difficulties in attracting capital, loans and employees.

In the end, the proliferation of foreign direct liability cases presents multinational corporations with increasing legal insecurity with respect to the legal and thus financial risks involved in their activities abroad, partly considering the potentially harmful effects that these may have on corporate image and thus on public relations with investors, consumers and (potential) employees. All these risk factors for multinational corporations that are associated with foreign direct liability cases and their broader socio-political context are likely to have contributed to the relatively high out-of-court settlement rate of those cases that have made it past the initial procedural stages, preventing a public hearing. These out-of-court settlements also inhibit further clarity and authoritative and binding judicial settlement of the legal issues typically raised in these cases and as

such themselves have the – intended or unintended – effect of perpetuating the state of legal uncertainty in this respect. At the same time, taking out insurance against that risk becomes more problematic and thus costly, not only as the risks involved become larger but also as they become more difficult to gauge and/or to control or manage in other ways. Thus, even multinational corporations that have not (yet) actually become the target of foreign direct liability claims may need to take costly anticipatory measures that restrict their entrepreneurial freedom and may affect both their competitiveness and their bottom lines.

Accordingly, the contemporary socio-legal trend towards foreign direct liability cases involves the risk, especially for high profile multinational corporations, of weakening their competitive positions vis-à-vis companies that are less likely to be targeted by such claims, for instance because they are less visible, because they operate out of home countries where it is legally or practically not feasible to bring such claims, because they are somehow better able to distance themselves from local operators, or because they only operate locally in the host country. This may create incentives for the multinational corporations involved to lobby their home country governments to create a level playing field preferably in cooperation with as many other home (and/or host) countries as possible. It may also, however, motivate them to seek to evade liability in this context. This may potentially be achieved by relocating to another home country where the risks of being targeted by foreign direct liability claims are smaller, for instance because the legal, procedural and/or practical circumstances for bringing such claims there may be less favourable.

However, with the contemporary socio-legal trend towards this type of transnational tort-based civil litigation spreading to more Western society home countries the number of home countries where multinational corporations may consider themselves to be immune from such claims is fast decreasing. This is reinforced to some extent by the emphasis of the UN 'Protect, Respect and Remedy' policy framework on business and human rights on the duties of states in general to provide remedies for business-related human rights abuse perpetrated by corporate actors operating out of their territory and/or jurisdiction, and of home countries in particular where victims of such abuse do not have access to remedies in the host countries involved. It should be noted, however, that even though this policy framework may contribute to the creation of a level playing field in the long run, its semi-legal (and non-binding) nature at this point still leaves states a wide measure of discretion as to how to dispose of their duties in this respect.[19]

On the other hand, the risk of being held liable for harm caused to people and planet abroad may motivate internationally operating business enterprises to adopt consistent best practice, as a preventive measure, with respect to their overseas operations. An interesting question that has been raised in this respect is whether compliance by those corporate actors with their responsibilities under the UN policy framework may provide

19 See further sub-sections 7.3.3 and 7.3.4.

a defence against civil liability.[20] Of course, compliance with the UN policy framework does not in itself guarantee exemption from liability in such matters, partly in light of the deliberately open and semi-legal nature of the corporate responsibilities laid down in this policy framework, and of the fact that regulatory compliance is not in itself sufficient to avert liability in tort, as behaviour in compliance with written legal norms may still be in violation of unwritten legal and/or societal norms. Nevertheless, it does seem that compliance with the corporate responsibilities set out in the UN policy framework, especially the responsibility to carry out human rights due diligence, would significantly reduce the risk of liability for multinational corporations and other types of internationally operating business enterprises, at least where it comes to their potentially adverse impacts on the human rights-related interests of others. As is noted in this respect in the Guiding Principles to the framework:

> "*Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses*".[21]

10.1.3 Using foreign direct liability cases as a policy tool?

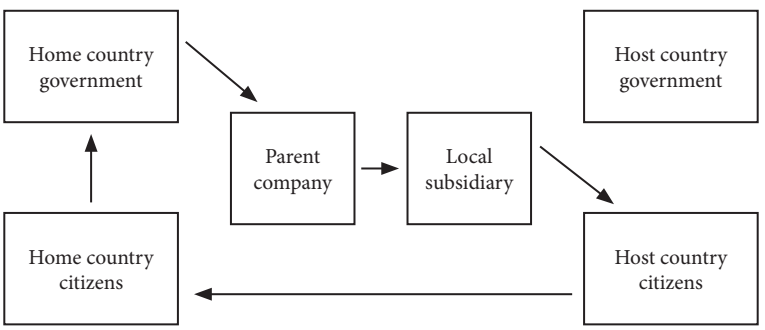

Figure 8. Using foreign direct liability cases as a policy tool

As has been discussed in detail in part II concerning the legal framework that determines the feasibility of these foreign direct liability cases, host country plaintiffs in their search for protection from the detrimental impacts of multinational corporations' transnational activities on their people- and planet-related interests, tend to rely on existing home

20 Compare Dhooge 2008.
21 UNHRC Report (Ruggie) 2011, principle 17, p. 17.

country legal avenues, some more controversial than others, in pursuing their claims.[22] Still, as is clear from what has been discussed before, these claims do tend to raise complex and novel (combinations of) legal issues, due to their transnational nature and the fact that they are typically aimed at the home country-based parent companies of the multinational corporations involved, rather than host country-based subsidiaries, business partners and/or sub-contractors.[23] In this part, it has been demonstrated that in their attempt to address and have resolved certain private law issues, these cases may give rise to a range of socio-political issues, due to the fact that they may thwart the public policies of both home and host countries to retain favourable investment climates for internationally operating business enterprises, as well as raise international trade and investment issues and upset international relations.[24]

At the same time, however, these cases may also be seen as ways to address and/or solve certain broader socio-political issues. After all, the societal upheaval they tend to create both domestically and internationally may provide multinational corporations and internationally operating business enterprises with powerful incentives to adopt consistent best practices with respect to CSR-related subject matter areas such as labour, the environment, health and safety and human rights. In addition to that, they may also motivate home country policymakers to adopt measures aimed at promoting international corporate social responsibility and accountability and provide them with a potential policy tool through which this can be accomplished.[25] Accordingly, in conjunction with the question whether host country plaintiffs seeking to bring foreign direct liability cases have and/or should be provided with better access to justice in home country courts so they can address and seek redress for past wrongs, the question may be raised whether these cases should be seized upon by home country policymakers to promote international corporate social responsibility and accountability by 'their' internationally operating business enterprises.

More and more frequently, foreign direct liability cases are viewed in light of the growing calls, especially from NGOs and Western society home country citizens, for socially responsible behaviour by Western society-based internationally operating business enterprises, both at home and abroad. As a result, the trend towards these cases has over the years become firmly embedded in socio-political debates on international corporate social responsibility and accountability especially in Western societies. It has been noted in this respect that:

22 See further chapter 3.
23 See further sub-sections 3.2.3 and 4.4.3.
24 See further section 7.1
25 See further section 9.3 and *infra* sub-section 10.2.1.

> "[...] *the career of the ATCA* [Alien Tort Statute (ATS)] *cases, as they have been represented and negotiated by actors with concrete political, economic and moral agendas, reflects and in turn shapes the contours of a broader struggle: one that deals with the general question of corporate regulation in the global era and, more specifically, one that deals with the very meaning and scope of the notion of corporate social responsibility* [...]".[26]

Obviously, this is true not just for ATS-based foreign direct liability cases but for foreign direct liability cases in general, as the underlying issues and broader context of these cases remain the same notwithstanding the specific legal basis upon which they are brought, which is bound to vary according to the actual legal possibilities offered in this respect by the various legal systems involved.

In most of these cases, the host country plaintiffs seem to be quite aware of the broader societal implications of their claims. The public interest groups that generally assist them in bringing their claims openly attest to the benefits they believe these cases (may) have for the broader environmental or human rights concerns they advocate. At the same time, the tendency on the side of the multinational corporations involved to settle these cases before a decision is reached on their merits seems to indicate that they, too, realise the broader implications that the judicial creation of any legal precedent may have in this context, and that they are not willing to risk the creation of any such precedent that might adversely impact their interests in the future. Among academics, the potential of these cases to provide some clarification on the societal expectations and ensuing normative and legal standards that exist with respect to internationally operating business enterprises, is widely recognized. And with the promulgation of the UN 'Protect, Respect and Remedy' policy framework, this type of transnational tort-based civil litigation has gained a firm and highly authoritative socio-legal basis.[27]

As a result of the attention paid to foreign direct liability cases by academics and the media, as well as pressure exercised by politicians and lobby groups, the attention of policymakers in most Western societies is increasingly being drawn to the socio-legal trend towards foreign direct liability cases and its potential broader impacts, as well as to the potential options that these cases offer when it comes to addressing some of the regulatory challenges that arise in the context of international corporate social responsibility and accountability. The UN policy framework on business and human rights notes in this respect that:

> "*The root cause of the business and human rights predicament today lies in the governance gaps created by globalisation – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without*

26 Shamir 2004, pp. 635-636.
27 See further sub-section 7.3.4.

> *adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge*".[28]

As has been discussed here in detail, home country regulation of the transnational activities of 'their' internationally operating business enterprises is the best contemporary option for addressing the gaps that exist not only in the business and human rights domain but also more generally with respect to any detrimental impacts that the activities of internationally operating business enterprises may have on people and planet around the world and especially in developing host countries where local regulatory protection of those interest is poor.[29]

The UN policy framework states in this respect that although there is no general duty for states under international human rights law "[...] *to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction*", there is also no general prohibition keeping them from doing so, "[...] *provided there is a recognized jurisdictional basis*". In fact, there are "[...] *strong policy reasons*" for home countries under their duty to protect human rights "[...] *to set out clearly the expectation that businesses respect human rights abroad* [...]".[30] And indeed, there are various examples of states taking extraterritorial measures or domestic measures with extraterritorial effects in order to regulate the transnational activities of internationally operating business enterprises, for instance in the fields of anti-corruption and antitrust law.[31] Contrary to many of the existing extraterritorial measures outside the CSR field, however, potential home country regulatory measures seeking to regulate the transnational activities of internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability may be classified as 'outward-looking', in the sense that their primary purpose is to promote and protect foreign rather than national interests.[32]

It is in this transnational context that private law mechanisms, although traditionally perceived as concerned with private interests, the interrelationships between private actors and the settlement of disputes between them, may play an important role in promoting public interests, public values and/or public policy aims. It has been noted in this respect that:

> "[w]*hile territorial sovereignty remains a fundamental principle, inequalities, resource constraints, lack of political will and corruption can all help to create governance gaps, which operate to the detriment of affected individuals and communities. The idea that extraterritorial jurisdiction (assuming it abides by international legal requirements)*

28 UNHRC Report (Ruggie) 2008, p. 3.
29 See further sub-section 8.2.1.
30 UNHRC Report (Ruggie) 2011, principle 2, p. 7. See further sub-sections 7.3.3 and 7.3.4.
31 See, more elaborately: Zerk 2010.
32 Compare Zerk 2010, pp. 25, 206-208. See further sub-sections 8.2.2 and 8.2.3.

> *provides a practical solution to these gaps has been influential in the development of a number of cooperative criminal law regimes, as well as in the private law sphere*".[33]

Considering, however, that such international or extraterritorially applicable criminal law regimes are few and far between and in view of the limited availability of other regulatory alternatives when it comes to global business regulation to promote international corporate social responsibility and accountability, it is especially private law mechanisms and tort law mechanisms in particular that seem promising in this context.[34]

Accordingly, the contemporary socio-legal trend towards foreign direct liability cases raises the question whether this type of transnational tort-based civil litigation may play a broader societal role in providing home country policymakers with a regulatory substitute or a regulatory alternative to more traditional, public law regulatory mechanisms when it comes to regulating the transboundary activities of 'their' internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability. After all, "[i]*n a world system vulnerable to democratic, regulatory, and legitimacy deficits,* [this type of] *transnational litigation, for all its obvious drawbacks, may constitute part of a plausible second-best strategy*".[35] Or, as has been noted in a somewhat more general sense:

> "*Transnational litigation may be a harmful distraction of political energies from more useful techniques for social change. Litigation is costly in money and time, and it often has a narrow, individualistic focus that only indirectly relates to the largest collective problems. The current state of world politics, however, does not suggest an excess of strategies to advance concerns such as redistribution or restitution, and so it seems unlikely that transnational litigation strategies will displace the simultaneous pursuit of multiple strategies including international law and institutions, national public regulation, NGO activism, consumer boycotts, and voluntary codes. Transnational litigation seems to offer a vehicle in substance and process to contribute to these other strategies, and build up a normal practice in domestic systems of attending to and protecting some global concerns*".[36]

Does this type of transnational tort-based civil litigation indeed provide home country governments with a policy tool when it comes to the promotion of international corporate social responsibility and accountability by enabling the imposition, monitoring and enforcement of behavioural standards for home country-based parent companies of multinational corporations with respect to their transnational activities? Arguably it can, at least in theory, as it may motivate the defendant parent companies and others like them to seek to avoid the risk of being held liable in this way by adopting consistent best practice

33 Zerk 2010, p. 211.
34 See further sub-section 8.2.5.
35 Wai 2005, p. 245.
36 Wai 2005, pp. 256-257 (citations omitted).

or at least practices that are likely to be considered reasonable/sufficiently careful in light of the potential risks of harm involved in the transnational activities of the multinational corporations involved, in light of the costs of taking precautionary measures too. This in turn may motivate them to make sure that not only they themselves but also their foreign subsidiaries, business partners and/or sub-contractors incorporate an awareness and consideration of the potential detrimental impacts that their operations may have on the people- and planet-related interests of others. In fact, the result would be much in line with what is expected of them under their responsibility to respect the human rights-related interests of others under the UN 'Protect, Respect and Remedy' policy framework on business and human rights. Accordingly, it seems that this type of tort-based civil litigation may contribute in two ways to the fulfilment by home country policymakers of the obligations that they have under their duty to protect human rights, both by providing host country victims of business-related human rights abuse with redress, and by (potentially) preventing further abuse by internationally operating business enterprises operating out of their territory and/or jurisdiction.

Of course, the question remains whether this theoretical role of foreign direct liability cases as a policy tool through which home country policymakers may seek to promote international corporate social responsibility and accountability by 'their' internationally operating business enterprises will also work out that way in practice. Although empirical evidence is lacking, intuitively it does seem plausible that the threat of being held liable for harm intentionally or negligently caused to people and planet in host countries is likely to motivate rationally acting parent companies to take reasonable precautions or to encourage their foreign subsidiaries, business partners and/or local subsidiaries to take reasonable precautions against such harm arising in the first place.[37] The fact that these cases are typically aimed directly at the parent companies involved on the basis of a duty of care allegedly owed by these parent companies to the host country plaintiffs who have suffered harm as a result of the multinational corporation's local activities, means that the parent company cannot hide behind the corporate veil to protect itself from liability in this respect. Furthermore, the fact that on the basis of the UN policy framework on business and human rights, internationally operating business enterprises as part of their responsibility to respect human rights have a responsibility to exercise human rights due diligence through which they are expected to assess the potential human rights impacts of not only their own activities but also those of their business relationships that are directly liked to their operations, products or services, means that at least when it comes to their indirect involvement in human rights violations it also becomes increasingly difficult for these parent companies to hide behind a lack of knowledge of what was going on abroad. The growing transparency on the people- and planet-related impacts of the transnational activities of internationally operating business enterprises that is created

37 Compare Van Boom 2006b.

by NGOs, modern media and the corporate actors involved themselves, is likely to have similar effects in other CSR-related subject matter areas such as the environment, health and safety and labour standards.

A further question that arises is whether and to what extent transnational tort-based civil litigation may provide home country governments with a policy tool when it comes to promoting international corporate social responsibility and accountability not only among multinational corporations but also among internationally operating business enterprises more generally. As is clear from what has been discussed in part II, the question whether corporate actors may be held liable for the harmful activities of others is dependent (at least where fault-based liability in tort is concerned) largely on the question whether they were or could have been aware of the risks involved in the activities in question and the extent to which they were or could have been able to control the actors and activities in question so as to prevent those risks from materializing.[38] It seems that these two requirements may (or may not) be fulfilled not only within the particular setting of a multinational group consisting of a home country-based parent company that is directly or indirectly connected through ties of ownership and control to its foreign subsidiaries, but also outside that setting, for instance within contractual chains between home country buyers and host country manufacturers/suppliers.[39]

As far as awareness is concerned, it should be noted that the UN policy framework on business and human rights and thus the corporate responsibility to respect human rights extends in principle to "[...] *all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure*".[40] At the heart of this corporate responsibility to respect human rights lies the requirement for all these different types of business enterprises to carry out human rights due diligence with respect to the potential adverse human rights impacts not only of their own activities but also of the activities of their business relationships to the extent that those are directly linked to their operations, products or services.[41] What this means for internationally operating business enterprises operating in complex and stretched-out supply chains is not completely clear and will no doubt have to be worked out in practice. Still, this requirement will make it much harder in the future for internationally operating business enterprises across the board, regardless of whether they conduct their operations through international group structures or for instance through contract-based international supply chains, to evade liability by hiding behind an alleged lack of knowledge, at least in the human rights domain.

As far as control is concerned, it should be noted that the control requirement pertains to *de facto* control that may be applied over the activities that bear the risk of causing

38 See further section 4.4.
39 Compare, for instance: ICJ Report (Civil remedies) 2008.
40 UNHRC Report (Ruggie) 2011, General principles, p. 6.
41 UNHRC Report (Ruggie) 2011, principle 17, pp. 16-17.

harm to people and planet locally.[42] As has been discussed before, such control may exist not only between parent companies and their subsidiaries, but also between, for instance, franchisors and franchisees, licensors and licensees, parties in joint ventures, as well as other parties that may be involved in international production chains, such as manufacturers, distributors, wholesalers and retailers. In fact, it is very possible that a company that has a long-standing and close working relationship with its foreign suppliers may in practice have more say over the way they conduct their local operations, than a parent company over any of the foreign subsidiaries to which it is directly or indirectly linked.[43] The UN policy framework, which as discussed pertains to all types of internationally operating business enterprises, links the corporate responsibility to carry out human rights due diligence to the responsibility to integrate the findings from their impact assessments and to take appropriate action. A distinction is made in this respect between situations in which a company causes adverse human rights impacts, situations in which it contributes to such impacts and situations in which the adverse human rights impacts are directly linked to its operations, products or services by its business relationships with others; this last mentioned is considered to be the most complex situation.[44]

Accordingly, even though the UN 'Protect, Respect and Remedy' policy framework is not itself concerned with determining in which situations liability in tort may or may not arise, it clearly expresses the idea that there is no *a priori* distinction between multinational corporations on the one hand and other types of internationally operating business enterprises on the other when it comes to their responsibilities for the adverse impacts of their own activities or those of their business relations on the human rights-related interests of third parties around the world. Interestingly, this seems to indicate that there is no reason why the socio-legal trend towards foreign direct liability cases, which typically revolve around liability claims against multinational corporations' parent companies for damage caused by their groups' activities in host countries, may not be extended to similar types of transnational tort-based civil litigation against home country-based internationally operating business enterprises with respect to people- and planet-related harm caused in host countries that is ultimately a result of the local business practices of their contract-based business partners and/or sub-contractors within the value chain. In turn, this means that this type of transnational tort-based civil litigation may indeed provide home country governments with a policy tool when it comes to promoting international corporate social responsibility and accountability not only just among multinational corporations but also among internationally operating business enterprises more generally.

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42 Compare, for instance: Joseph 2004, p. 136. See also further sub-section 4.4.3.
43 See further sub-sections 1.1.2 and 3.2.3.
44 UNHRC Report (Ruggie) 2011, principle 19, pp. 18-19.

In the end, a more profound assessment of the efficacy of foreign direct liability cases as a policy tool for home country policymakers seeking to promote international corporate social responsibility and accountability among 'their' internationally operating business enterprises would require empirical research into their actual effectiveness.[45] However, due to the relatively limited number of cases brought so far and the heterogeneity and high settlement rates among the cases that have been brought, it seems that the necessary data would be hard if not impossible to come by at this point. It should be noted in this respect too that, probably because the idea of private law regulation is still in its infancy in most Western societies (with the exception probably of the US), the kind of hard data that would be necessary to further explore the regulatory possibilities of private (or tort) law regulation in specific subject matter areas is not yet available.[46] The limited availability of knowledge and data even with respect to the feasibility of applying domestic tort law regimes to promote certain public interests, public values and/or public policies within the domestic sphere, demonstrates that the role of domestic courts and private (tort) law mechanisms in global business regulation requires further exploration in the future.

10.1.4 Private law regulation meets public interest litigation

As discussed, the contemporary proliferation of foreign direct liability cases raises the question whether and to what extent this particular type of tort-based transnational civil litigation offers possibilities for home country regulation of the behaviour of the defendant multinational corporations, as well as that of similarly placed multinational corporations and/or other internationally operating business enterprises, through the private law mechanism of tort law. By asking home country civil courts to judge the behaviour of internationally operating business enterprises regarding their own business practices and/or those of their foreign subsidiaries, business partners and/or sub-contractors to the extent that these practices have led to adverse consequences abroad, the host country plaintiffs in these cases in fact enable home country regulatory action on the basis of tort law with respect to the companies involved. After all, the finding and public pronouncement by a home country civil court through its judgment in a foreign direct liability case that a parent company of a multinational corporation is tortiously liable vis-à-vis those suffering the consequences of the activities of that parent company and/or its foreign subsidiaries, business partners or sub-contractors, and the accompanying imposition on that parent company of an obligation to provide redress to the host country victims, may be seen as a form of behavioural regulation to the extent that it motivates the defendant and others

45 See, on the distinction between efficacy and effectiveness: Van Boom 2006a, p. 7 (footnote 1), who notes that the term 'efficacy' "[...] *refers to the potency to produce a desired effect*", whereas the term 'efficiency'"[...] *alludes to empirical evidence of the desired effect*".

46 Compare, for instance: Van Boom 2006b.

similarly placed and/or engaging in similar activities to adapt their behaviour in order to avoid liability in the future.[47]

By monitoring and/or enforcing existing private law and public law behavioural standards in transnational civil disputes pertaining to the international business practices of multinational corporations and by setting new private law behavioural standards where necessary, home country civil courts may, in conjunction with their dispute settling function, also fulfil a regulatory function. As such, these foreign direct liability cases and similar types of transnational civil litigation that involve claims against internationally operating business enterprises brought by private actors before Western society civil courts may be said to enable the use of private law-based regulatory measures, with the civil courts involved acting as regulators and with stakeholders that have been detrimentally affected by the operations abroad of the internationally operating business enterprises concerned acting as 'private attorneys general', in many cases with the assistance of domestic and/or international NGOs. In this sense, Western society home country systems of tort law through these cases can be said to act as both indicators and facilitators of social change. They do so by giving voice to changing home country societal notions of corporate responsibility, by privately motivating home country-based internationally operating business enterprises to operate in a socially responsible manner both at home and abroad, and by inviting home country policymakers to rely on this type of transnational tort-based civil litigation in pursuit of public policies aimed at promoting international corporate social responsbility and accountability.[48]

And, most importantly, they provide host country citizens, often with the aid of public interest organizations, with an opportunity not only to address and seek redress for harm caused to people and planet locally as a result of the transnational activities of internationally operating business enterprises, but also to try to make a change with an eye to the future. Van Boom has noted with respect to private enforcement in contract and tort cases more generally:

> "*Private law has roots in society in the sense that private autonomy to instigate a private enforcement effort may well have serious idealistic or symbolic value surpassing strict added enforcement value. For instance, a claim – however insignificant in financial terms from the respondent's corporate view – may have lasting effects on corporate behaviour by, e.g., the intermediary effect of media exposure. In this sense the use of private law instruments may help 'empowerment'*".[49]

47 Compare, for instance: Baldwin & Cave 1999, pp. 51-53. See further sub-section 9.3.3.
48 Compare also section 1.3.
49 Van Boom 2006a, p. 31.

Transnational public interest litigation

In this sense, foreign direct liability cases may be seen as a transnational form of public interest litigation (or social impact litigation), which turns legal proceedings into a strategy to produce societal reform.[50] Public interest litigation employs the legal system to give a voice to those to whom other channels of socio-political influence are unavailable, for instance because of discrimination or collective action problems. It is based on the idea that lawsuits, whether successful or not, may generate the public awareness and/or public outrage necessary to kick-start political action, and that as such "[...] *judicial decisions are not simply legal decrees, but also social signals that are channeled into collective movements*".[51] With respect to the transnational context, the term 'transnational public law litigation' had already been introduced in the late 1980s in reference to transnational lawsuits seeking to vindicate public rights and values through judicial remedies by focusing retrospectively upon achieving compensation and redress for individual victims, while prospectively pursuing the judicial articulation of norms of transnational law that, even when they cannot be enforced against individual defendants, may be used as political bargaining chips to promote societal change (institutional reform) at a transnational level. It has been noted in this respect, for example, that:

> "[b]*y filing the Bhopal case in American court, India was no more seeking a traditional tort judgment than Linda Brown was seeking just to walk fewer blocks to a school bus in Topeka, Kansas*".[52]

In the US in particular, from the 1960s onwards litigation has frequently been resorted to in order to put specific issues on the public agenda. This practice has been accompanied by the development in the US of a variety of legal advocacy practice sites specifically geared to bringing such cases on the basis of funds derived from different sources, including legal services lawyers, pro bono lawyers and law firm pro bono programmes, private public interest law firms, law school clinics and public interest legal organizations.[53] It has been noted in this respect that:

> "[t]*he United States has by far the world's largest cadre of special 'cause lawyers' seeking to influence public policy and institutional practices by means of innovative litigation. In no other country are lawyers so entrepreneurial in seeking out new kinds of business, so eager to challenge authority, or so quick to propose new liability-expanding legal theories*".[54]

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50 See, generally and with further references: Cummings & Rhode 2009.
51 Cummings & Rhode 2009, p. 610 (citations omitted).
52 See, elaborately: Koh 1991 (quote at p. 2395). Note that the idea of transnational public law litigation is inspired by the already existing notion of public law litigation: Chayes 1976.
53 See generally: Cummings & Rhode 2009.
54 Kagan 2001, pp. 8-9.

This type of litigation fits in with the previously mentioned broader, uniquely American tradition of what has been termed 'adversarial legalism', meaning "*policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation*".[55] More than in any other Western society:

> "[...] *the legal system of the United States is* [...] *open to new kinds of justice claims and political movements. American judiciaries are particularly flexible and creative. American lawyers, litigation, and courts serve as powerful checks against official corruption and arbitrariness, as protectors of essential individual rights, and as deterrents to corporate heedlessness*".[56]

This legal culture of public interest and impact litigation and adversarial legalism, together with litigation practices and rules of civil procedure that tend to be plaintiff-friendly in the sense of conducive to the pursuit of civil litigation, results in a unique combination of procedural rules and legal culture that renders the pursuit in the US of (transnational or domestic) public interest claims in general and of foreign direct liability cases specifically both possible and attractive.[57]

Significant procedural and practical features that have been mentioned in this respect include for instance liberal rules of jurisdiction, which may allow US courts to exercise jurisdiction over cases involving defendants that have only limited connections with the US legal order. Another important factor in this respect is the fact that unsuccessful litigants are in principle not required to pay the legal fees of their victorious opponents, in combination with the possibilities for claimants to enter into contingency fee arrangements with their legal representatives that tempt "[...] *even private, for-profit law firms to participate in public interest cases that may lead to large, collectable judgments*". Furthermore, there is the possibility of claiming punitive damages that may potentially lead to judgments many times higher than judgments based merely on compensatory damages and that as such may provide not only financial incentives for plaintiffs and their legal advisers, but also punishment of the defendant corporations as well as additional behavioural incentives for them and for those similarly placed. Broad rules of discovery enable claimants to rely on documents or information that has been obtained from the defendants, in combination with the fact that the initial statement of claim may be based upon mere skeleton allegations of the key facts and a reasonable belief in the allegations put forward, which need only be substantiated at a later phase in the proceedings. Other features that may be favourable to those seeking to bring public interest litigation before US courts include the jury system and the possibilities for bringing class actions or mass litigation.[58]

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55 See authoritatively on this US tradition of adversarial legalism: Kagan 2001.
56 Kagan 2001, p. 3.
57 See further sub-sections 3.1.1, 4.5.1 and 8.3.2.
58 Compare: Stephens 2002, pp. 5, 10-17. See further sub-section 4.5.1.

As has been discussed before, there have been many, within but especially outside the US, who have criticized the US tradition of adversarial legalism and its accompanying plaintiff-friendly rules of civil procedure and legal practices for producing a claim culture that is slow, very costly, highly unpredictable and as such a source of inequality and legal uncertainty that is to be avoided rather than welcomed.[59] The fear of introducing a US-style claim culture has arguably contributed to the fact that the active use of civil litigation to raise awareness of and/or to resolve socio-political issues has so far generally remained controversial outside the US, just like the idea of the active deployment of private law mechanisms to promote public interests, public values and/or public policy aims by policymakers and by courts.[60] European civil society actors generally seem to prefer the political arena to the legal arena when it comes to socio-political issues such as international corporate social responsibility and accountability; they tend to be geared more towards stakeholder dialogue and collaboration than their more litigation-minded and adversarial US counterparts.[61] Furthermore, the institutional capacity needed to bring and/or to properly deal with this type of litigation seems to be much less developed in other Western societies, as is evidenced for instance by the fact that there are only a few European law firms that specialize in public interest litigation.[62]

Still, as is clear from what has been discussed before, this has not prevented the concepts of private law enforcement and private law regulation from taking hold among European scholars and policymakers. The past decade has seen an increasing focus within the European Union on the potential of private law enforcement mechanisms, in particular in the fields of competition law and consumer law, that has been partly inspired by US experiences, although it has expressly been stated that these changes are not supposed to lead to the introduction of a US-style claim culture within Europe.[63] With this development has come increasing attention to the procedural and practical preconditions that should be met in order for European domestic systems of private law to be able to adequately fulfil a regulatory (enforcement) role. With respect to the field of antitrust law, for instance, the European Commission has underlined the importance of addressing existing legal and procedural hurdles in the EU Member States' rules on civil liability and procedure

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59 See on adversarial legalism in civil litigation in general and some of its downsides specifically, Kagan 2001, pp. 99-125. See, on the fear outside the US of the possible export of American-style claim culture, for example, Hartlief 2005. See also, for instance, Hodges 2008, p. 242.

60 See further sub-section 4.5.3.

61 See, for instance: Doh & Guay, 2006, p. 68. Note, however, that in the field of consumer law, for instance, as early as the 1960s consumer organisations on the European continent were given a role in defending general consumer interests by bringing collective actions for injunctive relief. See elaborately: Hodges 2008, pp. 4, 8-50.

62 See further sub-section 4.5.3

63 See, with respect to the developments in the field of competition law in this respect: Freudenthal 2009, pp. 191-193, 200-202. Note that already from the 1960s onwards, in most of the EU Member States and, later on, also in the EU itself, there has been a tendency to rely on consumer organisations to defend general consumer interests through collective private procedures, often as an adjunct to public mechanisms of consumer protection. See further, for example: Hodges 2008, pp. 4, 8-50, 103-111.

in order to improve the legal conditions for victims of infringements of EC competition law to acquire full compensation for their damage, and as such deter future infringements and ensure greater compliance with EC antitrust rules. The focus in this respect has been on, *inter alia*, the need for effective mechanisms of collective redress, including both representative actions (brought by interest groups) and opt-in collective actions; the need for a minimum level of disclosure between the parties to a dispute; the need for victims to receive as a minimum full compensation; and the need to address disincentives that may result from limitation periods and the costs of actions for damages.[64]

Thus, despite the fact that domestic systems of private law and civil procedure in principle remain largely outside the EU competences for now, its influence on these fields seems to be on the increase.[65] This may lead to an increasing recognition of and appeal to the regulatory potential of private law mechanisms in the EU Member States, and may eventually also create a more permissive environment, where necessary, for those seeking to bring (transnational) civil claims before the civil courts of the EU Member States even beyond the specific subject matter areas targeted by the EU in this respect. At present, the focus in European jurisdictions seems to be specifically on the wider introduction of collective actions for damages, both on a representative and on a collective basis; the Commission is presently considering the possibilities for enhancing consumer collective redress across the Member States.[66] This is an interesting development in the context of home country private law regulation of internationally operating business enterprises in general and, as has already been discussed, of foreign direct liability cases particularly.[67]

However, the role that home country courts and, indirectly, home country governments may play on the basis of their civil procedures and domestic systems of tort law in reflecting changing societal notions on the societal responsibilities of internationally operating business enterprises, and in changing the behaviour of these corporate actors, is dependent in the end on three main factors. These are: the ability and willingness of host country citizens, where necessary, to initiate foreign direct liability claims; the ability and willingness for home country courts to deal adequately with such claims; and the ability and willingness of home country policymakers to (further) enable this type of transnational tort-based civil litigation and to let it realize its public interest and regulatory potential.

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64 European Commission, 'White Paper on Damages actions for breach of the EC antitrust rules', COM(2008) 165 final (2 April 2008).

65 Compare Freudenthal 2009, p. 203. See also, on the EU's competence in the field of civil justice, Hodges 2008.

66 Compare, for instance: Hodges 2008. See also, for the latest developments in the EU's foray into the field of collective redress in the context of consumer mass claims and beyond, the EC website: <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm>.

67 See further section 4.5.

A role for host country citizens

First, there is the ability and the willingness of host country citizens, whose people- and planet-related interests have been detrimentally affected by the transnational activities of home country-based internationally operating business enterprises, to initiate this type of transnational tort-based civil litigation. It is these host country plaintiffs who must be willing to take the lead in calling the internationally operating business enterprises concerned to account before home country courts for their wrongful behaviour that has resulted in harm to people and planet in the host countries involved. This wrongful behaviour may consist of violations of existing (host or home country) domestic or international standards, in which case the initiation by the host country plaintiffs of foreign direct liability claims allows home country courts to play a monitoring and enforcement role. The alleged wrongfulness of the activities in question may also lie in the violation by the corporate defendants of unwritten norms pertaining to proper societal behaviour/due care, in which case the initiation by the host country plaintiffs of foreign direct liability claims invites home country courts to play a standard-setting role and thus perform a broader, more public interest-related function in creating new law and formulating new policies.[68] NGOs and other civil society organisations obviously play a crucial role here in directing and shaping the issues that are put before the courts.

As has been discussed before, this type of transnational tort-based civil litigation tends to originate especially in developing host countries, emerging economies and/or failed states where policymakers and/or courts may for various reasons be unwilling or unable to adequately protect people and planet locally from the detrimental impacts of local business activities, whether prospectively by imposing regulatory standards on the corporate actors involved or retrospectively by enforcing those standards and by addressing and redressing harm done.[69] As long as these structural issues persist, so does the reason for host country plaintiffs to seek to initiate foreign direct liability cases before home country courts; in fact, there is reason to believe that the socio-legal trend towards this type of transnational public interest litigation is likely not only to persist but also to grow in the near future.[70] As recognition is growing among NGOs of the potential of these claims to bring about societal change, together with the institutional capacity in Western societies other than the US to initiate and sustain this type of litigation, more host country plaintiffs are likely to have recourse to home country courts and home country systems of tort law in search of protection for their people- and planet-related interests, often supported by public interest organizations.

However, the willingness to bring these cases may be one thing, but the ability to actually do so is another. As has been discussed in detail in part II, the feasibility of foreign direct liability cases is dependent on four main factors: jurisdiction of home

68 Compare Hartlief 2009, pp. 53-54.
69 See further sub-sections 1.2.3, 3.2.3 and 7.2.3.
70 Compare, for instance: Joseph 2004, pp. 151-153. See further sub-section 3.3.2 and section 6.1.

country courts over the claims brought before them; the system of tort law that is applied to those claims; the availability in the applicable system of tort law of legal bases upon which such claims may be brought; and the procedural and practical circumstances in the home countries where those claims are brought. As is also clear from what has been discussed in part II, it is especially those procedural and practical circumstances that may turn out to be less than favourable to the pursuit of foreign direct liability cases, in particular outside the US with its plaintiff-friendly litigation culture and tradition of public interest litigation.[71] Accordingly, it is in this particular area that a lot of room for improvement still exists. This is emphasized by the UN policy framework on business and human rights, which as discussed stresses the importance of access to home country courts for host country victims of business-related human rights abuse that face a denial of justice in their own countries, and points to the costs of bringing claims, difficulties in securing legal representation and inadequate options for aggregating claims or enabling representative proceedings as particular examples of practical and procedural barriers that may lead to a denial of access to remedy for those victims.[72] In this respect too, NGOs tend to play a crucial role in creating an awareness among home country policymakers on the problem areas that exist and in suggesting and mobilizing socio-political support for possible solutions.

A role for home country courts

A pivotal role is allotted to the home country courts seized of these matters, which are challenged, despite the limitations inherent both in the private law system itself and in their institutional set-up, to take an active role in the (monitoring and) enforcement of existing behavioural standards, as well as in the setting of new behavioural standards that do justice to the complicated nature of these cases and the wide range of private and public interests that are sought to be protected and/or promoted through them.[73] It should be noted that, as has been discussed in detail here, the field of private law in general, due to its open, standard-based, reflexive nature, is particularly flexible in adapting to changing societal practices, needs and expectations and leaves courts considerable leeway when it comes to administering justice in civil cases. The field of tort law, just like the more general field of private law, relies heavily on civil courts to mould existing private law standards to new factual situations and, where necessary, to create new standards on the basis of unwritten norms pertaining to proper societal conduct. As such, their decisions in concrete cases may have a significance that surpasses the individual dispute at issue and may come to have value as sources of law and public policy themselves.[74] Accordingly,

71 See further sections 6.3 and 6.4.
72 UNHRC Report (Ruggie) 2011, principle 26, pp. 23-24. See further sub-sections 7.3.3 and 7.3.4.
73 Compare Van Boom 2006a, pp. 47-49.
74 Compare, generally: Hartlief 2006, pp. 8-9.

Western society systems of tort law and civil courts may be said to have an inherent capacity to deal with new types of claims flexibly and creatively.

The question may legitimately be raised, however, whether and to what extent these courts are also equipped and able to deal with the more public interest-related and regulatory ambitions that may motivate certain civil claims, especially where those claims are situated in a transnational context. As has been discussed, the transnational context itself is not an issue for domestic systems of private law/tort law, which are quite suitable for application in a transnational context due to the coordinating role of systems of private international law in this respect.[75] The public interest nature of public interest litigation in general and foreign direct liability cases in particular, is more difficult to reconcile with the traditionally bipolar, specific, backward-looking and restorative nature of Western society tort systems. The question may be raised whether civil courts are the right institutions to seek to actively realize public policy aims and to formulate behavioural standards that go beyond the private actors and interests involved in a specific case. After all, they will in many cases lack the time, the know-how and the relevant information necessary to come to decisions that do justice not only to the rights and interests in dispute, but also to broader policy objectives aimed at promoting public interests and resolving societal issues.[76] Still, as has been discussed, there is a tendency in Western society tort systems not just in the US but also elsewhere to view tort law as a means of social engineering, an instrument for intervening in and changing society and promoting the public good.[77]

Arguably, the main difference at present between the US tort system and the tort systems of most other Western societies is the degree to which this more instrumental view of tort law is motivating not only legal scholars in their discussions of the potential of the field of tort law, but also courts in their decisions in individual tort cases brought before them. Van Boom has noted in this respect, with a view to European legal systems:

> "[o]*n a more general level, civil courts should be challenged to take a more active role in enforcing the substantive rules of private law. In this sense courts should consider their task in civil law to be not merely the specific adjudication of rights and duties after wrongdoing, but also the more general task of giving* [sic] *more specific guidelines to potential claimants and respondents how to act and how not to act to prevent wrongdoing*".[78]

Obviously, this requires certain changes to be made in judicial/litigation culture. Recent developments suggest, however, that in Western societies other than the US the legal climate in this respect is already subject to change. This is evidenced for instance by the Dutch Supreme Court's self-proclaimed mission to strengthen its role as developer of the law. Commentators have predicted that this strengthened law development role will lead

75 See further sub-sections 8.2.5 and 8.3.4.
76 Compare Hartlief 2009, pp. 59-60.
77 See further sub-section 1.3.3 and sections 9.3.3 and 9.3.4.
78 Van Boom 2006a, p. 49 (citations omitted).

to a more policy-oriented attitude by the Court to civil disputes brought before it, and may also become especially important when it comes to the adjudication of future cases with international aspects in general and the adjudication of foreign direct liability claims in particular.[79]

A role for home country policymakers

Finally, there is an important role for home country policymakers in further facilitating the pursuit of foreign direct liability cases and similar types of transnational tort-based civil litigation aimed at pursuing broader objectives such as the promotion of international corporate social responsibility and accountability and in enabling these cases to realize their public interest and regulatory potential. As has already been noted, there is an increasing tendency among Western society policymakers to view the field of tort law in light of its potential when it comes to the (monitoring and) enforcement of existing statutory norms, the judicial creation of new norms and more generally the creation of behavioural incentives for private actors to act in what is considered to be a socially desirable manner. This tendency fits in with a broader tendency towards viewing the field of private law from a more instrumental perspective, with a focus on the way it may contribute to the realization of public policies aimed at promoting and/or protecting public interests and public values. As mentioned before, it is clearly visible for instance in the European Commission's current interest in the role that Member States' domestic systems of tort law may play in enforcing EU rules and regulations in the fields of competition and consumer law for example, and the accompanying proposals to strengthen and expand the existing arsenal of civil remedies in order to enhance the effectiveness of the enforcement role of these systems of tort law.[80]

Although, as discussed, foreign direct liability cases are typically brought on the basis of existing legal bases, it is obvious that there is room for improvement, especially when it comes to the home country procedural and practical circumstances that determine the feasibility of these cases.[81] As mentioned, the UN policy framework on business and human rights has noted that particular barriers that may lead to a denial of access to judicial remedies for victims of business-related human rights abuse include, *inter alia*, the costs of bringing claims, difficulties in securing legal representation and inadequate options for aggregating claims or enabling representative proceedings.[82] In the end, however, the particular legal, procedural and practical barriers that may restrict the successful pursuit of this type of transnational tort-based civil litigation and/or the realization of its broader objectives are likely to vary from home country to home country, as has been set out more in detail in part II. It is here that home country policymakers may play a particularly

79 See, respectively: Giesen 2011, pp. 66-68 and Vranken 2011, p. 44.
80 Compare Hartlief 2009, pp. 5-6, 49-51.
81 See sections 6.3 and 6.4.
82 UNHRC Report (Ruggie) 2011, principle 26, pp. 23-24. See sub-sections 7.3.3 and 7.3.4.

important role in reducing those barriers, in helping host country plaintiffs and the public interest organisations supporting them to find ways around these barriers, and/or in refraining from raising new barriers. As has been discussed, one of the initiatives that have been considered in this respect was the possible introduction in the Netherlands of a legal aid fund for host country victims of people- and planet-related harm caused by Dutch multinational corporations seeking to bring their cases before Dutch courts, a proposal that was ultimately rejected by the Dutch government.[83]

As has also been discussed in the previous part on the legal framework that determines the feasibility of foreign direct liability cases, and as will be briefly discussed further in the next sub-section, the systems of private international law that are applicable in the Western society home countries where these cases are brought may play a pivotal role in this respect. After all, the extent to which home country policymakers may facilitate or enable the pursuit of or may themselves pursue broader, regulatory objectives such as the promotion of international corporate social responsibility and accountability through foreign direct liability cases, depends firstly on whether home country courts have jurisdiction to hear these cases and secondly on whether home country tort law is the law on the basis of which these claims are adjudicated. Here too, home country policymakers arguably have a potentially important role to play in making sure that any home country attempts at regulating the transnational activities of 'their' internationally operating business enterprises by home country civil courts through private law or tort law mechanisms are enabled rather than disabled by the applicable rules on private international law. Where, as is the case in the EU Member States, the applicable private international law regimes are laid down at a supra-national level, this role for home country policymakers is obviously complicated by the fact that the ultimate contents of those regimes are not in their own hands, but in those of policymakers at EU level.

In those cases where home country tort law provides the substantive provisions of tort law on the basis of which the case is decided, it is clear that general principles of tort law such as the tort of negligence tend to provide the host country plaintiffs with ample opportunities to seek to hold the parent companies of home country-based multinational corporations liable for the harm caused to their people- and planet-related interests as a result of these groups' local host country activities. However, under these general principles the parent companies involved will generally only be held liable for the damage suffered by the plaintiffs where it can be established that the damage is a direct result of their own wrongful (in the sense of below standard, careless) behaviour. This has led to calls for further statutory obligations of disclosure by internationally operating business enterprises on the impacts of their transnational activities on people and planet abroad,

83 See further sub-section 5.4.2 and section 6.4.

and for the introduction of statutory strict liability and/or statutory duties of care aimed at multinational corporations and their parent companies.[84]

The proposals for the introduction, whether at EU level or at the level of the individual Member States, of further transparency measures seem to hold potential, bearing in mind that this has been the area in which home countries have been most willing so far to introduce parent-based regulatory measures aimed at promoting international corporate social responsibility and accountability.[85] In view of the lack of transparency about the way in which multinational corporations organize, control and carry out their transnational activities, policy measures aimed at creating transparency in this respect may (indirectly) have an important conducive effect on the role and functioning of tort law and civil procedures in this context.[86] The significance of this issue is exemplified by the recent decisions of the The Hague district court in the Dutch Shell cases in which the court refused to order the disclosure by Shell of internal documents relating to group structures and practices and to possible causes of the oil spills in dispute.[87] It is important to note in this respect that ECHR Member States are under an obligation to make sure that domestic rules on evidence do not in practice violate the equality of arms principle that ensues from the right to a fair hearing under Article 6 ECHR.[88]

The proposals for the introduction of strict(er) liability in this context with a view to promoting international corporate social responsibility and accountability are interesting from various policy perspectives. These include the notion of general fairness whereby the actor that has the commercial benefits of an activity should also carry its costs, the concept that the actor that is best placed to control the risks of an activity should be responsible for preventing it, and the idea of loss-spreading, according to which losses resulting from an activity should be borne by the actor best placed to redistribute them, for instance through insurance or pricing.[89] However, the fact that theoretically there may be justifications for the legislature to impose stricter forms of liability in this context does not mean that their introduction is feasible in practice at present. After all, legislative intervention requires sufficient socio-political support and it is questionable whether such support exists at this particular point in time, especially considering the economic consequences that may ensue from such intervention. In line with this, fundamental questions arise as to whether such measures should be pursued at EU level or by the Member States individually, as well as with respect to their formulation and delineation to particular subject matter areas (human rights, the environment, labour issues, etc.) and/or to particular types of international business enterprises or transnational activities.

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84 See ECCJ Report (Gregor) 2010. See also sub-section 8.3.1.

85 See further section 7.3.

86 Compare Enneking, Giesen *et al.* 2011. See also sub-section 3.2.3.

87 See further sub-sections 3.3.2 and 4.5.3.

88 Compare *Dombo Beheer v. The Netherlands*, European Court of Human Rights, [1993] *E.C.H.R.* 49 14448/88 (27 October 1993). See also Enneking, Giesen *et al.* 2011, pp. 554-555.

89 Compare Van Dam 2006, pp. 256-258. See further sub-section 9.2.2.

At a more conceptual level, the introduction of strict(er) liability in this context, such as for instance strict parent company liability or multinational enterprise liability, creates tension with the fundamental corporate law notions of separate legal personality and limited liability.[90] At the same time, such measures also lay bare the fundamental challenges that the active use of tort law in this context, which is in essence based on policy objectives aimed at a more fair (re)distribution of resources, responsibilities, opportunities and burdens, may pose to lingering theoretical perceptions of the tort system as concerned with corrective justice (restoring a prior state of affairs between two private parties when this status quo has been disrupted).[91] Especially in a transnational context, where the (re) distribution is on a global scale rather than on a societal scale, this raises complex but interesting fundamental issues that require further research. After all, at a very practical level courts need to be enabled to recognize and deal with these broader issues when faced with them, for instance when they are asked to settle foreign direct liability cases.[92]

With all these challenges in mind, in my view policy attention in the near future should be on improving and expanding the existing possibilities offered by home country systems of private law and tort law in this respect. It seems that the question of further legislative action in this socio-politically controversial and legally complicated context will only become topical once these existing possibilities have been further explored both in theory, through further research, and in practice, through the further pursuit of foreign direct liability cases and of legal precedent with respect to the way in which and the circumstances under which multinational corporations may be held legally accountable for harm to people and planet caused abroad.[93] In the meantime, the development of the role(s) that domestic systems of tort law may play in this context remains largely dependent on the ability of host country victims to bring foreign direct liability claims before Western society home country courts, and the willingness of those courts to where necessary take an activist approach in contributing to a decent development of the law, justice and a better world, more generally.[94]

As is clear from what has been discussed in part II, in the transnational, North-South context of foreign direct liability cases the scope in this respect for host country victims and home country courts alike is dependent particularly on the applicable rules of private international law (with respect to both jurisdiction and choice of law), and on the practical and procedural circumstances determining the victims' access to these home country courts. Accordingly, in my view the focus of those seeking to promote international

90 See further sub-section 6.4.2.

91 Compare Van Dam 2006, pp. 125-129. See further section 9.2.2.

92 Compare, for instance: Cane 2001, who concludes that "[...] *the prime responsibility of tort scholars is to* [...] *focus their attention on uncovering the distributive principles on which tort liability is based, and offer courts a sound theoretical framework for considering distributive issues*" (p. 420).

93 See further sub-section 10.2.2.

94 Compare, with a focus on the need for judicial activism in the face of climate change: Spier 2010.

corporate social responsibility and accountability through the use of tort law should be on improving those threshold factors, while relying on existing principles of tort law as well as judicial activism to generate a fair measure of protection of host country people- and planet-related interests in individual cases. Contrary to what is sometimes argued in this respect by others, especially those in the field of international human rights,[95] I feel that in pursuing such improvements distinctions between claims dealing with grave violations of international human rights norms and claims dealing with other types of norm violations should sought to be avoided. In the end, as is clear from what has been discussed in this study, the CSR-related issues and people and planet-related interests at stake here go far beyond the narrow sub-category of international human rights violations.

At the same time, more fundamental, legislative changes to existing systems of substantive tort law or corporate law, which may provide an interesting theoretical possibility that merits further exploration as a subsidiary strategy in the medium to long term, should at this point not be the focal point of legal and policy considerations in this context.[96] Apart from the fact that attempts to introduce such a system are likely to raise near insurmountable issues of definition and delineation and may lack the necessary socio-political support (as exemplified by the failed attempt at introducing UN Norms on the responsibilities of multinational enterprises),[97] they are likely to draw attention away from what host country citizens, civil society actors, home country courts and home country policymakers can do in the short term to enable domestic systems of tort law to play their role(s) in promoting international corporate social responsibility and accountability.

10.2 The role of tort law in promoting international corporate social responsibility and accountability

10.2.1 Potential, limitations and possible solutions

It has been argued here that the role that Western society home country systems of tort law may potentially play in promoting international corporate social responsibility and accountability essentially has three aspects. The first aspect is the provision of remedies to host country plaintiffs who have suffered or are threatened with harm to their people- and planet-related interests as a result of the transnational activities of internationally operating business enterprises. The second aspect is the creation of a measure of transparency

95 See, for example: Dubinsky 2005.

96 See, differently, however, Eijsbouts 2011, who proposes the introduction of a multinational enterprise liability system in order to deal with violations by multinational corporations of fundamental rights of third parties (pp. 54-55).

97 UN Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights', E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003). See also sub-sections 1.2.3 and 7.3.2.

beyond the parties to the dispute on the adverse impacts that such activities may have on people and planet around the world. The third aspect is the generation of behavioural incentives for the corporate defendants involved and for other internationally operating business enterprises to conduct their transnational activities in a prudent manner so as to prevent them from causing harm to people and planet abroad.[98]

With the possibilities offered by Western society systems of tort law on each of these aspects come certain limitations, however, which tend to be inextricably bound up with the innate nature and structure of these tort systems, which are themselves a product of over 2000 years of historical development and changing views on their role in society.[99] At the same time, there may be other ways through which these outcomes may be produced in this particular context, perhaps even better, more efficiently and/or more cost-effectively than through the use of tort law. Therefore, the efficacy of Western society tort systems in promoting international corporate social responsibility by providing remedies, creating transparency and producing behavioural incentives can only be assessed in light of their inherent limitations in producing the desired effects and of the availability and efficacy of alternative mechanisms through which similar effects may be produced.[100]

In assessing the efficacy of Western society tort systems in this respect, note must also be taken of the fact that the field of tort law itself is always in motion. It tends to be highly responsive to changing societal needs and expectations and thus may over time gradually develop so as to fulfil any new demands placed upon it.[101] As has been discussed, it is generally left to courts dealing with tort disputes brought before them to mould existing private law standards to new factual situations and to create new standards where necessary on the basis of unwritten norms pertaining to proper societal conduct. As such, their decisions in concrete cases may have a significance that surpasses the individual dispute at issue and may themselves come to have value as sources of law and public policy.[102] The judicial development of tort law may where necessary and if considered desirable be backed up by legislative measures aimed at enhancing the role that tort law may play in particular subject matter areas, with a view to the public values, public interests and public policy aims that may be served by its utilization by private actors who have suffered harm as a result of the wrongful acts or omissions of others.

Remedies

The first aspect of the role that Western society home country systems of tort law may potentially play in promoting international corporate social responsibility and

98 See further section 9.3.

99 See further section 9.1.

100 The term efficacy is used here in imitation of Van Boom 2006a, where it is noted that: "[...] *'efficacy' refers to the potency to produce a desired effect. The term is slightly more theoretically oriented than 'effectiveness', which alludes to empirical evidence of the desired effect*" (p. 7, footnote 1).

101 See further sections 1.3, as well as 9.1 and 9.2.

102 Compare, generally: Hartlief 2009, pp. 53-54; Vranken 2006, pp. 8-9. See further section 8.3.

accountability is that of providing remedies to host country plaintiffs who have suffered harm as a result of the adverse impacts of the transnational activities of home country-based internationally operating business enterprises. The main remedy available is that of monetary compensation paid by the corporate tortfeasor to the host country victims for the material and non-material damage they have been caused as a result of the activities of the corporate defendants. Furthermore, in some Western society tort systems, notably in the US, the range of remedies that may be claimed is supplemented by punitive or exemplary damages, which are aimed not at providing compensation for harm suffered, but at punishing the perpetrator and/or at deterring him and others like him from engaging in the type of harmful behaviour in dispute. Another remedy that is available in some Western society tort systems and that is worth mentioning here is that of disgorgement of profits. Alternative, non-monetary remedies may also be claimed, for instance in the form of a judgment declaring the rights, duties and mutual obligations of the parties involved in the tort dispute, and/or court orders requiring the corporate defendants to take certain actions or prohibiting them from undertaking particular activities with a view to preventing further or future harm.[103]

The role of Western society tort systems in providing victims with remedies for harm suffered is necessarily a limited one, however, as remedies are only made available to those who can prove that the harm suffered by them was a direct result of another's wrongful acts or omissions. As such, it does not necessarily compare favourably, at least where its compensation function is concerned, with alternative compensation mechanisms, such as first party insurance, the social security system or publicly or privately financed compensation funds. At the same time, the tort system is strongly geared in practice towards the provision of financial compensation for harm to private interests that has a monetary equivalent. This means that it is less suitable for dealing with wrongful behaviour that does not result in detriment to others, but that results in detriment to more 'public' interests that are not reducible to individual private interests such as certain types of environmental harm, or that results in detriment that cannot be put in financial terms, such as violations of certain fundamental rights. It also means that tort law tends not to be able to deal very well with plaintiffs' less calculated, more emotional motives in filing tort claims against those who have caused them or their loved ones harm. Due also to the considerable financial and emotional stress that the often complicated and lengthy tort procedures entail for the parties involved, there tends to be a high threshold for initiating tort claims in pursuit of remedies for harm suffered.[104]

Furthermore, limitations also ensue from Western society tort systems' traditional focus on retrospectively restoring the *status quo* between two private parties that has been disrupted by the wrongful behaviour of one of them causing the other harm. Due to the fact that most tort cases, especially those involving liability for death and personal

103 See further sub-sections 4.5.3 and 9.2.2.
104 Compare, for instance: Hartlief 2009, pp. 11-21, 29-47. See further sub-section 9.2.3.

injury, pertain to accidents, the tort system's ability to provide *ex ante* remedies tends to be underdeveloped. Van Boom has noted in this respect that:

> "Claims in tort are by nature accidental: they are usually filed by individuals that have actually been harmed by the wrongful act at hand. The mere risk that precedes the materialization hardly ever seems to be litigated in a civil court, neither in a procedure concerning an injunctive order nor by means of a declaratory judgment".

As a result, the remedies that the tort system offers to those at risk of sustaining personal injury as a result of another's potentially harmful behaviour, enabling them to ask civil courts, through court orders and/or injunctions, to seek to reduce or prevent the realization of a particular intentionally or negligently created risk of harm, tend to remain underutilized in practice.[105]

Transparency

One of the key themes of the contemporary socio-political debates on international corporate social responsibility and accountability is the need for transparency. Especially in light of the search for effective ways to regulate the transnational activities of internationally operating business enterprises, there is an increasing emphasis on the need for transparency both with respect to the potential impacts that those activities may have on people and planet in host countries and with respect to the ways in which home country-based corporate actors may (be made to) influence the local activities of their host country-based subsidiaries, business partners and/or sub-contractors to prevent their activities from having such adverse impacts. One of the aspects of the role that Western society home country systems of tort law may potentially play in promoting international corporate social responsibility and accountability is the fact that they may help, through the adjudication of foreign direct liability claims brought before home country courts, to create a measure of transparency beyond the parties to the dispute on the adverse impacts that such activities may have on people and planet around the world.[106]

As discussed, it has been argued that since the legitimacy of any judicial decision is closely connected to whether it is based on true facts, the establishment in a civil procedure of the material truth is one of the main aims of civil procedural law. Particularly in the more inquisitorial systems of civil procedure, there is an increasing tendency towards expecting courts to 'actively' seek to establish the truth about the issue in dispute. This obligation is connected to the fact that the adjudication by courts of civil disputes, which as discussed tend to revolve around the private interests of private parties, inherently also concerns public interests. After all, courts are themselves public authorities that have a

105 Van Boom 2006a, pp. 14-16 (quote p. 15).

106 See further sub-section 9.3.2. See also, more elaborately on the role of transparency in the context of international corporate social responsibility and accountability: Kerr, Janda & Pitts 2009, pp. 241-284.

public role not only in ensuring compliance with existing laws and as such realising the public policies underlying those laws, but also in their role as lawmakers where they shape and contribute to the law in individual disputes that are brought before them.[107]

This public role of dispute resolution through civil procedures creates an opportunity for host country plaintiffs and NGOs to have the facts and circumstances relating to the harm that they have suffered to their people- and planet-related interests and the possible involvement of the corporate defendants in causing that harm, investigated and established by a court of law. Depending on the outcome, this may in effect amount to the public exposure and denunciation of the adverse impacts caused by the transnational activities of the internationally operating business enterprises involved by neutral, independent state-based authorities in the home countries where those corporate actors are based. Obviously, this may not only grant the host country plaintiffs a measure of satisfaction, but also provide them with an effective means to pressurize the internationally operating business enterprises involved and others like them to clean up their act and improve their local operational practices so as to prevent further harm to people and planet. Additional pressure may result from the fact that this type of litigation before home country courts is likely to alert home country-based investors and consumers to the issues that exist in this context and may even lead to regulatory action being taken by home country (and/or host country) policymakers.[108]

Here too, however, there are inherent limitations to the role that Western society tort systems may play in creating transparency going beyond the parties to the dispute on the adverse impacts that the transnational activities of the internationally operating business enterprises involved are having and the impacts that the activities of others like them may have on people and planet around the world. One of the main restrictions in this respect is the fact that, unlike in criminal procedure, the relevant facts and circumstances are not unearthed through the deployment of the state's police forces, something that would in fact be highly problematic due to strong territoriality constraints in this transnational context, but rather by the private parties to the dispute themselves. Obviously, even though they are granted certain procedural tools to request information from their opponents or other third parties, their means of investigation are limited due to the fact that they lack the broad authority that the state has in criminal cases. Combined with the fact that even if the parties to a civil dispute may be said to be under an obligation to present the relevant facts and circumstances as completely and truthfully as possible, they are of course not neutral in doing so, this means that the courts, at least in civil procedural systems of an inquisitorial nature, may have a tough job distilling the truth from the facts and circumstances presented to them. In more adversarial systems such as the US system of civil procedure, the task of revealing the truth is largely left to the parties themselves, while the task of deciding whether the alleged facts have been established is often left up

107 See further sub-section 9.3.2.
108 See further sub-section 9.3.2.

to civil juries, circumstances which according to some commentators reduce the potential truth value of the eventual outcome even further.[109]

Regulation

The third aspect of the role that Western society home country systems of tort law may potentially play in promoting international corporate social responsibility and accountability is the generation of behavioural incentives for the corporate defendants involved and for other internationally operating business enterprises to conduct their transnational activities in a prudent manner so as to prevent them from causing harm to people and planet abroad. As discussed, this potentially regulatory role that tort law may play in this context comprises a number of distinct tasks for home country courts dealing with foreign direct liability cases. On the one hand, they may be called on to monitor and/or enforce existing regulatory provisions that lay down rules with respect to the way in which internationally operating business enterprises conduct their transnational activities; these provisions may flow from international law or from domestic home or host country laws. On the other hand, they may be called on to apply their lawmaking powers in areas where the existing regulatory regimes leave gaps, by translating unwritten norms pertaining to proper societal conduct and/or due care into judge-made behavioural standards.

As has been mentioned before, it is especially the enforcement potential of Western society systems of tort law that seems to be capturing the attention of home country policymakers these days. Within the EU there is increasing interest in the enforcement potential of domestic systems of tort law when it comes to EU rules and regulations in fields such as consumer law and antitrust law. In the US, where instrumental views of the tort system have been prevalent for much longer, the tort system is also relied on as an enforcement mechanism for statutory provisions for instance in the field of environmental law.[110] In the execution of this particular role, the tort system acts as a mechanism through which compliance by private actors with existing, mandatory conduct-regulating rules may be enforced on the initiative of other private actors whose interests those rules seek to protect, thus realising the public policies underlying these rules. In the context of international corporate social responsibility and accountability, the rules in need of enforcement through foreign direct liability cases may include for instance local host country regulatory standards that local regulators are not able or willing to enforce properly, international regulatory standards such as human rights standards, or, where available, home country regulatory standards seeking to extraterritorially regulate the activities of internationally operating business enterprises abroad. It is the category of international human rights norms that has been the primary source of conduct-regulating

109See, elaborately: Verkerk 2010, pp. 343-344.
110 See further sub-section 8.3.2.

rules in need of enforcement in ATS-based foreign direct liability cases brought before US federal courts.[111]

However, as has been discussed in detail throughout this study, the main issue underlying contemporary debates on international corporate social responsibility and accountability is that regulatory regimes from which mandatory conduct-regulating rules flow with respect to the transnational activities of internationally operating business enterprises tend to leave significant regulatory gaps. Host country regulatory standards tend to be very lenient and thus offer people and planet locally very little protection from the adverse impacts of the local activities of internationally operating business enterprises and/or their local subsidiaries, business partners and/or sub-contractors. This is often one of the reasons why host country citizens who suffer harm from such local activities bring foreign direct liability claims before home country courts, namely in search of more adequate protection. At the same time, mandatory international regimes directly generating conduct-regulating rules for corporate actors tend to be few and far between, as states and not private actors are the primary regulatory addressees of norms of public international law. The few norms of public international law that do directly address private actors, such as norms of international criminal law and international human rights law, have so far been the primary source of conduct-regulating rules sought to be enforced against multinational corporations through ATS-based foreign direct liability cases. However, it is in this particular context that the question has recently been raised whether these norms do in fact apply to corporate actors; as has been discussed in detail in the previous part, this issue as yet remains undecided.[112] Due to the restrictions posed by traditional but still prevalent notions of state sovereignty and territoriality in the international legal order, home country-based mandatory conduct-regulating rules addressing the activities abroad of 'their' internationally operating business enterprises are also very scarce, although the willingness among home country policymakers to consider the imposition of parent-based domestic measures with extraterritorial implications in the CSR context seems to be on the increase, as is evidenced by cautious initiatives with respect to transparency/disclosure by international groups on their non-financial performance in their operations abroad.[113]

Due to these significant gaps when it comes to mandatory conduct-regulating rules pertaining to the transnational activities of internationally operating business enterprises, it is not only the enforcement potential but especially also the standard-setting potential of home country systems of tort law that plays a major role in foreign direct liability cases. As a result of the spread of the socio-legal trend towards foreign direct liability cases also outside the US, and in view of the contemporary uncertainty surrounding the applicability of international human rights norms to corporate actors in ATS-based cases,

111 See further sub-section 4.4.1.
112 See further sub-section 3.3.2.
113 See further sub-sections 7.2.2 and 7.3.2.

foreign direct liability claims brought on the basis of general principles of tort law are gaining importance. As discussed, because of the limited availability of mandatory written conduct-regulating rules in this context these cases are typically based on unwritten norms pertaining to proper societal conduct/due care.[114]

The translation of these unwritten norms into judge-made behavioural standards will give an indication, albeit in retrospect, as to what level of care was to be expected of the corporate defendants with respect to the people- and planet-related interests of the host country plaintiffs who have suffered harm as a result of these business actors' host country activities (or those of their local subsidiaries, business partners and/or sub-contractors). It is in this way that Western society systems of tort law as applied by home country courts may arguably play their most significant role in promoting international corporate social responsibility and accountability. After all, where home country courts thus apply their lawmaking powers in order to come to decisions in concrete cases on the liability of (parent companies of) multinational corporations for damages caused in host countries, their decisions will have a significance as individual sources of law and public policy that far surpasses the individual dispute at issue.[115] This significance lies in the fact that the behavioural standards set out by the courts in these cases will now form new mandatory behavioural standards that will guide the future behaviour not only of the corporate defendant involved, but also of internationally operating business enterprises that are similarly placed and/or that engage in similar activities.

Here again, however, there are inherent limitations to the extent to which home country courts' standard-setting, monitoring and enforcement endeavours may be said to actually create behavioural incentives for the corporate defendants involved in foreign direct liability cases and those similarly placed to integrate into their corporate policies, management decisions and operational practices an awareness and consideration of the impacts that their activities may have on people and planet in host countries so as to prevent future harm from occurring. After all, this broader, more public and more future-oriented role for Western society systems of tort law fundamentally contrasts with their traditionally bipolar, specific, retrospective and restorative nature. Issues that arise in particular with respect to Western society tort systems' standard-setting role are the inherent legal insecurity that ensues from the fact that judicial lawmaking is done *ex post facto*, as the applicable standard of care is only formulated after the harmful activities have already taken place, and the fact that (court judgments in) tort disputes are often geared more towards determining whether a particular course of conduct may be considered to be negligent than towards determining what would have constituted careful/diligent behaviour under the given circumstances.

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114 See further sub-section 4.4.2

115 Compare, generally: Hartlief 2009, pp. 53-54; Vranken 2006, pp. 8-9. See further sub-sections 3.2.3 and 8.3.4.

Furthermore, as has been discussed before, the courts charged with the task of setting behavioural standards for the corporate defendants and those similarly placed often lack the time, know-how and relevant information to formulate behavioural standards that go beyond the private actors and interests involved in the case at hand. This raises the question whether a court creating a new legal standard with respect to a particular issue in dispute has the capacity to oversee the direct and indirect consequences that the judicial creation of this new standard may have in a broader context, in other disputes and on the behaviour of others similarly placed and whether that court should be asked to consider those broader consequences just like the legislature would before introducing a new rule. A closely related question that may be raised in this context is to what extent courts are permitted, through their standard-setting role, to create independently new behavioural standards and as such sources of law and policy in societies where the promotion and realization of public interests, public values and public policy objectives and thus the organization of societal life and the level of protection of particular public and private interests is in principle reserved for the public legislature.[116]

Questions such as these that arise with respect to the standard-setting role of courts in domestic civil disputes are even more relevant when it comes to the role in this respect for home country courts in the type of transnational tort-based civil litigation under discussion here. After all, the question may legitimately be raised whether any home country court is able to oversee not only the legal but also the socio-political consequences of standards set in a particular foreign direct liability case for the broader transnational context of international corporate social responsibility and accountability within which these cases are set. A final and related issue that arises in this respect is whether home country courts are permitted, through their standard-setting role, to create new sources of law and public policy not just in a domestic context and with a view to the promotion of internal home country public interests, but rather in a transnational context and with a view to the promotion of people- and planet-related public and private interests abroad in the host countries involved. This raises complicated questions with respect to the legitimacy of such standards not only within the home countries concerned themselves, but also in the transnational context between those home countries and the host countries concerned, as the setting of such standards obviously has extraterritorial implications and may thus be considered to constitute an exercise of extraterritorial prescriptive jurisdiction.[117]

An assessment

All in all, it is clear that Western society systems of tort law through their application by home country courts in foreign direct liability cases or similar types of transnational tort-based civil litigation indeed have a role to play in promoting international corporate social responsibility and accountability. They do so in three ways: by providing remedies

116 Compare, for instance: Hartlief 2009, pp. 58-59, 119-120.
117 See further sub-sections 8.2.5 and 8.3.4.

to host country plaintiffs who have suffered harm as a result of the adverse impacts of the transnational activities of home country-based internationally operating business enterprises; by creating a measure of transparency going beyond the parties to the dispute on the adverse impacts that such activities may have on people and planet around the world; and by generating behavioural incentives for the corporate defendants involved and for other internationally operating business enterprises to conduct their transnational activities in a prudent manner so as to prevent them from causing harm to people and planet abroad.

It is clear that the potential of Western society systems of tort law in performing any of these three roles may be impaired in various ways by their inherent nature and set-up, which in turn are a result of historical development and changing views on the societal role of these systems. On the other hand, the tort system is a flexible system that has over time creatively adapted to varying societal demands made upon it.[118] Van Dam notes in this respect that:

> "[...] *courts throughout the systems have been able and prepared to knock down systematic hurdles if there was a social or economic need to do so*".[119]

When it comes to remedies, for instance, examples of judicial activism in response to changing societal needs include damages being awarded to third parties in personal injury cases, as for instance in the Dutch tort system with respect to nervous shock claims.[120] In the end, courts are not merely concerned with mechanically applying the law, but with doing justice in and also beyond individual cases. Of course, ideas on what type of justice should be strived for through the tort system vary, as is evident from the corrective justice versus distributive justice dichotomy, and societal notions of what constitutes justice vary, as the longstanding debate on social utility versus moral responsibility (or welfare versus fairness) shows.[121]

It should be noted in this respect that some of the relatively new demands that are being made of these tort systems by these cases and their particular broader context, fit in remarkably well with contemporary developments in the role that these tort systems are expected to play in their own societies. This is true especially where it comes to the potential role of these systems in providing remedies that may help to prevent further or imminent harm, in creating transparency on the issues underlying these cases and in providing internationally operating business enterprises with behavioural incentives to prevent harm to people and planet in host countries as a result of their transnational activities from arising in the first place. The question of how the contemporary developments in

118 See further section 9.1.
119 Van Dam 2006, p. 126.
120 See, more elaborately: Rijnhout (forthcoming) 2012, chapter 6.
121 Compare sub-section 9.2.2.

these societies towards a more instrumental view of the tort system, not only among legal scholars but also among policymakers, the general public and, very importantly, courts, relate to its application in a transnational, global context is an interesting and highly significant matter for further research. What seems clear, however, is that in the broader context of the contemporary socio-political debates on international corporate social responsibility and accountability, tort systems may play a role not only as indicators of societal change, but also as facilitators of societal change.

Any assessment of the efficacy of Western society systems of tort law in promoting international corporate social responsbility and accountability needs to be done in light of the available alternatives. As has been discussed in detail throughout this part, the main issue underlying the contemporary debates on international corporate social responsibility and accountability is the lack of effective ways to regulate the transnational activities of internationally operating business enterprises with a view to limiting the adverse impacts that those activities may have on people and planet in host countries. This means that at least at present, there are only a very few real alternative legal or non-legal mechanisms that may perform any of the three roles performed by home country tort systems in this context more efficaciously, in view of the fact that all of the alternatives that do exist tend to have drawbacks of their own as well. Arguably, the real strength of the tort system in this respect lies in the fact that through the adjudication by home country courts of foreign direct liability claims or similar types of transnational tort-based civil litigation, it may fulfil all three roles at the same time, albeit imperfectly; particularly interesting in this respect is the mix of retrospective and prospective, private and public features inherent in today's systems of tort law, a mix that arguably at the same time also creates the greatest amount of tension.

Accordingly, as has already been mentioned here, in fulfilling these three roles Western society tort systems, through the contemporary socio-legal trend towards foreign direct liability cases being brought before home country courts, form part of a plausible second-best strategy. Importantly, this strategy is primarily aimed not at corporate leaders in the field of international corporate social responsibility and accountability, but at corporate rogues and corporate laggards. It is particularly with respect to these poor performers, which on a structural basis allow their multinational groups' activities to pose risks of harm to people and planet in host countries in a way and on a scale that far exceeds anything they would dream of doing in the home countries in which they are based, that the remedies, transparency and behavioural regulation that may be provided by Western society tort systems will arguably be most efficacious. Despite the many declarations of good intent by internationally operating business enterprises around the world, when it comes to the respect being paid by them to people and planet in their operations both at home and abroad, the need for effective compliance mechanisms has not abated. In fact, it is even likely to increase as the effects of the contemporary global economic recession

are putting companies around the world under pressure to sacrifice virtually anything – possibly also their moral bottom lines – to sustain their financial bottom lines.

In view of the multitude of different actors, different subject matter areas and different issues to be tackled in the broader field of international corporate social responsibility and accountability, as well as in view of the pressing nature of some of these issues and the inherent limitations of Western society systems of tort law, tort law's role(s) in this respect should not be isolated. Instead, it should ideally be connected to efforts in other fields of the law as well as to non-legal initiatives. Arguably, this is a role that the tort system is particularly well-equipped to perform, due to its open norms, flexible nature and norm-neutrality. Accordingly, it offers a platform for the (further) development, application and enforcement of a wide range of norms pertaining to the activities of corporate actors, whether individually or in a group, and the extent to which they are expected to take account of the people- and planet-related interests of third parties in their corporate (group) policies, management decisions and operational practices. These norms may include pre-existing legal norms such as hard law or soft law norms of public international law, host or home country public law regulations, and/or statutory or judge-made rules of private law, as well as societal norms on socially acceptable conduct and due care.

Particularly interesting in this respect is the potential interplay between criminal law and civil law systems both in providing remedies and in enforcing existing legal norms. Furthermore, the tort system also has an interesting role to play when it comes to international soft law mechanisms that are non-binding in nature but may become binding through intervention by civil courts and their standard-setting/lawmaking capacities, which enable them to transform not only unwritten but also non-binding societal norms into binding tort standards. The same is true for corporate codes of conduct and other public statements of good intent. Furthermore, especially where it comes to matters of transparency, there may be an interesting interaction between Western society tort systems and the increasing transparency requirements imposed in the field of corporate law. At the same time, the fields of tort law and contract law may come together for instance where false corporate statements about the sources and/or manufacturing processes of their products are concerned, or where companies in transnational supply chains seek to impose contractual obligations on one another with a view to limiting any adverse impacts of their business partners on the people- and planet-related interests of host country third parties. Obviously, all these examples of common ground between the role(s) of tort law in promoting international corporate social responsibility and accountability and the role(s) that other judicial and non-judicial, legal and non-legal mechanisms may play provide interesting matters for further research, for instance through case studies in which an assessment is made of the comparative adequacy of different legal mechanisms when it comes to solutions of particular socio-legal issues in this context.

10.2.2 Improving and expanding the role(s) of tort law

Setting an agenda for the future

It has been argued in this study that domestic systems of tort law currently provide the best available legal mechanism through which issues of international corporate social responsibility and accountability can be raised by host country victims suffering the detrimental impacts of the local activities of Western society-based multinational corporations, in order to have them authoritatively dealt with and resolved by Western society authorities, through their court systems. This means that in view of the pressing nature of the matters raised – corporate involvement in international crimes and/or violations of international human rights norms, violations of core labour standards, unacceptable risks to the health and safety of third parties and widespread environmental degradation – the role in this context of foreign direct liability cases is essential. In recognition of the crucial role(s) that this type of transnational tort-based litigation may play in promoting international corporate social responsibility and accountability, and in view of the particular legal factors that in the end determine the feasibility of these claims, it seems important to map out the particular areas in which there is room or even a need for improvement of the legal status quo.

As discussed before, the UN 'Protect, Respect and Remedy' policy framework for business and human rights emphasizes the importance of judicial mechanisms as a way to give victims of corporate human rights abuse access to effective remedies and places a duty on states to address existing and avoid new legal, procedural and practical barriers that may lead to a denial of justice in this respect. The UN framework provides examples of some areas of particular concern in this respect, including *inter alia*: the attribution of legal responsibility among members of corporate groups under domestic civil and criminal laws; the costs of bringing claims; difficulties for plaintiffs in securing legal representation; and inadequate options for aggregating claims or enabling representative proceedings. Home countries of multinational corporations in particular are required to address such barriers where they prevent host country victims of corporate human rights violations being able to address meritorious claims before home country courts when faced with a denial of justice in their own countries, which as discussed is a very real possibility in these cases.[122]

Accordingly, in all Western society home countries, policymakers are now being faced with the question as to what legal, procedural and practical barriers posed by their domestically applicable rules of tort law, civil procedural law, corporate law and private international law may prevent host country victims of corporate human rights violations obtaining adequate remedies through foreign direct liability cases brought before their courts. In 2010, the European Commission (Directorate General Enterprise and Industry) commissioned a study on the legal framework on human rights and the environment

122 UNHRC Report (Ruggie) 2011, principles 1, 25 and 26, pp. 6-7, 22-24. See further *supra* sub-section 10.1.1.

applicable to European enterprises operating outside the EU, with a view to providing a basis for possible measures by the EU and its Member States to put into effect the Ruggie framework, and informing the new EU policy on corporate social responsibility. One of the recommendations made in this study is that:

> "[...] *even if third-country victims of corporate abuse succeed in securing access to EU Member State courts, they will face very significant procedural obstacles in obtaining redress from MNCs* [multinational corporations] *including obstacles pertaining to time limitations, legal aid and due process, non-availability of public interest litigation and mass tort claims, and provisions on evidence.* [...] *The European Union and the EU Member States should address these procedural obstacles as part of their State duty to protect*".[123]

The Commission's new strategy on CSR, which was released in October 2011, does not put forward any concrete proposals for measures seeking to ensure corporate accountability of EU-based multinational corporations operating outside the EU.[124] It does indicate, however, that the Commission intends, by the end of 2012, to publish a report on EU priorities in the implementation of the UN policy framework on business and human rights, considering the findings of the aforementioned report, and that it will issue periodic progress reports thereafter. The Commission also "[i]*nvites EU Member States to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles*".[125] At the same time, the fact that the Commission's previous emphasis on the voluntary nature of corporate social responsibility has been abandoned in the renewed EU strategy in favour of an approach that anticipates a role also for public authorities is an important development. After all, the expectation that public authorities support the development of corporate social responsibility, which is to be led by companies themselves, through "[...] *a smart mix of voluntary policy measures and, where necessary, complementary regulation*", offers a powerful argument in favour of strengthening the role that EU Member State-based courts and systems of tort law may play in EU-based multinational corporations. Consequently, it seems that now is the time for the formulation, both at EU level and within EU Member States, of innovative proposals and creative measures aimed at improving accountability of EU-based multinational corporations in general, and at enhancing the feasibility of foreign direct liability cases before domestic courts in Europe specifically.

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123 EC Report (Augenstein) 2010, p. 76.

124 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011). See also, critically: 'EU must take further steps to hold companies accountable', European Coalition for Corporate Justice (ECCJ) Press Release, 25 October 2011, available at <www.corporatejustice.org/csr-communication-eccj-reaction.html?lang=en>.

125 EC Communication CSR 2011, p. 14.

In part II of this study, the main legal framework for foreign direct liability cases was set out, with a focus on the four factors that typically determine the feasibility of this type of transnational tort-based litigation: jurisdiction, applicable law, substantive legal basis, and procedural and practical circumstances. Over the past years, countless suggestions have been made by NGOs and scholars alike for ways to change the legal status quo with respect to each of these factors so as to enhance the role that transnational tort-based civil procedures may play in promoting international corporate social responsibility and accountability. Some of these proposals have been very pragmatic and potentially fairly easy to implement, especially those that seek to build on existing legal instruments and those aimed at improving the practical circumstances impacting the feasibility of foreign direct liability claims. An example of the former are the proposals that have been made by the European Coalition for Corporate Justice (ECCJ), a civil society network devoted to corporate accountability within the EU, to amend the existing EU rules and requirements on corporate reporting in order to realize greater transparency on companies' social, environmental and human rights impacts.[126] An example of the latter is the recent political debate in the Netherlands over the possibilities for and necessity of the introduction of a legal aid fund for host country victims seeking to bring foreign direct liability claims in the Netherlands.[127]

Other proposals have been aimed at realizing more structural changes in the fields of tort law, civil procedural law, private international law and corporate law. Ideas that keep recurring in this context include for example the suggestion that domestic courts should be allowed to exercise universal civil jurisdiction over transnational civil claims brought before them by victims seeking redress for egregious human rights abuses.[128] Another example is the persistent notion that existing arrangements within the field of corporate law pertaining to the liability of separate entities within a corporate group should be reformed so as to better reflect group (enterprise) realities, particularly with a view to protecting tort creditors.[129] Furthermore, suggestions have for instance been made by European NGOs that some form of strict parent company liability should be adopted with respect to the damage caused in host countries by the transnational activities of EU-based multinational corporations, and/or that statutory duties of care should be introduced for EU-based internationally operating business enterprises with respect to the business practices of their overseas business partners/sub-contractors.[130]

When considering potential changes to the legal status quo in order to enhance the feasibility of foreign direct liability cases and improve corporate accountability, it

126 ECCJ Report (Gregor) 2010, pp. 10-13.
127 See further sub-section 8.2.5.
128 See, for instance: Ryngaert 2007; Donovan & Roberts 2006; Dubinsky 2005, pp. 268-282.
129 See, for instance: Blumberg 2001; Dearborn 2009.
130 See, for instance: FNCM/Sherpa Report (Bourdon/Queinnec) 2010, pp. 48-50; ECCJ Report (Gregor) 2010, pp. 16-21; ECCJ Report (Gregor/Ellis) 2008, pp. 11-26.

is important to recognize that foreign direct liability cases play out within a highly complicated socio-political environment and may raise controversy both domestically and internationally. Proponents point to the importance of these cases in promoting international corporate social responsibility and accountability. Opponents, however, point to the detrimental effects that they may have on international relations (especially with the host countries involved), the domestic investment climate and international competitiveness. As such, this controversy is likely to have an impact on the extent to which home country policymakers will be able and willing to endorse and even encourage this type of transnational tort-based litigation before their domestic courts with a view to promoting international corporate social responsibility and accountability by 'their' internationally operating business enterprises.

It should be noted in this respect that some of the objections that exist in this context might be allayed if legal measures aimed at enhancing the feasibility of foreign direct liability cases before domestic courts in Europe and promoting corporate accountability of EU-based multinational corporations were to be adopted at the international or EU level, rather than unilaterally. At the same time, however, it has to be recognized that the EU's field of play in this respect is limited by the nature and scope of its competences in particular subject matter areas. Accordingly, future legal measures in this respect need to be aimed for at different levels. The field of private international law is largely and in the future perhaps completely (depending on the outcome of the revision of the Brussels I Regulation) the domain of EU legislation in this context, for instance. By contrast, the field of substantive private law largely remains outside EU competences at present and is thus a matter of domestic policy in the individual Member States. Thus, proposed measures will have to be differentiated according to the level at which they are to be implemented and, when it comes to domestic measures, according to the particular impediments that exist in the particular home country tort system involved. At the same time, it needs to be recognized that although many of the measures aimed at enhancing the feasibility of foreign direct liability cases will require legislative action, there may also be certain aspects that are a matter of judicial discretion.

Furthermore, even despite their current societal significance, it has to be recognized that foreign direct liability cases represent only a tiny fraction of all of the tort-based civil disputes, transnational or domestic, that are brought before courts in these Western societies on a yearly basis. As such, any proposals seeking to change existing systems of tort law, civil litigation, or private international law in these societies in order to enhance the feasibility of this particular type of transnational tort-based civil litigation, require sound foundations, an adequate delineation and sufficient socio-political support in order to be successful. It is suggested in this respect that the more new proposals build on existing legislation, case law and procedural practice, or link on to broader developments taking place in legal fields such as tort law and civil procedural law, the more likely they are to have an impact in the short term. A relevant development in this respect includes for example

the European Commission's current preoccupation with collective redress mechanisms throughout the EU with a view to private enforcement of rules and regulations in, and potentially also beyond, the fields of consumer and competition law.[131]

Finally, it seems helpful to distinguish in this respect between policy measures aimed at short-term, medium-term or long-term improvements; after all, some changes may be more fundamental than others and will thus take more time to realize. The institution of a legal aid fund for overseas victims of corporate human rights abuses, for instance, is a relatively straightforward measure that would be easy to implement (although its desirability may cause political controversy in a time of economic decline) and could as such be an option for enhancing the feasibility of foreign direct liability cases in the short term. The introduction of any kind of strict(er) liability in this context, on the other hand, is likely to be much more complicated and to raise much more socio-political controversy, and would as such arguably be realizable only in the medium term. An example of a measure that could be proposed with a view to enhancing the feasibility of foreign direct liability cases requiring a long-term strategy would be a reorientation or curtailment of the fundamental corporate law notions of separate legal personality and limited liability in the context of the tortious liability of corporate group members, which could eventually lead for instance to the replacement of the current system of entity liability by a regime of (multinational) enterprise liability.

In part III of this study, it was argued that at this point in time Western society tort systems may potentially play three main roles in promoting international corporate social responsibility and accountability. These include: the provision of remedies to host country victims suffering harm as a result of the transnational activities of multinational corporations; the creation of transparency in and beyond a particular dispute on the adverse impacts that those activities (may) have on people and planet abroad; and the generation of behavioural incentives for the corporate defendants involved and others like them to exercise due care when conducting their transnational activities so as to prevent them from causing harm. Accordingly, it is suggested that (proposals for) policy measures seeking to improve the feasibility of foreign direct liability cases should arguably be aimed primarily at supporting and developing any or all of these three roles. At the same time, it should be recognized that virtually all of the proposals put forward in this context require not only sufficient socio-political support, but also further elaboration in order to specifically map out how they can best be framed and embedded at the level and in the legal field in which it is sought to implement them.

The figure below visualizes some of the main areas that in my opinion should be the focus of future policy endeavours, both in the short term and in the medium to long term, to realize legal change with a view to enhancing the feasibility of foreign direct liability

131 See more elaborately, the European Commission's web page on collective redress, available at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm>.

cases before domestic courts in Europe and improving corporate accountability of EU-based multinational corporations. I will indicate those fields that I think provide the best (primary) options and most room for further development at this point, bearing in mind the current legal status quo. It is these fields that should be the focus of improvements, where necessary, to the legal status quo in the short term. However, I will also indicate those fields which I think do not necessarily provide current feasible options, for lack of expected socio-political support or practical applicability, but which may, where necessary, serve as subsidiaries to the primary options in the longer run. It is these fields that may be worthwhile to map out in more detail in the future.

<table>
<tr><th></th><th colspan="2">Primary options</th><th colspan="2">Subsidiary options</th></tr>
<tr><td>Remedies</td><td>– Brussels I revision</td><td rowspan="3">– Parent company duty of care
– Funding & legal representation
– Collective & representative actions
– Court orders & injunctions
– Collection of evidence</td><td>– Universal civil jurisdiction</td><td rowspan="3">– Strict parent company liability
– Re-orientation fundamental principles corporate law/multinational enterprise liability
– Private law & distributive justice
– Public interest litigation culture</td></tr>
<tr><td>Transparency</td><td>– Reporting requirements
– Burden of proof</td><td>– Pursuit of material truth</td></tr>
<tr><td>Regulation</td><td>– Judicial standard-setting</td><td>– Post-facto incentive damages
– Extension Art. 7 Rome II</td></tr>
</table>

Table 1. Setting an agenda for the future

A brief elaboration

All of the areas of potential legal change indicated here are derived from what has already been found and/or discussed in this study. It should be noted at the outset that this overview does not seek to be exhaustive, but rather indicates a selection of areas of potential improvement that I think are highly relevant and deserve further policy initiatives. Some of the areas of high potential indicated here lie (more) within the powers of the courts, which in turn can only be exercised if meritorious claims are brought before them by host country plaintiffs, rather than within those of domestic or European legislators. The three main examples are: shifts in the burden of proof, which may enhance the tort system's role in creating transparency; the setting of (clear) behavioural standards by courts in foreign direct liability cases brought before them, with a view to (prospectively) promoting

socially responsible behaviour by internationally operating business enterprises; and the active use of court orders and injunctions as a remedy and/or a way of directly influencing corporate behaviour. At the same time, these tools rely not only the willingness of the courts involved to grant such measures, but also on the creative use of existing possibilities to request such measures by the host country plaintiffs and their legal representatives.

Furthermore, the distinction between primary and subsidiary 'projects' also indicates which fields should in my view be the focus of short-term policy initiatives, with a view as well to the European Commission's stated intention to set out its priorities with respect to the implementation of the UN policy framework on business and human rights before the end of 2012, and its call on Member States to adhere to the same deadline in the development of their national plans in this respect. Other recent developments, such as the ongoing revision of the Brussels I Regulation and the European Commission's endeavours with respect to collective redress, are also taken into account. It should be noted that some of the fields of improvement that are indicated here as primary options/short-term objectives represent necessary conditions for the initiation of foreign direct liability cases. Without the availability of adequate funding, legal representation and the possibility of pursuing collective and/or representative actions in the Western society home countries involved, the pursuit of this type of tort-based civil litigation is often rendered infeasible altogether, which means that Western society systems of tort law cannot fulfil their potential in this context.

At this point, the first priority of those seeking to promote international corporate social responsibility and accountability in the ways suggested here should arguably be to support the initiation of new meritorious foreign direct liability claims. Considering the current controversy over corporate ATS claims and the US (federal) courts' more general curtailment in recent years of this type of litigation, it seems that the real room for expansion lies with cases brought before US state courts and domestic courts in other Western societies on the basis of general principles of tort law and the tort of negligence in particular. The pursuit of more of these claims before courts in a variety of Western society home countries would allow for the additional generation of precedent ('judicial standard-setting') and would also provide other comparative insights into the opportunities and barriers that exist in this respect, allowing for cross-system learning. In order to map out in more detail the potential and feasibility of foreign direct liability cases, further precedent should be sought on preliminary matters such as (the boundaries of) civil jurisdiction and the possibilities for invoking home country tort law in this transnational context, evidentiary problems and the standing of public interest organizations. In addition, further precedent would be crucial especially with respect to substantive issues such as the circumstances under which parent companies of multinational corporations may be said to owe a duty of care toward third parties in the host countries where their multinational groups operate.

In principle, the tort of negligence and its accompanying duty of care (or their equivalents outside the common law legal systems) offer a wide range of possibilities for foreign direct liability claims against parent companies of multinational corporations with respect to harm caused by host country activities that have ultimately been carried out by local subsidiaries and/or local business partners or sub-contractors. Similarly, they may be relied on in (joint and several) liability claims against the corporate entities and private individuals (managers, directors) that were more directly involved in the harmful activities. Considering the novelty of the idea of parent company liability in this context in most Western societies and the lack of precedent that exists with respect to the circumstances under which parent companies may be held liable for harm caused by the transnational activities of their multinational groups to people and planet abroad, calls for statutory provisions introducing strict parent company liability or generic duties of care in this respect seem premature at the moment. It is also highly questionable whether there would be sufficient socio-political support for legislative intervention in this respect at this point, as the use of Western society tort systems to promote international corporate social responsibility and accountability is a rather recent development and still raises many questions.

In my opinion, the task of formulating duties of care and establishing parent company liability under certain circumstances in this context should, for the time being, be left to the home country courts when deciding individual foreign direct liability claims, rather than to home country legislators. After all, in a time of changing socio-political notions on the societal responsibilities of corporate actors, choosing the legal certainty created by written norms over the flexibility of the tort system's open norms is likely to stifle rather than advance the development of behavioural standards in this respect. If future case law were to reveal a need for the introduction of, for example, strict liability in this respect, this may be considered in the medium to long term, provided of course the socio-political support needed to implement such a statutory provision is available and the provision in question can be defined and circumscribed sufficiently clearly. In the meantime, however, the task of creating legal standards out of societal norms where appropriate in this context should be left to the courts.

In order to enable the pursuit of more foreign direct liability claims and to improve and expand the roles that tort law may play in promoting international corporate social responsibility and accountability, one of the main short-term objectives should be to improve access to home country courts for host country victims seeking to get redress for the harm that has been caused by the transnational activities of multinational corporations. The availability of adequate funding and legal representation, the possibilities of bringing collective and/or representative actions, and the use of court orders and injunctions are important conditions in this respect. All three of these conditions are in principle dependent on procedural rules and practices in the home countries where it is sought to

pursue foreign direct liability claims, which means that legal change will in principle have to be realized at the domestic level. As discussed, however, the European Commission is currently looking into ways to improve collective redress across the Member States with a view to strengthening the enforcement role of private law and litigation; it seems worthwhile to try to link onto this development in order to enhance the feasibility of foreign direct liability cases before domestic courts in Europe.

Similarly, in a wider context, the contemporary dynamics when it comes to corporate reporting and transparency may provide opportunities to enhance the transparency on group structures and corporate impacts on people and planet with a view to holding parent companies of multinational corporations accountable at home for any detriment caused abroad by the activities of local subsidiaries. The importance of enhancing transparency in this respect for the feasibility of foreign direct liability claims and the role of tort law in promoting international corporate social responsibility and accountability more generally is exemplified by recent developments in the Dutch Shell cases. These show that at least in the Netherlands host country plaintiffs seeking to hold parent companies of multinationals liable for harm caused abroad may be hindered by restrictive rules on the collection of items of evidence that lie within the ambit of their corporate opponents. Although in the short term some of these issues may be addressed where courts are willing to shift the burden of proof in favour of the host country plaintiffs, a closer look at the Dutch rules in general on acquiring evidence may be needed if they turn out to pose a structural challenge to the pursuit of the material truth in civil litigation and the tort system's role in creating transparency through these cases in particular. And, finally, the ongoing Brussels I revision should also be closely scrutinized for the impacts it may have on the feasibility of targeting non-EU-based corporate actors, such as host country subsidiaries or other non-EU-based members of corporate groups that have a connection to the EU, in foreign direct liability cases brought before domestic courts in EU Member States.

In my opinion, the focus of policy endeavours at this point should be on the primary options that have been described here. That does not mean, however, that it would not be useful to look as well at subsidiary options that may at this point be too controversial or too vague to provide adequate legal avenues for those seeking to apply Western society systems of tort law and private law more generally to promote international corporate social responsibility and accountability.

An interesting development is the growing acceptance internationally of states' exercise of universal civil jurisdiction over certain transnational tort claims that have no or only very few connections to the forum state. For host country victims seeking remedies for instance for the involvement of foreign (*i.e.*, not based in the forum state) corporate actors in egregious violations of international human rights perpetrated abroad, this may be a

highly significant development, considering the issues they tend to face when trying to address and/or get redress for their harm in their own countries.[132] When it comes to the regulatory role that tort law may play in guiding the future behaviour of multinational corporations so as to prevent them from causing harm to people and planet abroad, the introduction of measures that reinforce its functioning as a deterrent should also be considered. An example are post-facto incentive damages, which may be particularly effective in this context as the parent companies whose behaviour it is sought to regulate are often repeat players, in the sense that they will typically engage in the same types of risky behaviour time and again. Accordingly, damages awards in foreign direct liability cases that are calculated with a view not only to providing the host country victims with adequate redress for their harm but also making the externalization of production costs onto people and planet locally less attractive, are likely to have a significant impact on corporate behaviour in this context.[133]

Furthermore, the importance of the choice-of-law rules that are to be applied by the Western society home country courts when deciding foreign direct liability claims for the regulatory role that tort law may play in this transnational context cannot be overstated. After all, the standard-setting role that Western society home country systems of tort law may play in promoting international corporate social responsibility and accountability is directly linked to the question whether home country tort law is applicable to transnational tort-based civil disputes brought before home country courts. At present, the tort system's regulatory potential with respect to transnational actors and activities is limited particularly in domestic courts in EU Member States, where under the Rome II Regulation the rules of tort law of the forum country will be applicable only by way of exception to transnational disputes relating to damage caused abroad. In practice this means that within the EU the role of home country courts in setting behavioural standards in foreign direct liability cases for the corporate actors involved and those like them is likely to be restricted to cases involving environmental damage (based on Art. 7 Rome II). In light also of the growing tendency more generally towards viewing tort law as a behavioural and/or enforcement mechanism, a critical evaluation of the way in which the Rome II Regulation's choice-of-law regime impacts this potential role, both in general and in the specific context of foreign direct liability cases, seems highly advisable.[134]

Finally, there are some other areas where fundamental changes to the legal status quo could be sought to be achieved in the long term with a view to enhancing the feasibility of foreign direct liability cases and enabling the roles that tort law may play in promoting international corporate social responsibility and accountability. Although none of these

132 Compare, for instance: Mills 2009b; Donovan & Roberts 2006; Dubinsky 2005, pp. 268-282.
133 Compare, for instance: Van Boom 2006a.
134 See, more generally on the (potential) role of private international law in transnational regulatory regimes, for instance: Bomhoff & Meuwese 2011; Muir Watt 2011b; Whytock 2009.

options in themselves seem to provide feasible legal avenues at present, they may merit further mapping out. In the corporate law field, the longstanding idea that a reorientation of the fundamental principles of separate legal personality and limited liability may be in order so as to bring them in line with contemporary group realities, remains topical. Along the same lines there is the notion of (multinational) enterprise liability, according to which it is sought to hold (multinational) corporate groups liable for harm caused as a result of an act somewhere in the corporate structure. It is suggested that these corporate groups should be considered in law to be one economic enterprise, rather than an assembly of separate corporate entities with limited liabilities. In light of the contemporary reality in which members of corporate groups may be able and motivated to hide behind the group structure in order to avoid liability for harm caused by their activities, these ideas deserve further thought, with a view to the protection of involuntary (tort) creditors in general, and that of host country third parties in the North-South context of foreign direct liability cases particularly.[135]

In the field of private law, there is the growing tendency to view private law mechanisms such as tort-based civil litigation from an instrumental perspective, as tools that may be used to enforce existing legal norms and create new ones, to provide behavioural incentives and to bring about societal change more generally. This tendency raises many interesting issues pertaining to the blurring of boundaries between private (law) and public (law) that are very relevant for the question whether and to what extent tort law may be relied on to promote international corporate social responsibility and accountability. One of these issues is whether and to what extent private law mechanisms can be utilized in order protect or promote interests that go beyond the private interests of the private parties involved in any particular tort dispute, not only in a domestic context but also in a transnational context.[136] To what extent can the tort system, through foreign direct liability cases, contribute to the realisation of a fairer distribution of welfare in a transnational, North-South setting?

Closely related to this is the fact that the advent of foreign direct liability cases, in view of these changing views on the role of the tort system in society, seems to reveal a broader tendency towards (transnational) public interest litigation before domestic courts in Western societies.[137] This raises the question whether a legal culture conducive to the pursuit of public interest litigation may arise outside the US and to what extent policymakers in those societies would be willing to take additional steps to further enable

135 Compare, for instance: Eijsbouts 2011, pp. 48-55, who suggests three major revisions of existing systems of company law in this respect: a pluralist approach to the notion of 'the interest of the company'; better alignment of corporate group law with economic and organisational reality; and the establishment of a system of multinational enterprise liability for corporate violations of fundamental rights of third parties.

136 Compare, for instance: McCann 2008; Faure & Nollkaemper 2007; Cane 2002c; Cane 2002b; Cane 2001; Wightman 1999.

137 Compare, for instance: Cummings 2008; Viscusi 2002; Koh 1991.

this type of litigation.[138] Both of these tendencies require more study, since they may in the long term turn out to have a significant impact on societal perceptions on and socio-political support for foreign direct liability cases and the role of tort law in promoting international corporate social responsibility and accountability.

138 Compare, for instance: Kagan & Axelrad 2000; Damaska 1986.

PART IV

Epilogue

Conclusion

The impact of economic development on people- and planet-related interests

Over past centuries, economic development and technological progress have led to an unparalleled increase in material and non-material welfare especially in Western societies. Almost without exception, people living in these societies find their basic needs (air, food, water, shelter, clothing) fulfilled, giving them the opportunity to focus on higher level needs and to arrange their personal environments and their lives so as to maximize their well-being. This process has been accelerated by the development of modern states based on democratic principles and the rule of law, which have provided their citizens with stability, protection and certain fundamental rights and entitlements. But the main driver of economic development and increasing welfare has been business enterprises in general and in particular the modern corporation, which has a legal personality separate from its individual constituents and encourages investment and entrepreneurship through the principle of limited liability, on the basis of which investors are not personally liable for the debts of the corporation in excess of the sum of their investment. Under the influence of globalization and technological developments, the past few decades have seen an unparalleled increase in the number, size and influence of internationally operating business enterprises which, through their ability to seek out favourable regulatory environments, are generating even more benefits in the Western society home countries where they are based. Accordingly, the positive impacts that corporate actors and corporate activities have on the welfare and well-being of people around the world are growing fast and are increasingly outpacing the role of state governments in this respect, although more in some societies than in others.

However, the welfare of one person more often than not comes at a price to the well-being of others. This was made painfully clear in most Western societies by the Industrial Revolution, as the industrialization and expansion of production processes resulted not only in unprecedented economic progress but also in unprecedented risks of industry-related harm to workers, communities and the environment. Slowly but surely, the idea that the cost of industrial accidents was the price that society should pay, through those unfortunate enough to be detrimentally affected, for the benefits of economic growth and increasing welfare, was replaced by the idea that the economic spoils of some should not be gained at the expense of others in society. Accordingly, those benefiting from activities that involved certain inherent risks to others, such as employers, industrialists and drivers of motor vehicles, were increasingly asked to bear the full range of societal costs associated with those activities. These developments became reflected in the legal systems of these Western societies as increasingly strict regulatory standards have been

developed over time in order to make sure that one person's freedom to pursue personal gains is not exercised at the expense of the safety, health, well-being, basic rights and living environment of others. The advent in the 20th century of modern welfare states, in which governments played an active role in protecting and promoting the economic and social well-being of their citizens on the basis of principles of equality of opportunity, equitable distribution of wealth and public responsibility for those unable to fend for themselves, forms the pinnacle of this development.

At the same time, the triumph of the capitalist system as the world's dominant economic model and the primary generator of economic growth exercises pressure on governments all over the world to step back and minimize control over free market processes, especially in times of economic duress. This, in combination with the growing scale, influence and impact of corporate actors around the world is causing a shift in ideas and expectations, especially in Western societies, pertaining to the responsibilities that corporations themselves have towards society over and above the responsibility towards their shareholders to generate maximum profits while staying within the limits set by the law. After all, as companies' societal impacts, not only positive ones but potentially also negative ones, are growing while state control over their activities is declining, this inevitably leads to a redistribution of societal responsibilities. Accordingly, the question arises to what extent business enterprises may be expected to take responsibility, in exchange for their social licence to operate, for the detrimental impacts that their operations may have on people and planet in the societies in which they operate, even where local regulatory requirements do not legally compel them to take the people- and planet-related private third party or public interests into consideration.

Increasingly, consumers, investors, policymakers and the general public in Western societies are pressuring companies to operate in what is considered to be a socially responsible manner by incorporating an awareness and consideration of people- and planet-related interests into their corporate policies, management decisions and business practices and by seeking to minimize any detrimental impacts that their operations may have on those interests. As levels of welfare rise in Western societies and as travel, education and modern communication technologies combine to create a growing consciousness of the plight of the less well-off living in other societies, this moral appeal is turning into an appeal for corporate social responsibility (CSR) not only at home but also abroad. After all, the need for corporate actors to assume responsibility for the impacts of their activities on people and planet is arguably most pressing when it comes to business operations undertaken in developing host countries, emerging economies and/or failed states where the level of protection of private third party and public interests against harm resulting from corporate activities is significantly lower than in the developed societies that form their home base ('double standards'). The question arises whether internationally operating business enterprises have a moral duty to seek to apply consistent best practice in their

operations around the world, regardless of the regulatory context within which they take place, and whether there is a moral bottom line below which they should desist from going in their pursuit of profits. It seems that especially in Western societies, public support for this proposition is growing, as is evidenced by the growing call for transparency and accountability by internationally operating business enterprises as regards the people- and planet-related impacts of their business operations abroad as well as those of their foreign business partners and/or sub-contractors.

Questions remain, however, as to the actual responsibilities that internationally operating business enterprises have towards the people- and planet-related interests of host country citizens. In response to the increasing call in Western societies for international corporate social responsibility and accountability, many Western society-based internationally operating business enterprises have adopted corporate codes of conduct and/or are participating in various kinds of voluntary state-based or non-state-based (private) initiatives in an attempt to proactively address their impacts on people and planet around the world. In the absence (in most cases) of clear-cut, authoritative behavioural standards and/or monitoring and enforcement mechanisms that offer some prospects for exercising coercion against non-compliers and/or non-participants, however, these initiatives run the risk of providing only very limited (legitimate) guidance for corporate behaviour in this respect and of promoting corporate window-dressing (or green washing) more than anything else. At the same time, questions remain as to the actual socio-political support for some of the expectations expressed in this respect in the home countries of the internationally operating business enterprises involved. After all, consistent best practice with respect to the people- and planet-related impacts of business operations around the world is likely to come at a price that will eventually manifest itself in higher prices for consumers and/or lower returns for investors, a price that they may not be willing to pay where they have a choice in the matter. Accordingly, where a level playing field (*i.e.*, an environment in which companies are given an equal ability to compete as the same behavioural standards apply to all of them) does not exist and cannot be created by coercing corporate laggards to adopt the same consistent best practice as corporate leaders in the CSR field, expectations of international corporate social responsibility and accountability will necessarily have to be modest.

The role of the law

Another question that arises is what the role of the law is in promoting and/or commanding international corporate social responsibility and accountability. Ideally, the protection of people- and planet-related interests against the detrimental impacts of business operations would be guaranteed at the international level, for instance through an international

regime of mandatory behavioural standards applicable to business enterprises around the world, and/or through an international tribunal dealing with corporate misconduct in this respect. In reality, however, in line with the contemporary international legal order's emphasis on states as the primary subjects of public international law, there are only a very few norms of customary international law and/or international treaty regimes in CSR-related subject matter areas such as health and safety, the environment, labour standards and human rights that directly set binding behavioural standards for corporate actors. Those that do address issues in this context tend to be dependent for their application to internationally operating business enterprises on the ability and willingness of local governments to implement and enforce the standards set out in them. In light of the contemporary lack of consensus among states on the behavioural standards that should apply to corporate actors with a view to minimizing the detrimental impacts of their business operations on people and planet around the world, the pursuit of any meaningful international regime in this respect seems to be a fruitless and potentially even counter-productive exercise at this point. As for international tribunals, it should be noted that at present even the International Criminal Court, which may prosecute individuals for a very limited number of international crimes (genocide, crimes against humanity, war crimes), does not have jurisdiction to hear claims in this respect against corporate defendants.

It should be noted, however, that despite the virtual absence of international hard law standards dealing with the impacts of corporate activities on people and planet, there are a number of authoritative international soft law instruments that provide a measure of guidance as to the behaviour that may be expected of internationally operating business enterprises. An important example in this respect is provided by the recently updated OECD Guidelines for Multinational Enterprises, which consist of a set of recommendations addressed by the governments of the OECD Member States to 'their' internationally operating business enterprises. The OECD Guidelines provide voluntary principles and standards of business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. Another important example in this respect is the authoritative UN 'Protect, Respect and Remedy' policy framework on business and human rights that was promulgated in 2008 and further elaborated in subsequent reports and in a set of Guiding Principles that was put forward in 2011. This semi-legal policy framework addresses the respective duties and responsibilities of states and business enterprises when it comes to identifying, preventing, mitigating and/or addressing the adverse human rights impacts of corporate activities both at home and abroad. Although the framework does not set out any cut-and-dried behavioural standards for internationally operating business enterprises, it does provide them with important practical guidance on how to live up to their responsibility to respect human rights by avoiding infringements on the human rights of others and by addressing

adverse human rights impacts with which they are involved, not only directly but also indirectly through their business relationships.

As a result of the lack of binding international standards and the non-binding nature of the international soft law instruments that do exist in this respect, the setting (or implementation), monitoring and enforcement of behavioural standards for internationally operating business enterprises remains primarily a matter for the domestic legal regimes of the various home and host countries within which those business enterprises conduct their activities. The lack of coordination and/or oversight in this approach with respect to the transnational activities of internationally operating business enterprises is one of the major contemporary challenges of global business regulation. It allows corporate actors where possible to pick and choose those countries with the most favourable regulatory climate for various parts of their operations and thus withdraw from the control and oversight of any single state; it also gives them a very strong bargaining position vis-à-vis the home and host countries in which they (may potentially seek to) conduct part of their activities, whether directly or through a web of local subsidiaries, business partners and/or sub-contractors. Especially where developing host countries and/or emerging economies are concerned, this is likely to result in a downward pressure on local regulatory standards and may even lead to a regulatory race to the bottom between different would-be host countries. Even developed home countries are not insensitive to the financial and socio-economic benefits generated by internationally operating business enterprises operating from within their territory, and will generally also be motivated to retain a favourable investment climate. However, it is especially in developing host countries and/or emerging economies that the need for foreign investments in combination with a more general unwillingness (often because of corruption) or inability to adequately protect local private third party and public interests creates an overly permissive regulatory environment that does not motivate the corporate actors involved to identify, prevent, mitigate and/or address the potentially detrimental impacts of their activities on people and planet locally.

The regulatory role of home countries

It is against the background of these challenges that are inherent in global business regulation that the thoughts of those driving the contemporary debates on international corporate social responsibility and accountability in Western societies are increasingly turning towards home country policymakers. Even the UN 'Protect, Respect and Remedy' policy framework on business and human rights recognizes that home country governments may have a role in promoting respect for human rights by internationally operating business enterprises domiciled within their territory and/or jurisdiction when it comes to their activities abroad too; special duties exist where the corporate actors involved operate in conflict-affected areas and so run the risk of becoming involved in gross human rights abuses. This raises

the question as to what regulatory options home countries seeking to legally regulate the transnational activities of 'their' internationally operating business enterprises have at their disposal. In an international order based on state sovereignty and the accompanying idea that states in principle should not infringe the sovereign right of other states to pursue their own (regulatory) policies with respect to actors and activities located within their territory, the possibilities for states to extraterritorially regulate foreign actors and/or activities taking place abroad are necessarily limited. Even though customary international law imposes only a few real limitations on the ability of states to legitimately exercise extraterritorial jurisdiction, especially when it comes to the exercise of prescriptive and/or adjudicative jurisdiction over foreign actors and/or activities abroad, exercises of extraterritorial jurisdiction may raise international controversy especially where they conflict with domestic policies with respect to the same actors and/or activities of the state where they are located.

This means that the unilateral imposition by home countries of mandatory requirements aimed at regulating, whether directly or indirectly, the business practices of 'their' internationally operating business enterprises abroad, or those of the host country-based subsidiaries, business partners and/or sub-contractors of these home country-based corporate actors, with a view to promoting international corporate social responsibility and accountability, does not go undisputed. In the end, the amount of resistance by the host countries involved is likely to be determined by the extent to which the home country regulatory measures taken in this respect thwart host country regulatory policies with respect to those same actors and/or activities. At the same time, such measures may also be subject to dispute in the home countries involved themselves, as they may burden the internationally operating business enterprises they seek to regulate with the problem of potentially having to deal with conflicting regulatory requirements with respect to the same business activities, and as they may also have significant detrimental effects on the international competitiveness of the business actors involved. Furthermore, the question may legitimately be raised to what extent home country citizens in their capacity as consumers, investors and/or tax payers should be obliged to carry (some of the) costs associated with the imposition of home country regulatory measures aimed at protecting people- and planet-related interests abroad. And ultimately, such unilaterally imposed regulatory measures run the risk of impairing the investment climate in the home countries imposing them to such an extent that the internationally operating business enterprises they seek to regulate may go in search of greener pastures, something that is enabled by the organizational flexibility and international mobility that is often typical of these companies. Some of these concerns could be alleviated by the joint imposition of such measures by groups of home countries, for instance at EU level; here, however, the question arises whether EU-based regulatory measures aimed at protecting people- and planet-related interests outside the EU against the potential detrimental impacts of EU-based internationally operating business enterprises fall within the EU mandate, which after all is primarily aimed at promoting economic and social progress within the EU itself.

Still, in light of the limited regulatory options available internationally when it comes to global business regulation and in recognition of the profound detrimental impacts that business operations may have on people and planet especially in developing host countries, as is made clear for instance by the UNEP report on the environmental pollution caused by the oil industry in the Ogoniland region of the Niger delta, the domestic and international pressure on home country governments to take regulatory steps in order to promote international corporate social responsibility and accountability by 'their' internationally operating business enterprises is growing. And indeed, slowly but surely home country policymakers are starting to respond to this pressure, as is evidenced by cautious steps to increase transparency on any detrimental impacts that the foreign business practices of home country-based internationally operating business enterprises may have on people and planet in host countries. Even at EU level, developments are taking place that seem to suggest that the EU may in the future impose certain regulatory measures of a legal nature in order to promote international corporate social responsibility and accountability by EU-based internationally operating business enterprises with a view to protecting people- and planet-related interests in non-EU host countries. As such, it seems that a more prominent role for Western society home country-based regulatory measures aimed at identifying, preventing, mitigating and/or addressing any detrimental impacts that the transnational activities of 'their' internationally operating business enterprises may have on people and planet in host countries, whether directly or indirectly through the business practices of their local subsidiaries, business partners and/or sub-contractors, is near at hand.

Experience shows that there are indeed possibilities in this area, as is exemplified by reporting requirements imposed on parent companies of multinational corporations that cover the group's operations in countries around the world, and domestic criminal prosecutions of business enterprises that are suspected to have engaged in the course of their international business transactions in bribery of foreign officials. One of the factors that may mitigate the extent of international controversy that particular exercises of extraterritorial jurisdiction are likely to raise is the fact that the measures in question are domestic measures with extraterritorial implications (that is, aimed primarily at home country-based actors or activities but with regulatory consequences for related actors and/or activities abroad) rather than direct exercises of extraterritorial jurisdiction over foreign actors and/or activities abroad. When it comes to the regulation of the transnational activities of multinational corporations, for example, parent-based domestic measures with extraterritorial effects may potentially be an effective way to make sure that an awareness and consideration of the people- and planet-related interests of stakeholders is incorporated into corporate policies, management decisions and operational practices throughout the group. Other important factors may be the fact that the extraterritorial regulatory measures involved are based on values and/or seek to pursue policy aims on which there is some measure of international consensus, and/or the fact that they fall

within the domain of private law, which is traditionally concerned more with private interests than with public policies, rather than within the domain of public law.

Private law regulation

One legal avenue that seems to be particularly promising in this respect is that of private law regulation, in the sense of standard-setting and/or monitoring and enforcement of pre-existing behavioural standards with respect to the transnational activities of internationally operating business enterprises by home country courts on the basis of civil disputes pertaining to those activities that are brought before them by those whose people- and planet-related interests have been detrimentally affected as a result of such activities. The idea of using private law as a regulatory mechanism fits in well with the growing interconnectedness in most Western societies between public and private spheres, and the American traditions of private law enforcement, regulation through litigation and public interest litigation, notions that are currently slowly but surely also making their way into the private law systems of other Western societies, in Europe partly under the influence of the EU's growing emphasis on private enforcement of EU rules and regulations. At the same time, the relevance of private law regulatory measures when it comes to global business regulation aimed at promoting international corporate social responsibility and accountability is augmented by the very limited availability of regulatory alternatives in this context. Thus, even though the innate structure of private law poses certain limitations to its use as a regulatory mechanism, it arguably provides a viable second-best option in a regulatory context where ideal solutions are not currently available.

The major advantage of using private law as a regulatory mechanism in the context of global business regulation is its suitability to application in a transboundary context beyond the regulating home countries' territories to host country actors and activities that are connected to the internationally operating business enterprises that are the primary regulatory subjects. Other advantages associated with private law regulation of internationally operating business enterprises by home country courts with a view to promoting international corporate social responsibility and accountability include the responsiveness of private law regulation (in the sense that it relies to a considerable extent on the collaboration and co-operation of its regulatory addressees) and its flexibility in adapting to changing societal practices, needs and expectations. Private law's open texture standards tend to leave the internationally operating business enterprises at which private law regulatory measures are aimed a measure of freedom in choosing the means by which they are to comply with the behavioural standards. At the same time, they are more likely than bright-line rules to encourage the corporate actors involved to internalize the spirit of the law instead of merely formally complying with the letter of the law in the narrowest way possible. Another important advantage in the transnational context of global business

regulation is the fact that private law regulation relies on private stakeholders for the monitoring and enforcement of the adherence by internationally operating business enterprises to standards of socially responsible business behaviour in their operations abroad.

The rise and times of foreign direct liability cases

It is sometimes said that the law may act as an indicator of societal change; the field of private law, due to its flexible, open, standard-based and responsive nature, is particularly open to societal changes, as it allows private parties to raise novel legal claims and/or to challenge existing laws, legal doctrines and precedents in light of contemporary societal issues and changing societal norms and relationships. This is clearly evidenced by the contemporary socio-legal trend towards civil litigation brought before home country courts against (parent companies of) multinational corporations for harm caused to people- and planet-related interests as a result of their host country activities, which is currently starting to become visible in a growing number of Western societies. The various civil claims that have been brought before courts in the US, the UK and the Netherlands against oil multinational Shell for the detrimental impacts of its oil production activities in the Niger Delta represent only the tip of the iceberg in this respect. In fact, many more parent companies of multinational corporations have over the past two decades been faced with similar transnational tort-based civil claims brought by or on behalf of host country citizens suffering harm as a result of the detrimental impacts on people and planet locally of the parent companies' operations and/or of those of their local subsidiaries, business partners and/or sub-contractors, over which they have a measure of control.

These cases, known as foreign direct liability cases, which are typically brought by host country plaintiffs with the support of home country civil society actors such as NGOs, clearly tie in with the changing societal notions especially in Western societies on international corporate social responsibility and accountability. In the end, they revolve around the question whether and to what extent it is (legally) acceptable that Western society-based internationally operating business enterprises pursue profits at the expense of people and planet in host countries, even where this is done in compliance with regulatory standards as imposed and enforced locally. It is through these cases that Western society home country courts are asked to determine, on a case-by-case basis, whether the adverse consequences of the transnational activities of these internationally operating business enterprises on people- and planet-related private third party or public interests should be left to be borne by the host country victims suffering them, or whether and to what extent the corporate actors involved may be held liable in tort for the damage suffered and as such are under a legal obligation to compensate that damage. In doing so, they will essentially balance, *ex post facto*, the freedom of the internationally operating

business enterprises to conduct their activities as they see fit, in light of the societal benefits that this may generate, against the right of the host country plaintiffs to be protected from the adverse consequences of those activities, in light of the nature and severity of those consequences.

These foreign direct liability cases raise many novel and complex legal issues, not least because of their transnational setting. Regardless of where and with respect to what particular subject-matter issue they are brought (environmental damage, human rights violations, health and safety issues and/or labour issues), all of these cases raise questions with respect to four particular legal factors that together determine their feasibility. These include the jurisdiction of the home country courts before which they are brought for settlement; the applicable legal standards on the basis of which they should be decided (international or domestic, host country or home country); the possibilities for holding the defendant (parent companies of) multinational corporations liable in tort for the damage caused to host country people- and planet-related interests; and the procedural and practical factors relevant to this particular type of transnational tort-based civil litigation. The outcome of issues pertaining to jurisdiction and applicable law tend to be largely determined by the private international law regimes that are applicable in the home countries where these claims are brought; similarly, issues pertaining to civil procedure and litigation practice are largely determined by the procedural laws and practices effective in those home countries. The outcome of substantive issues of tort law tend to be dependent on the rules on non-contractual liability featured by the particular system of tort law governing the claims.

It is especially this last category of issues with respect to which a lot of uncertainty still exists. This is largely a result of the fact that many of the foreign direct liability claims that have been brought so far have either been dismissed at preliminary stages or have resulted in out-of-court settlements, which means that there is only very limited precedent available on the circumstances under which (parent companies of) multinational corporations may be held liable for the harm caused to people and planet in host countries as a result of their transnational activities. It seems, however, that especially when it comes to foreign direct liability claims brought on the basis of general principles of domestic tort law, there is nothing in principle keeping the home country courts seized of these matters from finding in favour of the host country plaintiffs where the circumstances of the particular case so warrant. This means that in theory it is possible for host country plaintiffs, through home country courts, to legally address and seek redress for the detrimental impacts of the transnational activities of home country-based multinational corporations on people and planet in host countries on the basis of this type of transnational tort-based civil litigation, something that is highly important in light of the fact that for various reasons it may be difficult for them to do so in the developing host countries and/or emerging economies from where they originate and where those impacts are felt. In practice, however, the

feasibility of bringing such cases is also determined to a large extent by the other factors mentioned here, in particular the rules on jurisdiction and those on civil procedure and litigation practices that are applicable in the home countries concerned. It should be noted in this respect that the UN 'Protect, Respect and Remedy' policy framework on business and human rights has made clear that at least where it comes to companies' adverse impacts on the human rights-related interests of others, states have a duty to reduce legal, practical and procedural barriers that could lead to a denial of access to remedy for the victims. One of the particular legal barriers that the policy framework identifies in this respect is the situation where host country plaintiffs face a denial of justice in the host country and cannot access home country courts regardless of the merits of the claim.

Challenging the limits of the law

Next to the particular legal issues raised by these foreign direct liability cases, the contemporary socio-legal trend towards this type of transnational tort-based civil litigation also raises broader issues challenging the contemporary limits of and ideas underlying fields such as public international law, private international law, corporate law and tort law. Issues arise for instance with respect to the state-based nature of public international law and its ensuing inability to adequately deal with and/or regulate the transnational activities of private actors in general and corporate actors in particular, something that is becoming increasingly problematic as the power and influence of internationally operating business enterprises around the world is growing and in some cases rivals or even exceeds the power and influence of the states within which they operate. Issues also arise with respect to the international legal and political limitations that exist with respect to the ability of states to address issues relating to foreign actors and/or activities taking place abroad, even where those issues pertain to global concerns such as global inequality, population growth, climate change, depletion of resources, poverty, disease, environmental degradation and conflict and/or where it is obvious that the states within the territory of which those actors and/or activities are located are unwilling or unable to adequately address those issues themselves.

More specifically, foreign direct liability cases may warrant reconsideration of the continued rationale of some of the legal limitations that currently exist with respect to their scope and ambit. Questions arise for example with respect to the circumstances under which home countries should provide host country victims of the detrimental impacts on people- and planet-related interests directly or indirectly related to the transnational activities of 'their' internationally operating business enterprises with access to justice, in order to allow them to address and/or seek redress for the consequences of those detrimental impacts. Furthermore, the question arises whether and to what extent home country courts should be allowed to exercise extraterritorial adjudicative and/or

prescriptive jurisdiction in civil disputes pertaining to foreign actors and/or activities taking place abroad with a view to protecting people- and planet-related interests abroad. Another question that arises is whether and to what extent the attribution of liability for harm caused by the operations of corporate groups among their members on the basis of traditional notions of corporate law is still a contemporary reality, especially in light of the growing emphasis on international corporate social responsibility and accountability. In addition, the question arises whether and to what extent home country civil courts dealing with foreign direct liability cases are capable of and authorised to deal with issues of a more public nature, in the sense of transcending the private interests of the private parties involved, that may come up.

A final question that is raised by foreign direct liability cases is the one that this study has sought to answer: what is the potential role of tort law in promoting international corporate social responsibility and accountability? As has been discussed, tort law is acting as an indicator of societal change in this respect, by reflecting, through the contemporary socio-legal trend towards foreign direct liability cases, the changing societal attitudes towards the societal responsibilities of internationally operating business enterprises. At the same time, however, tort law may also act as a facilitator of societal change, where it is consciously and deliberately applied to bring about or further societal change in this respect by inducing internationally operating business enterprises to incorporate into their corporate policies, management decisions and operational practices an awareness and consideration of the impacts of their activities on people and planet in the societies in which they operate. This is of particular importance in light of the contemporary pressure on home country policymakers to extraterritorially regulate where necessary the transnational activities of 'their' internationally operating business enterprises, as well as in view of the limited regulatory options currently in existence and the promise of private law regulation in this respect.

The role(s) of tort law

The role that home country systems of tort law may potentially play, through transnational tort-based civil claims addressing the detrimental impacts of the transnational activities of internationally operating business enterprises on people- and planet-related interests abroad, in promoting international corporate social responsibility and accountability is determined not only by the particular factors affecting the feasibility of such foreign direct liability claims, but also by the innate characteristics of the tort system itself and its role in society. Of old, this societal role of Western society systems of tort law has been subject to change and the contemporary reality is that the tort system is expected to fulfil a variety of different functions, none of which it is ideally equipped to fulfil. Arguably, however, the extra value of the tort system when it comes to the promotion of international corporate

social responsibility and accountability lies in its responsiveness, its flexibility in adapting to societal change, its standard-based nature and its ability to perform a number of particularly relevant functions in this respect at the same time. These functions include the tort system's capacity to: remediate harm caused by the transnational activities of internationally operating business enterprises by imposing upon them a legal obligation to compensate the host country victims involved for the damage caused; create a measure of transparency on the actual people- and planet-related impacts of the transnational operations of internationally operating business enterprises in general and those in dispute in particular; and provide a measure of behavioural regulation for internationally operating business enterprises by setting, monitoring and enforcing behavioural standards with respect to their transnational activities.

Due to the historical development and particular nature of Western society tort systems, their performance of any of these three functions is subject to significant limitations. However, certain adaptations may be made in order to improve the tort system's functioning in all three respects, although the improvement of the tort system's role with respect to one of these functions may lead to a deterioration in its ability to perform the other two. Questions are likely to be raised especially with respect to the capacity of home country systems of tort law to provide behavioural incentives for internationally operating business enterprises to integrate into their corporate policies, management decisions and operational practices awareness and/or consideration of the people- and planet-related interests of stakeholders that may be affected by their transnational activities as well as incentives to avoid detrimentally impacting those interests. After all, this constitutes a radical departure from the more mainstream idea of tort law as a system of interpersonal morality aimed at retrospectively restoring the status quo between two private parties that has become disrupted by the infliction of harm by one party on the other. Still, in view of the general adage that prevention is better than cure, it is this prospective role of tort law in influencing the future behaviour of internationally operating business enterprises so as to make them adopt socially acceptable business practices not only at home but also abroad through the behavioural standards it retrospectively sets, monitors and/or enforces with respect to the past behaviour of the corporate defendants in foreign direct liability cases that is of particular importance. It is in this sense that home country courts and/or home country systems of tort law may play an important role in the regulation, through foreign direct liability cases, of the transnational activities of internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability.

All in all, the extent to which home countries may indeed bring into action their courts and/or their domestic systems of tort law in order to promote socially acceptable business practices by internationally operating business enterprises operating out of their territory and/or jurisdiction is dependent again on the four factors determining the feasibility of foreign direct liability claims. In this transnational context, it is especially the private international law-related factors of jurisdiction and applicable law that play a

crucial role. After all, the home country's ability to set, monitor and enforce behavioural standards with respect to the transnational activities of internationally operating business enterprises through foreign direct liability cases is limited by the range of actors and/or activities over which its courts may assume jurisdiction. At the same time, it is also limited by the range of transnational tort disputes to which it may apply its own tort standards in determining the circumstances under which the freedom of internationally operating business enterprises to conduct their activities as they see fit should be trumped by the need for protection of people and planet. Next to these private international law-related factors, however, the role of home countries in regulating the transnational activities of internationally operating business enterprises through this type of transnational tort-based civil litigation is also strongly dependent on the presence in those home countries of procedural and practical circumstances that are conducive or at least not antagonistic to the pursuit of such claims.

A desirable development

Of course, the question remains whether the socio-legal trend towards foreign direct liability cases and potential home country attempts to promote international corporate social responsibility and accountability through this type of transnational tort-based civil litigation is a desirable development. Opinions on this matter seem to diverge widely and there are many who still maintain that corporate self-regulation in combination with discretionary participation in voluntary initiatives and local regulatory standards are sufficient to induce internationally operating business enterprises to operate in a socially responsible manner not only at home but also abroad. As described, however, there is also a growing counter-movement in Western societies according to which internationally operating business enterprises should be required to adhere to if not consistent best practice then socially acceptable practices in their operations abroad. It seems that this counter-movement has left consumers, investors, policymakers, the general public and most corporate actors in Western societies convinced that at the very least, internationally operating business enterprises are today expected to stay well above the moral bottom line below which the legitimate pursuit of profits becomes the morally objectionable exploitation of those less well-off and a legally inadmissible lack of consideration of people and planet. In addition, recognition is increasingly dawning that even if corporate self-regulation, possibly backed up by soft law mechanisms and voluntary initiatives is the best way of addressing the issues that may arise in this context, this can only feasibly be done if such self-regulation takes place in the shadow of the law.

In line with this, the role of tort law in this respect is at least to provide a legal big stick for corporate rogues and corporate laggards whose transnational activities go below this moral bottom line, by holding them accountable for the resulting harm to people- and

planet-related interests on the basis of existing international and domestic, binding and non-binding, written and unwritten, legal and societal behavioural standards that can be said to form the contemporary normative context of such activities. At best, it may provide behavioural guidance to internationally operating business enterprises actively seeking to incorporate an awareness and consideration of people- and planet-related interests into their corporate policies, management decisions and operational practices around the world and enable corporate leaders in this respect to stay in the lead by providing a more level playing field. In addition to this, it also provides a measure of transparency on the detrimental impacts that the transnational activities of internationally operating business enterprises may have on people and planet, creating an awareness in Western societies in general and among Western society consumers and investors in particular of the toll that is taken by people around the world and by our planet in order to sustain our ever-increasing levels of well-being. And last but certainly not least, it allows those suffering the detrimental impacts of the transnational activities of internationally operating business enterprises to shift, under certain conditions, the burden of adversity back onto the shoulders of the corporate actors profiting from those activities, thus forcing them to bear the full costs involved instead of leaving them to be borne by people and planet, by giving host country plaintiffs the opportunity to claim remedies.

In the end, in view of the lack of contemporary options for regulating the transnational activities of internationally operating business enterprises with a view to promoting international corporate social responsibility and accountability, the role that tort law may play in this respect, even if only a second-best option, is still the best contemporary option available and as such should be taken very seriously. It seems that there is at least a moral duty on home countries to make sure that foreign direct liability cases play their role in ensuring that 'their' internationally operating business enterprises do not generate profits at the expense of people and planet abroad by adopting business practices in host countries that infringe the rights and interests of others in ways that would be completely unacceptable at home. The fact that these cases and their underlying issues raise complicated moral, legal and socio-political questions and that it is not easy to define the boundary between what does and what does not constitute morally and legally acceptable behaviour in this respect, does not mean that there are no boundaries and it is this type of transnational tort-based civil litigation that may help to define the dos and don'ts when it comes to the transnational activities of internationally operating business enterprises. One final but significant matter for consideration in this respect is whether the environmental pollution caused in the Niger Delta as a result of over 50 years of oil operations there by oil producers such as Anglo/Dutch oil multinational Shell, would have been less dramatic if from the outset the extent and gravity of the people- and planet-related impacts of their local operations could have been brought to the attention of home country courts and international media in the way they are now. Obviously, there is no way of telling whether this would have been so; what matters now, however, is whether

not just internationally operating business enterprises such as Shell but also policymakers, investors, consumers and the general public in the Western society home countries from where they operate will take responsibility for the true costs of their prosperity.

Setting an agenda for the future

In view of the pressing issues underlying contemporary debates on international corporate social responsibility and the inadequacy of traditional regulatory mechanisms in responding to the challenge of global business regulation in this context, there is every reason for home country policymakers to improve the role that domestic systems of tort law may play in this context. In doing so, the emphasis should be on improving and expanding the tort system's ability to provide remedies to host country victims for harm caused by the transnational activities of internationally operating business enterprises; create transparency on people- and planet-related impacts of corporate activities around the world; and provide behavioural incentives for corporate actors to conduct their business operations with due care for people and planet wherever they operate. This study has made clear that in legal systems across Europe there may be substantial room for improvement with respect to all of the four factors that determine the feasibility of foreign direct liability claims (jurisdiction, applicable law, substantive legal basis, practical and procedural circumstances).

In setting a policy agenda aimed at supporting the role of European systems of tort law in promoting international corporate social responsibility and accountability, the primary focus at this point should be on increasing the feasibility of foreign direct liability cases brought on the basis of existing general principles of tort law and the tort of negligence in particular. However, in order for home country courts in these systems to be able to play any kind of role in this context, host country plaintiffs seeking to hold European (parent companies of) multinational corporations accountable for harm caused to people and planet abroad by their transnational activities need to be able to bring their claims before these courts in the first place. Accordingly, the focus of policymakers at EU level and in the individual Member States when determining their policy strategies in this context in the near future – the European Commission has called for plans on the implementation of the UN policy framework on business and human rights to be developed before the end of 2012 – should first and foremost be on improving the practical feasibility of bringing foreign direct liability claims before European courts. This, in combination with the versatility of existing principles of tort law and a touch of judicial activism, will allow the tort system to play its role(s) in promoting international corporate social responsibility and accountability by providing host country people- and planet-related interests with a justified measure of protection in individual foreign direct liability cases

Nederlandse samenvatting

Aansprakelijkheid van multinationale concerns voor schade aangericht aan mens en milieu in het buitenland

Een studie naar de rol van het civiele aansprakelijkheidsrecht bij het bevorderen van internationaal maatschappelijk verantwoord ondernemen

Al tijden groeit met name in de westerse wereld de maatschappelijke en politieke druk op ondernemingen om meer maatschappelijk verantwoord te ondernemen. In toenemende mate wordt er van hen verwacht dat zij zich rekenschap geven van de impact van hun bedrijfsactiviteiten op mens en milieu en dat zij eventuele schadelijke gevolgen zoveel mogelijk proberen te voorkomen. Daarnaast worden zij steeds vaker gevraagd om verantwoording hieromtrent af te leggen aan consumenten, investeerders, beleidsmakers en het algemeen publiek. De discussie rond maatschappelijk verantwoord ondernemen (MVO) draait daarbij vooral om twee vragen: wat kan er van ondernemingen verwacht worden aan verantwoord ondernemerschap bovenop hetgeen zij naar geldend recht al verplicht zijn, en is dat stukje 'extra' dan vrijblijvend of brengt het bepaalde morele, maatschappelijke en/of juridische verplichtingen mee?

Met name gedurende de afgelopen twee decennia is de focus in dit opzicht geleidelijk verschoven van de nationale naar de internationale context, waar multinationale concerns en andersoortige internationaal opererende ondernemingen een steeds prominentere rol spelen. Nu als gevolg van globalisering productieprocessen van ondernemingen in toenemende mate grensoverschrijdend worden, bijvoorbeeld omdat producten worden afgenomen van buitenlandse leveranciers, of samengewerkt wordt met buitenlandse jointventurepartners en/of dochtermaatschappijen, komt de nadruk steeds meer te liggen op de maatschappelijke verwachtingen ten aanzien van deze ondernemingspraktijken in het buitenland. De aandacht gaat daarbij vooral uit naar activiteiten in gastlanden waar het beschermingsniveau van mens- en milieugerelateerde belangen aanzienlijk lager ligt dan in de westerse thuislanden van de betreffende ondernemingen, zoals in de praktijk vaak het geval zal zijn in ontwikkelingslanden en opkomende economieën.

De vraag rijst wie verantwoordelijk is voor de regulering van de internationaal opererende ondernemingen en hun transnationale ondernemingspraktijken, en op welke manier het recht daarbij een rol speelt. Mede als gevolg van het feit dat het internationaal publiekrecht zich nog altijd vooral richt tot staten, is het aantal internationale instrumenten dat rechtstreeks en dwingend gedragsstandaarden oplegt aan internationaal opererende ondernemingen zeer beperkt. Voor zover betoogd kan worden dat op gebieden als het

internationaal strafrecht en het internationaal mensenrechtenrecht wél internationale verplichtingen voor multinationale concerns bestaan, zijn er vooralsnog geen internationale fora beschikbaar waar schendingen van dergelijke verplichtingen aan de kaak gesteld kunnen worden. Weliswaar bestaat er een snel groeiend aantal internationale richtlijnen, gedragscodes en andersoortige publieke of private internationale initiatieven gericht op het scheppen van een normatief kader voor internationaal opererende ondernemingen, maar deze instrumenten zijn meestal optioneel en/of niet bindend en ook hierbij ontbreken veelal adequate handhavingsmechanismen.

Dit betekent dat het opleggen en handhaven van gedragsnormen ten aanzien van de activiteiten van internationaal opererende ondernemingen uiteindelijk primair de verantwoordelijkheid is van de verschillende staten op wiens grondgebied die activiteiten worden verricht. Daarmee echter blijft de bescherming van lokale mens- en milieugerelateerde belangen tegen de mogelijke negatieve gevolgen van de betreffende bedrijfsactiviteiten afhankelijk van het vermogen en de bereidheid van de betrokken staten om adequate regels te stellen en af te dwingen. Zoals aangegeven kan dit problematisch zijn waar het gaat om ondernemingspraktijken in ontwikkelingslanden. Tegelijkertijd geeft het internationaal opererende ondernemingen de kans om zich door middel van complexe ondernemingsconstructies, mogelijk gemaakt door de ondernemingsrechtelijke beginselen van gescheiden rechtspersoonlijkheid en beperkte aansprakelijkheid, te onttrekken aan juridische verantwoordelijkheid voor die negatieve gevolgen.

Het huidige gebrek aan coördinatie en overzicht met betrekking tot internationaal opererende ondernemingen en hun transnationale ondernemingspraktijken wordt wel gezien als één van de grootste beperkingen bij het reguleren van internationaal opererende ondernemingen. Dit reguleringsdeficit maakt het immers heel lastig om deze ondernemingen waar nodig met enige dwang aan te sporen om de mogelijke schadelijke gevolgen van hun bedrijfsactiviteiten voor mens en milieu in gastlanden te identificeren en, waar mogelijk, te verminderen of te voorkomen. Dat dergelijke schade een reëel risico is, bewijst de niet-aflatende stroom aan berichtgeving door de westerse media en NGO's over gevallen van schade aangericht aan mens en milieu in gastlanden door de activiteiten aldaar van in westerse landen gevestigde multinationale concerns.

Dit beeld wordt verder versterkt doordat de slachtoffers van dergelijke schade steeds vaker pogingen ondernemen om het door hun geleden nadeel aan de kaak te stellen middels aansprakelijkheidszaken tegen de moedermaatschappijen van de betrokken multinationale concerns voor rechters in de westerse thuislanden waar deze gevestigd zijn. De afgelopen jaren hebben tientallen multinationale concerns te maken gekregen met civiele aansprakelijkheidsclaims in landen als de Verenigde Staten, het Verenigd Koninkrijk en Australië naar aanleiding van hun beweerdelijke betrokkenheid bij schendingen van mensenrechten- en milieunormen gepleegd bij de uitvoering van bedrijfsactiviteiten in gastlanden (zgn. '*foreign direct liability cases*'). De aansprakelijkheidsclaims tegen Shell

die momenteel aanhangig zijn voor de Rechtbank Den Haag, ingesteld door een aantal Nigeriaanse boeren en de Nederlandse NGO Milieudefensie naar aanleiding van lekkages uit oliepijpleidingen in Nigeria die door een lokale Shell-dochtermaatschappij beheerd werden, vormen een recent voorbeeld van deze internationale tendens.

Het groeiende bewustzijn van de problematiek die ten grondslag ligt aan deze ontwikkelingen heeft de laatste jaren gezorgd voor een intensivering van het maatschappelijk en politiek debat omtrent internationaal maatschappelijk verantwoord ondernemen in veel westerse thuislanden van multinationale concerns. Langzaam begint het besef door te dringen dat er mogelijk een normstellende en handhavende taak ligt voor beleidsmakers, wetgevers en rechters in deze landen ten aanzien van de (mogelijke) schadelijke gevolgen voor mens en milieu van de activiteiten van 'hun' multinationale concerns in het buitenland. Daarbij is de laatste vijf jaar een belangrijke impuls uitgegaan van het werk verricht door de Speciale Gezant van de Verenigde Naties op het gebied van bedrijven en mensenrechten, professor John Ruggie. Het door Ruggie opgezette beleidsraamwerk voor bedrijven en mensenrechten maakt duidelijk dat staten verplicht zijn bescherming te bieden tegen mensenrechtenschendingen door bedrijven, dat bedrijven zelf een verantwoordelijkheid hebben om andermans mensenrechten te respecteren, en dat beiden een rol hebben bij het voorzien in mogelijkheden tot herstel voor slachtoffers van bedrijfsgerelateerde mensenrechtenschendingen.

De vraag blijft echter wat wat de mogelijke en wenselijke rol van het recht is bij het bevorderen van internationaal maatschappelijk verantwoord ondernemen. In deze studie is betoogd dat bij de huidige stand van het recht het civiele aansprakelijkheidsrecht het juridische instrument bij uitstek vormt in deze transnationale en aan snelle maatschappelijke veranderingen onderhevig zijnde context. Het kan in theorie een drietal belangrijke functies vervullen: 1) het bieden van rechtsmiddelen aan de slachtoffers van schade aangericht in gastlanden als gevolg van de activiteiten van internationaal opererende ondernemingen aldaar; 2) het creëren van transparantie ten aanzien van de mogelijke schadelijke gevolgen van die activiteiten voor mens en milieu in het buitenland; 3) het genereren van gedragsprikkels voor de betrokken ondernemingen, door middel van rechterlijke normstelling en -handhaving, om dergelijke schade zoveel mogelijk te voorkomen.

De ervaring met bovengenoemde *foreign direct liability cases* leert dat de mogelijkheden tot het succesvol inzetten van het civiele aansprakelijkheidsrecht in deze context in de praktijk bepaald worden door een viertal factoren. Deze zijn: 1) de internationale rechtsmacht van de aangezochte rechter; 2) het op de transnationale aansprakelijkheidsclaim toepasselijke recht; 3) de grondslagen en materiële vereisten voor aansprakelijkheid van de betrokken ondernemingen; en 4) de relevante procedurele en praktische omstandigheden in de forumstaat. Voor wat betreft vorderingen ingesteld voor gerechten in de EU-lidstaten worden de eerste twee (internationaal privaatrechtelijke) factoren grotendeels

bepaald door EU regelgeving. De bestaande regels bieden in beginsel mogelijkheden voor het instellen van dit soort transnationale aansprakelijkheidsclaims tegen in de EU gevestigde multinationals, maar brengen ook bepaalde beperkingen met zich. De belangrijkste is dat het toepasselijke recht in deze zaken in de regel dat van het gastland zal zijn, hetgeen de mogelijkheden beperkt voor Europese thuislanden van multinationale concerns om hun nationale regels van aansprakelijkheidsrecht in te zetten met het oog op het bevorderen van internationaal maatschappelijk verantwoord ondernemen.

Qua materiële grondslag geldt dat zelfs waar geen specifieke basis bestaat voor dit soort type aansprakelijkheidsclaims (zoals in de Verenigde Staten de Alien Tort Statute), algemene regels van foutaansprakelijkheid in de meeste rechtssystemen toch voldoende aanknopingspunten bieden voor vorderingen tegen moedermaatschappijen van de betrokken multinationale concerns. Het laakbare gedrag kan dan geformuleerd worden als de schending van een zorgplicht jegens de gelaedeerde derden in het gastland, een open norm die vervolgens verder ingevuld kan worden aan de hand alle op het geval betrekking hebbende gedragsnormen, ongeacht hun aard en herkomst (internationaal of nationaal, geschreven of ongeschreven, bindend of niet-bindend). Dit biedt de mogelijkheid om in elke zaak tot een op het specifieke geval toegesneden rechterlijk oordeel te komen omtrent de mate van zorgvuldigheid die internationaal opererende ondernemingen dienen te betrachten ten opzichte van de mens- en milieugerelateerde belangen van derden uit gastlanden die mogelijk schade kunnen oplopen als gevolg van de activiteiten aldaar van deze bedrijven zelf of van hun lokale dochtermaatschappijen of zakenpartners.

Een dergelijk rechterlijk oordeel heeft niet alleen waarde als vorm van geschilbeslechting, waarbij voor het individuele geval wordt bepaald welk van de partijen de geleden schade rechtens behoort te dragen, maar kan ook in bredere zin betekenis hebben waar het bijdraagt aan de ontwikkeling van juridische normen omtrent de verantwoordelijkheden van internationaal opererende ondernemingen ten aanzien van mens en milieu in het buitenland. Daarbij moet echter aangetekend worden dat het belangrijkste obstakel bij de vervulling van een dergelijke rol door het civiele aansprakelijkheidsrecht veelal gelegen zal zijn in de procedurele en praktische omstandigheden in de forumstaat, welke een belangrijke invloed uitoefenen op de toegang tot het recht in dit type zaken. In Nederland bijvoorbeeld vormen de kosten van het procederen, in combinatie met de relatief beperkte mogelijkheden tot het instellen van collectieve acties en de moeilijkheden die kunnen worden ondervonden bij het vergaren van voldoende bewijs, een moeilijk te slechten barrière voor slachtoffers uit gastlanden die hun aansprakelijkheidsclaims tegen in Nederland gevestigde internationaal opererende ondernemingen aan de Nederlandse rechter willen voorleggen.

Het is dan ook op het gebied van deze praktische en procedurele omstandigheden dat op de korte termijn het meeste winst valt te behalen waar het gaat om het verbeteren van de rol van het civiele aansprakelijkheidsrecht bij het bevorderen van internationaal maat-

schappelijk verantwoord ondernemen. Beleidsmakers in westerse maatschappijen zullen zich daarvan rekenschap moeten geven bij het vormgeven van hun beleid op dit gebied, in het bijzonder wanneer zij op verzoek van de Europese Commissie tegen eind 2012 hun plannen formuleren voor de implementatie van het VN-beleidsraamwerk voor bedrijven en mensenrechten. Dit, in combinatie met een vleugje rechterlijke voortvarendheid bij het formuleren van zorgvuldigheidsnormen voor internationaal opererende ondernemingen ten aanzien van de gevolgen van hun transnationale activiteiten voor mens en milieu in het buitenland, zal ervoor zorgen dat de rol die het civiele aansprakelijkheidsrecht in potentie kan spelen bij het bevorderen van internationaal maatschappelijk verantwoord ondernemen, optimaal benut kan worden.

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Curriculum vitae

Liesbeth Enneking was born on June 2, 1979 in Nijmegen, the Netherlands. She studied Dutch law at Utrecht University, specializing in both Dutch Private Law and Public International Law. In her Masters' thesis, she discussed the feasibility of tort claims brought before courts in the Netherlands against Dutch multinational corporations for damage caused in host countries, as well as the limitations under public international law on the exercise of extraterritorial jurisdiction in this context. In 2007, her thesis was awarded the 'Scriptie uit de la'-prize for best legal Masters' thesis of the academic year 2006-2007, and subsequently published.

After finishing her studies, Enneking was invited to continue her research ventures as a PhD candidate at Utrecht University's Molengraaff Institute for Private Law, under the supervision of Professor I. Giesen and Professor M.L. Lennarts. In September 2011, she completed a PhD thesis on the role that Western society systems of tort law may play in promoting international corporate social responsibility and accountability. Her dissertation, titled Foreign direct liability and beyond – The role of tort law in promoting international corporate social responsibility and accountability, will be published in July 2012.

The main focus of Enneking's PhD research has been the contemporary socio-legal trend towards transnational tort-based civil litigation before Western society courts against parent companies of multinational corporations in relation to the detrimental impacts of their transnational activities on people and planet in (mostly developing) host countries. These cases, which may be referred to as 'foreign direct liability cases', play an important role in the contemporary socio-political debates in those same Western societies over business impacts on human rights abroad, and over international corporate social responsibility and accountability more generally. In her research, Enneking sets out the legal and socio-political framework pertaining to these cases, and traces the role that Western society systems of tort law may play in providing remedies, transparency and behavioural incentives in this context.

In her capacity as a legal expert in this field, Enneking has actively been involved over the past five years in the Dutch socio-political and legal debates on corporate social responsibility, fair trade, and business & human rights. She has published a book as well as various articles on these topical subjects in both Dutch and international journals, and has been a frequent speaker at conferences and research seminars, not only in the Netherlands but also abroad. In 2008, she spent eight months as a visiting scholar at Rhodes University in Grahamstown, South Africa.

Enneking currently holds a position as a postdoctoral research fellow at the Molengraaff Institute, funded by a 'talent postdoc' subsidy grant from Utrecht University's Department of Law. Her postdoctoral research focuses on the phenomenon of (transnational) public

interest litigation, and the opportunities and challenges involved in this type of litigation for Western society policymakers and Western society systems of private law and civil procedure. In her spare time, she likes to travel, enjoy music, and practice sports such as running, cycling, skiing and yoga; her next big challenge after obtaining her doctorate degree will be to take to the stage as a singer.