



UNIVERSIDAD
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Private International Environmental Litigation before EU Courts:

Choice of Law as a Tool of Environmental Global Governance

Eduardo Álvarez Armas

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de la Universidad de Granada

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JURY

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To the memory of my grandparents, Armenia, José, and Pedro;

To my grandmother, Concepción, and very especially, to my parents, Elsa and Enrique.

A la memoria de mis abuelos, Armenia, José, y Pedro;

Para mi abuela, Concepción, y, muy especialmente, para mis padres, Elsa y Enrique.

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“As you set out for Ithaka hope the voyage is a long one, full of adventure, full of discovery [...]” (“Ithaka”, C. P. Cavafy).

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Abbreviations

AEDIPr	Anuario Español de Derecho Internacional Privado
AJCL	The American Journal of Comparative Law
Albany LR	Albany Law Review
Am. J. Comp. L.	American Journal Comparative Law Review
Ariz. St. L. J	Arizona State Law Journal
B.C. Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
BCLR	Boston College Law Review
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BMJ	Boletín del Ministerio de Justicia
Buff. L. Rev.	Buffalo Law Review
BYIL	Baltic Yearbook of International Law
Cah. dr. Europ.	Cahiers de droit européen
Cambridge L.J.	Cambridge Law Journal
CityU LR	City University of Hong Kong Law Review
CLR	California Law Review
Colum. J. Envtl. L.	Columbia Journal of Environmental Law
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Columbia L. Rev	Columbia Law Review
Conn. L. Rev	Connecticut Law Review
CPL	Hague Convention on the law applicable to products liability, 1973
CTA	Hague Convention on the law applicable to traffic accidents, 1971
Duke LJ	Duke Law Journal
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECL	European Company Law
ECLJ	European Journal of Consumer Law
ECMR	European Common Market Law Review
ECoHR	European Court of Human Rights
EILR	Emory International Law Review
ELaR	European Law Reporter
ELC	European Company Law
ELD	European Environmental Liability Directive (Directive 2004/35/EC)
ELR	Erasmus Law Review
EnLR	Environmental Law Reporter
EPA	United States Environmental Protection Agency
EPIL	European Union's private international law
ERPL	European Review of Private Law
EU	European Union
FNC	Forum Non Conveniens
Geo. J. Int'l Aff	Georgetown Journal of International Affairs
Geo. Wash. Int'l L. Rev	The George Washington International Law Review
Harv. Int'l L.J.	Harvard International Law Journal
Harv. L. Rev	Harvard Law Review

HRILD	Human Rights & International Legal Discourse
ICLQ	International and Comparative Law Quarterly
InDret	Revista para el análisis del Derecho
Int'l Bus. L.J.....	International Business Law Journal
Int'l J. Civ. Soc'y L.	International Journal of Civil Society Law
Int. Law: Rev. Colomb. Int.	International Law – Revista Colombiana de Derecho Internacional
IPRax	Praxis des Internationalen Privat- und Verfahrensrs
JDE	Journal de droit européen
JDI	Journal du droit international (Clunet)
JEcl	Journal of Economic Literature
JEL	Journal of Environmental Law
J. Envtl. L	Journal of Environmental Law and Litigation
J. Eur. Envtl. & Plan. L	Journal for European Environmental and Planning Law
J. Int'l Bus. & L	Journal of International Business and Law
J. Mar. L. & Com.....	Journal of Maritime Law and Commerce
JPIL	Journal of Private International Law
JT	Journal des tribunaux
Jurid. Rev.	The Juridical Review
La. L. Rev	Lousiana Law Review
Law & Contemp	Law and Contemporary Problems
LIEI	Legal Issues of Economic Integration
LQR	Law Quarterly Review
Maastricht J Eur. & Comp. L	Maastricht Journal of European and Comparative Law
Maryland L. Rev	Maryland Law Review
OSLJ	Ohio State Law Journal
PIL	private international law
RabelsZ	Zeitschrift für ausländisches und internationales Privatrecht
RBDI	Revue belge de droit international
RCJB	Revue critique de jurisprudence belge
RDCB	Revue de Droit Commercial Belge
RDIDC	Revue de droit international et de droit compare
RDIP	Rivista di diritto internazionale privato e processuale
RDP	Revista de Derecho Privado
RDUE	Revue du droit de l'Union européenne
Rec. Des C	Recueil des Cours de l'Académie de Droit International
RECIEL	Review of European, Comparative and International Environmental Law
REDC	Revue européenne de droit de la consommation
REDE	Revista española de Derecho Europeo
REEI	Revista Electrónica de Estudios Internacionales
Rev. crit. dr. int. Pr.	Revue critique de droit international privé
Rev. Dr. Ulg	Revue de la Faculté de droit de l'Université de Liège
Rev. trim. dr. H	Revue trimestrille des droits de l'homme
RIDE	Revue internationale de droit économique
RPSC.....	Revue Pratique des Sociétés Civiles et Commerciales
Tex. Int'l L. J	Texas International Law Journal
TLT	Transnational legal theory

<i>U.C. Davis L. Rev</i>	<i>UC Davis Law Review</i>
<i>U. Ill. L. Rev.</i>	<i>University of Illinois Law Review</i>
<i>ULA</i>	<i>Urban Law Annual - Journal of Urban and Contemporary Law</i>
<i>U. of Penn. J. of International Law</i>	<i>University of Pennsylvania Journal of International Law</i>
<i>UPLR</i>	<i>University of Pennsylvania Law Review</i>
<i>Utrecht L. Rev.</i>	<i>Utrecht Law Review</i>
<i>Va J. Transnat 'l L</i>	<i>Vanderbilt journal of transnational law</i>
<i>VJIL</i>	<i>Virginia Journal of International Law</i>
<i>W. Va. L. Rev.</i>	<i>West Virginia Law Review</i>
<i>Washburn L.J.</i>	<i>Washburn Law Journal</i>
<i>Willamette L. Rev.</i>	<i>Willamette Law Review</i>
<i>Yale L.J.</i>	<i>Yale Law Review</i>
<i>YPIL</i>	<i>Yearbook of Private International Law</i>

Introduction

I. General introduction / Object of the dissertation

During the 20th century and the beginning of the 21st century our society has immensely evolved as a result of the development of science, commerce, industry and technology. This evolution, though enriching, has had and is still having a deep impact on the fragile natural equilibrium of our planet. Both the dramatic ecological accidents that have occurred in recent decades and the impact of the day-by-day pollution arising from business activities are placing an intense pressure on ecosystems and natural resources all around the globe. This pressure may amount to threaten human life in the long run. Therefore, deep concerns for environmental issues have dawned around the planet. The international character of these concerns is generally due to the fact that threats to environmental quality tend to be global in their dimension, but also, specifically, to the fact that many forms of pollution know no frontiers and may spread easily from one country to another¹. These concerns find their origins in two social developments that took place during the second half of the 20th century: on the one hand, the awareness work performed by the scientific community in respect of the urgent need for environmentally-protective actions at global scale². On the other hand, the parallel

¹ These ideas, under different formulations can be easily found in different fields of academic literature, ranging from environmental law to private international law or corporate governance. *Vid.*, as an example, J. COLLIER, *The corporate environment - The financial consequences for business*, Hemel Hempstead, Prentice Hall, 1995, p. 4: "It is worth remembering that environmental pollution does not recognise national boundaries and that ideas for its control should be freely borrowed and tried around the world".

As regards the global dimension of environmental concerns *vid.*, for instance, P.-M. DUPUY, "International environmental law: looking at the past to shape the future" in P.-M. DUPUY & J. E. VIÑUALES (eds.), *Harnessing Foreign Investment to Promote Environmental Protection*, Cambridge, Cambridge University Press, 2013, pp.1-23, at p. 10: "Moreover, what has become apparent in the last forty years is that environmental problems are by their very essence global. Ecology is by definition the science of interdependence. Likewise, international environmental law is no longer defined by the approximate laying out, or interaction, of state sovereignties on a planet that has become too small and cramped. More than a right of joint ownership, international environmental law has become the responsibility of the whole".

Vid., similarly, J. SCHNEIDER, *World public order of the environment: Towards and international ecological law and organization*, London, Stevens & Sons, 1979, p. 3: "It is today becoming widely recognized that this planet – or, more expansively, the entire earth-space system – is an ecological unity both in the basic scientific sense and in the interdependencies of the social processes by which mankind uses it. The plants, animals (including the homo sapiens), and micro-organisms that inhabit the planet are united with each other and with their non-living surroundings by a network of complex, interrelated, and interdependent natural and cultural components known as the planetary 'ecosystem,' indivisibly uniting the multitude of subsidiary ecosystems".

² This sense of urgency has also been reflected in legal literature. As put by N. DE SADELEER, ("Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", *Revue européenne de droit de la consommation*, num. 2011-1, 2011, pp. 25-51, at pp. 25-27): "Si la protection

momentum gained worldwide by environmentalism as a social movement³. It is within this context that the international community became aware of the need for national and international legal instruments aiming at the protection of the environment from damage caused by human activities. In this sense, in this “*era of unprecedented global capital and human mobility*”⁴, several legal trends have appeared, both nationally and internationally, addressing protection in a wide sense: protection as various forms of preventive action, and protection as *ex post* damage reparation and compensation.

Traditionally, perhaps following the well-known saying “*better safe than sorry*”, the main focus of legislative action has been placed on creating legal frameworks which provide for *ex ante* avoidance of environmental occurrences. This is possibly due to the fact that, too frequently, environmental damage tends to be irreparable⁵. These frameworks are mainly composed of public-subject-driven legal mechanisms, which reflect various forms of administrative / regulatory control of private activities, management of natural resources, etc.⁶ This has happened both at a domestic level, and at an international level, the tendency to focus on *ex ante* prevention being probably even clearer in the latter. Nevertheless, as mentioned, other than preventive action, there is an alternative approach to environmental problems, which has been given birth in recent times⁷: an *ex post* compensatory approach with focus on private

de l'environnement n'est pas une préoccupation récente, celle-ci a pris, ces dernières années, une acuité nouvelle, marquée par l'urgence de trouver des solutions universelles au réchauffement climatique, à l'érosion de la biodiversité ainsi qu'à l'épuisement des ressources naturelles. Pas un jour ne se passe, en effet, sans que nous ne soyons informés de nouvelles menaces, de risques insoupçonnés, de marées noires, de la disparition d'espèces sauvages, d'incendies ravageurs, de la fonte de glaciers, de smogs troposphériques, de disrupteurs endocriniens... Sorti de sa marginalité, ce sujet est rapidement devenu un enjeu majeur. L'intérêt qu'il suscite tient assurément au fait que la situation est devenue alarmante et risque de s'aggraver si rien d'ambitieux n'est entrepris”.

It must be noted that statements in such a sense could be found in academic literature already in the late 1970s: “*It is also becoming widely recognized that this planet is gravely endangered, and that this rapidly accelerating degradation is reaching a point of no return – a cusp at which we may arrive within perhaps fifty years if strong measures are not taken to halt the forces of degradation and reorient many of our basic patterns of resource use*” (SCHNEIDER, *World public order of the environment: Towards and international ecological law and organization*, op. cit., p. 4).

³ M. SHOOP (“Corporate social responsibility and the environment – Our common future”, in R. MULLERAT (ed.), *Corporate Social Responsibility – The corporate governance of the 21st century*, The Hague, Kluwer Law International, 2005, pp. 159-182 at 161) places the beginning of such momentum in the 1960s and 1970s.

⁴ As described by U. BAXI, “Mass Torts, Multinational Enterprises Liability and Private International Law”, *Recueil des Cours de l'Académie de Droit International*, vol. 276, Leiden, Martinus Nijhoff, 1999, p. 307.

⁵ P. BOUREL (“Un nouveau champ d'exploration pour le droit international privé conventionnel : les dommages causés à l'environnement” in *L'internationalisation du droit. Mélanges en l'honneur de Yvon Loussouarn*, Paris, Dalloz, 1994, pp. 93-108, at p. 100) speaks in terms of “*dommage [...] généralement irréversible*”.

⁶ It is also possible to find legal instruments which establish regimes of *ex post facto* compensation to the benefit of public administrations. *Vid.* for example, the Spanish environmental liability act (Ley 26/2007, de 23 de octubre, de responsabilidad medioambiental, BOE núm. 255, de 24 de octubre de 2007, pp. 43229-43250). This law is the Spanish transposition of the European Environmental Liability Directive, discussed in detail *infra* (Part I, Chapter 2).

⁷ “Re-discovery” would probably be more suitable an expression than “birth”, for the roots of this conceptualization can possibly be traced back to Roman law. In this sense *vid.* F. LLODRÀ GRIMALT, *Lecciones de Derecho Ambiental Civil*, col.leció materials didàctics 135, Palma, Universitat de les Illes Balears, 2008, p. 21) who, in respect of fume and smell-related nuisances between neighbours

subjects (private-subject polluters and private-subject victims), leading to a private-law conceptualization of environmental issues⁸. This trend entails that a situation of environmental damage can be conceived in legal terms as a non-contractual / tortious relationship between private parties, thus giving rise to an obligation to compensate / repair the damage by the – alleged – tortfeasor⁹. This tortious conceptualization has slowly spawned at the domestic level, as well as the international one, where it is even acknowledged by public international lawyers¹⁰.

Thus, despite the obvious preeminence of *ex ante* forms of legal action, efforts have crystallized in recent decades, both domestically and internationally, in respect of private-subject-focused damage reparation: in Western Europe, examples thereof can be found in Germany or Italy, for instance¹¹. The referred legislative efforts have taken different forms at

(“*molestias por humos y olores en relaciones de vecindad*”), refers that “[aunque] *el desarrollo del Derecho ambiental está gobernado por el aspecto público y administrativo del mismo, no hay que olvidar que el Derecho privado dio las primeras soluciones a los problemas ambientales*”. She equally asserts (quoting other authors as D. MCGILLIVRAY & J. WIGHTMAN, and D. LOPERENA ROTA) that “*el papel del Derecho privado en las cuestiones ambientales ha sido retomado, tras un periodo de predominio de la visión del Derecho público, desde una visión económica, en el sentido del rol que los instrumentos económicos pueden jugar en la política ambiental*”. *Vid.* in a similar sense, A. CABANILLAS SÁNCHEZ (*La reparación de los daños al medioambiente*, Cizur menor, Aranzadi, 1996, p. 39) who, in the 1990s, quoting G.J. MARTÍN, described as “recent” the awareness of the potential role that civil liability could play in respect of the environment (“*toma de conciencia reciente del papel de la responsabilidad civil en el ámbito del medio ambiente*”). However, as most academic commentators seem to consider this approach new, the following pages will stick to that conception.

⁸ A. CABANILLAS SÁNCHEZ, (*La reparación de los daños al medioambiente*, *op. cit.*, p. 48) refers to: “[...] *la reciente construcción del medioambiente, cuya lesión presenta singulares caracteres a los ojos del Derecho privado, tanto en cuanto a la naturaleza de los daños (continuados, sociales, futuros), como en cuanto a los sujetos (indeterminación de los agentes y de los lesionados), como en lo que respecta al concepto de culpa, como en lo relativo a la indemnización (dificultades de reparación in natura o de cuantificación real de los deterioros), como en lo que atañe a las trabas procesales (legitimación para demandar), etcétera*”.

⁹ Two qualifications need to be made to this idea. The first one has already been partially introduced *supra* note 6: *ex post facto* compensation can also benefit public subjects (tortfeasors being either private subjects or public ones). The second qualification relates to the fact that tort law can actually also act *ex ante* whenever it is used as the basis of injunctive action aimed at avoiding the production of damage.

¹⁰ *Vid.* I. SEIDL-HOHENVELDERN, “The third world and the protection of the environment”, *Estudios de Derecho Internacional – Homenaje al Profesor Miaja de la Muela*, Madrid, Tecnos, 1979, pp. 351-630, at p. 357: “*After all, according to a generally recognized principle of law, it is the wrongdoer who shall repair the consequences of this wrongful act –and while pollution may not be strictly forbidden in all circumstances, it may well be deemed to come so close to a tortious activity that rules on wrongful acts should play by analogy*”. This excerpt can be considered an example of the reflection process that has lead legal thinkers to a conceptualization of environmental occurrences as torts. This process, as it will be shown, has ultimately lead to the conception of private international law as a form of legal intervention in international environmental occurrences.

¹¹ A. CABANILLAS SÁNCHEZ, (*La reparación de los daños al medioambiente*, *op. cit.*, pp. 42-44) comments in detail the referred Italian and German legislation (the Italian *Legge 8 luglio 1986, Istituzione del Ministero dell'ambiente e norme in materia di danno ambientale* [n. 349 supplemento ordinario, n. 59 G.U.R.I. 15 luglio 1986, n. 162], and the German *Umwelthaftungsgesetz* [von 10. Dezember 1990, BGBl I 1990, 2634]). As regards Spain he explains that: “*En España carecemos de una ley específica que regule la responsabilidad civil por daños al medioambiente. A parte de lo previsto en el Código Civil, sólo hay una ley específica (Ley de 29 de Abril de 1964 reguladora de la energía nuclear) inspirada en el Convenio de París de 1960, ratificado por España en 1961*”.

the domestic level: in certain occasions they have led to the elaboration of specific special provisions; in other instances, they have simply entailed a reconceptualization or wider interpretation of general rules on torts¹². At the international level, this framework of reasoning has led to the involvement of private international law in environmental matters.

Private international law can be defined as the legal discipline that deals with “*legal relationships between private law subjects which are characterized by [the presence] of an international element*”¹³. Consequently, if the above-referred compensatory and private-subject-focused conceptualization is applied to environmental occurrences arising in the international scene, it necessarily entails the intervention of private international law. Such intervention can mainly take two forms: the first one is the elaboration of specific uniform substantive rules, embodied in international conventions. The realm of environmental matters counts several international instruments establishing substantive civil liability regimes. These instruments aim at the protection of certain specific aspects of the environment by channelizing liability to private parties¹⁴. The second form of intervention, which is the most common – up to the point that many authors identify this technique with the very notion of private international law¹⁵ – is the so-called conflict-of-laws method or conflicts technique¹⁶: since the world is composed by a plurality of legal orders, private law relationships which are simultaneously related to several of them require the determination of the relevant law to be applied to controversies stemming thereof – and, upstream, the determination of the relevant jurisdiction which may adjudicate them. Thus, through the means of the conflicts technique,

¹² In respect of the different forms that the civil-liability phenomenon may take, J. SCHNEIDER (*World public order of the environment: Towards and international ecological law and organization*, London, Stevens & Sons, 1979, p. 53) interestingly, mentions what she calls “*national substantive transnational regulation*”: “[...] *national substantive legislation itself can be drafted directly to take account of transnational or more broadly international environmental considerations. An illustration might be provided by the US Trans-Alaska Pipeline Act, which has provisions establishing strict liability for damages ‘to any person or entity, public or private, including residents of Canada’ that results from discharges of oil transported by vessels loading at terminal facilities of the pipeline*”. An interesting assessment of the factual situation involving the Trans-Alaska Pipeline line, as well as on the strict liability regime established over “owners of pipeline right-of-way” and operators and owners of tankers carrying Alaskan oil can be found in A. G. STONE, “The Trans-Alaska Pipeline and Strict Liability for Oil Pollution Damage”, *Urban Law Annual - Journal of Urban and Contemporary Law*, vol. 9, 1975, pp. 179-201.

¹³ *Vid.* J.C. FERNÁNDEZ ROZAS & S. SÁNCHEZ LORENZO, *Curso de Derecho Internacional Privado* (7th ed.), Madrid, Civitas, 2013, p. 24.

¹⁴ *Vid.*, for example, the International Convention on civil liability for oil pollution damage, adopted on the 29th of November 1969 in Brussels, entered into force on the 19th June 1975.

¹⁵ This conception under which PIL is merely considered a *droit de coordination* (i.e. the identification of the concept of private international law with the multilateralist methodology in choice-of-law), entails a rather narrow understanding of what private international law is. Interestingly, this conception seems to be quite present in the minds of specialists of other legal disciplines. However, the notion of private international law used within this dissertation is wider: not only it encompasses choice-of-court, (multilateral) choice-of-law, and recognition & enforcement rules, but also, transnational or international substantive rules, and unilateral choice-of-law rules. An example of the said “narrow understanding” can be found, for instance, in T. KONO, “Efficiency in Private International Law”, *Recueil des Cours de l’Académie de Droit International*, vol. 369, Leiden, Martinus Nijhoff, 2013, pp. 361-512, at pp. 410-444.

¹⁶ This dissertation will refer to both choice of court and choice of law conjunctly with the term “*conflict of laws*”, in order to distinguish these kinds of stake from the wider notion of private international law which, as referred *supra* note 15, encompasses international uniform substantive law.

private international law works as a tool of legal coordination between domestic legal orders: in the realm of international environmental torts¹⁷ the need for such legal coordination relates mainly to the fact that, putting aside the referred conventions on liability for damage to specific aspects of the environment, important divergences between national provisions remain. This renders applicable-law stakes significantly important¹⁸.

However, beyond this role of necessary legal coordination, required in order to allow the existence of international *ex post* damage reparation / compensation, private international law may further contribute to the enhancement of environmental protection at an international level: while the referred mere legal coordination is articulated through “classic” choice-of-law rules, which are said to be policy-blind, or neutral, it is contended that so-called “content-oriented” or “result-selective” choice-of-law rules may sustain certain given substantive policies in the international scene, such as environmental protection¹⁹. Thus, through result-selective choice-of-law provisions, private international may also respond to a need for new forms of legal intervention in environmental matters. These provisions may do so by leading to the application of legal systems which may improve the enforcement of pro-environmental policies.

After a couple of decades of scholar thought and reflection by private international legal scholars²⁰, the European Union – hereinafter EU – has acknowledged the potential of private international law – hereinafter “PIL” – in respect of international environmental stakes, and legislative action has been undertaken at European level in this respect. Thus, in the frame of the European Union’s system of private international law – hereinafter “EPIL” – a specific article on choice of law in respect of environmental damage was introduced in the legislative

¹⁷ Within the frame of this dissertation, the term “tort” will be used in a generic sense and will not be referred to any specific notion under any given legal order. It will therefore be used interchangeably – despite the fact that the author is aware that they are not perfect synonyms – with other terms as “delict”, “non-contractual obligation”, “non-contractual liability” and similar ones.

¹⁸ *Vid.* M. BOGDAN, “Some Reflections Regarding Environmental Damage and the Rome II Regulation” in G. VENTURINI & S. BARIATTI (eds.), *Nouvi Instrumenti del Diritto Internazionale Privato – Liber Fausto Pocar*, Milano, Giuffrè Editore, 2009, p. 96. Moreover, this author reinstates one of the ideas already referred above: “[...] the fact that environmental damage does not respect national borders [...]”. On the idea of the significant variety of the diverse private law regimes that may potentially come to be applicable to a given international environmental tort, *vid.* F. MUNARI & L. SCHIANO DI PEPE (“Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity”, in A. MALATESTA (ed.), *The unification of choice of law rules on torts and other non-contractual obligations in Europe. The “Rome II” proposal*, Padova, CEDAM, 2006, pp.173-219, at p. 204) who warn that “[in the European Union alone a non-negligible] number of national legal systems coexist providing for different civil liability rules with varying degrees and standards of environmental protection”. The same authors point out that, as regards the rest of the world, the 2000 Note drafted by C. BERNASCONI for the Hague Conference (C. BERNASCONI, *Civil Liability Resulting from Transfrontier Environmental Damage: a Case for the Hague Conference?*, www.hcch.net/upload/wop/gen_pd8e.pdf) contains “a comprehensive overview of existing national legislation and international regimes”, including both substantive and PIL rules (p. 185).

¹⁹ These notions are properly developed *infra*, “Basic concepts of conflict of laws (II)”.

²⁰ A good example of this work are the so-called “Dix points d’Osnabrück”, the closing summary of a colloquium that took place, under the name “Vers une convention sur les problèmes de droit international privé en matière de dommages causés à l’environnement”, between the 7th and the 9th of April 1994 (*Rev. crit. dr. internat. privé*, vol. 83 – 4, 1994, pp. 853-855).

proposal that later became *Regulation (EC) No 864/2007*²¹. This Regulation, known as the “Rome II” Regulation, is the general legal instrument that currently deals with the question of the law applicable to non-contractual obligations before courts across the EU, with the exception of Denmark²².

The referred rule, Article 7 of the Rome II Regulation, is said to be inspired by the principles of environmental law of the European Union²³ and the *favor laesi* principle – “*the principle of discriminating in favour of the person sustaining the damage*”²⁴. This Article provides that the victims of an environmental tort may choose the law to be applied to such tort at their convenience, between *lex loci delicti commissi* – the law of the place where the event giving rise to damage occurs – and *lex loci damni* – law of the place where the tortious result arises²⁵. Through the choice between the two referred potentially applicable laws the victim is offered the possibility to maximize the reparation to be paid by the polluter, by choosing the one that will lead to a more substantial economic compensation. Allegedly, this strategic privilege is meant to produce an enhanced deterrence effect upon potential polluters, thus amounting to an increase in the level of environmental protection in force in the international scene²⁶. Overall, “*the point 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*”²⁷.

Article 7 of the Rome II Regulation is currently accompanied in the field of international jurisdiction by the *fora* contained in articles 4.1 and 7.2 of *Regulation (EU) No 1215/2012*²⁸.

²¹ Regulation (EC) 864/2007, of the European Parliament and of the Council, of 11 July 2007, on the law applicable to non-contractual obligations (Rome II), O.J. L 199, 31.7.2007, p. 40. This Regulation entered into application on January the 11th 2009 (*vid.* Arts. 31 & 32). For a clarification on the blurry language used in the Regulation as regards its *ratione temporis* scope of application, *vid.* ECJ, *Homawoo v GMF Assurances*, judgment, case C-412/10, ECLI:EU:C:2011:747. Rome II applies to events giving rise to damage which occurred after the 11th January 2009.

²² *Vid.* Art. 1.4 of the Rome II Regulation.

²³ These principles are: the precautionary principle, the principle that preventive action should be taken, the principle of priority for corrective action at source and the polluter-pays principle. They are mentioned in Art. 191 of the Treaty on the functioning of the European Union (TFUE) (former article 174 of the Treaty establishing the European Community) to which recital 25 of the Rome II Regulation refers.

²⁴ *Vid.* recital 25 of the Rome II Regulation.

²⁵ Article 7 provides that “[t]he law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred”. The connecting factor in Article 4.1 is *lex loci damni*.

²⁶ *Vid.* Art.7, recital 24, and recital 25 Rome II Regulation. *Vid.* also the Explanatory Memorandum to the Commission’s 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, pp. 19-20. L. ENNEKING (“The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law”, *European Review of Private Law*, 2-2008, pp. 283-311, notably at pp. 289-291) explicitly addresses this point, which is not explicitly addressed in the referred legislative documents (only implicitly).

²⁷ *Vid.* Explanatory Memorandum to the Commission’s Proposal, *op. cit.*, p. 19.

²⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), O.J. L 351, 20.12.2012, p. 1. This Regulation was preceded by Council Regulation (EC) 44/2001, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and

This Regulation, known as the “Brussels I BIS” Regulation, is the general legal instrument that regulates international jurisdiction and enforcement of judgments in civil and commercial matters in the EU. Together, the three referred articles constitute the main EPIL provisions which are relevant to international environmental tort; they create a micro-regime of “environmental PIL” – hereinafter indistinctly referred to as “micro-regime” or “mechanism”.

The fact that, in nowadays global world, creative and innovative efforts are made in order to try to deal with complex transnational problems such as environmentally-related ones must be celebrated. However, after the description made in preceding pages, it may be legitimate to ask whether this kind of legal intervention is actually useful for environmentally-protective purposes. Is it realistic to try to spread environmentally-protective policies through private international law means? If so, which policies? Preventive ones, compensatory ones? And within which territorial scope, global or regional? Put otherwise, what roles or functions may effectively be fulfilled by this kind of legal tool? May this kind of tool, beyond providing protection, enhance it? In light of all of the above, this dissertation aims at assessing the way in which private international law may contribute to the protection of the environment *via* multilateral choice-of-law rules dealing with the non-contractual obligations which arise from environmental damage. In order to do so, it will mainly focus on the above-referred example, provided by the law of the European Union, for it is possibly the approach’s core illustration.

Accordingly, the dissertation is structured around an apparently simple questioning: from the standpoint of environmental protection, is it effective to intervene in environmental matters through the means of content-oriented multilateral choice-of-law rules? And, moreover, is it effective to intervene therein with the precise kind of content-oriented and multilateral choice-of-law rule in force nowadays in the EU? As it may be obvious, the term effectiveness, as used in this dissertation, refers to the notion of “political” effectiveness (“*eficacia política*”), as described by L. PRIETO SANCHÍS: effectiveness from the perspective of the policy goals established when elaborating the provision²⁹. In the light of the two questions just asked, the analysis to be performed is double-fold: first, it aims at ascertaining whether conflict of laws *in abstracto* may serve environmentally-protective goals satisfactorily. Secondly, it aims at verifying whether, and under which circumstances, the micro-regime in force in the European Union may be able to fulfil the environmental objectives assigned thereto³⁰. Therefore, this

commercial matters, O.J. L12, 16.1.2001, p. 1. As it is well-known, the latter Regulation was the “*communautarisation*” of the 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

²⁹ L. PRIETO SANCHÍS, *Apuntes de teoría del Derecho* (9th ed.), Colección Estructuras y Procesos. Derecho, Madrid, Trotta, 2014, p. 85: “*En el sentido que he llamado político la eficacia de las normas alude a la satisfacción o realización de las finalidades u objetivos sociales o políticos en vista de los cuales fueron establecidas esas normas. Como ya sabemos, el Derecho es un instrumento para ordenar la sociedad de acuerdo con un cierto modelo o proyecto ideológico, filosófico, etc., y cuando el legislador dicta una norma en principio hemos de pensar que lo hace para algo, para producir un impacto en la sociedad a través de la orientación de las conductas de los destinatarios. A veces, las normas se muestran como instrumentos idóneos para alcanzar esos fines, y entonces se dice que son eficaces; pero en otras muchas ocasiones el legislador no acierta en el diseño de la norma y ésta o no produce los efectos esperados o incluso obtiene justamente los contrarios*”.

³⁰ In 2010, O. BOSKOVIC published “L’efficacité du droit international privé en matière environnementale” (in O. BOSKOVIC (dir.), *L’efficacité du droit de l’environnement – Mise en oeuvre et sanctions*, Paris, Dalloz, 2010, pp. 53-66). In this concise (13-page) contribution, the author mainly focused on briefly introducing

project will place its focus on choice-of-law issues and will only refer to international jurisdiction where necessary or appropriate.

II. Interest of the topic / Novelty

During the last decade of the 20th century and the first decade of the 21st century, at least eight monographs have been devoted to various aspects of the intervention of private international law in international environmental matters – including one contribution to the *Recueil des Cours* of the Hague Academy of International Law³¹. Despite such profusion, the expediency of drafting this dissertation can be nevertheless justified on several bases.

Expediency arises, firstly, from the coming into force of an already-mentioned extremely relevant legal provision: a European multilateral choice-of-law rule dealing with the law applicable to non-contractual obligations arising from environmental damage. As opposed to pre-existing domestic provisions, which were in most cases neutral and general in nature – entailing the application to environmental damages of a general choice-of-law rule worded for all kinds of tortious matters – on January the 11th 2009 a content-oriented rule specifically designed to deal with the referred problem entered into application. This is, to say the least, a significant shift in the *de lege lata* panorama throughout the EU³². Its rarity merely reflects the

some of the stakes that the mechanism could face, without providing, however, a thorough evaluation of the latter. The contribution simply states, at p. 54, that the mechanism is to be regarded in “positive” terms, but does not elaborate on the point. The theme of the “effectiveness” (specially from the standpoint of the policy objectives set by the European legislator), in my humble opinion, remains largely unexplored.

³¹ Vid. C. VON BAR, “Environmental damage in Private International Law”, *Recueil des Cours de l’Académie de Droit International*, vol. 268, Leiden, Martinus Nijhoff, 1997; G. MUSGER, *Grenzüberschreitende Umweltbelastungen im internationalen Zivilprozessrecht*, Saarbrücken, Europa-Institut (Universität des Saarlandes), 1991; G. PALAO MORENO, *La responsabilidad civil por daños al medioambiente*, Valencia, Tirant Lo Blanch, 1998; A. CRESPO HERNÁNDEZ, *La responsabilidad civil derivada de la contaminación transfronteriza ante la jurisdicción estatal*, Madrid, Eurolex, 1999; K. FACH GÓMEZ, *La contaminación transfronteriza en Derecho internacional privado*, Barcelona, Bosch, 2002; M. VINAIXA I MIQUEL, *La responsabilidad civil por contaminación transfronteriza derivada de residuos*, De conflictu legum 8, Santiago de Compostela, Servizo de Publicacións e Intercambio Científico - Universidad de Santiago de Compostela, 2005; C. COSTA DE OLIVEIRA, *La réparation des dommages environnementaux en droit international (Contribution à l’étude de la complémentarité entre le droit international public et le droit international privé)*, Université Panthéon-Assas, 2012; L. GARCÍA ÁLVAREZ, *Daños ambientales transnacionales y acceso a la justicia*, Madrid, Dykinson, 2016.

³² Priorly, few *de lege lata* provisions existed in this sense. The most popular amongst them, despite the fact that it does not come from an EU Member State, is Article 138 of the Swiss Law on Private International Law (*Loi fédérale Suisse du 18 décembre 1987 sur le droit international privé* (LDIP), RS 291). However, in purity, this provision does not deal with environmental damage but with “nuisances” (“Immissions”): “Les prétentions résultant des immissions dommageables provenant d’un immeuble sont régies, au choix du lésé, par le droit de l’Etat dans lequel l’immeuble est situé ou par le droit de l’Etat dans lequel le résultat s’est produit”. Moreover, the original version of the Belgian code of Private International Law (*Loi du 16 juillet 2004, portant le Code de Droit International Privé*, Moniteur Belge, 27.07.2004) also contained a provision – now repealed – dealing with these matters (art. 99, §2, 3°). The repealed provision read as follows: “Toutefois, l’obligation dérivant d’un fait dommageable est régie : [...] 3° en cas de dommage aux biens ou aux personnes résultant d’une atteinte à l’environnement, par le

fact that, for many, environmental matters are, from a private-international-law perspective, a “new area of regulation”³³.

Expediency arises, also, from the ongoing succession of environmental occurrences that have spawned around the globe over the last five decades, which leads up to nowadays. These occurrences have gathered massive media attention and have kept environmental matters from falling into oblivion for the general public. Just to name a few of them, it may be recalled that heavy public-opinion concerns were sparked in the 1980s by catastrophes such as “Chernobyl” and “Bhopal”, and have been kept alive by more recent ones such as the “Prestige” and “Erika” shipwrecks at the turn of the millennium, and the “Deep Water Horizon” accident in 2010. The referred public-opinion concerns have been especially acute in those rare cases where environmental occurrences have led to publicly-known litigations, such as the “Lago Agrio-Chevron” and “Trafigura / Probo Koala” cases³⁴, despite the fact that it is even rarer that cases reach the decision / ruling stage, thus providing very little precedent in the field³⁵. All in all, environmental disasters keep on arising – attracting diverging levels of media coverage – and keep on entering litigation and settlement phases, maintaining the topicality of the subject.

Overall, the referred long-lasting concerns³⁶ and ongoing topicality would justify by themselves investing further academic efforts in the subject. However, when combined with the “novelty”

droit de l'Etat sur le territoire duquel le dommage est survenu ou menace de survenir”. Interestingly, the Article only dealt with environmental damage *lato sensu* (thus, damage to persons or property derived from an environmental occurrence), and not with pure ecological damage.

³³ *Vid.* M. AUDIT, H. MUIR WATT & E. PATAUT (eds.), *Conflit de lois et régulation économique: l'expérience du marché intérieur*, Paris, L. G. D. J., 2008, p.VII (*table des matières*). *Vid.* in the same sense the title of the above-referred article by P. BOUREL (“Un nouveau champ d’exploration pour le droit international privé conventionnel: les dommages causés à l’environnement”, *op. cit.*).

³⁴ Amongst other authors M. FALLON, B. FAUVARQUE-COSSON and S. FRANCO comment the fact that it is only seldomly that litigation is conducted in respect of environmental matters (They highlight the “*rareté du contentieux dans la matière*”): *Vid.* M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO, “Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge”, in G. VINEY & B. DUBUISSON (dir.), *Les responsabilités environnementales dans l'espace européen, point de vue franco-belge*, Bruxelles, Bruylant, 2006, pp. 547-652, at p. 547.

³⁵ Along these lines, R. MEERAN (“Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States”, *City University of Hong Kong Law Review*, vol. 3-1, 2011, pp. 1-41, at p. 1) explains that: “[i]f cases survive inevitable legal procedural challenges, [Multinational corporation] cases to-date have been settled before trial due to the high stakes, especially for the [Multinational corporation], of a trial. Binding legal precedents in this area are generally limited to procedural issues which, albeit of tangential relevance to the substance of a case, are frequently decisive”. Furthermore, (*ibidem*, p. 24): “[a]cademics and campaigners have expressed concern that the settlement of litigation enables deep-pocketed MNCs to avoid being held to account at trial and deprives the system of binding legal precedents”³⁵. This needs not to be taken directly for a sign of lack of relevance of private litigation in the field. It is probably related to the significant amount of settlements that apparently happen in practice. In this sense, *vid.*, for example, H. KOCH as reported by I. SPYRIDAKIS (“Summary of the session – Mass torts”, in K. D. KERAMEUS (ed.), XIV International Congress on Comparative Law - Athens 1994 - General reports, Athens, Ant. N. Sakkoulas publishers, 1996, pp. 144-148, at p. 146): “Most of the mass tort cases in Germany are not judicially treated but end up in settlement”). It is thus at this point that comes into play the appropriateness of the rule, which is an essential element in the negotiations and the ensuing bargaining process that may eventually lead to a settlement.

³⁶ However, these concerns are probably not exclusively related to the strictly environmental dimension of these dramatic events, but to their immense impact in the life and health of the neighboring populations involved.

of Article 7 of the Rome II Regulation, the said justification comes up reinforced: although, to the best of my knowledge, Article 7 has not been yet properly applied in any final court decision, it is only a matter of time until a European court rules on an international environmental tort³⁷. Before this happens a thorough discussion of the Article's true potential is to be welcomed.

Lastly, a final ground for expediency comes from the need to place the question of the law applicable to environmental torts within the frame of two highly topical and inter-related conceptual frameworks, which have been implicitly referred to above: the one on private international law as a potential tool of global governance, and the one on the enforcement of European Union policies through private litigation – commonly known as “private enforcement”. Let us briefly present both debates in sequence.

A. Private international law as a tool of environmental global governance

Since “*globalization is the buzzword of our times*” there exists little consensus on how to define it³⁸. Generally speaking, it may be said that this notion refers to

“the social, economic, political, and cultural processes that, taken together, have produced the characteristic conditions of contemporary (late twentieth-/early twenty-first-century) existence. In particular it refers to the ways previously distant parts of the world have become connected in a historically unprecedented manner, such that

³⁷ Reportedly, there are / have been some cases before British courts which should lead / have led to the application of Article 7 of the Rome II Regulation. *Vid.* the following blog entries in Conflict of laws.net: E. ARISTOVA, “UK court on Tort Litigation Against Transnational Corporations”, published on June the 23rd 2016; and M. REQUEJO, “Oil Spills in Nigeria, Damages in the UK”, July the 14th 2014 (Both available, on November the 14th 2016, respectively under the following links:

<http://conflictoflaws.net/2016/uk-court-on-tort-litigation-against-transnational-corporations/> and <http://conflictoflaws.net/2014/oil-spills-in-nigeria-damages-in-the-uk/>). It would seem, however, that the case reported by Requejo has been dismissed on January the 26th 2017, without properly discussing its merits to the fullest extent. The decision (*His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd*, 2017 EWHC 89 (TCC)), available on June the 26th 2017 at the website of the British firm Leigh Day, does briefly contemplate the application of Art. 7 of the Rome II Regulation (paras. 50 to 55, pp. 19 to 21). Nevertheless, (para. 57): “*It is not necessary to determine the applicable law definitively at this stage. This is because the legal experts for the parties are agreed that the law of Nigeria would follow, or at least include as an essential component, the law of England in this respect. In other words, if there is no legal claim in English law against [Royal Dutch Shell], there would be no legal claim against [Royal Dutch Shell] under the law of Nigeria as that is also a common law jurisdiction and would follow English law in this respect*”. Ultimately, the case is dismissed on the grounds that all operational decisions were taken by the Nigerian subsidiary (para. 106) and that, therefore, there is no arguable duty of care by the parent company (para. 118). Without Royal Dutch Shell as an “*anchor defendant*” the court decides not to further pursue the case as regards its subsidiary.
(<http://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Corporate%20accountability/Judgment-26-Jan-17-FINAL.pdf>)

³⁸ *Vid.* J.-U. WUNDERLICH & D. J. BAILEY, “Introduction”, in J.-U. WUNDERLICH & D. J. BAILEY (eds.), *The European Union and Global Governance – A Handbook*, London, Routledge, 2011, pp. 1-11, at p. 1: “*Globalization, it appears, means different things to different people*”. *Vid.* similarly R. MICHAELS, “Globalisation and Law: Law Beyond the State”, in R. BANAKAR & M. TRAVERS (eds.), *Law and social theory*, Hart, 2013, pp. 287-303, at pp. 287, for whom it is a “*vague concept*”.

developments in one part of the world are now able to rapidly produce effects on geographically distant localities. This in turn has made it possible to begin to imagine the world as a single, global space linked by a wide array of technological, economic, social, and cultural forces that are able to cross and crisscross the imagined boundaries of cultures or nations with relative ease”³⁹.

In recent years, within the wider context of academic literature on law and globalization, scholarly debate has sparked on the possible use of private international law as a tool of global governance⁴⁰. This proposal is closely related to a series of interesting elements which have been identified by private law scholars as being either causes or consequences of the impact of

³⁹ I. SZEMAN, "Globalization", in M. Groden, M. Kreiswirth & I. Szeman, *The Johns Hopkins Guide to Literary Theory and Criticism* (2nd ed.), Baltimore, Johns Hopkins University Press, pp- 458-465, at pp. 458-459. The excerpt goes on as follows: "Globalization has been used to refer both to this larger, historical process and to the effects produced separately in a variety of conceptual registers, as in discussions of contemporary finance capitalism and the scale of corporatization and privatization (economic), the erosion of the nation-state system and the rise of transnational organizations and corporations (political), the threat posed by global culture to local cultures and traditions (culture), the deleterious impact of human activity on the natural world (ecological), and the communications revolution introduced by new technologies like the Internet (communications). The term "globalization" is perhaps still most often used to describe the profound transformations that have taken place in capitalism over the past several decades, beginning with the elections of the conservative governments of Margaret Thatcher (United Kingdom), Ronald Reagan (United States), and Brian Mulroney (Canada) in the 1980s and extending through to the establishment of powerful international agreements and institutions regulating global trade and finance (World Trade Organization, World Intellectual Property Organization, etc.)". *Vid.* also R. SHAMIR, "Without Borders? Notes on Globalization as a Mobility Regime", *Sociological Theory*, vol. 23-2, 2005, pp. 197-217. This author compiles descriptions of the notion by other authors which focus on the ideas of "flow" and "fluidity" (pp. 197-198, as for instance, "seamless flow of goods, services, ideas, technologies, cultural forms, organizational forms, and people, all more or less in agreement that globalization is largely about "free movement across national boundaries" and cross-border interdependencies") just to then argue that "globalization is a lived reality of hypermobility for a small social stratum of "cosmocrats" (p. 197). This is due to the fact that "the regulation of movement that evolves under the new cultural and normative conditions brought about by globalization is predicated on a paradigm of suspicion, one that constructs individuals and often whole social groups as having suspect identities related to the risks of immigration, crime, and terrorism" (p. 214). For a summary of the core traits of globalization understood as a source of legal challenges for corporations, *vid.* J.-Y. TROCHON, "Les nouveaux risques de l'entreprise face à la mondialisation, une approche juridique", *Int'l Bus. L.J.*, 2003, pp. 847-863. These three accounts of the notion of globalization may be confronted with the one presented by R. MICHAELS ("Globalisation and Law: Law Beyond the State", *op. cit.*, pp. 287-303, at pp. 287-293) for whom "globalization" bears at least three different dimensions: globalization as reality, as theory and as ideology.

⁴⁰ *Vid.* H. MUIR WATT, "Private International Law beyond the schism", *Transnational legal theory*, vol. 2-3, 2011, pp. 347-427. This is a revised version of the launching paper of the PILAGG ("Private international law as global governance") project [<http://blogs.sciences-po.fr/pilagg/>]. In this article some of the ideas presented by the author in her contribution to the *Recueil des Cours* blossom, and the core of the debate is introduced. *Vid.* also H. MUIR WATT & D. P. FERNÁNDEZ ARROYO (eds.), *Private International Law and global governance*, OUP, 2014 (especially, H. MUIR WATT, "Future Directions?", pp. 343-382); R. WAI, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization", *Columbia Journal of Transnational Law*, vol. 40, 2002, pp. 209-274. For a very brief, yet very practical, overview of the theme, *vid.* L. CARABALLO PIÑEIRO & X. KRAMER, "The Role of Private International Law in Contemporary Society: Global Governance as a Challenge", *Erasmus Law Review*, vol. 2014-3, 2014, pp. 109-112. For another brief account which reviews investment-arbitration and WTO-related aspects, *vid.* H. SCHEPEL, "Private international law as a regulatory tool for global governance?", in EUROPEAN PARLIAMENT (DIRECTORATE-GENERAL FOR INTERNAL POLICIES), *Cross-border activities in the EU - Making life easier for citizens*, 2015, pp. 232-248.

globalization on private law systems worldwide. Despite the topic's breadth, J. M. SMITS successfully summarizes its core traits in the following four phenomena: first, the rise of centers of power beyond the nation-state – as, for example, the EU, the IMF, the World Bank, the WTO, etc; second, the increasing amount of so-called “private global norm-production”; third, the increasing mobility of private actors around the globe; and, finally, the so-called “law market / legal tourism” – i.e. the possibility of “choosing” through different maneuvers the legal regime that will be applied to a given situation⁴¹. The first two phenomena referred are considered to be narrowly inter-connected. In this sense, J.M. SMITS contends that “[...] *the national legislature may continue to have the Westphalian ambition to set the law for its citizens [...but] State authority is leaking away*”⁴², and suggests that the way in which private lawyers understand and conceive private law should adapt correspondingly, in order to adjust to so-called “private global norm-production”. His idea is that the “authoritative norms and rules” – allegedly – stemming therefrom constitute “self-contained autonomous systems of global law [which] are [...] as powerful systems of customary law as the early English common law was in its day”⁴³. Those systems, so the contention goes, can fill in the “present vacuum in global regulation” derived from the fact that “the traditional suppliers of law fail to regulate things at the global level”⁴⁴.

On their turn, the last two elements in the referred list are equally inter-related between themselves, and sketch the silhouette of a further tandem of notions that play a fundamental role in the frame of the intersection of law and globalization: regulatory competition and the “race to the bottom”. The former notion refers to the fact that wherever legal subjects have the possibility to move freely around the globe (especially so, economic actors, such as multinational corporations), they may decide to settle wherever the legal framework is most

⁴¹ Vid. J. M. SMITS, *Private Law 2.0 – On the role of private actors in a post-national society (Inaugural lecture delivered by Jan M. Smits as Maastricht-Hiil Chair on the Internationalisation of Law)*, The Hague, Eleven international publishing, 2011, pp. 5 and following. This article provides an excellent introduction to the wide topic of the impact of developments related to globalization on private law. A more “optimistic” vision on globalization – in comparison with those in Private Law 2.0 and the PILAGG launching paper – can be found in M. FAURE & A. VAN DER WALT, “Introduction and editorial preface”, in M. FAURE & A. VAN DER WALT (eds.), *Globalization and Private Law – The way forward*, Cheltenham, Edward Elgar Publishing Limited, 2010, pp. 1-10 (especially 1-4). These authors deal with, *inter alia*, the “public law oriented processes behind lawmaking in private law”, the “constitutionalization of private law”, and, of course, the validity of the “public law-private law” divide (p. 8).

⁴² *Ibidem*, p. 11. This idea is so well-expanded that it probably requires no further comment. Vid. equally, as an example, D. CURTIN, “Public accountability of transnational rule making: a view from the European Union and beyond”, in M. FAURE & A. VAN DER WALT (eds.), *Globalization and Private Law – The way forward*, Cheltenham, Edward Elgar Publishing Limited, 2010, pp. 32-34, pp. 32-34: “[the notion] of governance beyond the state [...] highlights the shift of governance that has taken place across legal and political systems and the fact that a wide variety of groups, organizations and networks are making authoritative rules and policies outside the democratic and constitutional confines of the state”. On the changing nature of the State in the frame of a globalized world, with a specific focus on “state commercial activity” (the State’s “action [...] that emulates private market transactions”), vid. G. QUINOT, “Globalization, state commercial activity and the transformation of administrative law” in M. FAURE & A. VAN DER WALT (eds.), *Globalization and Private Law – The way forward*, Cheltenham, Edward Elgar Publishing Limited, 2010, pp. 183 and following.

⁴³ Vid. J. M. SMITS, *Private Law 2.0 – On the role of private actors in a post-national society*, *op. cit.*, p. 9.

⁴⁴ *Ibidem*, p. 17.

beneficial to their interests⁴⁵. This behavioral pattern would thus trigger competition amongst law-makers, each of them having an interest to render its legal systems as most attractive as possible, in order to capture investment. The ensuing notion of *race to the bottom* reflects the fact that within the referred scheme, legislators may have a tendency to drive standards of legal protection (legal requirements) downwards in fields such as labour law, and environmental protection, in order to obtain competitive advantages in the global “*normative price war*”⁴⁶. As it may be well understood, these dynamics play a very delicate role within the context of international relations, and of the economic tensions between developed and developing countries.

Coming back to J.M. SMITS’ thinking, overall, this author conceives the four elements in his list as only supplementing the existing law. He does, however, plead on that basis for a reconceptualization of private law in order to reach a more private-party-driven “*Private Law 2.0*”⁴⁷. Clearly, this kind of contention may be found to be very controversial, and lead to a substantial amount of academic debate. But, my intention, by presenting J.M. SMITS’ thinking is not to take part in this debate by either sustaining or rejecting his claims: the main point to be retained from previous lines is that they summarize the views of a certain sector of the worldwide legal academia and constitute the basis of the debate on the potential of private-law-related aspects of globalization. And it is this debate, that has led to conceiving new forms of intervention by private law, private international law and – broadly speaking – “private initiatives” (initiatives by private actors) in the schemes of governance at a global scale. The notion of “governance” – as opposed to government – may be defined as covering:

“[...] among other things, policy, coordination between public and private actors, often across multiple levels of government and through formal and informal networks of actors. Whereas ‘government’ is traditionally understood as involving a distinction between who is governing (the government as executive power) and who is being governed (the citizen), ‘governance’ at the very least blurs that distinction. There is a significant erosion of the boundaries separating what lies inside a government and its administration and what lies outside them [...] The use of the term ‘governance’ [...] is used to indicate broader phenomena than what traditionally are accepted parts of a legal system as such. It indicates a wider focus than that of the content of substantive rules as such, embracing a link with institutions and institutional design both in a formal sense and more informally. It implies a dynamic process in the sense that new forms of governance are emerging compared with the more traditional governing

⁴⁵ Vid. H. MUIR WATT, “Aspects économiques du droit international privé - Réflexions sur l’impact de la globalisation économique sur les fondements des conflits de lois et de juridictions”, *Recueil des Cours de l’Académie de Droit International*, vol. 307, Leiden, Martinus Nijhoff, 2005, notably, pp. 57-117.

⁴⁶ The expression “*normative price war*” – as well as, some other elements in the description of the notion of race to the bottom – has been borrowed from B. FRYDMAN, “A pragmatic approach to global law”, in H. MUIR WATT & D. P. FERNÁNDEZ ARROYO (eds.), *Private International Law and global governance*, Oxford, OUP, 2014, pp. 181-200, at pp. 189-190.

⁴⁷ Vid. J. M. SMITS, *Private Law 2.0 – On the role of private actors in a post-national society*, op. cit., pp. 15-16. Such reconceptualization would consist, *inter alia*, on the idea that “[...] citizens themselves should play an important role in deciding which law applies to (at least part of) their activities [...] within the limits set by mandatory law, they should be able to choose a legal system that in their view fits in best with the type of activity that they engage in” (p. 17).

*mechanisms. It also implies a mixing or blurring of boundaries, public and private as well as local, regional, national, transnational and global levels of governance within the respective spheres*⁴⁸.

Taking into account this definition, the proposal of conceiving private international law as a tool of global governance may be presented as a wide intellectual project, embracing simultaneously different understandings of how conflict of laws may contribute to the spread of policies, the deployment of authority and the coordination between public and private actors around the planet. On the one hand, it may, *inter alia*, reject the claims of normativity of the aforementioned private global norm-production and may allow governing transnational situations through an enlarged notion of “recognition”, which would expand beyond the typical mechanisms of recognition of foreign judgments and foreign public acts⁴⁹. The notion of recognition in private international law may thus be extended in order to acknowledge the claim of applicability which may arise from the self-determination of its own scope of territorial application by a given foreign legal instrument. Or to acknowledge foreign legal relationships through the means of balancing and proportionality tests, as those present in EU internal market law, and within the framework of the European Convention of Human Rights⁵⁰.

⁴⁸ *Vid.* D. CURTIN, “Public accountability of transnational rule making: a view from the European Union and beyond”, *op. cit.*, pp. 32-34 (Even if it is probably not essential for this definition, it is important to highlight that the referred author – as other authors in the same collective work – places in the same category rules stemming from international organizations – in the most common sense of the expression as used in public international law – and rules stemming from private organizations and/or private actors, etc. The fact of not discriminating adequately between both elements hinders, in my opinion, an adequate analysis of the issues at stake). Beyond the definition of “Global governance, it is also interesting to note the definition provided by the same author (p. 34) for the term “multi-level governance”: “Multi-level governance is the term used by some for the different layers and interactions involved in decision making beyond that of the territorial State. The point is that the decision-making layers may be multi-level but paradoxically the political and administrative actors are often the same [...] This also holds true for non-state actors [...]”. Similar to D. Curtin’s definition of global governance is the one offered by J.-U. WUNDERLICH & D. J. BAILEY “Introduction” (*op. cit.*, p. 3): “[...] academic literatures have also moved beyond the state-centric model of world politics effectively broadening the analysis to include other actors at the global stage such as international institutions, non-governmental organizations, multinational companies, transnational advocacy networks, civil society and regional institutions. It is in relation to this that we speak of ‘global governance’, which, very broadly conceived, refers to governance without the existence of an overarching sovereign authority”. *Vid.* in this sense, and more specifically in reference to the EU, the contributions in B. VAN VOOREN, S. BLOCKMANS & J. WOUTERS (eds.), *The EU’s Role in Global Governance – The Legal Dimension*, Oxford, OUP, 2013. For a perspective on the exclusively “public” dimension of global governance (thus focused on governance provided by international organizations, and on so-called “global administrative law”) *vid.* E. BENVENISTI, “The Law of Global Governance”, *Recueil des Cours de l’Académie de Droit International*, vol. 368, Leiden, Martinus Nijhoff, 2013, pp. 47-280. For an institution-focused approach to environmental global governance (which proposes further development of UNEP instead of a “world environment organization”), *vid.* F. BIERMANN, O. DAVIES & N. VAN DER GRIJP, “Environmental policy integration and the architecture of global environmental governance”, *International Environmental Agreements: Politics, Law and Economics*, vol. 9-4, 2009, pp. 351-369.

⁴⁹ H. MUIR WATT, “Future Directions?”, *op. cit.*, pp. 343 & 367-369. For further insights into the enlarged notion of recognition, *vid.* I. ISAILOVIC, “Political Recognition and Transnational Law: Gender equality and Cultural Diversification in French Courts”, in H. MUIR WATT & D. P. FERNÁNDEZ ARROYO (eds.), *Private International Law and global governance*, Oxford, OUP, 2014, pp. 318-342.

⁵⁰ *Ibidem*, where she contends that this would possibly entail “the end of choice of law” as it is classically understood in Europe (p. 363), for current trends would point to the “absorption” of most of the choice of law methodology into “proportionality tests” (pp. 381-382).

Conversely, on the other hand, private international law may be used as a tool of global governance by enshrining the development of private global norm-production as “law beyond the state”, and re-affirm its alleged vocation to govern the transnational sphere. This may be so, notably, through the recognition, for choice-of-law purposes, of private norm production as “law”⁵¹.

This dissertation will present a third possible understanding of the role that private international law may play as a tool of global governance. This third conception aims to respond to a questioning that necessarily arises from the above-referred account of the interactions between law and globalization – especially the assertion that state sovereignty is leaking away towards private actors: is there anything that States can do to counteract these developments? Is there any possible kind of assertive intervention that they may try to perform in order to reassert their role in the global governance framework? The answer may be more easily identifiable when placing the issue of conflict of laws in environmental torts against the above-described canvas of law and globalization.

Environmental torts in a globalized world are frequently characterized by being embedded in a constellation of conflicting interest, whose complexity goes beyond that borne by the typical clash between economic values and other kinds of social values (as environmental protection and health) in purely domestic environmental torts: very often, corporate economic interests, as well as those of the relevant home countries, and even sometimes those of the governments of the relevant “host countries”, go generally against global environmental interests, and more specifically so, against those borne by the populations of the said “host countries”⁵². This tension is even more blatant whenever it hits a developing country. This is the case not only because these countries frequently live beneath the Damocles sword of regulatory competition and the race to the bottom, but because of the sometimes unbearable costs of the measures, equipment, and remedies required to control and re-establish environmental conditions⁵³. On the other side of the globalization equation lie multinational

⁵¹ Within this academic position, the defense of the legal character of law beyond the State can be found at different degrees. *Cfr.*, for instance, R. MICHAELS’ assertive but cautious approach (“Globalisation and Law: Law Beyond the State” *op. cit.*, pp. 297-303) with BENOIT FRYDMAN’S intensity (“Comment penser le droit global?”, in J.Y. CHÉROT & B. FRYDMAN (dir.), *La science du droit dans la globalisation*, Brussels, Bruylant, 2012, pp. 17-48; *Petit manuel pratique de droit global*, Coll. L’économie de marché est-elle juste ? vol. 4, Brussels, Académie Royale de Belgique, 2014).

⁵² Both developed and developing countries alike. This tension is described by A. CASSESE (*Vid.* A. CASSESE, *International Law*, Oxford, OUP, 2001, p. 380) as follows: “[States] have crafted principles, rules, and monitoring mechanisms designed to strike a balance between two conflicting requirements: the dramatic urgency to put a stop to the deterioration of the environment besides forestalling new damages, on the one hand; the necessity realistically to take into account the huge economic and social costs involved in this process both for developed States and even more for developing countries, on the other”.

⁵³ *Vid.* A. CASSESE, *International Law*, *op. cit.*, p. 379. Furthermore: “Developing countries assert that, given their backwardness and poverty, they cannot afford to improve their conditions, unless they receive considerable financial assistance from industrialized States”. One should not forget that, as explained by I. SEIDL-HOHENVELDERN (“The third world and the protection of the environment”, *op. cit.*, p. 354), after all, “awareness of a need for environmental protection is a relatively recent phenomenon even for industrialized countries”. Specifically, as regards developing countries he contends (p. 353) that: “[f]rom their short-term point of view it is understandable that they consider the protection of the environment as a luxury which they cannot afford. If the industrialized States want to extend the

corporations from developed countries. These economic actors would indeed have the economic power to adopt whichever pro-environmental measures were needed, but they may not be inclined to do so for fear of becoming uncompetitive due to the subsequent increases in their production costs⁵⁴. They thus develop their activities within the frame of a “grey zone”: on the one hand, between the boundaries of law and ethics and, on the other hand, within the midst of the political, diplomatic, legal and economic relations between developed and developing countries.

As a consequence of the interplay of all of these factors, the aforementioned “*present vacuum in global regulation*”⁵⁵ materializes in the frame of global environmental matters, becoming very tangible when occurrences reach a litigation – or pre-litigation – stage. It is precisely at these stages that the third understanding of the role that private international law may play as a tool of global governance comes into play. While environmental torts frequently – although, clearly, not exclusively – arise in developing countries, they are indeed very frequently litigated upon before the courts of the western countries that are “home” to the – parent – corporations that have allegedly caused harm⁵⁶. This is because environmental victims feel the need to attempt to “*overcome the handicaps of the legal systems in those developing countries*”⁵⁷. In any case, whichever the specific reasons, it is this preference for western *fora* that gives Western Nation-States the possibility to reassert their role within global governance schemes. Private international law may possibly come to fill the vacuum in two closely-related senses: i) through the elaboration of content-oriented choice-of-law rules which may project to the transnational sphere the substantive – in this case environmentally-protective – policies of concerned *fora*; ii) by facilitating at the jurisdictional and procedural levels the development of private-law actions by private parties, in order to facilitate the said projection of policies. As counter-intuitive as it may seem – due to the alleged threat of re-location of mobile multinational corporations – both of these ideas may actually stand as responses by Nation-States to the aforementioned leakage of authority and the so-called private global norm-production⁵⁸.

While it is the proposal concerning content-oriented state-crafted rules of private international law that will play the most significant role in the frame of this dissertation, the proposal on the facilitation of the development of private-law actions by private parties at the jurisdictional and procedural levels needs not be neglected. This is so because both ideas and, notably, the second one, lie at the intersection between the academic debate on private international law

protection of the environment on a world-wide scale, they should bear the costs involved in extending such standards to the territories of the developing countries”.

⁵⁴ Vid. A. CASSESE, *International Law*, op. cit., p. 379.

⁵⁵ Vid. J. M. SMITS, *Private Law 2.0 – On the role of private actors in a post-national society*, op. cit., p. 17.

⁵⁶ Vid. C. OTERO GARCÍA-CASTRILLÓN, “International litigation trends in environmental liability: a European Union-United States comparative perspective”, *Journal of Private International Law*, vol. 7-3, 2011, pp. 551-579, at p. 552. After the referred excerpt, the text continues as follows: “*Moreover, even when litigation takes place in the affected developing country, judgments awarding damages may have to be recognized and enforced in developed countries where the defendant’s assets are to be found. It is not surprising that the length of litigation and the uncertainties and costs associated with it – for companies, economic as much as reputational – favours the settlement of these cases through agreements*”.

⁵⁷ *Ibidem*.

⁵⁸ As it will be discussed *infra* (Part II, Chapter 4, “*Fifth criticism: The suggested solution would foster the “off-shoring” of European corporations*”), the threat of “mobility” needs to be relativized.

as a tool of global governance and the second conceptual framework to be presented: the one on private enforcement of public policies.

B. Private international law as a tool of private enforcement of the EU's environmental policy at the international level

The second theme within which a contemporary analysis of the issue of the law applicable to environmental torts needs to be placed is the one relating to the “private enforcement” of public policies. The notion of “private enforcement” refers to the judicial assertion of public-law-related interests indirectly through private law actions introduced by private parties against private parties⁵⁹. This notion is opposed to traditional “public enforcement”, understood as the assertion of those very same public-law-related interests through public law means, fostered by public entities. The origins of private enforcement can be found in the North-American legal system, *inter alia* in its antitrust law⁶⁰. From this legal tradition, private

⁵⁹ Admittedly, none of the core Antitrust-related documents published by the European Institutions contains a technical definition of what “private enforcement” is. No definition can be found in the 2008 White paper *on Damages actions for breach of the EC antitrust rules* (COM(2008) 165 final). However, rough definitions, exclusively circumscribed to the competition law context, can be found, for instance, in the Green paper *on Damages actions for breach of the EC antitrust rules* (COM(2005) 672 final, p. 3: “Private enforcement in this context means application of antitrust law in civil disputes before national courts”), or in a EU Commission’s memo on “Frequently Asked Questions: Commission proposes legislation to facilitate damage claims by victims of antitrust violations” (MEMO/13/531, p. 1: “The private enforcement of EU competition rules consists in legal actions brought before a national court to enforce the rights derived from those rules. It particularly concerns the right to be compensated for the harm suffered from an infringement of the competition rules, e.g. through higher prices or lost profits”). The elements used to build the definition offered can be found, for instance, in Recital 3 and Article 1 of the Directive on Antitrust damages actions (Directive 2014/104/EU of the European parliament and of the council of 26 November 2014 *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, O.J. L 349, 5.12.2014, p. 1). Recital 3 refers to the role performed by “national courts” in “applying” Competition Law provisions “when ruling on disputes between private individuals”. Although Article 2 (“definitions”) does not define what private enforcement is, Article 1 (“subject matter and scope”) refers, in a different manner, to the same elements as Recital 3 (“national courts”, “undertakings” and “victims” [i.e. private parties], etc.), and makes an explicit reference to “fostering undistorted competition in the internal market”.

Inspiration for the definition has equally been drawn from developments in C. ORO MARTINEZ’S unpublished PhD dissertation (C. ORO MARTINEZ, *La aplicacion privada del derecho de la competencia: Aproximacion desde el Derecho Internacional Privado. Competencia Judicial y Ley aplicable*, Barcelona, Universitat Autònoma de Barcelona, 2009, p. 2 and pp. 6-11). In pages 6 and following the author stresses the “private” nature of the legal subject starting the proceedings, the “private” nature of the main legal provisions involved and of the actions giving rise to the proceedings, and the private “nature” of the defendant.

⁶⁰ *Vid.* J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, *Environmental Law Reporter*, vol. 13, 1983, pp. 10309-10323, at p. 10311: “Private enforcement of federal statutes is not a new concept, unique to environmental law. The antitrust treble damage provision, stockholder derivative suits under the securities laws, the doctrines of private right of action, and statutory tort all attest to the vintage and pervasiveness of private enforcement of federal statutes”.

enforcement has been later imported into Europe, where it has slowly begun to blossom in the last decades, also within the field of competition law⁶¹.

For this approach to law enforcement to work smoothly in practice, at the very minimum, the procedural and jurisdictional facilitation / fostering of private-law actions by private parties is required, *via* the adequate drafting of jurisdictional and procedural rules (*inter alia*, rules on international and domestic choice of court, and rules on collective redress). Moreover, introducing private enforcement within a purely domestic context requires, on top of the referred facilitation / fostering, the adequate drafting of relevant substantive rules in order to produce adequate incentives for potential private claimants to choose to get involved in these issues⁶². In parallel terms, whenever private enforcement operates internationally, it requires the adequate drafting of rules on choice of law. Private enforcement at the international level may quite possibly be conceived as a State-encouraged form of intervention by private subjects in global governance: inasmuch as the State decides to confer private parties the role of enforcing public-related interests within the global arena, it is delegating to a certain extent some of its global activity / authority and, by the same token, it is encouraging the involvement of non-state subjects in the activity of “governing” within a global setting. However, the possible conception of private enforcement as a form of global governance is only one of the reasons why such notion may constitute the second framework within which the object of this dissertation needs to be placed.

To begin with, because private enforcement’s practical manifestations bear significant importance *per se*, even outside the “global governance” frame of reasoning. In other words, assuming that private enforcement is a form of private-subject participation in global governance is not a necessary theoretical assumption for it to be relevant for the object of this dissertation. This is so because, in practical terms, articulating policies at the international level through choice-of-law rules necessarily requires using private parties as proxies for the enforcement of the said policies and, thus, the above-referred adequate procedural and jurisdictional framework becomes a precondition of the said articulation. Put otherwise, private enforcement is relevant because its procedural and jurisdictional manifestations are the necessary foundations on which content-oriented choice-of-law needs to rest in order to work smoothly.

Nevertheless, even within the “governance” frame of reasoning, private enforcement holds further interest for this dissertation’s purposes, by simply placing aside the “global” focus, and substituting it with a European one. As suggested above, private enforcement is an approach

⁶¹ Vid. C. ORO MARTINEZ, *La aplicacion privada del derecho de la competencia: Aproximacion desde el Derecho Internacional Privado. Competencia Judicial y Ley aplicable*, *op. cit.*, p. 5. Further developments on antitrust-specific aspects can be found in pp. 11-20.

⁶² For an economic analysis of private enforcement, vid. G. S. BECKER & G. J. STIGLER, “Law Enforcement, Malfeasance, and Compensation of Enforcers”, *The Journal of Legal Studies*, vol. 3-1, 1974, pp. 1-18. These authors advocate clearly for private enforcement, even in delicate matters as criminal ones (p. 16: “We conclude by emphasizing that the view of enforcement and litigation as wasteful in whole or in part is simply mistaken”). Cfr. W. M. LANDES & R. A. POSNER, “The private enforcement of law”, *The Journal of Legal Studies*, vol. 4-1, 1975, pp. 1-46. These latter authors take a more nuanced view (notably, p. 29: “Our conclusion that the market cannot be depended upon to optimize law enforcement will not come as a surprise”).

to law enforcement that may operate in domestic contexts – i.e., within a given Nation-State – and it is, therefore, apt for being conceived simply as a form of – non-global – governance. In this sense, “domestic contexts” may also include federative or quasi-federative ones, as it is the case of the European Union, which despite not being a federation, it is most certainly not a common international organisation. Thus, private enforcement may also be expected to respond to the “federative” governance needs of a quasi-federal entity as the EU is (for instance, by contributing to the consolidation, through the potential facilitation of European collective redress, of a “European civil society”). As regards environmental matters, this would call for attention to intra-European environmental torts, and the specific dynamics that may raise therefrom, on the one hand, amongst Member States, and, on the other hand, amongst European citizens – individually or in groupings – and corporations.

In sum, potentially, any region in the world – not only the EU – may choose to opt for the private enforcement of its public policies as means to intervene in global or internal – simply domestic, or federative – governance. The choice of developing the private enforcement of competition policy is clear and neat in the US, and is clearly and neatly being advocated for in the EU⁶³. However, it may be worth asking whether this model may work for other policy fields, such as environmental matters – be it at domestic, intra-European or global levels. Is environmental policy actually prone to being privately enforced? And if so, would its private enforcement actually represent a vacuum-filling form of intervention in global environmental governance? And / or would it represent a positive form of intervention in intra-European environmental governance? The EU institutions seem to think so, for environmental protection is constantly being listed as one of the fields where the development of mechanisms of collective redress are required⁶⁴. But this position may, legitimately, raise questions, whose answers may be sought *infra*.

In the light of developments in previous pages, the notions of global governance and private enforcement are the threads that, implicitly at some points, explicitly at others, run right through this dissertation. Let us examine how these threads are structured⁶⁵.

⁶³ At least this would be the message sent to the European public opinion, if one is to believe all the official documents related to the private enforcement of EU competition law, amongst which those mentioned *supra* note 59.

⁶⁴ *Vid.*, for instance, Recital 7 of the Commission recommendation of 11 June 2013 *on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law* (2013/396/EU).

⁶⁵ As fully explained in the following pages, Part I of this dissertation will try to answer to this question *in abstracto* in respect of environmental policy. Part II of this dissertation will aim at identifying whether this is actually being done within the EU in respect of environmental matters, and if so, whether the manner in which is being implemented is actually effective.

III. Working hypothesis and justification for the structure chosen

Structurally, this dissertation is divided in two parts, respectively entitled "Defining the role of private international law in respect of environmental protection" and "Assessing environmental protection by means of private international law in the European Union".

Part I intends to present the way in which any system of PIL, anywhere around the world, may generally contribute to environmental protection *via* the conflict-of-laws method, and comprises two chapters, which respectively sketch a positive and a negative definition of such contribution.

Chapter 1, the positive definition, introduces and describes the most basic notions of both private international law and environmental issues, including a reflection on the functions of tort law and private international law. It is thus composed by an ensemble of elements, theories and elementary concepts which shape a first approximation to and delimitation of the nucleus of this dissertation.

Conversely, Chapter 2 contains a so-called negative definition, or a definition *per* opposition. It consists of a brief description of the means of intervention in environmental matters that other legal disciplines possess, and of the relationships that such legal "tools" entertain with the conflict-of-laws method. Such an operation aims at defining the normative space that conflict of laws may occupy in terms of environmental protection.

Overall, Part I will provide an understanding of what it means to intervene in environmental matters through the conflict-of-laws method, and what objectives may be achieved through it. Ultimately, it should be able to provide an answer to the first of the two main questions asked *supra*: is it effective, in terms of environmental protection, to intervene in environmental matters through the means of (either content-oriented or neutral) multilateral choice-of-law rules? By the same token, it should also allow presenting some considerations as regards the role of PIL (and more specifically) conflict of laws as a tool of – environmental – global governance.

Part II consists on the assessment of a given multilateral environmental PIL mechanism: the one currently in force before the courts of the Member States of the European Union. The aim of this part will be to determine the *in concreto* effectiveness of that particular mechanism in the light of the policy objectives that the European legislator specifically set for it. As with Part I, its content will be divided into two chapters.

The first chapter of Part II, Chapter 3, is a transition from the generalist approach of analysis that characterizes Part I, to the specific one that characterizes Part II. This chapter presents a set of challenges that may generally be faced by any multilateral PIL micro-regime addressing environmental matters – and which may potentially undermine the effectiveness thereof – coupled with the specific responses given thereto by the EU: (lack of) mechanisms of collective redress, "interferences" produced by the involvement of the State, the existence of networks of subsidiaries entailing the subsequent need to pierce the corporate veil, and the hindrance constituted by the *forum non conveniens* doctrine. In most cases, these questions have an impact on litigation at the stage of the assertion of international jurisdiction, or else they have

a quasi-procedural nature and, therefore, they "precede" to some extent the operation of choice-of-law rules, potentially constituting hindrances to the effectiveness thereof. Thus, as it will be shown, these questions may have a significant impact in the practical usefulness of the said rules.

Finally, in Chapter 4, a detailed assessment of the specific choice-of-law rule on environmental torts in force within the EU will be conducted, placing it against the backdrop of environmental governance, both within and outside the EU.

Part II of the dissertation should, overall, provide an answer to the second of the two questions asked *supra*, namely the one related to the effectiveness of the specific kind of provision in force in the European Union: is this precise kind of content-oriented and multilateral choice-of-law rule in force in the EU effective from the standpoint of environmental protection? By the same token, it should equally allow sketching specific considerations in respect of the private enforcement of the EU's environmental policy through its private international law.

**PART I: DEFINING THE ROLE OF PRIVATE INTERNATIONAL LAW IN RESPECT OF
ENVIRONMENTAL PROTECTION**

The first part of this dissertation aims, as explained, at considering *in abstracto* what role may be played by a multilateral PIL intervention in environmental matters, and whether it is effective to intervene in those matters through such means. Due to the said abstract character, there is an attempt in the following pages to avoid, inasmuch as possible, references to any specific legislation. Nevertheless, as it is impossible to present certain ideas in a vacuum, reference will be made, where necessary, to the existence of the above-referred specific European micro-regime of PIL for environmental torts, as it is the regime that will be assessed in part II of this dissertation. Equally, where necessary, reference will be made to the existence of certain uniform substantive law conventions which have been widely ratified by EU Member States.

As announced in the introduction, part I will consist of two chapters which will respectively aim at providing a positive definition (description of core traits) and a negative definition (definition *per* opposition) of what it means to address international environmental torts through conflict of laws. Jointly, these two chapters should provide an answer to the question of what role may multilateral private international law abstractly play in the fostering and enforcement of environmental policies, and whether it is worth it to seek its involvement.

Chapter 1:

Conflict-of-laws approach

The first of the two definitions that constitute Part I of this dissertation is a “positive” one: it simply aims at presenting a kind of legal intervention addressed at a given kind of social problem. In order to do so, it comprises two different sets of considerations.

The first one is a presentation of the main pieces of the puzzle: the most basic concepts, developments and dynamics whose understanding is required in order to seize the stakes at the core of this dissertation. If one of the objectives of this dissertation is to assess the effectiveness of a given kind of legal mechanism when dealing with certain situations, it seems logical to begin it by introducing its core components and the core traits of the phenomena it is meant to deal with.

The second set is a reflection on the functions that may be performed by the said mechanism, which serves a double purpose: on the one hand, it provides a more complete and clearer picture thereof. On the other hand, determining the functions that a given kind of mechanism may perform is a necessary step in order to ascertain the effectiveness of this kind of intervention from the standpoint of the objective to be achieved (the protection of the environment).

I. Basic notions

Providing a description to a complex object requires adequately presenting the main elements that compose it. In this sense, the following pages comprise five different sets of considerations: the two first constitute approximations to the notions of environment and tort (A and B, respectively). The third one bridges both of the former, by introducing the notion of mass-tort, by presenting environmental torts as a variety thereof, and by delivering a typology of environmental occurrences (C). Finally, the two last sets are directly devoted to presenting the basics of conflict of laws (private international law under its multilateral configuration): the first set refers to international jurisdiction over environmental torts (C), the second one refers to choice of law on environmental torts (D).

A. The evasive notion of the environment

Since environmental occurrences constitute a central notion to the purpose of this dissertation it would be logical to start this chapter by attempting to provide a precise and technical definition of the “environment”. Arguably, any legal study addressing environmental damage

should attempt at doing so⁶⁶. However, entering into the specifics of what the “environment” legally is, is actually beyond any common-sense consideration or intuitive notion, and requires framing the analysis in a given legal order, possibly even in a given legal regime within the latter. In other words, unfortunately, legally defining the “environment” is extremely problematic: against what could be expected from such a general and common question, there is no generally-accepted legal definition of “environment”; different legal instruments within different legal orders contain different definitions which comprise different aspects⁶⁷. The European legal order alone counts several definitions some of which directly address the notion, while others do so only indirectly, through the proxy of definitions of related concepts, as for instance “environmental damage”. Some of them even resort to referring to other international legal instruments. Four of these European definitions are reproduced hereinafter as examples. They are presented chronologically, beginning with the original 1985 Environmental Impact Assessment Directive, which defined the “environment” indirectly as follows⁶⁸:

⁶⁶ Admittedly the same could be said about “damage to the environment” (in this sense, *vid.* Green paper on remedying environmental damage, COM(93) 47 final, p. 10): “A legal definition of damage to the environment is of fundamental importance, since such a definition will drive the process of determining the type and scope of the necessary remedial action – and thus the costs that are recoverable via civil liability. Legal definitions often clash with popularly held concepts of damage to the environment, yet are necessary for legal certainty. But the debate over how to define the object of environmental damage, the degree of impact considered damage, and who has the right to decide these issues has not yet been resolved”). However, due to additional complexities, “damage to the environment will be dealt with only within the assessment of the specific legal mechanism that Part II of the dissertation is devoted to: the European environmental PIL mechanism. *Vid. infra*, part II, Chapter 3, “The concepts of environmental damage and non-contractual obligation in Rome II”.

⁶⁷ For a review of different definitions within the Spanish legal order, *vid.* A. CABANILLAS SÁNCHEZ, *La reparación de los daños al medioambiente*, *op. cit.*, pp. 19 and following, especially p. 23. In the field of Criminal law he refers, amongst others, a definition by L. Rodríguez Ramos. He defines the environment as a legal good which relates to “*las condiciones básicas necesarias para el mantenimiento y desarrollo de la vida en general y de la humana en particular con la calidad correspondiente al estado de desarrollo económico y cultural presente [...]. Es decir, el medioambiente no es solo ni idénticamente la vida humana, la salud pública o individual, la cultura, la riqueza nacional, etc. bienes todos aquellos tradicionales y ya protegidos por el Derecho en general y por el penal de modo específico; el medio ambiente como bien o valor jurídico es precisamente un interés de superior nivel de abstracción y generalidad, formado a partir de la conjunción de esos bienes jurídicos tradicionales antes descritos, fundando precisamente la entidad del nuevo bien en la interrelación existente entre todos ellos, entidad que tiene, por tanto, carácter de síntesis o sincretismo de dichos bienes [...]*”. Interestingly, the core of this definition is constituted by a reference to the “basic conditions necessary to the continuity and development of life in general”. As it will be seen in the following pages, this element is extremely relevant.

⁶⁸ As explained in the website of the DG environment of the European Commission (<http://ec.europa.eu/environment/eia/eia-legalcontext.htm> ; 13th November 2014): “the initial Directive of 1985 and its three amendments have been codified by Directive 2011/92/EU of 13 December 2011. Directive 2011/92/EU has been amended in 2014 by Directive 2014/52/EU”. The definition comes from Article 3 of the Directive (Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. L 175, 05.07.1985, p. 40). For a comparison and analysis of this definition and the ones contained in the green paper and in the 1990 Directive on access to information on the environment (Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, O.J. L 158, 23.06.1990, p. 56) *vid.* A. CABANILLAS SÁNCHEZ, *La reparación de los daños al medioambiente*, *op. cit.*, pp. 26-27.

“The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors: - human beings, fauna and flora, - soil, water, air, climate and the landscape, - the interaction between the factors mentioned in the first and second indents, - material assets and the cultural heritage”.

The 1993 “Green paper on remedying of environmental damage” is one of those instruments which addresses the notion through a reference to a different legal instrument:

“Regarding the definition of "environment" some argue that only plant and animal life and other naturally occurring objects, as well as their interrelationships, should be included. Others would include objects of human origin, if important to a people's cultural heritage. The draft Council of Europe Convention, for example, puts forward the following broad definition of the environment: "Environment includes natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape”⁶⁹.

More interestingly for the pupose of this dissertation, the 2004 Directive on environmental liability provides the following definitions in article 2⁷⁰:

“For the purpose of this Directive the following definitions shall apply:

1. 'environmental damage' means:

(a) damage to protected species and natural habitats, which is any damage that has significant adverse effect on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I; Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.

(b) water damage, which is any damage that significantly adversely affects the ecological, chemical and / or quantitative status and / or ecological potential, as

⁶⁹ Vid. Communication from the Commission to the Council and the Parliament and the Economic and Social Committee: Green paper on remedying environmental damage, op.cit., p. 10.

⁷⁰ 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, J.O. L 143, 30.4.2004, p. 56. Interestingly, the article does not define the notions of “environment” and “damage” in order to deduce “environmental damage” therefrom, but “environmental damage” and “damage”. The purpose of introducing the notion of “damage” may be to subtly introduce a *de minimis* restriction in the operation of the directive.

defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;

(c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms;

2. 'damage' means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly; [...]"

Finally, as it was the case of the 2004 Environmental liability Directive, the Rome II Regulation, does not directly define the notion of “environment” but it can be deduced from its definition of environmental damage, which, in turn, can be construed from elements present in recital 24 of the Regulation and in its Article 7. First, recital 24 states that

“‘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”.

Then, Article 7 clarifies that it applies to *“non-contractual obligation[s] arising out of environmental damage or damage sustained by persons or property as a result of such damage”.*

These excerpts clearly demonstrate that, despite the possibility identifying a common core to the different definitions, the “environment” remains a concept *“à géométrie variable”*. Beyond the need to accommodate conflicting political interests, this is probably due to the fact that, the environment is possibly some sort of meta-notion or meta-legal-good, which gathers different sub-notions or sub-legal-goods (despite being frequently spoken of as a unitary concept). Arguably, the definitions referred above can be easily decomposed into sets of sub-concepts:

- 1) Human health and Life
- 2) Human property (Assets)
- 3) Healthy “surroundings” (as a pre-requisite for human life and health. *“Entorno sano”* in Spanish, *“Cadre de vie sain”* in French)
- 4) Fauna and flora (biodiversity), and trophic relations
- 5) Abiotic natural resources, such as soil, water, air, etc...
- 6) Historical monuments and cultural elements

Accordingly, different notions of environment may have narrower or broader scopes depending on how many of the sub-notions they encompass. Obviously, it may be possible to identify more sub-notions than those listed here in definitions comprised in order legal instruments. Just to give a simple example, it may be possible to identify as a possible additional sub-legal good the richness and beauty of the landscapes and the esthetic pleasure

that humans may obtain therefrom. Furthermore, establishing neat boundaries between sub-notions may be difficult: due to their interrelationships their frontiers may become blurry, as it is for instance, the case of the frontiers between sub-notions number 3 and number 5 above⁷¹. All in all, the list of subnotions above may suffice as an approximation to the stake.

At this point it becomes significant to highlight the fact that certain medium-size to large-size notions of environment may comprise as legal goods (other than natural resources, biodiversity, and related notions) human life, human health – and even property – when they are directly damaged in the frame of environmental occurrences. The reason why these latter legal goods are included in the notion of environment is the intense connection that links them to the latter⁷²: humans can only live within an environment of a certain quality⁷³; an environment of a certain quality is even conceived by some authors as a pre-condition for the very human existence. This is so, up to the point that, as it will be seen *infra*, a human right to a healthy environment has sparked within several regional instruments of Human Rights⁷⁴, for it is some sort of prerequisite for the enjoyment of individual life and health⁷⁵.

⁷¹ Put otherwise, clearcut distinctions are not always easy and thus, sometimes disentangling elements is not simple. This is especially so, as suggested in the following paragraph, when it comes to disentangling “pure” environmental elements from human health and human life.

⁷² As reflected by the inclusion of sub-notion number 3 in the list above.

⁷³ *Vid.* M. PAQUES, “L’environnement, un certain droit de l’homme”, *Administration Publique - Revue du Droit Public et des Sciences Administratives*, 2006, pp. 38-66, at p. 38: “l’homme ne peut vivre que dans un environnement d’une certaine qualité. Cette condition d’existence de notre contemporain détermine aussi la survie de l’espèce. La protection du cadre de vie devient un devoir de l’homme. Le pouvoir de détruire comme de protéger a pour corollaire une responsabilité de l’homme actuel vis-à-vis des générations futures”. The author (p. 55) further relates the notion of environment within the Belgian legal order with the corresponding notions at the European and Human Rights law levels: “En droit belge, il s’agit de reconnaître le droit à la protection d’un environnement «sain». Dans ce cas, le lien avec la santé est clair. La santé, protégée depuis plus longtemps, a parfois permis à l’environnement de faire son entrée dans le cercle des droits de l’homme avant sa reconnaissance explicite. La protection de la santé a parfois été présentée comme le cœur de la protection de l’environnement. Elle est un objectif de la politique de l’environnement établi à l’article [191.1 TFUE]. Certaines mesures environnementales protègent la santé et font naître des droits au profit des bénéficiaires alors que ce point demeure souvent problématique quand il s’agit de mesures protégeant un environnement plus large. La protection de la santé et de la sécurité de l’homme l’emportent sur les considérations environnementales ou économiques. En revanche, la décision de protéger seulement l’environnement demeure souvent soumise à l’arbitrage de proportionnalité”. The last part of the excerpt seems especially relevant, for it sustains a contention which will be further developed in the following pages: the fact that one of the approaches remains “soumise à l’arbitrage de proportionnalité” justifies, in my opinion, the assertion that we are not addressing the same legal good, but two clearly differentiated legal goods.

⁷⁴ *Vid.* P. LAMBERT, “Le droit de l’homme à un environnement sain” (Commentary to the ECHR’s decision in *Athanassoglou v. Switzerland*), *Rev. trim. dr. h.*, 2000, pp. 565-580, at pp. 578-580 (quoting M. Déjeant-Pons): “le droit à l’environnement soit un des droits de l’homme majeur du XXI^e siècle, dans la mesure où l’humanité se voit menacée dans le plus fondamental de ses droits, celui à l’existence”.

⁷⁵ *Vid. infra* Part I, Chapter 2, “Human rights law”. This may be done in a direct or in an indirect way. *Vid.* D. SHELTON, “Human Rights, Health and Environmental Protection: Linkages in Law and Practice”, *Human Rights & International Legal Discourse*, vol. 2007-I, 2007, pp. 9-59, at p. 32: “In the European human rights system, whose Convention does not contain a right to health, cases nonetheless have been brought for environmental harm, invoking either the right to life (art. 2), information (art. 10) or the right to privacy and family life (art. 8)”. In any case the relation is clear, and as explained by M. FALLON (“Le droit fondamental à l’environnement selon le droit communautaire”, *Revue d’études juridiques Aménagement-Environnement*, num. spécial, 2008, pp. 79-129 at pp. 96-97), within the law of the EU –

The importance of human health as a constitutive element of some notions of environment can be seen: i) in that it is identified as one of the main objectives of environmental protection in various international agreements; ii) in that it may be found as a definitory element of the notion of pollution; in several legal instruments pollution is, *inter alia*, whatever detrimentally affects human health⁷⁶.

Notwithstanding the intensity of the referred link between human health and environmental protection, such relationship is nonetheless a conceptual double-edge sword: on the one hand, it has determined the insertion of the environment amongst legal goods protected through human rights, *via* the aforementioned “right to a healthy environment”, therefore somewhat elevating its protection. But, on the other hand, this elevation has happened at the price of focusing on and highlighting the anthropocentric dimension of the environment. This has entailed, as it will be seen *infra*, the narrowing of the notion of environment within the human

specifically within its internal market law –, it may manifest in several ways: “*L’interaction de l’environnement et de la santé est certaine. Elle se manifeste de plusieurs manières. D’abord, le juge communautaire ne peut que constater la similarité des valeurs, en termes de rang et de contenu : souvent, la réglementation technique d’un produit dangereux affecte autant la santé que l’environnement. Il en va de même pour la santé des animaux. Aussi les deux valeurs sont-elles parfois associées dans l’énumération de justifications d’une entrave au nom de l’intérêt général [...] Ensuite, le juge communautaire a établi une similitude de notions servant à apprécier la compatibilité d’une réglementation avec l’objectif d’intérêt général qui la fonde. Le constat s’impose à propos du principe de précaution. Indubitablement, ce qui est devenu un « principe général » – ou à tout le moins un principe commun – en droit communautaire n’est formulé en droit primaire qu’à propos de l’environnement. Son extension au domaine de la santé publique n’est pas moins certaine*”.

The interface of the notions may be taken even further (Vid. P. LAMBERT, “Le droit de l’homme à un environnement sain”, *op. cit.*, p. 566): “*Enfin, le droit à un environnement sain a été longtemps associé au « droit à la santé ». Cette corrélation n’est en soi pas surprenante, malgré une volonté progressive d’autonomie, en dépit d’une interdépendance croissante de l’écologie et du sanitaire*”. He bases his position on the idea that: “*Une évolution est amorcée avec le Pacte international relatif aux droits économiques, sociaux et culturels, adopté par l’Assemblée générale des Nations Unies le 16 décembre 1966. Son article 12 reconnaît « le droit de toute personne de jouir du meilleur état de santé physique et mentale qu’elle soit capable d’atteindre » par, notamment, « l’amélioration de tous les aspects de l’hygiène du milieu et de l’hygiène industrielle*” (*ibidem*, p. 567).

⁷⁶ Vid. D. SHELTON, “Human Rights, Health and Environmental Protection: Linkages in Law and Practice”, *op. cit.*, p. 13. The author analyzes the definitions of the notion of “pollution” found in the following international instruments: “*Convention on Long-Range Transboundary Air Pollution* (Geneva, 13 November 1979 - Art. 1); *Vienna Convention for the Protection of the Ozone Layer* (Vienna, 22 March 1985 - Art. 1(2)); *Montreal Protocol on Substances that Deplete the Ozone Layer* (Montreal, 16 September 1987, 3rd paragraph of the preamble); *Convention on the Transboundary Effects of Industrial Accidents* (Helsinki, 17 March 1992 - Art.1(c)); *United Nations Framework Convention on Climate Change* (Rio de Janeiro, 9 May 1992 - Art. 1(1)); *Convention on the Protection of the Marine Environment of the Baltic Sea Area* (Helsinki, 22 March 1974 - Art. 2(1)); *Convention for the Prevention of Marine Pollution from Land-Based Sources* (Paris, 4 June 1974 - Art. 1); *Convention for the Protection of the Mediterranean Sea against Pollution* (Barcelona, 16 February 1976 – Art. 2(a)); *Convention on the Non-Navigational Uses of International Watercourses* (New York, 31 May 1997 – Art. 21(2))”. She concludes that: “*Concern for health is a constant theme in environmental agreements; indeed, it is one of the principal aims of environmental protection. This can be seen in a standard definition of pollution, found in many legal texts: pollution is “the introduction by man, directly or indirectly, of substance or energy into the [environment] resulting in deleterious effects of such a nature as to endanger human health, harm living resources [...]”*. She furthermore asserts, on the base of a number of EC Directives from the 1980s, that: “[t]he preambles of European Community directives often state their aim as being “to protect human health and the environment”.

rights dialectic and within some regimes of international environmental law⁷⁷, which has amounted, in many instances, to protecting exclusively those aspects which are immediately connected to human beings, and not feeling the need to go any further.

After previous developments, one could think that the protection of human health in environmental occurrences came in a second stage of environmental protection, since it may somewhat be considered a conceptual “by-product”. However, the truth is that, notwithstanding certain regional international conventions for the protection of given animal species as economic assets, and other rules which equally focused on economic values, it actually came first⁷⁸. Concern for the environment was actually related to concerns over human health and life as values directly suffering from the rise of major environmental occurrences. Probably it is structurally simpler to establish liability for elements which can be “easily” attributed to identifiable / identified private subjects than establishing liability for public / collective damage.

In any case, all of the above referred reflections point to the need to always mind the precise notion of “environment” that is being addressed by a given policy argument. Depending on the – larger or narrower – scope of the relevant notions – and thus the sub-notions / legal goods comprised therein – certain arguments for or against a higher or lower degree of environmental protection may or may not make bigger sense, hold true, or be highly dubious. This reasoning could be pushed even further as to sustain that, notwithstanding the above-referred difficulties in disentangling pure environmental elements and human life and health, these are actually two distinct legal goods, and placing them together has blurred policy reasoning⁷⁹. Furthermore, as it will be seen *infra*, in contexts where the environment has been considered to have no specific value and / or has been totally submitted to economic reasoning, it has dragged human life and health down with it⁸⁰.

After exploring the evasiveness of the notion of “environment”, it seems appropriate to present some of the specificities of the occurrences it may face. Due to their specific features – among which, their nature, the extent they may reach, and their eventual multi-location – environmental occurrences are frequently classified as being one of several types of so-called

⁷⁷ Vid. P. BIRNIE, A. BOYLE & C. REDGWELL, *International Law & the Environment* (3rd ed.), Oxford, OUP, 2009, p. 7: [After stating that the emergence of an environmental dimension in human-rights law has a strongly anthropocentric motivation] “A more explicit relativism characterizes most environmental measures aimed at protecting human health or safety, including those in which responsibility for the welfare of future generations is a prominent feature, such as the conventions on nuclear radiation risks or climate change. In this context the principal question is the level of socially accepted risk, but the underlying objective is nevertheless anthropocentric”. Vid., equally, P. LAMBERT, “Le droit de l’homme à un environnement sain”, *op. cit.*, p. 565: “Cependant, il importe de souligner d’emblée que le droit à un environnement sain, garanti au nom du principe fondamental du respect de la dignité humaine, correspond à une notion restreinte par rapport au droit à l’environnement qui est infiniment plus large et qui comprend la protection de la faune, de la flore, du patrimoine architectural autant que celle de la santé contre toutes les formes de pollution sonores, olfactives ou autres”.

⁷⁸ As it will be explained *infra*, Part I, Chapter 2, “Conventional regimes”.

⁷⁹ As an example of how academic discourses sometimes mix-up and intertwine public and private law elements, perspectives, and private and public legal goods *vid.*, for instance, P. BOUREL, “Un nouveau champ d’exploration pour le droit international privé conventionnel : les dommages causés à l’environnement”, *op. cit.*, pp. 95-96, and p. 103.

⁸⁰ As it will be seen, for instance, in the “Chevron-Lago Agrio” litigation, *infra* Box 2.

mass torts. But before dealing with these developments, it is necessary to roughly understand what “tort” is. Therefore, this notion will be introduced in the following pages.

B. The evasive notion of tort in comparative law: search for a common denominator

As explained in the introduction, the basis of the intervention of private international law in the field of environmental matters relies on the characterization of any given environmentally harmful situation as a tortious one. Consequently, the following pages will try to roughly sketch what may be generically considered as non-contractual liability / tort in comparative terms. The said sketch will need to remain rough: unfortunately, a quick glimpse at the main treatises on comparative law will immediately reveal that efforts made in the past in order to deliver a precise and technical definition of “tort” or “*non contractual liability*” in comparative law have not been successful. This is due to the fact that, allegedly, discrepancies amongst different legal systems render the objective of crafting a unitary scientific definition almost unreachable⁸¹.

Therefore, ongoing developments will not aim at presenting a proper, technical notion, but a rough minimum common denominator to different definitions of “tort” / “delictual liability” under different legal systems: by sketching some very general traits or common elements to different national definitions, the idea is to aim at identifying the common structural foundations upon which various systems construct their own notions of tort.

The process will begin by presenting the three national conceptions of tort / delict which, in Europe, are considered to embody the main paradigms of tort law⁸²: the French “*responsabilité délictuelle*” (i), the Common Law’s “*Law of torts*” (ii), and – even if only summarily – the German mixed model (iii). The reasoning will continue by presenting some further notions of tort delivered by some Pan-European projects aiming at an eventual unification of tortious liability throughout the EU (iv). All of these developments will allow extracting a set of “necessary but not sufficient” defining elements of tortious / delictual liability (v). Beyond their usefulness in the frame of this chapter, these elements will be needed in the frame of Chapter 2⁸³.

i. The French “responsabilité délictuelle”

⁸¹ *Vid., inter alia*, A. TUNC, “Introduction” in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, vol. XI - *Torts*, Chapter 1, 1977, pp. 7 & 14 (“[...] the concept of tort thus seems to escape any clear and undisputable analysis [...]”). Hereinafter “A. TUNC - *International Encyclopedia*, *op. cit.*”.

⁸² For a concise description of the historical evolution of delictual liability from Roman Law to the “modern [French and German] code provisions”, *vid.* J. GORDLEY & A. T. VON MEHREN, *An Introduction to the Comparative Study of Private Law - Readings, Cases, Materials*, Cambridge, Cambridge University Press, 2006, pp. 236-240. For a more developed historical review of both Common Law and Continental systems, *vid.* A. TUNC - *International Encyclopedia*, *op. cit.*, pp. 33-54 (“II. An historical and geographical survey of the law of tort”).

⁸³ Besides its illustrative character for the purposes of the current chapter, this generic notion of tort will be equally useful in Chapter 2, for it will allow a better identification of the sort of environmental situations that may be addressed through any conflict-of-laws tool.

Under French civil law, which is usually presented as the main example of how "*Continental civil law systems*" conceive the legal phenomenon, *la responsabilité délictuelle* – delictual liability – is considered to be built upon a general principle which could be described as "*everyone is responsible for the harm he is to blame for causing*"⁸⁴. This general principle stems out of barely two articles in the French *Code Civil*⁸⁵, which encompass all kinds of damage⁸⁶. The first of them, article 1382, provides that "[t]out fait quelconque de l'homme, qui cause à autrui un dommage, oblige à celui par la faute duquel est arrivé, à le réparer". As this provision is to be understood as referring only to intentional torts, the following article – 1383 – contains an identical rule covering negligent acts⁸⁷. The combination of both is considered to form "*a general clause for liability in tort*"⁸⁸, which is completed by a very scarce number of provisions in the code – five in total –⁸⁹. This entails that the contours, specificities, limits and further elements of delictual liability in the French legal system are mainly defined by case-law⁹⁰. As a consequence, it is case-law what establishes that, in structural terms, the traditional *responsabilité délictuelle* is defined by the concurrence of 3 elements: "*dommage*" (damage), "*faute*" (fault), and "*lien de causalité*" (causal link)⁹¹. Thus, the victim must have suffered a

⁸⁴ Vid., K. ZWIEGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), Clarendon paperbacks, Oxford, OUP, 1992, p. 638: "Roman lawyers, however, never arrived at the general principle that everyone is responsible for the harm he is to blame for causing. This principle had to wait until the seventeenth and eighteenth centuries for its promulgation by the great natural lawyers, especially Grotius and Domat. Thereafter it may its way into many of the codes of Europe". Furthermore, (vid. K. ZWIEGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), op. cit., p. 662): "The chief task of the law of delict is to select out of the enormous range of daily occasions when harm is caused those where, in accordance with the sentiment of justice and equity prevailing in the society at the time, the victim should be allowed to transfer the loss to the defendant. The legal techniques which are used for this purpose seem to vary considerably. A legal system may progressively identify particular interests as worthy of protection and give them that protection against a particular kind of behaviour by setting up a special kind of tort. Such a process of developing specific torts is historically the older method everywhere, and very clear traces of this tradition may be seen in all those systems, such as the Common Law, where the law of tort has not been smoothed out by thorough legislative alteration. This is in stark contrast with the solemn and formal elegance of the general clause in delict in the French Code Civil, which goes back to DOMAT and POTHIER. Under the influence of natural law thinking they made extrapolations from the casuistical Roman law of delict and arrived at idealistic, if somewhat literary, formulas which were enacted into law when the enlightened zeal of the French Revolution made the time ripe".

⁸⁵ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 9.

⁸⁶ "Locré XIII no. 19, 58" – no further info provided – as quoted by J. LIMPENS, R. M. KRUIHOF & A. MEINERTZHAGEN-LIPENS, "Liability for one's own act", in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, vol. XI - Torts, Ch. II, 1977, p.5.

⁸⁷ Vid. G. WAGNER, "Comparative Tort Law" in M. Reimann & R. Zimmermann (eds.), *The oxford handbook of comparative law*, Oxford, OUP, 2008, pp. 1003-1041, at p. 1006.

⁸⁸ Vid. G. WAGNER, "Comparative Tort Law", op. cit., p. 1006. As commented by K. ZWIEGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), op. cit., p. 656: "[Articles 1382 and 1383] are based on the idea that the whole of the law of delict can be traced to a unitary fundamental principle, an idea which first appears in the works of the great natural lawyers of the seventeenth century. Believing that a legal order could be inferred from reason alone, they were brave enough to go behind the traditional specific torts and seek out and formulate a general principle of delictual liability".

⁸⁹ Vid. K. ZWIEGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), op. cit., p. 656.

⁹⁰ Vid. K. ZWIEGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), op. cit., p. 657.

⁹¹ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 9. "According to the traditional [French] view liability implies the existence of three factors: (a) fault (a factor which, in the traditional view, included in turn two elements: behaviour different from that of a good pater familias, and blameworthiness); (b) damage; and (c) a causal connection between the fault and the damage". In the same sense, vid. K.

harm that may be attributable to the culpable behavior of the defendant – which is defined by French scholars as a "*failure to observe a precept of behaviour which the defendant should have respected*"⁹². Then, a causal link between the faulty behaviour of the defendant and the harm suffered by the plaintiff is required in order to establish the existence of delictual liability. Such link does not exist if there is an external cause to such harm – such as "*force majeure*"⁹³, behavior of the victim, unforeseeable behavior of a third party, etc. –⁹⁴. While some authors track the roots of the French approach to great natural lawyers as Domat, Grotius and Pothier⁹⁵, others highlight the fact that, in their opinion, articles 1382 and following do nothing but transpose the French customary law which was in force prior to the adoption of the Code Civil in 1804⁹⁶. In any case, both lines of opinion highlight the Roman Law roots of the approach. In Europe, notably, Spain, Belgium and Luxembourg follow this model.

ii. The "Law of torts" in the Anglo-American tradition

Per oppositio to the "single rule"⁹⁷ of the French model, the "law of torts" in Anglo-American Common Law systems comprises a multiplicity of specific categories of liability, arising from specific situations, and no generic / overarching abstract notion wrapping them as a common reference. "*Each [...] separate [tort] is regarded as independent, each has its own constituent elements and its appropriate defenses, and each protects a particular interest of the citizen against a specified form of invasion*"⁹⁸. Thus, the Anglo-American approach "consists of a

ZWEIGERT & H. KÖTZ, *op. cit.*, *An Introduction to Comparative Law* (2nd ed.), pp. 656-662. As it may be understood, these authors focus their respective assessments on fault-based liability, not strict liability.
⁹² *Vid.* K. ZWEIGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, p. 659. In the same sense, J. LIMPENS, R. M. KRUIHOF & A. MEINERTZHAGEN-LIPENS, "Liability for one's own act", in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, vol. XI - Torts, Ch. II, p. 13: "*Whatever efforts have been made to found (sic) liability on objective grounds or even on the risk theory, in the countries of the French legal family liability remains based on fault*". A contrario, A. TUNC (*Vid.* A. TUNC - *International Encyclopedia*, *op. cit.*, p. 9) considers that fault should not be considered as an element of the definition of the French responsabilité délictuelle. Such assertion is not related to the existence of the category of "strict liability", but it is deduced from a reasoning which starts from the provisions on delictual liability in the Code Civil. For further discussion on the notion of fault in the French Code Civil, as well as the relationship between the notions of "fault" and "unlawfulness" in different legal systems, *vid.*, J. LIMPENS, R. M. KRUIHOF & A. MEINERTZHAGEN-LIPENS, "Liability for one's own act", in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, vol. XI - Torts, Ch. II, p. 13-25. For some reflections on the role of fault generally – not under French law – *Vid.* A. TUNC - *International Encyclopedia*, *op. cit.*, pp. 63 & 86.

⁹³ Defined as an "*irresistible and unforeseeable event outside the control of the defendant*" (*vid.* K. ZWEIGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, p. 661).

⁹⁴ *Vid.* K. ZWEIGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, p. 661.

⁹⁵ *Vid.* K. ZWEIGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, pp. 638 & ff. Domat and Grotius are also referred to by J. LIMPENS, R. M. KRUIHOF & A. MEINERTZHAGEN-LIPENS, "Liability for one's own act", in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, vol. XI - Torts, Ch. II, p. 5.

⁹⁶ *Vid.* G. WAGNER, "Comparative Tort Law", *op. cit.*, p. 1007.

⁹⁷ The expression "single rule" is used by J. LIMPENS, R. M. KRUIHOF & A. MEINERTZHAGEN-LIPENS, "Liability for one's own act", in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, vol. XI - Torts, Ch. II, p. 5.

⁹⁸ *Vid.* K. ZWEIGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, p. 645-646. In the same sense, J. LIMPENS, R. M. KRUIHOF & A. MEINERTZHAGEN-LIPENS, "Liability for one's own act", in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, vol. XI - Torts, Ch. II, p.3: "[...] systems as English

number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility"⁹⁹. This approach is somewhat resembling to the one embodied in the legal system where, following certain authors, the roots of the Common Law of torts can be found, which, paradoxically, would be Roman Law too¹⁰⁰. As law evolved through the centuries¹⁰¹, the number of torts under the Common Law began to grow. It is said that nowadays roughly 70 to 75 different torts can be identified in the Common Law of England, Ireland and Cyprus¹⁰². But such diversity has not prevented academics from trying to craft an abstract definition for the Common Law concept of tort¹⁰³. One of those definitions, for instance, presented tort as a three element legal notion comprising (a) an injury inflicted; (b) which the law will redress; and (c) which does not constitute the breach of a contract – or, which exists independently of any contractual relation¹⁰⁴. This definition acknowledges that, possibly, the notion would also comprise: (i) the breach of a duty primarily fixed by the law; (ii) which is owed by the tortfeasor to persons generally¹⁰⁵. Other attempts have aimed at providing a conception of tort somewhat closer to the French *responsabilité délictuelle*. In such a line, it has also been said that under the Common Law "*the infliction of all harm is tortious unless it can be justified*"¹⁰⁶. But, unfortunately, such efforts towards a general definition have often proved to be unsuccessful, and have suffered strong criticisms, for it seems to be generally considered that "*it is impossible to analyze the concept into factors that remain undisputable under all circumstances and which allow one to define it sharply*"¹⁰⁷.

law [...] are still happy to rely on fragmentary solutions based on the traditional casuistic method". The same authors (p. 5) refer to this approach as "*special remedies appropriate to particular circumstances*" and a "*pragmatic case-by-case approach*".

⁹⁹ Vid. K. ZWIEGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, p. 645-646. These authors quote SALMOND, *Law of torts* (2nd ed.), 1910, 8f – no further info provided.

¹⁰⁰ Vid. G. WAGNER, "Comparative Tort Law", *op. cit.*, p.1007. Under Roman Law there was no general concept of non-contractual liability, but several specific types of – tortious – liability: *injuria*, *furtum*, and *lex aquilia* – the latter bearing the "*most striking resemblance to the development of the English tort of trespass*" (Vid. K. ZWIEGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, p. 637). Vid., equally, L. DÍEZ-PICAZO, *Derecho de daños*, Madrid, Civitas, 1999, p. 44 ("*Es cierto que en algunos ordenamientos jurídicos, sobre todo de corte anglosajón, se conocen los daños punitivos. Probablemente, se debe ello a que en tales ordenamientos se ha heredado en su pureza la tradición de la Ley Aquilia, sin la evolución que en ella introdujo la doctrina iusnaturalista*").

¹⁰¹ For a concise description of the historical evolution of tort under Common Law, *vid.* J. GORDLEY & A. T. VON MEHREN, *An Introduction to the Comparative Study of Private Law - Readings, Cases, Materials*, *op. cit.*, pp. 240-246. For a more developed historical review of both Common Law and Continental systems, *vid.* A. TUNC - *International Encyclopedia*, *op. cit.*, pp. 33-54 ("II. An historical and geographical survey of the law of tort").

¹⁰² Vid. B. RUDDEN, *Tortious*, *TulCivLaw Forum* 6/7 (1991-1992), 105-129 – no further info available – as quoted by C. VON BAR, *Non-contractual liability arising out of damage caused to another (PEL Liab. Dam.)*, Coll. Principles of European law. Study group on a European civil code, vol. 7, München, Sellier, 2009, p. 230.

¹⁰³ Vid. A. TUNC - *International Encyclopedia*, *op. cit.*, p. 7 (A. Tunc quotes authors such as Winfield, Province and Fleming).

¹⁰⁴ Vid. A. TUNC - *International Encyclopedia*, *op. cit.*, p. 7.

¹⁰⁵ Vid. A. TUNC - *International Encyclopedia*, *op. cit.*, p. 9.

¹⁰⁶ WINFIELD, *Law of torts* (ed. I London 1937) s. 7 – no further info provided –, as quoted by J. LIMPENS, R. M. KRUIHOF & A. MEINERTZHAGEN-LIPENS, "Liability for one's own act", in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, vol. XI - *Torts*, Ch. II, p.11. The authors quoting WINFIELD also explain that in their opinion certain torts obviously do not fit the test proposed by WINFIELD.

¹⁰⁷ Vid. A. TUNC - *International Encyclopedia*, *op. cit.*, p. 9.

The above-referred controversy seems to be nothing more than a partial reflection of a wider scholar debate. When comparing the Common Law and the Continental conceptions of tort, it is submitted that their "*two contrasting approaches parallel the distinction in modern legal theory between ruled-based and principle-based models of law*"¹⁰⁸. Opinions as how significant the referred structural / methodological difference is vary widely.

In any case, some authors consider that such difference is merely theoretical, since the "*catalogue*" of torts under Common Law potentially allows reaching as many situations as a general clause, and therefore "*the contrast [...] seems to be exaggerated*"¹⁰⁹. Furthermore, some consider that, despite starting their legal reasoning from specific torts, Anglo-American courts have "*power to adapt the rules of tort to changes in social and economic conditions, by imposing liability to make compensation where previously there was none*"¹¹⁰, and that "*the two systems could easily be merged by simply abandoning the lush variety of intentional torts kept alive in England without much practical use*"¹¹¹. However, other authors highlight that under Common Law there is only a very tenuous link between its several specific torts, which are always regarded as independent notions¹¹². Only in respect of liability for unintentional harm the latter authors dare to say that the aforementioned Common-Law-tort of "negligence" comes close to having the same reach as a *general clause*¹¹³.

Taking this into account, sketching the main traces of *negligence* – which is considered to be the most important tort in practice¹¹⁴ – may prove to be helpful. The notion of *negligence* refers to the "*conditions under which a person can be made liable for harm he did not intend to cause*"¹¹⁵. It is composed of mainly three elements: "duty", "breach", and "damage" / "injury". Firstly, the claimant needs to belong in a category of people towards whom the defendant

¹⁰⁸ Vid. G. WAGNER, "Comparative Tort Law", *op. cit.*, pp. 1005-1006.

¹⁰⁹ *Ibidem*, pp. 1009-1010; in a similar sense *vid.* K. ZWIGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, p. 646.

¹¹⁰ Vid. K. ZWIGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, p. 646. These authors contend that there is general consensus on their opinion.

¹¹¹ Vid. G. WAGNER, "Comparative Tort Law", *op. cit.*, p. 1010.

¹¹² Vid. ZWIGERT & KÖTZ (2nd ed.), *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, pp. 663-664. Notably: "[...] One must not forget the difference between the Common Law's method of having specific torts and the way in which Continental legal systems deal in particular groups of case under a general clause. The Common lawyer regards the specific torts as pretty independent, only tenuously and invisibly connected with each other. In continental law it is different, for although Continental lawyers subcategorize the cases which fall under the general clauses of *826 BGB and art. 1382 Code Civil, they nevertheless realize that despite the differences between these groups of cases the imposition of liability in damages ultimately depends on the same statutory text and on the fulfillment of its requirements". Nevertheless, (p. 662): "If we leave the history and attend to the practicalities of the law of tort, we quickly see that underneath the doctrinal variations the groups and types of case which appear problematical owing to the exigencies of actual life are much the same in all the legal orders under consideration, even if they are dealt with in different portions of the legal system, and even occasionally with divergent results".

¹¹³ Vid. ZWIGERT & KÖTZ (2nd ed.), *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, pp. 664. A similar thought is shared by J. GORDLEY & A. T. VON MEHREN, *An Introduction to the Comparative Study of Private Law - Readings, Cases, Materials*, *op. cit.*, pp. 333-334. Nevertheless, *cfr.* with K. HORSEY & E. RACKLEY (*Tort law* (3rd ed.), Oxford, OUP, 2013, pp. 2-3) who are reluctant about this possible subsidiary role of the tort of negligence, at least for the time being, and highlight the heterogeneity of the English Law of torts.

¹¹⁴ Vid. K. ZWIGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, p. 649.

¹¹⁵ *Ibidem*, p. 650.

owes a duty of care. Secondly, such duty of care needs to be breached by the defendant, i.e. he needs to have behaved not as a "*reasonable man of ordinary prudence*". Finally, the damage needs to be a "*reasonably relevant consequence*" of the defendant's "*careless behaviour*", i.e. there needs to be a causal connection between both¹¹⁶. In such a sense, certain authors seem to believe that, in the frame of the Common Law of torts, the tort of negligence does, in fact, fulfill the same function as a general clause¹¹⁷ :

*"In the context of general liability in negligence, negligence is not simply one type of fault (as in negligent trespass) but it is elevated to an independent tort, so the essential descriptive function of its name is lost. A negligence case can involve product liability [...], liability of doctors, [etc]. A basis of liability which covers such a wide range of cases does, however, have the characteristics of a general, albeit restricted, theory of liability, and therefore distances itself from the traditional nominate torts [...] Negligence attaches liability to the breach of a general duty of care, in which decisions on both the breach and the interest protected are fundamentally open. Negligence can therefore be moulded with little difficulty into an instrument which, like its continental counterparts, offers a "catch-all" form of protection against negligent injury to individual interests, rights and property"*¹¹⁸.

As it is not the purpose of this study to take a position on the aforementioned debates, but merely to present them, the description will be stopped at this point, and a third model of tortious / delictual liability will be very briefly addressed.

iii. The German "mixed" approach to tortious liability

¹¹⁶ Vid. K. ZWIEGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), op. cit., p. 650. For further explanations, vid. inter alia, Vid. A. TUNC - *International Encyclopedia*, op. cit., pp. 42-45.

¹¹⁷ Vid. C. VON BAR & U. DROBNIG, *The interaction of contract law and tort and property law in Europe: a comparative study*, Munich, Sellier, 2004 p. 28: "[...] most of the tort law systems work with a basic norm, out of which all the essential elements at least of the so-called liability for "fault" arise. This applies too, albeit with limitations, to the Common Law, where the tort of negligence undertakes a very similar function". A similar assertion can be found in C. VON BAR, *Non-contractual liability arising out of damage caused to another (PEL Liab. Dam.)*, op. cit., p. 236. In such a context, the information is used to justify the approach chosen in the elaboration of certain "Principles of European Law" on non-contractual liability arising out of damage caused to another.

¹¹⁸ Vid. C. VON BAR, *The Common European Law of Torts*, (Vol. 1 - *The Core areas of tort law, its approximation in Europe, and its accommodation in the legal system*), Clarendon, Oxford, OUP, 1998, p. 298. Vid., in the same sense, J. LIMPENS, R. M. KRUIHOF & A. MEINERTZHAGEN-LIPENS, "Liability for one's own act", in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, vol. XI - *Torts*, Ch. II, p.11 ("Although being the latest tort arriving on the scene, it appears to be extraordinarily vigorous, and little by little it is ousting the traditional torts. Some authors have been quick in seeing in this signs of impeding unification. <The notional sequence, duty - breach - damage>, writes Millner, <though generally associated with the tort of negligence, is really applicable to the whole law of tort>"). These authors quote MILLNER, *negligence in modern law* (London 1967), p. 3 – No further info provided. Vid. also, F. WERRO, "Liability for harm caused by things", in A. S. HARTKAMP, M. W. HESSELINK, E. H. HONDIUS ET AL., *Towards a European civil code* (4th revised and expanded ed.), Alphen aan den Rijn, Kluwer law international, 2011, pp. 921-943 ("In European Civil Law jurisdictions, tort liability is based as a rule on personal wrongful conduct. This is also true for the Common law jurisdictions of England and Scotland, where the principle of negligence liability has been gradually recognized despite the survival of some specific torts").

As a final core example, it needs to be briefly mentioned that a compromise between the two previously described models can be found in the German BGB. The German system of tortious / delictual liability is based on three "*heads of tortious liability*" or "*small general clauses*" contained in paragraphs 823 I, II and 826 BGB¹¹⁹. The specificities of this model of liability not being pertinent for this study, these developments will not go into any further detail¹²⁰. Suffice it to say that the objective of the drafters of the BGB was to obtain a balanced approach to the conceptualization of tort, which would avoid both the "*casuistic panoply*" of a "*patchwork of specific torts*" – proper of the Roman and Anglo-American approaches – and the "*uncertainty*", "*solemn distance*" and case-law "*outgrowths*" of a general clause – such as the French one¹²¹.

iv. *The notions of tort arising from pan-european projects on a common tortious liability*

The three examples described *supra* represent three different approaches to tortious / delictual liability, namely legal systems which adopt a unified concept of liability – systems relying on "*broad principles*" –, systems characterized by "*unlimited pluralism*" – systems of tortious liability which resemble "*the way continental European systems set out their penal laws*" –, and systems based on "*restricted pluralism*" / "*lists of protected interests*"¹²². As it has been mentioned, despite some – quite developed – attempts at building conceptual bridges (most notably between the French and the Anglo-American models), there seems to be a significant degree of opposition to such possibility. In contrast with these opinions, an optimistic conception of a potential Pan-European law of torts has stemmed out of some very interesting comparative law efforts developed in the European Union in these past decades. These efforts aimed at finding some sort of "*European common principles of tort*" or "*Non-contractual liability arising from damage caused to another*". The authors which inscribe

¹¹⁹ Vid. K. ZWIEGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, pp. 639; vid. G. WAGNER, "Comparative Tort Law", *op. cit.*, p. 1008.

¹²⁰ Within the debates on anglosaxon torts, G. L. WILLIAMS ("The Foundation of Tortious Liability", *Cambridge L.J.*, vol. 7, 1939-1941, pp. 111-132) explored the possibility of some third, middle-ground position, between a general clause, and a typology of torts, that he described as the combination of general rules creating liability and general rules exempting liability.

¹²¹ Vid. G. WAGNER, "Comparative Tort Law", *op. cit.*, p. 1008; K. ZWIEGERT & H. KÖTZ, *An Introduction to Comparative Law* (2nd ed.), *op. cit.*, p. 639. C. VON BAR & U. DROBNIG (*The interaction of contract law and tort and property law in Europe: a comparative study*, *op. cit.*, p. 28) consider the Dutch system of tortious liability to be, in turn, a compromise between the French and the German models.

¹²² J. LIMPENS, R. M. KRUIHOF & A. MEINERTZHAGEN-LIPENS provide a summary of the main traces of the three models and comment their geographical expansion, i.e. countries which have adopted them ("Liability for one's own act", in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, vol. XI - Torts, Ch. II, pp. 3-11). Although highlighting the specificities of Scandinavian, Greek, Italian, and Dutch legal systems, C. VON BAR & U. DROBNIG (*The interaction of contract law and tort and property law in Europe: a comparative study*, *op. cit.*, pp. 26-28), generally coincide with the three category-classification suggested. For information on the legal systems of the countries which became Member States to the EU after 2004, vid. C. VON BAR, *Non-contractual liability arising out of damage caused to another (PEL Liab. Dam.)*, *op. cit.*, pp. 231-233. The references to "broad principles" and a "list of protected interests", as well as the comparison with continental systems of penal law can be found in C. VON BAR & U. DROBNIG, *The interaction of contract law and tort and property law in Europe: a comparative study*, *op. cit.*, pp. 26-28. Further developments on the "penal law" comparison can be found in C. VON BAR, *The Common European Law of Torts*, *op. cit.*, p. 254

themselves in such lines of thought submit that such problems merely amount to "*differences in external representation*":

*"The differences between the existing national laws of non-contractual liability arising out of damage caused to another in the European Union lie much less in their substantive outcomes for given situations than in their external representations (their structures). Certainly there are also, here and there, differences in conception in judging concrete situations of conflict in society. The greatest obstructive boulder on a path to a better mutual understanding is, or rather has been until now, the divergence in theoretical constructs devised for the functioning of the law of non-contractual liability"*¹²³.

In the frame of the above-referred projects, some interesting definitions of non-contractual liability have arisen¹²⁴. The following one, drafted in the frame of the PEL project, could serve as an example : *"In all the systems of the European Union, the law of non contractual liability arising out of damage caused to another (in the Common Law called tort law or the law of torts, in most but not all other jurisdictions referred to as law of delict) is that area of the law in which it is decided whether one who has suffered a damage can on that account demand reparation (whether in money or in kind) from another with whom there may be no other connection in law than the incident of causation of damage itself"*¹²⁵.

In the frame of a similar project, sharing similar premises, Von Bar suggested one of the most minimalistic expressions of Tort: *"Law of delict describes the field of private law which determines whether a person who has sustained a damage has a right to compensation [...] even if the infliction of the damage forms the only legal bond between the two parties"*¹²⁶. Then, he suggests stripping the definition down to two basic elements *"constituting its very heart, for they find general acceptance everywhere: first its function as a system to compensate damage and secondly, the fact that its operation requires no prior legal relationship between victim and tortfeasor"*¹²⁷. The author describes one of the main values of the latter definition by explaining that *"[t]his definition may not include all the characteristics relevant in the various national laws of the European Union to the decision as to whether or not a legal rule is part of the law of the delict. However, any additional characteristics, such as fault, or considerations of*

¹²³ Vid. C. VON BAR, *Non-contractual liability arising out of damage caused to another (PEL Liab. Dam.)*, op. cit., p. 229.

¹²⁴ Another very relevant project is the one done by the "European Group on tort law": EUROPEAN GROUP ON TORT LAW, *Principles of European Tort Law - Text and commentary*, Vienna, SpringerWien, NewYork, 2005.

¹²⁵ Vid. C. VON BAR, *Non-contractual liability arising out of damage caused to another (PEL Liab. Dam.)*, op. cit., p. 229. A similar description can be found in C. VON BAR & U. DROBNIG, *The interaction of contract law and tort and property law in Europe: a comparative study*, op. cit., p. 25: *"In all the legal systems of the European Union, the law of tort (or delict) is the area of the law in which it is decided whether one who has suffered damage can on that account demand reparation from another with whom there may be no other connection in law than the incident of damage itself"*.

¹²⁶ Vid. C. VON BAR, *The Common European Law of Torts*, op. cit., p. 2.

¹²⁷ *Ibidem*, p. 2.

protected interests, are merely auxiliary criteria designed for the classification of only minor issues. Each of these additional characteristics would be questioned at European level"¹²⁸.

It is *inter alia*, due to this last reflection, that it seems to me that the most fruitful way to proceed in order to overcome the referred conceptual difficulties, is the already suggested aim of trying to identify a list of "necessary but not sufficient" defining elements of tortious liability in comparative terms.

v. *The quest for a set of "necessary but not sufficient" defining elements of tortious / delictual liability*

The description provided in previous pages is a mere sample drawn from an extensive comparative law literature developed in Europe in the last 50 years. As already mentioned, in order to overcome the conceptual difficulties referred at the beginning of this section, the aim of these pages is not to find the ultimate common definition of "tort", but simply to search for a minimal structural expression of that notion. Thus, this is a quest for a list of minimum constitutive elements in a necessary-but-not-sufficient fashion. In such a sense, it seems that it is possible to highlight some structural elements which recurrently appear in each of the considerations above – be it in proper definitions or in comments which help refine them – for they seem to respond to the referred "necessary-but-not-sufficient" logic. Such structural elements would be the following: an event – action/default –, a harmful result – the damage which may require compensation –, and a causal link between both of them. These three elements come very close to what the researchers of the PEL projects consider to be the conceptual structure for tort: a "*triumvirate made up of a ground of accountability (incorrect – i.e. intentional or negligent – conduct or, as the case may be, responsibility for a source of danger), damage and causation, [which] defines their relationship to one another*". In their opinion, "[t]hese three elements universally make out the constituent ingredients of a tort and lay the ground for the legal redress which suits the case"¹²⁹.

Although these three elements do not suffice to even begin to sketch a proper definition, a situation not comprising the addition of these three elements cannot be a tortious one: they seem to be present in all legal systems as the basis of each system's own definition. Or, put otherwise, each legal system places further elements over these "foundations" in order to build its own conception of tort.

Taking this into account, using this minimum common denominator in further developments, may prove to be sufficient for the purpose of this dissertation, whichever the final and definite definition of tort under comparative law may amount to be. Why would this be the case? The goal of this quest for the "necessary but not sufficient" constitutive elements of tort is not to define what tort is, but, quite the opposite, merely being able to intuitively assert what tort is not, and thus to discard situations which, structurally are not suitable for being dealt with within a tortious framework of reasoning. In other words, my purpose is to obtain a conceptual

¹²⁸ *Ibidem*, p. 2.

¹²⁹ *Vid.* C. VON BAR, *Non-contractual liability arising out of damage caused to another (PEL Liab. Dam.)*, *op. cit.*, p. 235.

framework which may permit distinguishing situations which can be addressed through a PIL tool from those which cannot, and the developments in previous pages are the first step of such endeavor.

Yet for such first step to the conceptual framework to be complete two further elements need to be added to those mentioned above: (an) identified / identifiable tortfeasor(s), and (an) identified / identifiable victim(s). The presence of at least one well-identified / identifiable legally relevant character – bearing legal personality – on each side of the tortious relationship is required. Although this detail may seem fairly evident it will prove to be essential *infra* – Chapter 2 of the first part of this dissertation: other than scientific uncertainty and further elements having an impact on causal linking, the closely-related problems of identification of the relevant rights-holder, and / or tortfeasor, and / or the lack of "procedural proxy" to the first may exclude having recourse to the tool.

At this point, it is my contention that events which do not fit into the described *in abstracto* tortious structure – be they environmentally-related – cannot be dealt with within an environmental-tort framework of reasoning, independently of how large or narrow a given definition of tort may be within the relevant legal system, or whether the latter encompasses environmental considerations or not. This does not mean that situations which do not fit within the structure are not worthy of legal consideration, and that should be devoid of legal attention, but merely that there are other tools and other ways of addressing such environmentally-related problems¹³⁰.

Now that an approximation to the notion of tort in comparative terms has been attempted, let us connect the concepts of “environment” and “tort”, not by the means of a speculative notion of “environmental tort” but through the wider and overarching concept of “mass tort”: it may be more fruitful to focus on this meta-category where environmental torts belong, for it seems to have attained some sort of “transnational” recognition.

C. Environmental occurrences as mass-torts and environmental-damage typology

In the European Union, it is considered that the term “*mass harm*” refers to situations “*where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons*”¹³¹. Amongst these situations, a significant majority bears a tortious nature. These so-called “mass torts” – or “*dommages de masse*”, as referred to by French legal academia – may be defined as “[...] *atteintes aux personnes, aux biens ou au milieu naturel qui touchent un grand nombre de victimes à l’occasion d’un fait dommageable unique, ce dernier pouvant consister en un ensemble de faits dommageables ayant une origine commune* [...]”¹³². Thus, they comprise

¹³⁰ As for instances, climate-change-related situations, as it will be seen in Chapter 2.

¹³¹ *Vid.* Commission recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), point 3.b.

¹³² *Vid.* A. GUEGAN-LECUYER, *Domage de masse et responsabilité civile*, bibliothèque de droit privé, vol. 472, Paris, L.G.D.J., 2006, pp. 95-96, especially p. 96. The referred author identifies the main sources of these occurrences as being products, and industrial and transport-related accidents.

*“hundreds and in some cases, even thousands of victims, some of whom will suffer their injuries in the future and may not yet have been born”*¹³³. Due to these features, it may be contended that there is a significant element of public interest involved in mass torts which, in comparative terms, should possibly bring their regulation close to public law¹³⁴. This public interest is not limited to public assistance to victims of mass-tort situations; it also expands to the need to provide access to justice to victims seeking compensation from those allegedly responsible for their situations¹³⁵. Therefore, *“mass accidents are peculiarly amenable to a “public law” approach, justifying modifications of the traditional private law standards regarding proof and remedies”*¹³⁶. Interestingly, moreover, due to their massive nature, mass torts are easily prone to vesting a conflict-of-laws dimension: victims may reside in different states, injuries may arise in a state different from their state of residence or domicile, there may be multiple defendants, which may perform business in several different states, the events giving rise to damage may have occurred in multiple different states, etc¹³⁷.

The “mass tort” label simultaneously covers several kinds of occurrences, which respond to the characteristic features which have been just referred. These kinds of occurrences are categorized by U. Baxi as belonging in several consecutive “generations” of mass disasters, which have succeeded each other in parallel with the evolution of industrial society, increasing their complexity as society increased hers¹³⁸:

“Starting, first, with [...] situations of transportation disasters (on road, sea and by air) that at least triggered international régimes of liability to supranational regulation within the EC, the notion has extended now, second, to the new production technologies. The second generation (as it were) of mass disasters extends to pharmaceutical, chemical or biotechnology products, defective servicing, defective designs of industrial production plants and safety systems. The third generation extends the notion to environmental/toxic torts entailing noxious and often mutagenic human and eco-harms. As globalization proceeds apace, new structures of production

¹³³ Vid. R. A. SEDLER, “Interest analysis, state sovereignty, and federally-mandated choice of law in “mass tort” cases”, *Symposium on Conflict of Laws: celebrating the 30th anniversary of Babcock v. Jackson*, *Albany Law Review*, vol. 56-4, No. 4, 1993, pp. 855 and following, at p. 858.

¹³⁴ Vid. J. G. FLEMMING “Mass tort”, in K. D. KERAMEUS (ed), *XIV International Congress on Comparative Law - Athens 1994 - General reports*, Athens, Ant. N. Sakkoulas publishers, 1996, pp. 123-143, at p. 143.

¹³⁵ *Ibidem*.

¹³⁶ *Ibidem*. The excerpt further continues as follows: “[...] It calls for subordinating the values of individual litigation to the need of delivering justice to the many, for aggregative procedures and results [...]”. This last part is controversial and disputable in many European continental legal systems. Vid. in this sense *infra* Part II, Chapter 3, “Opt in – Opt out schemes and their implications as regards fundamental rights” (considerations on individual access to justice as a fundamental right vs. opt-out collective-redress proceedings). Nevertheless, the referred idea of modifying private-law standards due to the peculiarity of the public interest element may further justify some of the ideas presented *infra*.

¹³⁷ Vid. R. A. SEDLER, “Interest analysis, state sovereignty, and federally-mandated choice of law in “mass tort” cases”, *op. cit.*, p. 858.

¹³⁸ On the idea that torts have evolved deeply as the industrial society has also become more complex, joining the category of mass torts, vid. R. A. SEDLER, “Interest analysis, state sovereignty, and federally-mandated choice of law in “mass tort” cases”, *op. cit.*, p. 856: “In the thirty years since *Babcock*, conflicts tort cases have also undergone their own “revolution”. At the time of *Babcock*, most conflict tort cases presented relatively simple fact-law patterns [...] In virtually all of the conflicts cases that arose in practice, the facts were not complicated and the choice-of-law issue was fairly straightforward”.

*of global risk industries appear on the horizon, marking the fourth generation, such as social impacts of capital market manipulation resulting in fiscal and monetary crises and response measures such as devaluation, that approach dimensions of mass disasters [...]*¹³⁹.

Despite this heterogeneity, it is suggested that mass torts may be reduced to only 2 archetypical situations. There is, on the one hand the single disaster case, where *“a large number of persons [...] are killed or injured in a single disaster, such as an air plane crash”*. On the other hand, there is also the multi-exposure case or *“mass toxic tort”* which *“involves claims of a large number of persons exposed to a product that has caused illness or condition, such as in asbestos, Agent Orange, Dalkon Shield and DES litigation”*¹⁴⁰.

However, environmental torts do not exactly fit into this schema: cutting across these archetypes, they can either be “single disaster” cases or else “toxic torts”. This is due to the fact that damage to the environment can be either the result of a one-shot harmful occurrence (accident), or else it can derive from the continuous flux of day-by-day industrial activity¹⁴¹. Following this distinction, the remainder of this dissertation will refer, where appropriate, to “one-shot” / “accidental” environmental torts, or conversely to “non-accidental” / “continuous” environmental torts. This last clarification points to the fact that the notion of environmental tort is not a unitary notion either and, therefore to the need to introduce a typology of environmental torts. Beyond the just-referred distinction, which delineates two kinds of environmental tort following the features of the event giving rise thereto, it is possible to make, at least, two further classifications.

To begin with, a further classification may be drawn in respect of the geographical structure of the environmental occurrence, thus distinguishing between “transfrontier” (also known as “transboundary”) and “merely international” environmental torts. Cases of so-called transfrontier environmental tort are those *“where the place where the accident has arisen and [the place] where damage has been suffered are located in different countries”*¹⁴². Conversely, the notion of merely international tort is not related to the location of the places of action and of result, but refers to situations whose international element derives from the *“multinational*

¹³⁹ Vid. U. BAXI, “Mass Torts, Multinational Enterprises Liability and Private International Law”, *op. cit.*, pp. 326-327. As it will be seen, the referred author is extremely critical with the western approach to private international law due to the political implications arising thereof. The excerpt reproduced continues as follows: “[...] This explains, in part, why the situations like Ogoniland or Marshall Islands (the paradigmatic site of export of hazardous nuclear wastes) simply do not enter the archive of conflicts theory and practice. Or why the World Bank and International Monetary Fund, among other international and regional financial institutions, and donor/aid agencies, if and when *sui juris*, may not still be proceeded against on the ground of the tort of global “professional negligence” that causes mass disasters. That tort, the *suprema lex* of global future, is already now in the making in acts of arrogant imposition of fiscal and monetary policies, and deregulation of capital markets, as an aspect of “structural adjustment” and “good governance” policies of international financial institutions”.

¹⁴⁰ Vid. R. A. SEDLER, “Interest analysis, state sovereignty, and federally-mandated choice of law in “mass tort” cases”, *op. cit.*, pp. 858-59. For a similar typology, *vid.* J. G. FLEMMING “Mass tort”, *op. cit.*, p. 124.

¹⁴¹ The distinction between accidental pollution and day-by-day pollution arising from industrial activities is mentioned and dealt with by many authors. *Vid. inter alia*, U. MATTEI, *Comparative Law and Economics*, Ann Arbor, The University of Michigan Press, 1997, pp. 249-250.

¹⁴² Vid. F. MUNARI & L. SCHIANO DI PEPE (“Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity”, *op. cit.*, p. 176.

*dimension of one of the persons involved (usually the polluter)*¹⁴³. Interestingly, it has been stated that “[a]lthough there are many torts in which the place of injury is also the place of the wrongful conduct [...] there are few mass torts of which that can be said”¹⁴⁴. This is not, however, the case of environmental torts – and other sorts of human-rights-related international torts. As it will be seen *infra*, environmental torts in nowadays globalized world may quite frequently bear this structure¹⁴⁵. The referred two kinds of environmental tort following their geographical structure may, moreover, take place within two different political contexts: within a federal state / quasi-federal entity or, purely and simply, in the international scene. Consequently, when combining geo-structural and political criteria, at least, four kinds of environmental tort scenarios may be declined: transboundary environmental torts within a federal or quasi-federal context, merely international torts in the global scene, transboundary environmental torts outside a federal or quasi-federal context (thus in a global context), and merely international torts within a federal or quasi-federal context. The first kind of case may be illustrated by referring to the well-known “Mines de Potasse d’Alsace” case between France and the Netherlands. No further comment will be made here, for it will be properly discussed *infra*¹⁴⁶. However, the remaining scenarios may be illustrated by the following cases:

BOX 1 – Example of a merely international environmental tort in the global scene:

Friends of the Earth NL / Milieu Defensie v. Royal Dutch Shell¹⁴⁷

In May 2008, the Dutch environmental NGO *Friends of the Earth NL / milieudefensie* and four Nigerian farmers, Eric Dooh, ElderFriday, Alali Efanga, and Chief Fidelis brought Royal Dutch Shell to court in the Netherlands claiming redress due to the oil pollution suffered by the three villages where the Nigerian claimants live: Goi (one spill in 2004), Ikot Ada Udo (several spills in 2007) and Oruma (one spill in 2005)¹⁴⁸. The plaintiffs demand: i) “that Shell cleans up the oil which leaked from its pipelines on to the fields and fishing ponds of the farmers”; ii) “that Shell pays financial compensation for the economic damage suffered by them”; and iii) “that Shell

¹⁴³ *Ibidem*.

¹⁴⁴ *Vid.* L. WEINBERG, “Mass torts at the neutral forum: a critical analysis of the ALI’s proposed choice rule”, *Symposium on Conflict of Laws: celebrating the 30th anniversary of Babcock v. Jackson*, *Albany Law Review*, vol. 56, No. 4, 1993, pp. 807 and following, at p. 847.

¹⁴⁵ This will be an important point of discussion *infra*, Chapter 4.

¹⁴⁶ *Vid. infra* “(Brief reference to) the Ubiquity theory [Mines de Potasse]”.

¹⁴⁷ This summary of the case has been made with the information provided by Friends of the Earth NL in its official web page, under the two following links:

<https://milieudefensie.nl/english/shell/courtcase/our-courtcase-against-shell>

<https://milieudefensie.nl/english/shell/courtcase/timeline>

(Last consulted on November the 26th 2016). The case will be referred to, hereinafter, as “*Milieu Defensie v. Shell*” or simply “*Milieu Defensie*”.

¹⁴⁸ As explained by Friends of the Earth NL: “These spills only represent the tip of the iceberg: around 250 spills from Shell installations in Nigeria occur annually. Millions of people in the densely populated country suffer the consequences of the pollution every day. 55 per cent of all spills from Shell pipelines occur in Nigeria, while no more than 10 per cent of Shell’s oil production comes from there.

In some parts of the country, leaked oil has penetrated up to five metres deep into the ground. Agriculture and fishing – which most Nigerians are dependent on for their living – have become nearly impossible due to this pollution and many people no longer have access to clean drinking water”.

better maintains and secures the pipelines it manages, so that new spills can be prevented in the future". Friends of the Earth NL considers that this case "is unique because it is the first time that a Dutch company has been brought before a Dutch court to account for environmental damage caused abroad". The lawsuit is directed both against the Shell parent company and against its Nigerian subsidiary, with the stated goal of seeking "a court ruling that holds de headquarters of Shell in The Hague responsible for the damage inflicted by her subsidiary Shell Nigeria [...] Because in reality Shell headquarters in The Hague directly manages her subsidiaries abroad, [and therefore] the policies must be changed there".

After dealing with several procedural hurdles introduced by Shell that delayed the proceedings (a challenge to the international jurisdiction of the court¹⁴⁹, an attempt at questioning the NGO's standing, an alleged *lis pendens*, etc.), the main court-hearing of the case was held on October the 11th 2012. A first instance decision was pronounced on January the 13th 2013, after which both parties filed appeals: the said first instance judgment "*rules that Shell is liable for the oil spills on the land of Friday Alfred Akpan from the village of Ikot Ada Udo and is ordered to pay damages*". However, the court's ruling establishes that Shell's liability has not been proven in the case of the other three farmers. While Friends of the Earth NL wishes to see Shell be held liable in respect of the situations suffered by the remaining farmers¹⁵⁰, Shell intends to challenge the liability established in respect of Mr. Akpan. As of June 2017, the appeal is still pending¹⁵¹.

BOX 2 – Transboundary environmental tort outside a federal or quasi-federal context

(i.e. in a global context):

Lago Agrio-Chevron case in respect of the Peruvian victims

Between 1964 and 1990, North-American oil-giant Texaco owned an interest in a circa 1.500 squared mile concession in Ecuador comprising various oil fields and over 350 well sites. During the said period Texaco – acquired by Chevron in 2001 – conducted sub-standard operations in the area: deliberately dumping billions of gallons of waste byproduct from oil-drilling directly into the rivers in the area; burning gases and oil waste, thus creating "black

¹⁴⁹ On the very words of the NGO: "*Shell states that Shell Nigeria is a Nigerian company and thus is not required to appear before a Dutch court, even though Shell Nigeria is a 100 per cent subsidiary of Royal Dutch Shell, its parent company located in the Netherlands*".

¹⁵⁰ Friends of the Earth NL feels backed up by the conclusions of the UNEP (United Nations Environmental Program) report "Environmental Assessment of Ogoniland" published in August 2011: "*This report shows, among other things, that Shell has not been cleaning up the pollution it causes in Ogoniland – where the village of Goi is located. UNEP concludes that Shell's working methods in Nigeria do not lead to 'environmental restoration nor legislative compliance, nor even compliance with its own internal procedures'. Friends of the Earth NL's lawyers [have introduced] this UNEP report to the court as a significant piece of evidence*".

¹⁵¹ The most recent English-language pieces of news in respect of the case that may be found in the internet on June the 24th 2017 date back to December 2015 (vid. <http://www.foei.org/news/outcome-appeal-shell-victory-environment-nigerian-people-friends-earth-netherlands> ; <http://www.reuters.com/article/us-shell-nigeria-pollution-idUSKBN0U11C520151218> ; this second link is a very concise yet enlightening summary of the whole procedure throughout the Dutch court system).

rain” and poisoning the air; digging over 900 unlined waste pits in the jungle which still leach toxic waste into soils and groundwater. This *modus operandi* simultaneously violated then-current US industry standards, Ecuadorian environmental law, and the Contract that bound the company to the Government of Ecuador¹⁵². Other than causing an environmental catastrophe in the region, which has been labelled as the “Rainforest Chernobyl”, Texaco / Chevron’s operations have caused an “*epidemic of cancer, birth defects, miscarriages, and other ailments*”¹⁵³. This epidemic is not restrained to the Oriente region in Ecuador: downstream Peruvian populations have also suffered its impact.

In 1993 the affected communities introduced a class-action against Texaco in the United States seeking redress for the damages suffered. After a long and expensive litigation throughout the US court system, their claims were rejected by the United States Court of Appeals for the Second Circuit, on the basis of the *forum non conveniens* doctrine, under the condition that Texaco / Chevron submitted to the jurisdiction of Ecuadorian courts¹⁵⁴.

During the ensuing two decades the dispute has evolved into a nasty and complex spider-web of interrelated proceedings: it has spawned into several streams of litigation, both before the domestic courts of several countries and before international arbitration panels; it has covered civil-law – both as regards the substance of the dispute as well as purely procedural incidents and injunctions – criminal-law, investment-related, and enforcement-related aspects¹⁵⁵.

As a summary of the evolution of the main civil dispute, it may be said that the lawsuit was re-filed in Ecuador shortly after the *forum non conveniens* dismissal, where it climbed through the court system until the Ecuadorian Supreme Court upheld in 2013 a lower-court ruling against Texaco / Chevron for environmental damage, establishing the amount of damages at 9.51 billion dollars¹⁵⁶. Enforcement of the judgment in Ecuador has not been possible due to the fact that Chevron withdrew its assets from the country, foreseeing an unfavourable final ruling. Enforcement in the US has not been possible either due to the fact that the US judiciary has validated the Chevron public-relations’ strategy: the oil company has articulated a corruption, bribery, and tampering narrative since 2010, in order to discredit the Ecuadorian judiciary, and block the enforcement of potentially unfavourable court decisions¹⁵⁷. As of June 2017, enforcement proceedings are being conducted in Canada, amongst other places: while the Canadian Supreme Court originally ruled against some of Chevron’s objections to

¹⁵² Vid. the EarthRights international’s “Invictus memo” on the case, pp. 1-2. Available online under the following link: <https://www.earthrights.org/sites/default/files/documents/Invictus-memo.pdf> (Last consulted on November the 27th 2016).

¹⁵³ <http://chevrontoxico.com/about/rainforest-chernobyl/> (Last consulted on November the 27th 2016).

¹⁵⁴ Aguinda v. Texaco INC 2000 10650

¹⁵⁵ For a summary of the ensemble of the “spider-web”, vid. <https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador> (Last consulted on November the 27th 2016).

¹⁵⁶ Vid. <http://chevrontoxico.com/about/historic-trial/about-the-trial>, and <https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador> (Last consulted on November the 27th 2016).

¹⁵⁷ Vid. Wall Street Journal, “Chevron Wins Ruling Blocking Enforcement of \$9.5 Billion Ecuador Judgment”, August the 8th 2016: <http://www.wsj.com/articles/chevron-wins-ruling-blocking-enforcement-of-9-5-billion-ecuador-judgment-1470686218> (Last consulted on November the 27th 2016).

enforcement¹⁵⁸, the subsequent enforcement proceedings, held in Toronto, resulted in a victory for Chevron, which the plaintiffs' lawyers have already appealed against¹⁵⁹.

As it may be understood, from the perspective of the Peruvian victims who joined the original class-action in the 1990s, this case is a transboundary environmental tort outside a federal or quasi-federal context.

BOX 3 – Merely international environmental tort within a federal or quasi-federal context:

Aznalcollar-Boliden¹⁶⁰

"On April 25, 1998, a tailings dam failure of the "Los Frailes" lead-zinc mine at Aznalcóllar near Seville, Spain, released 4-5 million cubic meters of toxic tailings slurries and liquid into nearby Río Agrio, a tributary to Río Guadiamar. The slurry wave covered several thousand hectares of farmland, and it threaten[ed] the Doñana National Park, a UN World Heritage Area".

*"The failure of the tailings storage facility at Boliden Ltd's, Los Frailes mine marked the 4th major international tailings failure since 1990 and the 2nd major European failure since 1980. [...] Boliden Apirsa a wholly owned subsidiary of Boliden Ltd, Toronto which operates the Los Frailes zinc mine in southern Spain continues to deny liability [...]"*¹⁶¹

Reportedly, coordinated action by the Spanish Government and the Regional Government of Andalusia avoided a further catastrophic outcome: it succeeded in protecting the National Park, which limited the extent of the ecological tragedy. During the three following years, under the guidance of a scientific committee, cleaning work was undertaken in the zone, after which the environmental regeneration of the zone could begin¹⁶².

"In a press release dated Feb. 26, 1999, Boliden for the first time [admitted] that the tailings dam was ill designed. Boliden blame[d] its contractor Dragados y Construcciones, and its

¹⁵⁸ Vid. http://www.csrwire.com/press_releases/38268-Chevron-Facing-Major-New-Difficulties-In-Ecuador-Pollution-Case-After-Losing-Before-Canada-Supreme-Court and <http://thechevronpit.blogspot.be/2015/09/six-reasons-why-chevronecuador.html> (Last consulted on November the 27th 2016).

¹⁵⁹ Vid. REUTERS, "Court rejects bid to enforce Ecuador judgment on Chevron Canada", available on March the 21st 2017 (<http://www.reuters.com/article/us-canada-ecuador-chevron-idUSKBN1542U2>); FINANCIAL POST, "Ecuadorian plaintiffs appeal Chevron Canada court ruling", available on June the 24th 2017 (<http://business.financialpost.com/legal-post/ecuadorian-plaintiffs-appeal-chevron-canada-court-ruling/wcm/9993fff7-1651-4c3c-8f9b-772193ef5fc5>).

¹⁶⁰ Unless otherwise stated, all the quotations and in general information from this box is taken from the following webpage: <http://www.wise-uranium.org/mdaflf.html> (last consulted on November the 26th 2016).

¹⁶¹ Vid. T. W. COLEMAN & A. PERALES, "Combined Report: Boliden Apirsa, Los Frailes Tailings Incident", Mining and Environment Research Network, [Not dated] (Available under the following link on November the 26th 2016: <http://www.pebblescience.org/pdfs/LosFrailes.pdf>).

¹⁶² Vid. EL PAÍS, "El desastre que amenazó Doñana", published on October the 6th 2010, under the following link (last consulted on November the 26th 2016): http://www.elpais.com/articulo/sociedad/desastre/amenazo/Donana/elpepusoc/20101006elpepusoc_6/Tes

*associated engineering firms, Itecsa and Geocisa for the failure"*¹⁶³. Despite the fact that Boliden sued the referred firms for damages, trying to pin the blame for the ecological disaster on them, the Spanish Supreme Court ruled that liability could not be attributed to the said companies.

As reported by several Spanish newspapers on April the 23rd 1999, the day before *"the Spanish Government [had] extended the claims against the foreign owners of Boliden Apirsa SL, Canadian Boliden Ltd. and Swedish Trelleborg AB. [...] The claims [were] extended against the foreign owners, since it [was] feared that the Spanish [subsidiary would] declare insolvency"*. Precisely, on October the 2nd 2000, Boliden Ltd. – the parent company – announced that its Spanish subsidiary Boliden Apirsa had made a filing to initiate insolvency proceedings ("suspension de pagos"). Subsequently in recent years, Spanish Administrations have tried to enjoin assets from the parent company abroad, notably by conducting proceedings before Swedish courts.

Other than this, in the almost twenty years that have elapsed, the said administrations have equally tried to obtain redress from Boliden through several domestic legal means, including civil and administrative proceedings, and have equally imposed upon Boliden administrative fines. However, reportedly, until 2010 the Boliden corporation had not paid a single euro back to the public Administrations that contained the toxic spill, and cleaned and regenerated the area¹⁶⁴.

In February 2015, after domestic civil proceedings had been terminated several years before, the Andalusian Government re-launched a civil claim, re-initiating the proceedings, following a

¹⁶³ This came after experts had publicly expressed their opinion on the occurrence not being attributable to *force majeure*. As reported by <http://www.wise-uranium.org/mdaflf.html> (which provides a description of the case, with chronological extracts of newspapers translated into English):

"The reason for this foundation failure is a matter of discussion, still. While Boliden Ltd. maintained that there was no way to foresee it, even the report prepared by Geocisa on behalf of Boliden in June 1996 described the weak point of the dam already two years in advance of the failure".

"Rafael Baena Escudero of the Department of Physical Geography and Regional Geographic Analysis stated: "In this case, a complete lack of foresight emerged. The dam was built on top of expansive clays. [...] This is a matter of general negligence and not a problem of nature." (El Mundo, May 25, 1998)

According to a report by Geocisa, deformations of the inclinometers had been observed already in 1997. One of four inclinometers has been out of operation since May 1997, the three others were not in a good condition. (El País Domingo of May 17, 1998)".

The idea was ultimately confirmed in 2000 by an expert witness in court: *"An expert report prepared on behalf of the Court of the Sevillian [town] of Sanlúcar la Mayor concludes that the dam failure was a result of negligence: The dam failed since it was constructed and enlarged in two projects that did not take into account two factors crucial for the stability. [...] The report was prepared by Antonio Gens and Eduardo Alonso, university professors of the Polytechnical University of Catalonia in Barcelona. (El País / El Mundo / La Vanguardia / ABC, Apr. 8, 2000)"*.

¹⁶⁴ Vid. EL PAÍS, "El desastre que amenazó Doñana", published on October the 6th 2010, under the following link (last consulted on November the 26th 2016):

http://www.elpais.com/articulo/sociedad/desastre/amenazo/Donana/elpepusoc/20101006elpepusoc_6/Tes . Vid. in the same sense: <http://www.libertaddigital.com/sociedad/boliden-no-ha-pagado-ni-un-duro-por-el-desastre-de-aznalcollar-1276359632/>

Spanish Supreme Court ruling which, in a related matter, indicated that that was the appropriate procedural channel to pursue matters further¹⁶⁵.

Due to their different legal, political and policy implications, these different categories of international environmental tort will need to be clearly kept in mind during the remainder of this dissertation.

A third and final distinction which may also integrate the typology of environmental torts leads back to the contents reflected upon in previous pages, and more precisely to the very “elusive” concept of environment. Quite naturally, the different legal goods which, as suggested *supra*, may integrate the notion of “environment” give rise to different categories of environmental damage, depending on the content included therein. Traditionally, it is possible to distinguish between¹⁶⁶: i) damage to property or human health due to an environmental contamination, “thus including both physical and economic damage”¹⁶⁷, hereinafter environmental damage *lato sensu* and, ii) damage to the environment itself, irrespective of any damage to property or health, thus “damage to natural habitats and protected species”¹⁶⁸, hereinafter “ecological damage” or “environmental damage *per se*”.

There is a need to keep in mind this latter distinction which is parallel to the need – suggested *supra* – to always keep in mind which notion – larger or narrower – of environment is being addressed at each moment. Otherwise any policy or legal reasoning conducted may be incoherent, inconclusive, or simply erroneous. This does not mean, under any circumstances, that *lato sensu* environmental damage does not deserve to be considered environmental

¹⁶⁵ Vid. EL PAÍS, “La Junta reactiva la demanda contra Boliden por el desastre de Aznalcóllar”, published on February the 26th 2015, under the following link (last consulted on November the 26th 2016):

http://ccaa.elpais.com/ccaa/2015/02/26/andalucia/1424950082_018546.html

¹⁶⁶ The only element regarding the characterization of environmental damage actually contained in Art. 7 is the distinction between these two different types of damage. However, the inclusion of this distinction works more as a clarification, since, in principle, it does not have any practical consequence: both types of damage are identically treated.

¹⁶⁷ Vid. F. MUNARI & L. SCHIANO DI PEPE, “Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity”, *op. cit.*, p. 190. In Spanish civil law this kind of damage is denominated “typical environmental damage” (“daño típico”): “Es el daño al medioambiente que va acompañado de un daño a un tercero (a su persona o a su propiedad) [...] Es decir, se trata de daños medioambientales individuales que se incardinan en la protección dispensada por el Código civil a la persona y a la propiedad, por esto, respecto a ellos, cabe dicha protección indirecta vía la responsabilidad civil extracontractual” (Vid. F. LLODRÀ GRIMALT, *Lecciones de Derecho Ambiental Civil*, *op. cit.*, p. 93. In order to illustrate the rooting of the distinction within Spanish civil law, the autor cites a Supreme Court decision dating from 1944 [STS 14.02.1944]). In a similar vein, A. CABANILLAS SÁNCHEZ (*La reparación de los daños al medioambiente*, *op. cit.*, pp. 46-47) mentions that are equally meant to be considered as environmental “los daños que sufren los particulares a consecuencia de inmisiones industriales que contaminan el aire, agua, o el suelo con el consiguiente perjuicio para las personas y las cosas”.

¹⁶⁸ Vid. F. MUNARI & L. SCHIANO DI PEPE, “Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity”, *op. cit.*, p. 190. F. LLODRÀ GRIMALT (*Lecciones de Derecho Ambiental Civil*, *op. cit.*, p. 93) defines the notion of “per se environmental damage” or “ecologic damage” as “daño directo al medioambiente” or “daño al medioambiente considerado en sí mismo, i.e. “aquel determinado por la alteración del equilibrio ecológico o la destrucción de elementos naturales de titularidad común (ejm. fauna y flora)”.

damage, but that policy arguments which make sense in respect of one kind of environmental damage may not make sense in respect of the other.

Previous pages have delivered an approximation to the notions of environment, tort and mass tort, and to a typology of environmental torts. These basic general concepts having been introduced, it is necessary to turn now to some basic notions of private international law as applied to environmental matters.

D. Basic concepts of conflict of laws (I): international jurisdiction over environmental torts (Art.4 & 7.2 of the Brussels I BIS Regulation as illustrations)

As referred *supra*¹⁶⁹, it is possible to conceive environmental occurrences as non-contractual / tortious relationships between two parties, which give rise to an obligation to compensate / repair the damage by the – alleged – tortfeasor. When this conceptualization applies to relationships arising in the international scene and involving private parties (or involving a private party and a public subject, outside the realm of her *iure imperii*), it entails the necessary intervention of private international law, either through uniform law, or through conflict-of-laws means. As mentioned, in this latter case conflict of laws works as the necessary means of inter-legal-order coordination required to provide justice to individuals, and / or as a state-policy-fostering mechanism. The following pages will aim at briefly presenting the most basic notions of the conflictual method in private international law, as relevant for environmental torts, using as an illustration the specific micro-regime introduced within the EU. They hereby begin with the notion of international jurisdiction. “*To say that a court has jurisdiction means that the law regards it as having the power to hear and determine a case against a defendant*”¹⁷⁰. Therefore, rules on international jurisdiction establish under which conditions and principles the jurisdictional organs of a given State are competent to hear and provide a solution to a given private international dispute¹⁷¹.

¹⁶⁹ *Vid. supra*, “General introduction / Object of the dissertation”.

¹⁷⁰ *Vid.* A. BRIGGS, *The Conflict of Laws* (3rd ed.), Clarendon Law Series, Oxford, OUP, 2013, p. 50. *Vid.*, similarly, J. G. COLLIER, *Conflict of Laws* (3rd ed.), Cambridge, Cambridge University Press, 2001, p. 71 (“*Jurisdiction means the competence of the courts to hear and decide a case*”); E. B. CRAWFORD & J. M. CARRUTHERS, *International Private Law in Scotland* (2nd ed.), Edinburgh, Thomson-W. Green, 2006, p. 119 (“*Jurisdiction means the power of a court to hear an action and make a decision*”).

¹⁷¹ *Vid.* J.C. FERNÁNDEZ ROZAS & S. SÁNCHEZ LORENZO, *Curso de Derecho Internacional Privado* (1st ed.), Madrid, Civitas, 1999, pp. 43-44: “*Se trata de determinar en qué condiciones y bajo qué principios los órganos que ejercen la función jurisdiccional tienen competencia para entrar a conocer y, en consecuencia, proceder a solucionar los problemas que suscita una determinada situación privada internacional. No se trata de una mera cuestión de orden procesal [...] la determinación de a quien compete solucionar los supuestos de tráfico jurídico externo es, al menos en un plano lógico, un problema o cuestión previa que es preciso solucionar antes de instrumentar la respuesta de fondo del legislador estatal a tales situaciones, y que condiciona indirecta, e incluso directamente, el contenido de dicha solución*”. Therefore, international jurisdiction is a question that “[...] *vise le pouvoir juridictionnel de l’État, c’est-à-dire de ses juridictions considérées dans leur ensemble, au regard des limites que connaît ce pouvoir en ce qui concerne son domaine matériel et son champ spatial*” (*Vid.* F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), Précis de la Faculté de Droit de l’Université Catholique de Louvain, Bruxelles, Larcier, 2005. p. 36).

In the European Union, Union Institutions have the power to enact rules of jurisdiction in respect of civil matters having cross-border implications¹⁷². Since at EU level there is no specific legal regime of jurisdiction over civil liability lawsuits for damage caused by environmental tort it is necessary to resort to existing general regimes¹⁷³. Consequently, the main legal instrument to establish whether a European court has jurisdiction over a certain dispute in the field of civil and commercial matters comes into play: the already mentioned Brussels I BIS Regulation¹⁷⁴. It is an EU “double-fold” Regulation which deals both with international jurisdiction, and recognition and enforcement of judicial decisions, in relation to civil and commercial matters¹⁷⁵. Its provisions are binding on the 28 member States of the EU¹⁷⁶. Nevertheless, generally, international jurisdiction can only be asserted through its rules if the defendant is

¹⁷² *Vid.* 81.1 and 81.2.c TFUE. Art. 4.2.J establishes that this competence is a “shared” one.

¹⁷³ *Vid.* F. MUNARI & L. SCHIANO DI PEPE, “Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity”, *op. cit.*, p. 194.

¹⁷⁴ The origins of the Brussels I BIS Regulation can be found in the *Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* (Convention of 27 september 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), O.J. C 27, 26.01.1998, p. 1). The Brussels Convention is an international convention signed in 1968 by the six original Member States, whose aim was to facilitate the free movement of judicial decisions within the – then – European Economic Community (*Vid.* P. A. NIELSEN, “Behind and beyond Brussels I – An Insider’s View”, in P. DEMARET, I. GOVAERE & D. HANF (eds.), *30 years of European Legal Studies at the College of Europe (Liber Professorum 1973-74 – 2003-04)*, Cahiers du Collège d’Europe N°2, Brussels, P.I.E.-Peter Lang, 2005, pp. 241-243). The logic behind the free movement of judgments principle is that it boosts the four fundamental freedoms on which the European Internal Market is based, thus becoming an “essential piece” thereof (*Vid.* A. L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado* vol. I (9th ed.), Granada, Comares, 2008, p. 91). The first Brussels I Regulation, which entered into force on the 1st of March 2002 (*Vid.* Art. 76), was just the transformation – notwithstanding a few amendments – into European Regulation of the referred Convention, due to the process of “communitarisation” of PIL started with the entry into force of the Treaty of Amsterdam (*Vid.* P. A. NIELSEN, “Behind and beyond Brussels I – An Insider’s View”, *op. cit.*, p.241-243). Due to this strong and fundamental link between the Convention and the Regulation (*Vid.* the Brussels I Regulation, recital 19), the case-law of the ECJ on the latter retains, in general, its authority in regard of the interpretation of Brussels I (*Vid.* M. BOGDAN & U. MAUNSBACH, *EU Private International Law: an EC Court Casebook*, Groningen, Europa Law Publishing, 2006, p. V). It soon became an “essential piece” of the progressive elaboration of a “Space of Freedom Security and Justice” which accompanied the birth of the “European Union”, and its development, throughout the decades of the 1990s and the 2000s. The Brussels I BIS Regulation is an upgraded and updated version of the Brussels I Regulation.

¹⁷⁵ *Vid.* P. A. NIELSEN, “Behind and beyond Brussels I – An Insider’s View”, *op. cit.*, pp. 241-243. Art. 1 of both the original Brussels I Regulation and the Brussels I BIS Regulation provides a negative definition of what is meant to be understood as “Civil and commercial matters”.

¹⁷⁶ Despite the wording of article 1.3 of the Brussels I Regulation – “*In this Regulation, the term “Member State” shall mean Member States with the exception of Denmark*” – such regulation was binding on Denmark. This was due to the conclusion of an “Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters” – done at Brussels on the 19th of October 2005, O.J., L 229, 16 November 2005, p. 62. As explained in recital 41 of the Brussels I BIS Regulation, Article 3 of the Agreement of 19 October 2005 confers to Denmark the possibility of applying the amendments to the Brussels I Regulation. For further details concerning the special status of Denmark, the United Kingdom and Ireland, as well as for indications regarding the relationship between the Brussels I Regulation and its predecessor, the “Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters”, *vid.* H. GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe : règlement 44/2001, conventions de Bruxelles (1968) et de Lugano (1988 et 2007)* (4th ed.), Paris, L.G.D.J., 2010, pp. 57-59.

domiciled in one of the 28 member states (notwithstanding certain exceptions)¹⁷⁷. Naturally, in most environmental tort cases, the alleged polluter will be a legal person¹⁷⁸. In order to establish whether a corporation has her domicile in the European Union – and thus in order to establish if the rules in the Brussels I BIS Regulation can be used to assert jurisdiction over the matter – article 63 establishes that "(f)or the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business"¹⁷⁹.

If the defendant is not domiciled in the EU, generally, the regulation refers the matter to the national rules of international jurisdiction in force in each of the 28 member states¹⁸⁰. This entails a distinction, in terms of jurisdiction, between litigation started against European-based polluters (i) and litigation against polluters based outside the European Union (ii).

¹⁷⁷ This is the so-called *ratione loci* condition of applicability of the Regulation (*vid.* Article 6.1 of the Brussels I BIS Regulation *sensu contrario*). This general premise has, of course, some exceptions, as it is the case of hypotheses of choice of forum, and situations involving the exclusive grounds of jurisdiction enshrined in the very Regulation. For a slightly different conceptualization, which naturally does not lead to different result in practical terms, *vid.* EUROPEAN COMMISSION, *Green paper on the review of Council Regulation (EC) N° 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM(2009) 175 final, p.3 (The European Commission conceives the *ratione loci* condition as a "personal scope" of application of the Regulation), and P.-E. PARTSCH, "L'application territoriale des Règlements Bruxelles I et Bruxelles II" dans G. DE LEVAL & M. CANDELA SORIANO (eds.), *Espace judiciaire européen: Acquis et enjeux futurs en matière civile*, Bruxelles, Larcier, 2007, pp. 75-84, at p. 75 (Partsch considers that the "territorial application" of the Regulation comprises two different aspects: the first one would be related to the determination "*de l'espace dans lequel des autorités publiques doivent prêter leur collaboration à la mise en œuvre des règles contenues dans [le Règlement]*" and a second one, which would aim at determining "*quelles caractéristiques doit présenter une situation [...] d'un point de vue spatial pour déclencher l'application [du Règlement]*". For a detailed explanation about what is exactly meant to be understood as the "territory of a Member State", *vid.* the explanation provided in respect of the former Brussels I Regulation by J.J. FAWCETT and J.M. CARRUTHERS, (*Cheshire, North & Fawcett*) *Private International Law* (14th ed.), Oxford, Oxford University Press, 2008, pp. 222-225.

¹⁷⁸ As mentioned by B. S. WRAY, notwithstanding terrorists, individuals hardly ever have the potential to cause mass-harm (B. S. WRAY, "Transnational corporations and the disjoint of traditional structures of liability to victims", available online on February the 9th 2014, at the following address: <http://ssrn.com/abstract=1733582>). However, should the defendant not be a legal person, the domicile of a physical person is determined following the rule in Article 62 of the Brussels I BIS Regulation, which contains the so-called principle of "territoriality of domicile" – "*le principe dit de "territorialité" du domicile*". This means that the judge applies its own law in order to determine if the person is domiciled in its country. Otherwise, he applies the law of foreign country "X" in order to determine whether the person is domiciled in foreign country "X". For an in depth assessment of this point, *vid.* GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe : règlement 44/2001, conventions de Bruxelles (1968) et de Lugano (1988 et 2007)* (4th ed.), *op.cit.*, pp. 80-82.

¹⁷⁹ As opposed to what is the case with natural persons, and to what was the case with legal persons under the Brussels Convention (*vid.* Art. 53 of the Convention), the concept of domicile of legal persons is nowadays a uniform concept (This was one of the most positive novelties introduced in the original Brussels I Regulation). Additionally, the connecting factors applied in Art. 63 of Brussels I BIS are copied from Art. 54 TFUE, and therefore ensure coherence with Internal market law (*Vid.* P. A. NIELSEN, "Behind and beyond Brussels I – An Insider's View", *op. cit.*, p.247).

¹⁸⁰ Again, situations pertaining to choice of forum and exclusive grounds of jurisdiction constitute exceptions to the general rule. Moreover, following H. GAUDEMET-TALLON, (*Compétence et exécution des jugements en Europe : règlement 44/2001, conventions de Bruxelles (1968) et de Lugano (1988 et 2007)*) (4th ed.), *op.cit.* p. 86), Article 6.1 is to be understood as a *renvoi* to each State's own rules on international jurisdiction.

i. *Jurisdiction over European-based polluters*

As explained, international jurisdiction over European-based polluters needs to be asserted following the rules of the Brussels I BIS Regulation. The following lines will only deal with the two heads of jurisdiction that are most likely going to be resorted to in environmental tort cases, due to their specificities¹⁸¹: the main criterion of jurisdiction in the Brussels I Regulation (a), and one of the additional heads of jurisdiction contained in the Regulation under the label "Special jurisdiction"¹⁸² (b).

a. Brussels I Regulation's main head of International Jurisdiction

The main criterion of jurisdiction in the Regulation is contained in its Article 4: the courts of the Member State of the domicile of the defendant have jurisdiction over any dispute falling within the material scope of the Regulation¹⁸³. The *forum* of the domicile of the defendant is considered its general *forum*, because it applies generally in any possible civil or commercial dispute in which it may be involved¹⁸⁴. In other words, it applies independently both from the precise matter which gives rise to a particular set of proceedings and from the precise type of civil or commercial procedure, amongst those available, that the claimant may choose to

¹⁸¹ Due to the specific features of the kind of litigation at stake, I consider highly unlikely that parties may even try to negotiate in respect of international jurisdiction (and even more unlikely that they may reach an agreement on that point). Consequently, Art. 25 of the Brussels I BIS Regulation, on choice of forum, will not be dealt with.

¹⁸² Other than its main rule, Brussels I contains another 3 types of *fora*: Exclusive *fora*, which are mandatory in nature – Art. 24 –, and prevail over any other *fora* in the Regulation; provisions on tacit and express submission – Art. 25 and 26 –, which prevail over other *fora*, in exception of the exclusive ones; and special *fora* – art. 7 to to 23 –, which lie beneath the previous two categories in the hierarchy established in the Regulation, and stand as an alternative to the *forum* of the domicile of the defendant (Vid. A. L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol. I (9th ed.), *op. cit.*, p.113). Nevertheless, this is a "weak forum" (*Ibidem*), because it gives way to the exclusive *fora*, and is not applicable if there has been a submission of the controversy to the courts of another Member State under art. 25 or 26. As far as international environmental tort is concerned, there are no relevant exclusive *fora* in Art. 24 (*vid.* in this sense the ECJ's decision in "Čez" [ECJ, Čez, judgment, case C-343/04, ECLI:EU:C:2006:330]), and Art. 25 and 26 do not have any specific role to play in this respect.

In order to keep the explanation as concise as possible, the eventual role that may be played by article 7.5 of the Brussels I BIS Regulation will not be considered. Regarding the predecessor of that provision (Article 5.5 of the Brussels I Regulation), *vid.*, J. FAWCETT & J. M. CARRUTHERS, (*Cheshire, North & Fawcett*) *Private International Law* (14th ed.), *op.cit.*, pp. 258-261; H. GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe : règlement 44/2001, conventions de Bruxelles (1968) et de Lugano (1988 et 2007)* (4th ed.), *op.cit.*, pp. 236-245; and P. MANKOWSKI, "Section 2 - Special jurisdictions - Article 5" in U. MAGNUS and P. MANKOWSKI (eds.), *Brussels I Regulation. European commentaries on Private International Law*, Munich, Sellier - European Law Publishers, 2007, pp. 219-229.

¹⁸³ As mentioned *supra* note 175 "Civil and Commercial matters" as defined by article 1 of the Brussels I and Brussels I BIS Regulations.

¹⁸⁴ There is a fundamental concern for the position of the defendant in the Brussels Convention and the Brussels I Regulations, which amounts to a certain "jurisdictional protection", "*alors que le principe de protection du demandeur ne reçoit qu'une place marginale, ou à tout le moins inconfortable [...]*" in the said European legal instruments (*vid.* M.FALLON, "La compétence internationale selon le droit judiciaire européen : émergence d'une compétence judiciaire européenne?", in M. STORME & G. DE LEVAL (eds.), *Le droit processuel et judiciaire européen*, Bruxelles, La Charte, 2003, pp. 25-62, at p. 61).

start¹⁸⁵. It is the classic *actor sequitur forum rei* principle¹⁸⁶. This means that if any of the above-referred three possible "domiciles" of a company is placed in the EU – and thus the regulation is applicable – then courts of any of those three Member States may have jurisdiction over the dispute at the claimant's choice. In other words, should the statutory seat, the central administration, and / or the principal place of business of the corporation be placed within the EU, the plaintiff will be able to choose amongst these three options which stand on equal footing¹⁸⁷. The philosophy behind Article 63 is that the claimant should be given a choice in cases where the legal person has set up its organization in such a way that the three referred connecting factors are not located in the same state. Criticism can be raised towards this policy option since it opens the way for *forum shopping*, but, as it has been pointed out, these "*shopping possibilities are only available because the defendant has decided to organise its business in this way. It therefore seems reasonable to let that organisational structure have procedural consequences*"¹⁸⁸.

Before moving to the above-announced special head of jurisdiction, several positive features of the connecting factor "domicile of the defendant" need to be underlined¹⁸⁹: First, it ensures economy and simplicity in the development of the proceedings, especially in respect of service and taking of the evidence. Secondly, the fact that it requires that the claimant travels to the country of the defendant to submit the claim reduces the risk of dilatory proceedings. Thirdly, it is beneficial to the defendant, because it allows a more convenient organization of her procedural defence. Fourthly, it is also beneficial to the claimant, since it leads to a smooth enforcement of the judicial decision, for the assets of a defendant tend to be gathered in the very country where she has her domicile. Finally, it has a unifying dimension: it facilitates the concentration before the same courts of controversies which arise from facts that have taken place in several countries.

¹⁸⁵ Vid. A. L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol. I (9th ed.), *op. cit.*, p. 143.

¹⁸⁶ In this sense, *vid.* M. KAWANO, "Globally Expanding Business Activities and Tort Regulations", in R. STÜRNER & M. KAWANO (eds.), *Comparative Studies on Business Tort Litigation*, Tübingen, Mohr Siebeck, 2011, pp. 1-25, at p. 14: "Generally speaking, many European countries know a traditional common rule of general consideration: '*actor sequitur forum rei*'. This consideration of venue is based on the convenience of the defendant who has no chance to choose the forum of the case".

¹⁸⁷ Vid. FAWCETT & CARRUTHERS, (*Cheshire, North & Fawcett*) *Private International Law* (14th ed.), *op. cit.*, pp. 227-228; GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe : règlement 44/2001, conventions de Bruxelles (1968) et de Lugano (1988 et 2007)* (4th ed.), *op. cit.*, pp. 80-83; P. A. NIELSEN, "Behind and beyond Brussels I – An Insider's View", *op. cit.*, p. 247.

¹⁸⁸ Vid. P. A. NIELSEN, "Behind and beyond Brussels I – An Insider's View", *op. cit.*, p. 247. Furthermore, Calvo & Carrascosa (A. L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol. I (9th ed.), *op. cit.*, p. 145) consider this triple concept of domicile to be very positive since it may work as an incentive for international commerce: should an international undertaking decide not to comply with its obligations it will be possible to sue it in several different countries. This reasoning may as well work outside the field of international commerce. In general, the latter referred authors consider that the triple domicile may be a warranty of compliance by legal persons with both contractual and non-contractual obligations which will encourage other subjects to enter in all sorts of relationships with them.

¹⁸⁹ Vid. A. L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol. I (9th ed.), *op. cit.*, p. 143.

b. Special heads of International Jurisdiction in the Brussels I Regulation

In some cases, the Brussels I BIS Regulation offers the claimant the possibility of alternatively suing the defendant before the courts of another Member State following some special jurisdictional criteria contained in its seventh article¹⁹⁰. These are qualified by certain authors as "*attack fora*" as they provide alternative options for litigation purposes¹⁹¹. The ECJ, however, has stated that the actual rationales behind them are procedural proximity, adequacy in terms of taking the evidence, sound administration of justice, etc¹⁹².

The precise head of jurisdiction which may be relevant for our purposes is the one contained in Article 7.2 – former Article 5.3 of the original Brussels I Regulation¹⁹³. This provision deals with international jurisdiction over tort, delict or quasi-delict. It establishes a special *forum* for all non-contractual obligations in general – amongst them, environmental tort. Even if the multiple references to "tort, delict and quasi-delict" may seem to intend to cover as many national concepts of tort-related figures as possible, this article actually contains an "autonomous" concept of tortious matters, independent from those existing in the internal law of the Member States: this formulation "*covers actions calling into question the liability of the defendant outside the field of matters relating to the contract*"¹⁹⁴. As regards its content, Article 7.2 basically enshrines a "classic" – well-known – rule of jurisdiction:

¹⁹⁰ For a general explanation on the "special" heads of jurisdiction, *vid.* FAWCETT & CARRUTHERS, (*Cheshire, North & Fawcett*) *Private International Law* (14th ed.), *op. cit.*, p. 228.

¹⁹¹ *Vid.* A. L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol. I (9th ed.), *op. cit.*, pp. 40 and 149. The name "*attack fora*" thus refers to the fact that, following these authors, they provide additional strategic jurisdictional possibilities to the claimant. This would mean two things: on the one hand, these fora would enhance the claimant's possibilities of litigating, and a plurality of *fora* may possibly foster international commerce, since it increases the trust of economic operators in judicial systems. On the other hand, they also contend that these *fora* aim at increasing the possibilities for the claimant to start proceedings in its own country, or in other words, each of them aims at providing for a *forum actoris*. P. E. NYGH ("The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort" *Recueil des Cours de l'Académie de Droit International*, vol. 251, Leiden, Martinus Nijhoff, 1995, p. 361) sees in Art. 5.3 of the Brussels I Convention (Art. 7.2 of Brussels I BIS) a special head of jurisdiction "*designed to allow a plaintiff who has been injured in a transnational tort to sue the foreign defendant 'at home'*". Finally, it needs to be recalled that, as opposed to other *fora* in Brussels I, they have a double nature: they determine domestic jurisdiction as well as international jurisdiction, or in other words, they designate directly the specific court which is competent for the matter, and not globally the courts of a state.

¹⁹² *Vid.* D. MCLEAN & K. BEEVERS, *The conflict of laws* (6th ed.), London, Sweet & Maxwell, 2005, p.70. The rationale behind these *fora* may equally be interpreted as deriving from the fact that the subject matter of certain disputes may be more closely connected with a country different to that of the domicile of the defendant. Furthermore, *vid.* ECJ, *Somafer SA v Saar-Ferogas AG*, judgment, case 33/78, ECLI:EU:C:1978:205, at 7 and *cf.* 11. Despite justifying the existence of these *fora* by virtue of the referred principles, the European Court of Justice specifies that they need to be narrowly interpreted, since they are exceptions to Art. 2 of Brussels I (4.1 of Brussels I BIS).

¹⁹³ For an in depth analysis of Article 5.3 of the former Brussels I Regulation, as well as the related case-law, *vid.*, *inter alia*, P. MANKOWSKI, "Section 2 - Special jurisdictions - Article 5", *op.cit.*, pp. 182 à 215; H. GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe : règlement 44/2001, conventions de Bruxelles (1968) et de Lugano (1988 et 2007)* (4th ed.), *op.cit.*, pp. 215 à 230; J. FAWCETT & J. M. CARRUTHERS, (*Cheshire, North & Fawcett*) *Private International Law* (14th ed.), *op.cit.*, pp. 247 à 258.

¹⁹⁴ This is the way in which D. MCLEAN & K. BEEVERS (*The conflict of laws* (6th ed.), *op. cit.*, p.75) describe the provision and summarize the *Kalfelis* case-law [ECJ, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, judgment, case 189/87, ECLI:EU:C:1988:459], which is meant

"A person domiciled in a Member State may be sued in another Member State: [...] 2. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".

It has been submitted that "the reference to the place where the harmful event may occur makes explicit what was implied in the Brussels Convention, that Article 5(3) extends to a preventive action in respect of a threatened or future tort"¹⁹⁵. Furthermore, it is also considered to mean that "plaintiffs who have prevented the occurrence of a pollution damage may avail themselves of the right to recover the cost of those anticipatory measures that they have successfully sustained"¹⁹⁶. However, when examining the precise formulation of this provision one of the main remarks to be made is that it is imprecise in respect of the question of the identification of the "place of the tort", and thus, doubts may arise as regards what exactly is meant to be understood as "place where the harmful event occurred or may occur"¹⁹⁷. Two fundamental ECJ decisions and the theories they have consecrated will help us seize the exact dimension of this article.

1. (Brief reference to) the Ubiquity theory [*Mines de Potasse*]

The first case of international environmental tort that reached the ECJ precedes in some thirty years the adoption of Rome II¹⁹⁸. But its relevance exceeds the field of jurisdiction on environmental torts. Actually, in general terms, it is one of the most important ECJ judgments in relation to the interpretation of the article that nowadays is numbered as 7.2 in the Brussels I BIS Regulation. At the beginning of the decade of the 1970s, *Handelskwekerij G.J. Bier B.V.*, a Dutch undertaking engaged in horticulture, established in Nieuwerkerk aan den IJssel, the Netherlands, discovered that the sudden pollution of the waters of the Rhine, on which it was dependent to irrigate its plantations, was causing severe damages to its crops. After taking expensive measures in order to limit such damages, it tried to trace the pollution back to its source. That task led it to Mulhouse, France, where the mining company *Mines de Potasse*

to be understood as completed by the definition of contractual matters provided by *Handte* [ECJ, *Handte*, judgment, case C-26/91, ECLI:EU:C:1992:268]: contractual matters refer to "obligation[s] freely assumed by one party towards another". This is merely the core of the relevant case-law, further developments may be found in both prior and subsequent ECJ decisions which further refine the distinction between contractual and non-contractual matters, sometimes in specific thematic fields as consumer-related claims, antitrust-claims, etc. and other times in general contractual claims amongst professionals and/or corporations. *Vid.* in this sense, *inter alia*: ECJ, *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, judgment, case C-344/00, ECLI:EU:C:2002:499; ECJ, *Harald Kolassa v Barclays Bank plc*, judgment, case C-375/13, ECLI:EU:C:2015:37; ECJ, *Marc Brogister v Fabrication de Montres Normandes EURL and Karsten Fräßdorf*, judgment, case C-548/12, ECLI:EU:C:2014:148; ECJ, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others*, judgment, case C-352/13, ECLI:EU:C:2015:335.

¹⁹⁵ *Vid.* P. STONE, *EU Private International Law – Harmonization of laws*, Cheltenham, Edward Elgar Publishing, 2006, p. 86.

¹⁹⁶ *Vid.* F. MUNARI & L. SCHIANO DI PEPE, "Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity", *op. cit.*, p. 184.

¹⁹⁷ *Ibidem*.

¹⁹⁸ *Vid.* ECJ, *Handelskwekerij G.J. Bier B.V. & the Reinwater Foundation v. Mines de Potasse d'Alsace S.A.*, judgment, case 21-76, ECLI:EU:C:1976:166. Hereinafter *Mines de Potasse*.

d'Alsace S.A. was performing massive discharges of substances into the river. When the Dutch undertaking decided it wanted to sue the French company in order to obtain compensation for the damages it faced the difficulty of needing to clarify the wording of Article 7.2, which in view of the relevant events had turned obscure. In order to determine which courts were competent on the matter, the terms “*the place where the harmful event occurred*” needed to be interpreted, to establish whether they referred to the Netherlands – “*the place where the damage took place or became apparent*” – or to France – “*the place where the act was or was not performed*”¹⁹⁹. The question reached the ECJ by the means of a reference for a preliminary ruling. In the *Mines de potasse* judgment the ECJ consecrated what is known as the “theory of ubiquity”²⁰⁰: when the place of the happening of the event giving rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression “*place where the harmful event occurred*” must be understood as covering both places²⁰¹. Consequently, the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage²⁰². As explained by the court, two reasons stand behind this decision: firstly, both the place of the event giving rise to the damage and the place where the damage occurred may constitute a significant connecting factor from the point of view of jurisdiction, since each of them may, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings²⁰³. Secondly, “*to decide in favour only of the place of the event giving rise to the damage would, in an appreciable number of cases, cause confusion between the heads of jurisdiction laid down by Articles [4.1] and [7.2], so that the latter provision would, to that extent, lose its effectiveness*”.

Therefore, the ratio of the decision largely corresponds with the principle of the sound administration of justice, and it is acknowledged that it is not directed at favouring any of the parties to the litigation, since both the alleged victim and the alleged tortfeasor may resort to it – the latter one in order to seek for a declaration of non-liability²⁰⁴.

¹⁹⁹ *Vid. Mines de Potasse, judgment, op. cit.*, para. 6.

²⁰⁰ The theory of ubiquity is further assessed in detail *infra*, Chapter 4, “*Origins and developments of the theory of ubiquity*”.

²⁰¹ The ECJ further considers that the place where the damage occurred “*can be understood only as indicating the place where the event giving rise to the damage [...] directly produced its harmful effects upon the person who is the immediate victim of that event*” (*Vid.*, ECJ, *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*, judgment, case C-220/88, ECLI:EU:C:1990:8).

²⁰² *Vid. Mines de Potasse, judgment, op. cit.*, para. 24 and 25.

²⁰³ *Vid. Mines de Potasse, judgment, op. cit.*, para. 15 and 17.

²⁰⁴ *Vid.* A. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol. II (9th ed.), Granada, Comares, 2008, p. 689. This position on “*Actions for a negative declaration*”, precognized by the said authors, was confirmed by the ECJ in its *Folien Fischer* ruling (ECJ, *Folien Fischer AG and Fofitec AG v Ritrama SpA*, judgment, case C-113/11, ECLI:EU:C:2012:664): “*Point (3) of Article 5 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action for a negative declaration seeking to establish the absence of liability in tort, delict, or quasi-delict falls within the scope of that provision*”. For a commentary, *vid.* E. RODRÍGUEZ PINEAU, “*Acciones negativas, derecho de la competencia y abuso de derecho procesal en la Unión Europea. Consideraciones sobre el asunto C-133/11, “Folien Fischer AG y Fofitec AG c. Ritrama SpA”*”, *Revista española de Derecho Europeo*, nº 47, 2013, pp. 125-147; H. MUIR WATT, “*Compétence en matière d’action en constatation négative visant à*

However, notwithstanding this neutral policy ratio, the theory of ubiquity is to be celebrated from the point of view of environmental protection: in the frame of environmental occurrences, in practical terms it may amount to expanding strategic and litigation options for plaintiffs, possibly even becoming a *forum actoris*, which can be profited from by environmental victims. Although this strategic dimension is not restricted to the realm of environmental torts, it is clear that avoiding the confusion between Articles 4.1 and 7.2 is extremely useful in environmental tort cases. As it will be seen *infra*, due to the fact that this theory can perfectly fit into the polluter-pays principle, it has been reflected, for a different set of policy reasons, in Art. 7 of Rome II²⁰⁵.

2. The Mosaic theory [*Shevill*]

While *Mines de potasse* addresses the question of how to interpret Article 7.2 in respect of “distant delicts” (*distanzdelikte*), *Shevill*, another crucial ECJ judgment on the same article, explores the difficulties entailed by situations of “multi-located damages”²⁰⁶. *Shevill* is a case on jurisdiction over an action for damages caused by the publication of a defamatory newspaper article which was published in France and distributed in other European countries, including the United Kingdom²⁰⁷. In its judgement, the ECJ, after restating the main principles in *Mines de Potasse*, specifies that in the case of “libel by a newspaper article” distributed in several Member States, the place of the event giving rise to the damage can only be the place where the publisher of the newspaper in question is established²⁰⁸. This is so because it is the place where the harmful event originated and from which the libel was issued and put into circulation. In consequence, the court of the place where the publisher of the defamatory publication is established must have jurisdiction to hear the action for damages for all the harm caused by the unlawful act. However, since that *forum* will generally coincide with that of Art. 4.1, the Court states that the plaintiff must have the option to bring proceedings also in the place where the damage occurred – where the harmful effects were produced upon the victim – since otherwise Art. 7.2 would be rendered meaningless. It is at this point that the ECJ introduces the so-called “mosaic theory” – which not only applies to damage arising from defamation, but generally to all sorts of torts²⁰⁹: in the case of an international libel, the injury

faire établir l'absence de responsabilité délictuelle ou Quasi-délictuelle”, *Revue critique de droit international privé*, 2013, pp. 506-511; C. ORÓ MARTÍNEZ, “Legitimación del presunto autor de un hecho dañoso para demandar a la víctima potencial ante el tribunal del lugar en el que tal hecho supuestamente se ha producido o pudiera producirse – Tribunal de

Justicia, Sala Primera, Sentencia de 25 de octubre de 2012. Asunto C-133/11 [Folien Fischer AG y Fofitec AG / Ritrama SpA]”, *Anuario español de derecho internacional privado*, Tomo XII, 2012, pp. 846-850.

²⁰⁵ The different ratios behind the use of the ubiquity principle are different as regards choice of law are examined, *inter alia*, *infra*, Chapter 4, “Origins and developments of the theory of ubiquity”.

²⁰⁶ *Vid.* A. L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol. II (9th ed.), *op. cit.*, pp. 691 and 695.

²⁰⁷ *Vid.* ECJ, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA.*, judgment, case C-68/93, ECLI:EU:C:1995:61. Hereinafter *Shevill*.

²⁰⁸ *Vid.* *Shevill*, judgment, *op. cit.*, paras. 23-32.

²⁰⁹ Although this general application of the Mosaic theory is nowadays uncontested general wisdom, G. KAUFMANN-KOHLER (“Internet: mondialisation de la communication - Mondialisation de la résolution des litiges?” in K. BOELE-WOELKI et C. KESSEDJIAN (eds.), *Internet: Which Court decides? Which law applies?* La

caused to the reputation of a natural or legal person crystallizes in the places where the publication is distributed, when the victim is known in those places. Consequently, in accordance with the principle of the sound administration of justice, the courts of each Member State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his / her reputation have jurisdiction over the case, but it is limited to ruling on the injury suffered in that very State. This is justified by the fact that each of those courts is the best placed in territorial terms both to assess the libel committed in the relevant State and to determine the extent of the corresponding damage. The ECJ closes its line of reasoning in the ruling by suggesting a remedy to this fragmentation: if the plaintiff is not satisfied by such perspective it can resort to the general *forum* of the defendant's domicile or to the first interpretation of "*place where the harmful event occurs*" – place of the event giving rise to the damage.

Despite the technological (r)evolution that has taken place in the 20 years that have elapsed since it was pronounced, *Shevill* has remained the relevant case-law in respect of the interpretation of Article 7.2 in all kinds of cases of multi-located damages. The only specific exception admitted by the ECJ pertains to cases of libel through internet: since the *e-Date* judgment in 2010 an additional jurisdictional option – the center of interests of the victim, which will usually be its habitual residence – has been added to the general *Shevill* reasoning whenever defamation (or an alleged "infringement of personality rights") is conducted through internet means²¹⁰. Other than this specific kind of case, all other kinds factual scenarios – breach of intellectual or industrial property rights through internet, for instance²¹¹ – are excluded from the additional jurisdictional option introduced by the *e-Date* ruling.

From the perspective of the victim of a tort, the mosaic theory and is a double-edged sword: on the one hand, it widens the scope of Article 7.2, as it results in a multiplicity of national courts having jurisdiction on the matter, but, on the other, jurisdiction becomes limited, since each national court will have jurisdiction only over the damages arising in the corresponding Member State. Despite appearances, and despite possibly not being as relevant as *Mines de Potasse*, the *Shevill* case-law is indeed significant for environmental torts, in respect of property held by given individuals on both sides of a State-boundary. In order just to provide a simple example, if a chemical cloud kills crops that a given farming society owns on both sides of a frontier, *Shevill* may be resorted to, if the counsels of such corporation deem it necessary for procedural and strategic reasons.

Haye, Kluwer Law International, 1999, pp. 113-119) contested in the late 1990s the idea that the principles in *Shevill* could possibly be transposed to other fields.

²¹⁰ ECJ, *eDate Advertising GmbH v X (C-509/09)* and *Olivier Martinez and Robert Martinez v MGN Limited (C-161/10)*, judgment, joined cases C-509/09 and C-161/10, ECLI:EU:C:2011:685.

²¹¹ *Vid.*, for instance, ECJ, *Peter Pinckney v KDG Mediatech AG*, judgment, case C-170/12, ECLI:EU:C:2013:635 (notably, paras. 45-46). In recent years there has been a string of ECJ decisions on Article 5.3 of the Brussels I Regulation (Art. 7.2 of Brussels I BIS) which have further dealt with specific situations and thematic fields. However, their content is not relevant for the purposes of this dissertation, and thus, they are not dealt with herein. For a summary analysis of the implications of this string of decisions, *vid.* the following blog entry at Conflict of Laws.net: K. SIRAKOVA, "Is the *Shevill* Doctrine Still Up to Date? Some Further Thoughts on CJEU's Judgment in *Hejduk* (C-441/13)", (<http://conflictoflaws.net/2015/is-the-shevill-doctrine-still-up-to-date-some-further-thoughts-on-cjeu-judgment-in-hejduk-c-44113/>), last consulted on November the 16th 2016).

This brief review of *Shevill* and the mosaic theory closes the fragment on special jurisdiction and on jurisdiction against European-based polluters altogether. Let us examine what happens, in terms of international jurisdiction, when the alleged environmental tortfeasor is domiciled outside the European Union.

ii. Jurisdiction over polluters based outside the European Union

As the law stands in June 2017, if a polluter is not based in the EU, then, by virtue of Article 6.1 of the Brussels I BIS Regulation, the Regulation gives way, and domestic rules of international jurisdiction come into play. In the case of Belgium, for instance, these rules are contained in its "*Code de droit international privé*" (CODIP)²¹², and in the case of Spain, in its "*Ley Orgánica del Poder Judicial*"²¹³. It has been contended that such restriction on the applicability of the Brussels I Regulation may entail an unequal access to justice for EU citizens from different member States facing similar situations²¹⁴. This is so because the subsidiary domestic heads of jurisdiction vary so widely that they may amount to placing citizens who face identical problems in diverging litigating positions: while some may be able to comfortably assert international jurisdiction before the courts of the Member State of their own domicile, others may be forced to litigate before third-country courts, without due process guarantees; or even worse, they may face denial of justice²¹⁵. For instance, certain countries, as Belgium²¹⁶ and Spain²¹⁷ are ready to cope with transboundary environmental torts caused by third-country

²¹² Vid. Loi du 16 juillet 2004, portant le Code de Droit International Privé, *M.B.*, 27 July 2004, p. 57344.

²¹³ Vid. Ley orgánica 6/1985, de 1 de julio, del Poder Judicial, BOE, núm. 157 de 2 de julio de 1985, pp. 20632-20678 (as amended by Ley Orgánica 7/2015, de 21 de julio, por la que se modifica la L.O. 6/1985, de 1 de julio, del Poder Judicial, BOE, núm. 174 de 22 julio de 2015, pp. páginas 61593 a 61660).

²¹⁴ For an overview of the notion of "access to justice" (the right to an effective remedy and to a fair trial, as embodied in Article 47 of the Charter of Fundamental Rights of the European Union, in Chapter VI "Justice") and its value within the European legal order, vid. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, Publications Office of the European Union, 2011. The notion is defined in p. 14 as comprising the following rights: "right to an effective remedy before a tribunal; right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law; right to be advised, defended and represented; and right to legal aid for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

²¹⁵ Vid. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 174 final, pp. 5-6.

²¹⁶ Vid. Article 96.2.b of the Belgian *Code de Droit International Privé*: "*Les juridictions belges sont compétentes pour connaître de toute demande en matière d'obligations, outre dans les cas prévus par les dispositions générales de la présente loi, lorsque cette demande concerne : [...] 2° une obligation dérivant d'un fait dommageable, [...] a) si le fait générateur de l'obligation est survenu ou meance de survenir, en tout ou en partie, en Belgique ; ou b) si et dans la mesure où le dommage est survenu ou menace de survenir en Belgique*".

²¹⁷ Vid. Article 22 "quinquies" of the Spanish *Ley Orgánica del Poder Judicial*, as inserted by the 2015 amendments, which reads: "*Asimismo, en defecto de sumisión expresa o tácita y aunque el demandado no tuviera su domicilio en España, los Tribunales españoles serán competentes: [...] b) En materia de obligaciones extracontractuales, cuando el hecho dañoso se haya producido en territorio español*" (emphasis added). Based on the similarity between this wording and the Spanish wording of Article 7.2 of the Brussels I BIS Regulation, it may be possible to conclude that the former is meant to be

polluters: their domestic heads of jurisdiction on tortious matters use as a criterion for asserting jurisdiction, *inter alia*, the place where the damage – tortious result – arises. This provides Spanish and Belgian environmental victims with the possibility of bringing third-country polluters before the courts of their respective countries. Unfortunately, this is not the case of the entirety of the Member States of the European Union. Finland, Greece and Poland do not have any kind of domestic head of jurisdiction on tortious matters²¹⁸. Austria, the Czech Republic, Cyprus and Malta have inadequate heads of jurisdiction: their heads of jurisdiction in tortious matters are not based on the notion of place of damage or tortious result, but on the notion of place of activity²¹⁹. This entails that they are helpless whenever they suffer environmental damage caused by a third-country polluter and the act or omission giving rise thereto is not located in their territories.

Thus, overall, 25 % of the EU Member States are not ready to cope with the kind of situation described. Victims domiciled in these countries would have to seek judicial redress in the relevant third-country – if available – or else face a denial of justice. In other words, in situations of transboundary environmental damage, if the polluter is domiciled outside the EU, a domestic head of jurisdiction based on the place where the tortious result arises is required. Otherwise, the concerned State will be unprotected against environmental menaces coming from outside the EU.

In the frame of the recent recast of the Brussels I Regulation, the EU Commission suggested the possibility of expanding the scope of the Regulation through the suppression of its *ratione loci* condition of applicability²²⁰. This would have entailed the universal application of its rules on jurisdiction – i.e. their application would have been mandatory in order to assert international jurisdiction in every single situation, thus leaving no room to the national rules on

interpreted in the same terms as the latter. This would be logical, since the original Article 22.3 of the Ley Orgánica del Poder Judicial (before the 2015 amendments), was already interpreted in the same terms. The original Article read: "[e]n el orden civil, los Juzgados y Tribunales españoles serán competentes: [...]3. En defecto de los criterios precedentes [...] en materia de obligaciones extracontractuales, cuando el hecho del que deriven haya ocurrido en territorio español o el autor del daño y la víctima tengan su residencia habitual común en España" (emphasis added). As explained by Calvo & Carrascosa (A. L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol. II (9th ed.), *op. cit.*, p. 699) the second part of the provision was useless even at the time of its original drafting: due to the equivalence under Spanish Law of the concepts of "habitual residence" and "domicile", a common habitual residence in Spain would mean that defendant was domiciled in Spain, and thus that the Brussels I Regulation should have been used in order to assert jurisdiction. As regards the first part of the provision, the same authors contended that it had to be interpreted in the same sense as Article 5.3 of the Brussels I Regulation, including the *Mines de Potasse* case-law. They based this contention on a ruling by the *Audiencia Provincial de Barcelona* (26th of April 2007) which considered that Article 5.3 was a direct inspiration when the original Article 22.3 of the *Ley Orgánica del Poder Judicial* was drafted.

²¹⁸ Vid. A. NUYTS & K. SZYCHOWSKA, "Study on residual jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations)" - *General report*, JLS/C4/2005/07-30-CE, Brussels, Université libre de Bruxelles, 2007, pp. 32-33.

²¹⁹ *Ibidem*.

²²⁰ Vid. Green paper on the review of Council Regulation (EC) N° 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final, p.3. This possibility was justified on grounds of equal access to justice throughout the Union.

international jurisdiction, and ensuring homogeneity in access to justice²²¹. Nevertheless, such proposal of "universality" was rejected²²², and *de lege lata*, the new Brussels I BIS Regulation, as its predecessor, can only be used to assert jurisdiction over defendants domiciled within the EU²²³.

iii. *Conclusions on international jurisdiction in the European Union*

After having briefly reviewed in previous pages the notion of international jurisdiction as implemented in the European Union, the environmentally relevant aspects that arise therefrom may be summarized as follows:

As regards environmental damage taking place in European territory, if the defendant is a European-based legal person, the victim may have up to five different *fora* at her disposal: the three "versions" of the domicile of a (legal person) defendant, the place where the event giving rise to damage takes place and the place where the tortious result crystallizes. This wide jurisdictional discretion is very comfortable for the victim, since it provides an important amount of flexibility, allowing her to choose the jurisdiction that is most convenient in strategic, economic or practical terms. Of course, such amount of flexibility decreases predictability for the tortfeasor, but as it has been explained, the triple dimension of the domicile of a legal person is the mere result of her structural choices, and the double dimension of the "*place where the harmful event occurred*" is required to give *effet utile* to Art. 7.2. Consequently, from an environmental tort point of view, the relevant rules on jurisdiction seem to be satisfying, and the only improvement that could be made – although not strictly necessary – would be to codify the mosaic and ubiquity theories into Art. 7.2.

On the other hand, as seen in previous pages, whenever environmental damage is caused in European territory by non-European based tortfeasors questions may be raised as regards guarantees of access to justice. Access to justice being a fundamental value for building the European area of freedom, security and justice²²⁴, further efforts in order to enhance it should

²²¹ On the eventual universalization of the scope of the regulation, *vid.*, J. WEBBER, "Universal jurisdiction and Third States in the reform of the Brussels I Regulation", *RebelsZ*, 2011, pp. 629-643; A. BORRÁS, "La aplicación del Reglamento Bruselas I a domiciliados en terceros Estados: los trabajos del Grupo Europeo de Derecho Internacional Privado", *Anuario Español de Derecho Internacional Privado*, vol. X, 2010, pp. 795-814.

²²² This is so to the relief of third countries, which even before the brain-storming leading to the recast of the Brussels I Regulation already considered that some of the criteria of international jurisdiction in the Regulation were too invasive (*Vid.* T. KRUGER, *Civil jurisdiction rules of the EU and their impact on third States*, Oxford, Oxford University Press, 2008, p. 421).

²²³ This is so notwithstanding the above-referred exceptions: the heads of exclusive jurisdiction, and the provisions on prorogation of jurisdiction, which have their own criteria of spatial applicability.

²²⁴ As recalled by M.-L. NIBOYET & G. DE GEOUFFRE DE LA PRADELLE (*Droit international privé* (4th ed.), Paris, L. G. D. J., 2013, p. 24) the effective instauration of an area of freedom security and justice dates back to the entry into force of the Treaty of Amsterdam, even if it is built on foundations already introduced in the European legal order by the Treaty of Maastricht. Furthermore, its programmatic evolution can be seen in the Tampere 1999, The Hague 2004 and Stockholm 2009 programmes. As explained by the referred authors, the idea embodied in the notion of an area of freedom security and justice is to overcome the logic of a coexistence of different legal systems in order to fully reach a ratio of legal integration throughout the Member States of the European Union: "*On ne cherche plus seulement à*

be considered, not only in order to foster such value *per se*, but in order to ensure systemic coherence: access to justice for third-country victims of European polluters is ensured; EU polluters who cause environmental harm in third countries can be brought to justice before an EU court by using the general head of jurisdiction of the domicile of the defendant, as established by the ECJ's *Josi* case-law²²⁵. Why not come full-circle and ensure access to justice to European victims of environmental torts caused by third country polluters when the environmentally harmful effect is felt in Europe?

This having been said, the description of conflict-of-laws basics will continue by dealing with choice of law.

E. Basic concepts of conflict of laws (II): Choice-of-law on environmental torts (Art. 7 Rome II as an illustration)

Once the identification of the potential judge(s) having jurisdiction over the dispute at stake has been accomplished, the following step in the conflict-of-laws process is to determine the substantive solution that may be given thereto²²⁶. As per their very nature, private relationships at the international level are connected to more than one legal order; therefore, determining the dispute's resolution is not as straightforward as with purely domestic situations. In the absence of a relevant international treaty providing uniform substantive private-law solutions²²⁷ – i.e. a treaty binding upon the relevant court and applicable to the dispute at stake – individuals involved in the referred legal relationship face a “conflict of laws”²²⁸. This expression refers to the situation of a social actor who participates in a

promouvoir la liberté de circulation des jugements en Europe, mais on a l'ambition d'aménager un espace judiciaire européen dont les fondations seraient une communauté de valeurs, celle des droits humains, et les principes de sécurité juridique et d'égalité”. The fundamental value of access to justice in the frame of the referred area of freedom, security and justice can be seen in the references already provided to documents issued by the European Institutions pertaining to the Recast of the Brussels I Regulation. For further considerations in this respect, most notably in respect of what an “international case” is, and the impact of the *Owusu* case-law, *vid. infra*, Chapter 3, “European criticism and European responses” (a sub-section on critiques to the notion of *forum non conveniens*, which thoroughly discusses the referred case).

²²⁵ *Vid.* ECJ, *Group Josi Reinsurance Company SA*, judgment, case C-412/98, ECLI:EU:C:2000:399.

²²⁶ The substantive solution attained in front of each of the courts which potentially have international jurisdiction may be different: depending on the relevant sources of law in force within each legal order outcomes may vary, either through substantive uniform law or through “la méthode conflictuelle”. In order to simplify the explanation, the main text omits this point.

²²⁷ *Vid.* F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), *op. cit.*, p. 80: “La méthode sans doute la plus séduisante d'un point de vue conceptuel consiste à éliminer le conflit de lois par l'élaboration de règles matérielles communes aux différents États dont les droits sont en concours [...] Pour séduisante qu'elle soit, cette méthode n'est pas généralisée. Plutôt récente, elle repose sur la possibilité d'obtenir un accord entre États, de préférence entre un nombre significatif d'États. Malgré son intérêt, la méthode d'uniformisation du droit matériel n'a pas encore cessé d'être marginale”. Similarly, *vid.* B. AUDIT & L. D'AVOUT, *Droit international privé* (7th ed.), Paris, Economica, 2013, pp. 5 & 8.

²²⁸ Although, as explained in the introduction, the term “conflict of laws” will be used throughout this dissertation as comprising both choice-of-court and choice-of-law issues (as it is done, amongst others, in J. H. C. MORRIS ET AL., *Dicey's Conflict of Laws* (7th ed.), London, Steven & Sons limited, 1958), in this precise paragraph it is used in a stricter sense, therefore as an equivalent to choice of law. In the same

transboundary relationship and who wonders how to act in order to act “*in conformity with the law*”, as she faces a plurality of laws stemming from a plurality of States, containing diverging substantive solutions²²⁹.

As it is well-known, the logical method to solve this situation, and the only operational one in the absence of an international agreement, consist on fixing the spatial / territorial scope of application of State-produced substantive legal rules²³⁰. This is done through the operation of choice-of-law rules. In the following pages, a binomial typology of these rules will be presented, following classification criteria vividly emblazoned in French-speaking legal academia (i, ii). Within such approach, a very classic / conservative understanding of the relevant notions will be presented. Subsequently, the specific choice-of-law solution introduced in the European Union in respect of environmental matters will be presented. But before addressing the relevant provision (iv), attention will be paid to its context – the EU Regulation where it is contained (iii).

i. Typology of choice-of-law rules (I): multilateral choice-of-law rules (règles de rattachement)

Despite being more recent in time, the first kind of choice-of-law rule to be presented is the one that may be considered to be dominant nowadays²³¹: multilateral choice-of-law rules (or “*règles de rattachement*” in French). This kind of “indirect” provision limits itself to designating the legal system where the solution to the situation at stake is to be found; methodologically, it determines the law to be applied to a given situation abstractly, without regard to the content of the provisions thereby declared applicable. Therefore, it embodies an objective

sense, *vid.* D. MCLEAN & K. BEEVERS, *The conflict of laws* (7th ed.), London, Sweet & Maxwell, 2009, pp. 1-21, especially pp. 4-5).

²²⁹ *Vid.* F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), *op. cit.*, pp. 34-35 (“L’expression « conflit de lois » se réfère de manière imagée à la situation de l’acteur social participant à une relation transfrontière et qui, face à la pluralité des droits étatiques contenant des règles de droit matériel aux solutions discordantes, s’interroge sur la manière de se conduire pour agir conformément au droit. En un premier sens, l’expression désigne le caractère conflictuel des solutions respectivement apportées à la même question de droit par différents ordres juridiques étatiques”). In a similar sense, *vid.* NIBOYET & DE GEOUFFRE DE LA PRADELLE, *Droit international privé* (4th ed.), *op. cit.*, p. 121: “[...] la situation de conflit de lois naît de la vocation concurrente de lois relevant d’au moins deux systèmes juridiques différents [...] à régir une même situation juridique internationale [...]”. *Vid.*, identically, D. BUREAU & H. MUIR WATT, *Droit international privé*, vol. I (3rd ed.), Paris, PUF, 2014, p. 28. *Vid.* close in content, but with different nuances, B. AUDIT & L. D’AVOUT, *Droit international privé* (7th ed.), *op. cit.*, p. 9: “Il s’ensuit ainsi un risque de réglementation cumulative et contradictoire, la même situation étant appréhendée par les lois de différent pays avec lesquelles elle présente des rattachements. Certes, dans l’expression « conflit de lois », le conflit est purment virtuel et désigne la simple concurrence de deux ou plusieurs lois nationales ayant vocation à s’appliquer”.

²³⁰ *Vid.* F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), *op. cit.*, p. 81.

²³¹ *Vid.* A. V. M. STRUYCKEN, “Coordination and co-operation in respectful disagreement - General Course on Private International Law”, *Recueil des Cours de l’Académie de Droit International*, vol. 311, Leiden, Martinus Nijhoff, 2009, p. 218. This author qualifies it as “new but in the meantime traditional, or even “classical”, approach, often connected to the name of Von Savigny”.

designation of the relevant legal system, without referring to any pre-identified State. This is why it is qualified as being multilateral²³².

This description corresponds to what can be called a rationalist approach to choice-of-law: historically, this approach first aimed at finding the "seat" of a legal relationship – as it was the case with the paradigmatic Savignian choice-of-law rule²³³, and with the rules that J. H. Beale "codified" in the North-American Restatement (First) of the Conflict of Laws²³⁴. Later, during the second half of the 20th century, choice-of-law rules in Europe evolved, as a reaction to the American Conflict-of-Laws Revolution and the Restatement (Second) of the Conflict of Laws²³⁵ towards the so-called "proximity principle", or the "closest connection" paradigm: the selection of the most closely connected legal order to the issue at stake. Either way, typically, multilateral choice-of-law rules have generally been "objective" or "neutral"²³⁶, i.e. they have indicated the law to be applied to the situation at stake regardless of any sort of consideration as to the result they may lead to.

²³² These lines are a rough translation of the following excerpt from F. RIGAUX & M. FALLON (*Droit International Privé* (3rd ed.), *op. cit.*, p. 81): "Le dispositif de la règle de rattachement, norme proprement indirecte, se borne à désigner le droit applicable à la situation [...] La notion de rattachement est liée à une méthode qui détermine le droit applicable à une situation particulière, abstraction faite du contenu matériel des règles de droit ainsi déclarées applicables. La règle de rattachement désigne ce droit de manière objective, sans référence à un État nommé. Une telle règle est alors qualifiée de « multilatérale »".

²³³ *Vid.* K. F. VON SAVIGNY, *Traité de Droit Romain*, Paris, Panthéon-Assas, 2002, notably, pp. 1-132 (This is a French translation of Von Savigny's mythic work, originally published in the 19th century).

²³⁴ The Restatement First is a non-legally binding academic codification where the core traces of the common-law-based North-American conflict of laws, as it stood in 1934, were reflected, at least as Beale and some of his contemporaries saw them (*Restatement, Conflict of Laws*, 1934). B. AUDIT ("Le caractère fonctionnel de la règle de conflit (Sur la « crise » des conflits de lois)", *Recueil des Cours de l'Académie de Droit International*, vol. 186, Leiden, Martinus Nijhoff, 1984, pp. 240-241) considers that the rules in the Restatement first have a typically savignian structure, and that: "les préoccupations fondamentales de Beale prolongent au demeurant celles de Savigny". For an analysis of the First Restatement and its linking to the "vested rights theory" from a European perspective, *vid.* B. HANOTIAU, *Le droit international privé américain : du premier au second restatement of the law, conflict of laws*, Louvain-la-Neuve, Université catholique de Louvain – Faculté de droit, 1979, pp. 7-22. For a rather harsh critique of the First Restatement *vid.* E. G. LORENZEN & R. J. HEILMAN, "Restatement of the Conflict of Laws", *University of Pennsylvania Law Review*, vol. 83-5, 1935, pp. 555-589. For a more modern critique which criticizes the fact that the Restatement First was still followed in the 1990s by 11 jurisdictions, and overall, wishes for a total abandonment thereof, *vid.* W. M. RICHMAN, & D. RILEY, "The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts", *Maryland L. Rev.*, vol. 56, 1997, pp. 1196-1231.

²³⁵ This idea has been extracted from P. LAGARDE's seminal course at the Hague Academy of International Law ("Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé", *Recueil des Cours de l'Académie de Droit International*, vol. 196, Leiden, Martinus Nijhoff, 1986, pp. 25-28). For a summary description of the Revolution and the content of the Restatement (second), *vid.* B. AUDIT, "Le caractère fonctionnel de la règle de conflit (Sur la « crise » des conflits de lois)", *op. cit.*, pp. 242-248. For more elaborated developments on this historic events in the development of conflict of laws in North-America, *vid.* S. C. SYMEONIDES, "The American choice-of-law revolution in the courts: today and tomorrow", *Recueil des Cours de l'Académie de Droit International*, vol. 298, Leiden, Martinus Nijhoff, 2002.

²³⁶ *Vid.* A. L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol. I (9th ed.), *op. cit.*, pp.229-233.

However, conversely, multilateral choice-of-law rules can follow a functionalist approach, i.e. they can be “content-oriented”. Thus, instead of being “blindfold”, this kind of provisions quite precisely responds to considerations as to the content of the substantive law to be applied: they are inspired by substantive concerns and they pursue specific substantive results, which are frequently expressly stated in their very wording²³⁷. This is why they are also called “*result-selective*” (or “*à caractère matériel*” and “*à finalité matérielle*” in French legal literature). The means to reach the desired policy result are varied, but the most commonly used is to resort to rules bearing an alternative structure²³⁸, i.e. rules designating two or more legal systems as potentially applicable, and establishing that the one to be effectively applied is the one which allows obtaining the desired result²³⁹.

²³⁷ Vid. B. AUDIT, “Le caractère fonctionnel de la règle de conflit (Sur la « crise » des conflits de lois)”, *op. cit.*, p. 363: “Or, de plus en plus des règles de conflit s’ouvrent à des considérations matérielles, poursuivant des objectifs concrets [...] Dans d’autres cas, la règle de conflit est orientée vers un résultat matériel et cesse alors incontestablement d’être neutre [...] un pas de plus est franchi lorsque la règle révèle expressément la faveur à un certain résultat et surtout à une certaine personne [...]”. Vid. also P. LAGARDE, “Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé”, *op. cit.*, pp. 56-57 : “On assiste à l’époque contemporaine à un développement notable des règles de conflit de lois inspirées de préoccupations de droit matériel ou plutôt de règles de conflit dont le but avoué est de désigner l’ordre juridique qui permettra le plus sûrement d’obtenir le résultat matériel voulu par l’auteur de la règle de conflit”. Furthermore (*ibidem*): “Ces règles de conflit diffèrent des lois de police qui sont des lois matérielles unilatérales revendiquant, pour atteindre leur objectif, leur application aux situations entrant dans leur champ, mais qui se désintéressent de la solution qui sera donnée aux rapports de droit se trouvant en dehors de leur domaine d’application. Elles diffèrent aussi des règles matérielles de droit international en ce que ces dernières prétendent parfois régir directement les situations internationales, sans le détour de la règle de conflit. Lorsque le législateur, par exemple, édicte une règle de conflit à finalité matérielle, il a en vue, dans l’abstrait, un certain résultat et il utilise pour l’atteindre le procédé de la règle de conflit, en prenant d’ailleurs le risque que ce résultat ne soit pas atteint”. If Lagarde’s course on the proximity principle is seminal in respect of that notion, the same can be said in respect of B. Audit’s course in respect of functionalism. For an interface between functionalism and the law-beyond-the-state debates, whose authors firmly support the private law-making phenomenon, *vid.* C. JOERGES & F. RÖDL, “À propos de l’évolution fonctionnelle du droit des conflits de lois II : une constitution légitime pour la constellation post-nationale”, *Revue internationale de droit économique*, 1/2013 (t. XXVII), 2013, p. 79-93.

²³⁸ A. BUCHER (“La dimension sociale du droit international privé – Cours general”, *Recueil des Cours de l’Académie de Droit International*, vol. 341, Leiden, Martinus Nijhoff, 2009, p. 28) identifies alternative structures with content-orientedness. However, there are other possible structures which may reflect content-orientedness (Cfr. B. AUDIT, “Le caractère fonctionnel de la règle de conflit (Sur la « crise » des conflits de lois)”, *op. cit.*, p. 362). In any case, B. AUDIT (*ibidem*, p. 361) largely admits the “recoupement” between both phenomena in a paragraph that sublimely summarizes the core differences between the “classic” choice-of-law rule, and its “evolution”: “Le procédé de la règle de conflit, dans sa pureté, présente trois caractéristiques importantes : le petit nombre de règles, l’association d’un rattachement unique à une qualification donnée, l’indifférence au résultat (sous réserve de l’ordre public). Cette conception théorique admet toutefois des infléchissements, lesquels tendent à se multiplier dans les législations modernes [...]. Les caractères précités sont respectivement atténués de trois manières, entre lesquelles existent des larges recoupements : la spécialisation des règles de conflit, la pratique des rattachements multiples ou souples et l’introduction de considérations matérielles [...]”.

²³⁹ Vid. P. LAGARDE, “Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé”, *op. cit.*, pp. 56-57: “Pour privilégier un certain résultat, le législateur décide que si ce résultat peut être obtenu par l’une ou l’autre des lois qu’il déclare alternativement applicables, c’est cette loi qui sera appliquée. On en trouve des illustrations fréquentes en matière de forme des actes, mais aussi en bien d’autres domaines comme la filiation”.

It may be easily understood that the policy-driven character of this latter kind of choice-of-law rule may be considered problematic from certain points of view. One of them is the "*quasi-impossibilité d'aboutir à une unification géographiquement étendue du droit international privé au moyen de règles de conflit à caractère matériel*"²⁴⁰. In this sense it is contended that, while it is understandable that a State may want to promote certain policies or protect certain interests even at the level of international relations, this kind of provision risks causing severe problems within the realm of conflict of laws: they may entail, within private international law, the cristalization of the divergences that may be noticed amongst competing substantive rules from various States²⁴¹.

Therefore, since content-oriented rules hinder the international unification of conflict-of-law solutions, they do not gather the sympathy of classic private international lawyers²⁴². However,

²⁴⁰ Vid. P. LAGARDE, "Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé", *op. cit.*, p. 60.

²⁴¹ *Ibidem*, pp. 58-59 : "Le recours à ce type de règles doit évidemment être laissé à la discrétion du législateur et l'on peut comprendre qu'un Etat veuille, même dans les relations internationales, promouvoir ou faire triompher certaines politiques, ou certains intérêts qu'il juge particulièrement dignes de protection [...] Mais [...] ces règles de conflit, qui ne sont que le reflet de politiques législatives étatiques, risquent de cristalliser sur le terrain des conflits de lois les divergences existant entre les règles matérielles concurrentes des différents Etats. Dans cette mesure, elles peuvent être un frein à l'harmonisation internationale des solutions". The extract goes on as follows: "On objectera que de nombreuses conventions internationales ont adopté de telles règles de conflit à finalité matérielle, par exemple les Conventions de La Haye sur les conflits de lois en matière de forme des dispositions testamentaires ou sur la loi applicable aux obligations alimentaires, ou encore certaines dispositions de la Convention de Rome (art. 5, 6 et 9). C'est vrai, mais seulement parce que, sur ces points précis, existait entre les Etats contractants un accord sur les politiques législatives de droit matériel. Les illustrations du contraire sont nombreuses". Nevertheless, *vid.* W. S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", *Harvard International Law Journal*, vol. 39-1, 1998, pp. 101-169. This author presents arguments in respect of the unilateral application of legislation, whose transposition to the field of content-oriented rules may be interesting to consider. The said author considers that the "clash" of policies arising from the extraterritorial application of laws may enhance international negotiations (pp. 106 & 158-169). It needs to be considered whether a similar clash may arise from the existence of content-oriented choice-of-law rules, and what results this may lead to. In any case, in respect of the menace that content-oriented rules entails, Lagarde ("Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé", *op. cit.*, p. 64) considers that: "[I]a conclusion [...] est que le principe de proximité est le seul qui puisse fonder dans sa plénitude la règle de conflit bilatérale. Le principe de souveraineté débouche logiquement sur l'unilatéralisme. Les rattachements à finalité matérielle dissimulent sous l'apparence d'une règle de conflit des règles matérielles imposées dans l'ordre international. Ils font obstacle à l'unification internationale et peuvent conduire à terme à la ruine de la règle de conflit. Le principe d'autonomie, seul, échappe à ces reproches, mais c'est parce que, le plus souvent, il est le complément rationnel du principe de proximité".

²⁴² As put, for instance by P. PICONE ("Les méthodes de coordination entre ordres juridiques en droit international privé : Cours général de droit international privé", *Recueil des Cours de l'Académie de Droit International*, vol. 276, Leiden, Martinus Nijhoff, 1999, p. 37): "Le principal objectif de la méthode traditionnelle de solution des conflits de lois est exprimé, comme il est bien connu, par le « principe d'uniformité » ou de l'« harmonie internationale des décisions ». It must be mentioned, that while these pages restrain themselves to describe the conflictual justice v. substantive justice dichotomy, there may be contended that there is a certain "middle ground" between both notions: "[...] some conflict rules tend to protect the weak party by designating the law best known by this party. Such is the case for consumer and employee's protection matters. As a result, conflict rules can pursue specific policies of private international law (different from substantive policies) and nevertheless remain neutral: the search for a close connection matching the expectation of both parties or of the party deserving special

the importance of the multilateral choice-of-law rule, be it neutral or content-oriented, for the solution of conflicts of laws, must not entail the oblivion of the existence of another kind of rule which fulfills the same function.

ii. *Typology of choice-of-law rules (II): scope rules (règles d'applicabilité)*

A second technique to deal with choice-of-law issues, which was the first one to arise in history²⁴³, is the one generally known as "Unilateralism". The unilateralist method consists in directly fixing the spatial / territorial scope of application of a given substantive provision or set of provisions²⁴⁴. This is done through a *règle d'applicabilité*²⁴⁵ (or *scope rule* in English, or *norma de extensión* in Spanish), which can be defined as a special kind of choice-of-law rule "(either legally established, or deduced from a legal text through interpretation) which determines the spatial scope of application of the substantive rules to which it is attached"²⁴⁶.

protection remains detached from the content of the designated law and from the final outcome of the case" (S. FRANCO, "The External Dimension of Regulation Rome I and Regulation Rome II – A Schizophrenic Policy of Neutrality", in H. MICKLITZ, M. CREMONA (eds.), *The external dimension of European Private Law*, Oxford, OUP, 2015, pp. 71-106, at p. 82).

²⁴³ Vid. A. V. M. STRUYCKEN, "Coordination and co-operation in respectful disagreement - General Course on private international law", *op. cit.*, p. 218. This is not the appropriate place to provide an adequate account of the history and evolution of Private International Law and its methodologies. The historical origins of unilateralism are summarized by S. C. SYMEONIDES ("The American choice-of-law revolution in the courts: today and tomorrow", *op. cit.*, p. 358) as follows: "*Historically, unilateralism preceded multilateralism. The Italian statutists developed the original unilateral method in the twelfth century, and their French and Dutch successors improved upon it. This method is based on two premises: (1) that conflicts of laws should be resolved on the basis of the involved states' respective claims to apply their law; and (2) that one can ascertain those claims by examining each involved state's relevant substantive statutes (statuta) and determining whether they were intended to reach the case at hand*". For a summary presentation of unilateralism as a methodology in choice of law, vid. G. RÜHL, "Unilateralism in European Private International Law", in J. BASEDOW, K. HOPT & R. ZIMMERMANN (eds.), *Max Planck Encyclopedia of European Private Law*, Oxford, OUP, 2012. For some reflections on the relative lesser success of unilateralism as an academic tendency in Europe, vid. A. PRUJINER, "Le droit international privé: un droit de rattachement", in C. DOMINICE, R. PATRY & C. REYMOND (eds.), *Etudes de droit international privé en l'honneur de Pierre Lalive*, Basel / Frankfurt am Main, 1993, pp. 161-173, at pp. 169-172.

²⁴⁴ P. PICONE ("Les méthodes de coordination entre ordres juridiques en droit international privé : Cours général de droit international privé", *op. cit.*, pp. 40-42) expresses the notion in terms of "auto-rattachement": "*la localisation à suivre est indirectement obtenue par le fait qu'une loi « veuille », de son point de vue, régir un cas d'espèce*".

²⁴⁵ For a thorough analysis, vid. M. FALLON, "Les règles d'applicabilité en droit international privé", in *Mélanges offerts à Raymond Vander Elst*, Bruxelles, Nemesis, 1986, pp. 285-322. Vid. also F. RIGAUX, "Les règles de droit délimitant leur propre domaine d'application", *Annales de Droit de Louvain*, 1983, pp. 285-331, esp. 305-311.

²⁴⁶ Vid. F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), *op. cit.*, p. 129. Literally, in French: "*disposition- législative ou déduite de la loi par voie d'interprétation- qui fixe le domaine d'application dans l'espace des règles matérielles auxquelles elle est attachée*". Alternatively, the European Court of Justice deals with the notion in terms of "*a criterion [for a legal instrument] to be applicable*" (Vid. ECJ, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, judgment, case C-366/10, ECLI:EU:C:2011:864; paragraph 125).

Despite divergences in terminology from one language to another, and divergences in conceptualization from one author to another²⁴⁷, the notion of scope rule may be carefully distinguished from other related conflict-of-laws concepts, with which it may possibly share given features but which are by no means synonyms:

i) Firstly, “[c]e que l’on propose d’appeler « règle d’applicabilité » recouvre un concept visé sous d’autres appellations. L’expression la plus courante en langue française est celle de « loi d’application immédiate » ou de « loi d’application nécessaire ». Le qualificatif « nécessaire » traduit le degré d’impérativité de la règle. Le qualificatif « immédiate » fait apparaître que la règle évite le détour d’une règle de rattachement. Dans les deux cas, ces appellations ont le mérite de montrer le caractère dérogatoire de la règle par rapport à la règle de rattachement. Elles comportent cependant une approximation d’ordre technique. En effet, ce qui constitue la disposition de droit international privé n’est pas la « loi » elle-même, mais plus précisément une disposition - « ou règle » - inscrite dans cette loi pour en fixer le domaine d’application”²⁴⁸.

ii) Secondly, the scope rule, as a manifestation of “unilateralism”, can be distinguished from the unilateral choice-of-law rule by analyzing the focus of each kind of rule: while the scope rule determines the spatial applicability of the substantive provisions to which it is attached, the unilateral – as opposed to multilateral – choice-of-law rule determines that, as regards a given kind of legal relationship, the law of a pre-identified country is to be applied. Audit²⁴⁹ implicitly recognizes that the frontiers between both notions may become somewhat blurry under certain circumstances. This can be inferred from his acknowledgement that, despite being worded in unilateral terms – its object being the French “lois” – Article 3.3 of the Code de Napoléon is interpreted as being a unilateral choice-of-law provision – i.e. as if it determined that the status and capacity of those bearing the French nationality are determined by French Law.

Despite the above-mentioned terminological and conceptual diversity, which may hinder their correct identification and systematic assessment, the importance and practical impact of scope

²⁴⁷ For B. AUDIT (“Le caractère fonctionnel de la règle de conflit (Sur la « crise » des conflits de lois)”, *op. cit.*, pp. 248-250) the expressions “loi de police”, “loi d’application immédiate” and “norme autolimitée” seem to be synonymous, while for M. FALLON, following R. VANDER ELST “loi de police” and “norme d’application immédiate” are to be distinguished, many of the latter not responding to the features of the former (M. FALLON, “Les règles d’applicabilité en droit international privé”, *op. cit.*). Furthermore, for P. KINSCH (“L’autolimitation implicite des normes de droit privé matériel”, *Revue critique de droit international privé*, 2003, pp. 403-435.) the phenomenon of self-limitation of substantive provisions is to be placed totally outside the realm of Private International Law: it is merely a question of the inapplication of a given special provision in favour of general provisions within the same legal order, which only happens after the applicable legal order has been determined (pp. 405 & 410). He even suggests a test to distinguish a self-limiting provision from a “règle de conflit unilatérale”. *Cfr.* with P. HAY, “Comments on “Self-Limited Rules of Law” in Conflicts Methodology”, *Am. J. Comp. L.*, vol. 30, 1982, pp. 129-141, who reviews the notion from the North-American standpoint, tracing some parallelisms with North-American conflicts thinking and contends (p. 134) that “[...] even a self-limited rule of substantive law does have aspects of a conflicts rule [...]” and that “[t]he lines are much more fluid at least from the methodological perspective of American law”. He thus concludes (p. 141) that “[w]hatever approach is used for the choice-of-law determination, the discovery of a self-limitation in foreign or forum law will often enter into the choice-of-law process”.

²⁴⁸ *Vid.* F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), *op. cit.*, pp. 130-131.

²⁴⁹ *Vid.* B. AUDIT, “Le caractère fonctionnel de la règle de conflit (Sur la « crise » des conflits de lois)”, *op. cit.*, pp. 231-232.

rules cannot be neglected. They will prove to have a very relevant role in developments on uniform substantive law, presented ahead in Part I (Chapter 2).

The presentation of the scope rule closes the introduction of the main theoretical choice-of-law notions that will be used throughout the dissertation. Let us turn to the rule which will be presented as an example of choice-of-law rules dealing with environmental matters, Article 7 of the European “Rome II” Regulation. Before doing so let us first briefly examine the Rome II Regulation, as the systematic context thereto.

iii. *The systemic context to the provision at stake: the Rome II Regulation*

Despite the fact that several years have elapsed after the adoption and entry into application of the Rome II Regulation, it may be useful to summarily recall its main aspects and features. This will allow a better understanding of the systemic context to the provision that lies at the core of this dissertation. Unlike the Brussels I BIS and Rome I²⁵⁰ Regulations, Rome II is a completely new European legal instrument²⁵¹, dealing generally with the law applicable to non-contractual obligations²⁵². It entered into application on the 11th of January 2009²⁵³ in all the member States except Denmark²⁵⁴, and, as it is well-known by European private international lawyers, its name derives from the denomination of the 1980 Convention on the law applicable to contractual obligations, known as the *Rome Convention*²⁵⁵, which was later on transformed into the referred Rome I Regulation. Truth be told, the very earliest drafts of the Rome Convention contained rules on both the law applicable to contractual and non-contractual obligations, but due to the difficulties faced, such ambitious task was later on withdrawn, and the final Rome Convention focused exclusively on the law applicable to contractual obligations. Due to this “genetic” linking, Rome I and Rome II are coherently parallel legal instruments, dealing respectively with the law applicable to contractual and non-contractual obligations. Together with Brussels I they constitute a legal *corpus* which is meant to be the core of the EU’s economic and business private international law – Private

²⁵⁰ *Vid.* Regulation (EC) 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (Rome I), O.J. L 177, 4.7.2008, p. 6.

²⁵¹ This is so notwithstanding that *ab initio* the draft Rome Convention rules both on the law applicable to contractual and non-contractual obligations (*Vid.* F. MUNARI & L. SCHIANO DI PEPE, “Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity”, *op. cit.*, p.194). However, it must equally be acknowledged that, in the late 1990s, the GEDIP prepared a draft “Rome II Convention”, whose text can be found in the website of the GEDIP under the following link: <http://www.gedip-egpil.eu/documents/gedip-documents-8pf.html>. Moreover, a commentary thereof by M. Fallon & P. Lagarde may be equally found in the GEDIP’s website under the following link: <http://www.gedip-egpil.eu/documents/gedip-documents-8cf.html> (Both last consulted on November the 10th 2016).

²⁵² *Vid.* Art. 1 of the Regulation; it provides a negative definition of the notion.

²⁵³ *Vid. supra* note 21.

²⁵⁴ *Vid.* P. A. NIELSEN, “Behind and beyond Brussels I – An Insider’s View”, *op. cit.*, p.243. This is a consequence of the fact that Denmark has made a reservation to Title IV of the Treaty.

²⁵⁵ Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (consolidated version), O.J. C027, 26.01.1998, p. 34.

international law on "*civil and commercial matters*". Thus, these three legal instruments are meant to be interpreted coherently and uniformly²⁵⁶.

As regards the Regulation's material scope, following Art. 2.1, Rome II applies to a variety of categories of non-contractual obligations – unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* – and this is perfectly reflected in its structure. However, despite this breadth, the following paragraphs will focus only on the main elements which are relevant in respect of "torts" – "general" non-contractual obligations²⁵⁷. These elements can be summarized as follows:

i) The main choice-of-law rule is the one contained in Art. 4.1, which reflects the *Lex loci damni* principle

"[...] the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur".

ii) This rule has two main general exceptions²⁵⁸ and is accompanied by an escape clause. The first is found in Art. 14, which provides that, under certain conditions²⁵⁹, the parties may agree to submit non-contractual obligations to the law of their choice. This point will be dealt with in further detail *infra*. The second one is found in Art. 4.2, which establishes that, in absence of choice "*[when] the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply*".

iii) The aforementioned escape clause, which reflects Europe's attachment to the proximity principle, is contained in Art. 4.3. It operates in absence of agreement following Art. 14, and reads as follows: "*[w]here it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply [...]*".

²⁵⁶ *Vid.* the Rome I Regulation, recital 7: "*The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to noncontractual obligations (Rome II)*". Put otherwise, by virtue of the principle of coherent interpretation of the EU's instruments of (economic) private international law on "civil and commercial matters", the characterization performed in the field of jurisdiction will be retained in order to choose the relevant conflict-of-laws instrument which will determine the applicable law – the Rome I Regulation on the law applicable to contractual obligations or else the Rome II Regulation on the law applicable to non-contractual obligations. Thus, the scope of the Rome II Regulation should be the coincident with that of Art. 7.2 of the Brussels I BIS Regulation.

²⁵⁷ The Regulation does not use the term "tort". The term "tort" is used here, as in previous pages, as a generic synonym of "non-contractual obligation". For further explanations, *vid. supra* note 17.

²⁵⁸ *Vid.* S. C. SYMEONIDES, "Rome II and Tort Conflicts: A Missed Opportunity", *The American journal of comparative law*, 56-1, 2008, pp. 173-222, at p. 192.

²⁵⁹ *Vid.* the Rome II Regulation, Art. 14. The conditions set intend to avoid abuses, protect consumers, etc.

iv) Besides the referred “general” rules, Articles 5 to 9 contain a few special choice-of-law rules for certain specific torts²⁶⁰, “where the general rule is not deemed to allow a reasonable balance to be struck between the interests at stake”²⁶¹. Amongst these, Article 7 contains the referred specific rule on environmental damage, on which the following pages will focus.

v) A final and very important aspect to stress about Rome II is that it has an *erga omnes* and universal nature: the application of Rome II by a European court in order to determine the law applicable to a certain controversy is independent of the nationality, domicile and habitual residence of the parties involved in the proceedings²⁶², and, as established by Article 3, of the fact that it designates or not the law of an EU member state. It is furthermore independent of whether the court’s jurisdiction is asserted on the basis of the Brussels I BIS Regulation or on the basis of domestic heads of international jurisdiction.

From the perspective of the EU’s environmental policy, as well as from the perspective of adequately addressing international environmental torts, Rome II’s universality and *erga omnes* nature are very convenient, for they fit adequately with the fact that “[g]eographically, the environment mentioned in the Treaty is not limited to the [Union’s] environment”²⁶³. Thus, the combination of Rome II’s universal application with the possibilities provided by the Brussels I *fora* result in an “almost universal” EPIL mechanism of environmental protection: compensation can be sought before European courts for any environmental tort allegedly caused by a European-based tortfeasor, irrespective of its location. Put otherwise, whenever the alleged polluter is a subject domiciled in an EU Member State, any environmental tort that she may cause in any part of the world – within or outside the EU – will be indirectly subjected to the “polluter pays” principle and other EU environmental law principles in regard of choice of law. Let us glimpse briefly at how this can be so by presenting Article 7 of the Rome II Regulation.

iv. Presentation of Article 7, on environmental torts

While the two provisions on international jurisdiction that have been examined *supra* have a wider material scope – they operate as well in respect of other kinds of delictual matters – Article 7 of Rome II is a very specific provision which deals exclusively with environmental torts (“environmental *damage*”). Therefore, it is the backbone provision of the EU’s environmental PIL mechanism. Notwithstanding the fact that it will be thoroughly assessed in Part II (Chapter 4) of this dissertation, a brief presentation thereof is required at this point in order to allow a

²⁶⁰ Vid. S. C. SYMEONIDES, “Rome II and Tort Conflicts: A Missed Opportunity”, *op. cit.*, p.193. These are defined by the author as “specific exceptions” to the general rule, as opposed to the general ones referred above.

²⁶¹ Vid. recital 19 of the Rome II Regulation.

²⁶² Vid. A. L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol. II (9th ed.), *op. cit.*, p.703.

²⁶³ Vid. L. KRÄMER, *EC Environmental Law* (6th ed.), London, Sweet & Maxwell, 2007, pp. 3-5. “Community” in the original, in reference to the European Community. In the same sense, under a different formulation, *vid.* M. FALLON, “Le droit fondamental à l’environnement selon le droit communautaire”, *op. cit.*, pp. 111-112 (who coincides with KRÄMER in the worldwide scope of the EU’s environmental policy).

better understanding of certain developments. Article 7 of the Rome II Regulation reads as follows:

"The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred"

As it has already been mentioned, Article 7 gives the victim the possibility to choose between two connecting factors in order to establish the law applicable to environmental torts: *lex loci damni* – via a reference to Art. 4.1 – or *lex loci actus* – i.e. *lex loci delicti commissi* understood as the law of the place where the tortious action or omission giving rise to damage takes place. Following recital 25 of Rome II, the choice between the two possible applicable laws is meant to be made at a procedural stage determined in accordance with the *lex fori*. The same recital equally explains that

"[...] Article [191] of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage [...]".

The referred discrimination thus manifests itself in the fact that the person sustaining the damage may make its choice between the above-referred connecting factors. Nevertheless, it has been held that the said connecting factors are not placed in a position of equal standing because, in absence of choice by the victim, the first one will take precedence over the second²⁶⁴. Thus the conflict rule is not truly alternative, but elective²⁶⁵: a certain hierarchy is introduced, in which *lex loci actus* plays a “secondary” role in respect of *lex loci damni*. This elective structure, which already existed in similar preexisting provisions, is said to have been developed in its origin in order to – partially – avoid the problem of determining who should make the choice amongst the potentially applicable laws²⁶⁶. Overall, the choice for this construction has been justified by the European Commission in the following terms²⁶⁷:

²⁶⁴ Vid. M. BOGDAN, “Some Reflections Regarding Environmental Damage and The Rome II Regulation”, *op. cit.*, p. 96-97.

²⁶⁵ *Ibidem*, p. 97.

²⁶⁶ Despite the fact that, as it will be seen *infra*, the theoretical elements which configure the current wording of the article may have German origins, the precise configuration used by the European legislator, reportedly, has its origins in Italian and Venezuelan similar provisions. Vid. K. FACH, “The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II”, *Yearbook of Private International Law*, vol. 6, 2004, pp. 291-318, at pp. 299-300. This author establishes that while paragraph “40(1) of the German BGB provides that cross-border torts shall be settled by applying the *lex loci actus*, unless the claimant requests application of the *lex loci damni*”, it is the Italian and Venezuelan conflict rules that have instaurated the preminence of the *lex loci damni*. These rules have the same structure, but consecrate the opposite solution (application of the *lex loci damni* unless the application of the *lex loci actus* is requested). This author considers that “[t]his [more appropriate] solution is based on the presumption that the injured party frequently has recourse to the courts of his

i) Regarding the *lex loci damni* connection the Commission contends that

"[t]he basic connection to the law of the place where the damage was sustained is in conformity with recent objectives of environmental protection policy, which tends to support strict liability. The solution is also conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries, which removes the incentive for an operator to opt for low-protection countries. The rule thus contributes to raising the general level of environmental protection".

ii) But then, in order to justify the resort to the *lex loci actus* connection, it adds 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. Considering the Union's more general objectives in environmental matters, the point is [...] 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".

iii) Consequently, the Commission concludes that

"Article 7 accordingly allows the victim to make his claim on the basis of the law of the country in which the event giving rise to the damage occurred. It will therefore be for the victim rather than the court to determine the law that is most favourable to him".

However, it is argued that the determination of the most favourable legal system may be a complicated operation: since a certain legal system may be more convenient in one point but less in another, the choice of the applicable law may amount to a labour of love²⁶⁸. In this respect it is submitted that the claimant cannot *"pick the cherries out of the cake"* by combining selected substantive rules of the *lex loci damni* and *lex loci actus*: in other words, *dépeçage*²⁶⁹ is excluded and the claimant must rely solely on one of the two legal systems in its

country [...] thus leading to the application of the local law of the court seized, unless the injured party chooses otherwise".

²⁶⁷ Vid. the Explanatory Memorandum to the Commission's 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, pp.19-20.

²⁶⁸ Vid. M. BOGDAN, "Some Reflections Regarding Environmental Damage and The Rome II Regulation", *op. cit.*, p. 98.

²⁶⁹ P. NYGH, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort", *op. cit.*, p. 283: "[The] procedure of separating out an issue [...] and subjecting [it] to a different choice of law rule, known as *dépeçage*, is, of course, a well-known technique to arrive at the desired result".

entirety²⁷⁰. Interestingly, it is equally submitted that it will be possible to choose different applicable laws for “*different parts of the damage*”, for example, choose the *lex loci damni* for the personal damage, and the *lex loci actus* for the damage to property²⁷¹. Moreover, the ability to make a choice is not restricted to *ex post facto* situations: a joint interpretation of Art. 7 and Art. 2 of the Rome II Regulation leads to the conclusion that it is also possible to choose the relevant law for an application for injunctive relief aiming at the prevention of environmental damage that is about to be caused²⁷². Article 2 specifies that Rome II applies to non-contractual obligations that are “*likely to arise*”, and damage that is “*likely to occur*”. In the field of environmental tort this is coherent with the EU environmental principles of preventive action and correction at source, and with the wording of Art. 7.2 in the Brussels I BIS Regulation, whose *fora* apply to a harmful event that “*may occur*”.

Yet the determination of the most favourable law is not the only difficulty that may be encountered in the implementation of Article 7. One major issue for which academia does not

²⁷⁰ *Ibidem*. Cfr. F. GRISEL, “Analyse critique de l’article 7 du règlement du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (“Rome II”)”, *Revue de droit international et de droit compare*, vol. 2011-1, 2011, pp. 148-165, at pp. 164-165: on the one hand Grisel agrees with Bogdan on the idea that *dépeçage* is excluded; he considers that the wording of the article in the French version of the Regulation, combined with the lack of an explicit provision on *dépeçage* within such legal instrument, amounts to a prohibition of *dépeçage*; on the other hand, he understands the notion of *dépeçage* differently (*vid.* the following note *infra*). Nevertheless, in his opinion, allowing the performance of *dépeçage* would foster the objective of environmental protection, for he considers the unitary application of Article 7 to be a hindrance to that objective. In turn, A. DICKINSON (*The Rome II Regulation: the law applicable to non-contractual obligations*, Oxford, OUP, 2008, p. 440) considers that “[t]he claimant may not, for example, seek to apply one law to the question of the defendant’s liability, and another to the question of available remedies. There is no room for *dépeçage*”. But, he also asserts (p. 438) that: “The structure of Art 7 suggests that the location of the environmental damage and the location of resulting damage sustained by persons or by property must be determined separately for the purposes of determining the basic applicable law, although it may be doubted whether this will make any material difference to the outcome of the enquiry”. Furthermore, (K. FACH, “The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II”, *op. cit.*, pp. 303-304): “Although codified rules have a tendency to grant a broad scope to the *lex causae*, legal scholars and the case law indicate that other legal systems might concurrently apply in transboundary cases. Some examples are mentioned to illustrate the various situations in which *dépeçage* could be taken into consideration in an international pollution case: the judge could determine the tort capacity of the tortfeasor by reference to his personal law; the law governing a previous relation between the parties could determine the existence to a right to be released from liability; the *lex fori* could be applied in matters of public law such as where compensation is paid through compensatory funds or compensation for damage is suffered by the environment itself; [...] the *lex societatis* could be applied in matters where a company is liable for unlawful activities of its organs; [...] The above-cited matters show that in practice the law governing an obligation may be fragmented. Although some of the proposals do not have unanimous backing, other exceptions to the *lex causae* have already been introduced into the national legislation of some States and thus reflect a broader consensus on restrictions of the monopoly of the *lex causae* in torts [...]”.

²⁷¹ *Vid.* M. BOGDAN, “Some Reflections Regarding Environmental Damage and The Rome II Regulation”, *op. cit.*, p. 98. Cfr. F. GRISEL, “Analyse critique de l’article 7 du règlement du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (“Rome II”)”, *op. cit.*, pp. 164-165, who seems to have a different understanding of the notion of *dépeçage*. What BOGDAN considers to be choosing “*different laws for different parts of the damage*” is a hypothesis of *dépeçage* for GRISEL. For this latter author, all the “*prétensions*” need to be submitted to the same *lex*.

²⁷² *Vid.* M. BOGDAN, “Some Reflections Regarding Environmental Damage and The Rome II Regulation”, *op. cit.*, p. 98.

seem to have a unitary answer is the operation of the kind of connecting factors borne by the rule whenever the tortious result (damage) and / or the event giving rise to the damage are located in spaces beyond State sovereignty. In this sense it has been denounced that, despite the fact that these elements may be placed, for instance, on the high seas, in the Antarctic or even in the outer space, the wording of the article seems to assume that the said elements will always somehow “be localized in a country or countries having legal systems that can be applied”²⁷³. As one possible solution, it has been suggested that “whenever possible the national registration (“flag”) of the ship, aircraft, spacecraft, etc. involved should be used as the relevant connecting factor. If there is no such factor, the law of the most closely connected country (analogical use of Art. 4(3)) or the *lex fori* may have to be applied as the last resort”²⁷⁴.

Precisely, in respect of this last idea, it must be noted that the reference in Article 7 to Article 4 – which, as mentioned, allows the choice of the *lex loci actus* – is limited to the article’s first paragraph – only Art. 4.1 is expressly mentioned. This means that the habitual residence of both parties in the same country or a manifestly closer connection to any other law will bear no influence in the determination of the law applicable to an environmental tort²⁷⁵. Conversely, the provision in Art. 14 of the Rome II Regulation regarding the possibility for the victim and the tortfeasor to commonly agree on the law to be applied to the dispute does operate in respect of environmental torts. Thus, an agreement on the law to be applied is possible. Nevertheless, such an option, despite being legally available, seems to be *de facto* irrelevant in respect of these matters. In the frame of an international environmental tort, the victim has at her disposal the possibility to freely choose the applicable law. Thus, entering into a negotiation with the tortfeasor in such respect is, in principle, not necessary, and therefore, in practical terms, not very likely to happen: why would the party having the strategic advantage of choosing the law to be applied give away such privilege?²⁷⁶ Interestingly, it must be

²⁷³ Vid. M. BOGDAN, “Some Reflections Regarding Environmental Damage and The Rome II Regulation”, *op. cit.*, p. 105. In a similar vein, A. CRESPO HERNÁNDEZ, “Daños al medio ambiente y regla de la ubicación en el art. 8 del futuro Reglamento de Roma II”, *InDret – Revista para el análisis del Derecho*, 388, 2006, pp. 1-25, at p. 17; J. BASEDOW “Rome II at Sea – General Aspects of Maritime Torts”, *RabelsZ*, 74, 2010, pp. 118-138, at pp. 131, 132, 136). As explained by K. FACH (“The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II”, *op. cit.*, p. 301): “It should first be noted that the application of the *lex loci delicti* could give rise to problems if the pollution has occurred in an area not yet subject to territorial sovereignty. In the event of damages arising or suffered on the high seas, at the poles or in outer space, recourse to the *locus delicti* would lead to a place with no legal system. It has appropriately been suggested that other criteria should be taken into consideration in such cases, such as the *lex fori* of the law of the State of the ship’s flag”. Interestingly, the same author (*op. cit.*, p. 317) explains that: “Article 4 of the Preliminary Draft Proposal [of the Rome II Regulation], which provided alternative applicable laws for torts occurring in areas not subject to the territorial sovereignty of a State [was] deleted from the Rome II proposal. Instead, Article 18 of the proposed Regulation provides that, in certain circumstances, a series of territories and means of transport shall be treated as belonging to the territory of a State”.

²⁷⁴ Vid. M. BOGDAN, “Some Reflections Regarding Environmental Damage and The Rome II Regulation”, *op. cit.*, p. 105

²⁷⁵ Vid. M. BOGDAN, “Some Reflections Regarding Environmental Damage and The Rome II Regulation”, *op. cit.*, p. 99.

²⁷⁶ In a similar sense, *vid.* A. CRESPO, “Daños al medio ambiente y regla de la ubicación en el art. 8 del futuro Reglamento de Roma II”, *op. cit.*, p. 19, and C. OTERO GARCÍA-CASTRILLÓN, “International litigation trends in environmental liability: a European Union-United States comparative perspective”, *op. cit.*, pp. 567-568. LAGARDE (“Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé”, *op. cit.*, p. 104) considers that: “[a]près l’accident, le choix par les

acknowledged that, as unlikely as such scenario may appear to be, there are precedents in such a sense: it has been reported that both parties to the already-referred *Mines de Potasse* litigation agreed on the application of the law of the Netherlands in order to ensure “that the Dutch court of appeal and the Dutch Supreme court (*Hoge Raad*) would have the capacity to review the application of the law, which under Dutch law is [not] possible [...] where a case is governed by foreign law”²⁷⁷.

The mention of *Mines de Potasse* leads to a final remark in order to complete the review of the core traits of the Article: the structure and content of Article 7 can be considered to be coherent with the reasoning of the ECJ in *Mines de Potasse*, and thus reflect the “theory of ubiquity”²⁷⁸. This is so despite the fact that, as suggested *supra*, the ratio behind the use of the theory of ubiquity as regards applicable law is different from the ratio behind its use as regards international jurisdiction. While resorting to the theory of ubiquity in choice-of-law responds to the environmental and weak-party-protective considerations previously depicted, the theory of ubiquity within the frame of Article 7.2 of the Brussels I BIS Regulation mainly corresponds with the objective of fostering a sound administration of justice, as already suggested²⁷⁹. The demonstration that ubiquity does not correspond to the same ratio in both levels comes from the availability of the choice of law: while ubiquity in Article 7.2 of the Brussels I BIS Regulation is available to alleged tortfeasors, in order to obtain a declaration of non-liability, ubiquity in Article 7 is available to alleged victims only.

parties de la loi applicable n'est plus très éloigné d'une transaction sur le fond”. Funnily enough, long before party autonomy became *en vogue* in EU PIL – as it seems to be the case, following the latest EU choice-of-law Regulations – P. NYGH (“The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort”, *op. cit.*, pp. 350-351, and pp. 294-295) already considered it to be the “Fundamental value” of PIL (“[...] *basic to choice of law is the autonomy of the will of the parties. This applies in Private law and also in Private International Law of which it is a part. The basic principle is that what the parties want to happen shall happen unless the State has a compelling interest and the right to coerce the party concerned [...] This political right is not derived from municipal law; it is supranational [...] It is an axiom grounded in universal practice*”). Despite conferring such an important value to the principle, Nygh acknowledged, however, that “*after the event each side is unlikely to agree to the legal system preferred by the other*”. In any case, he considered that – despite this difficulty – it responds to the reasonable expectations of the parties to confer them autonomy to select the appropriate law – if they can reach such an agreement: “*agreement on the applicable law is rare but not unknown*”, and should be welcomed for it provides certainty. For a thorough review of the role of party autonomy as means of fulfilling the reasonable expectations of the parties in tortious matters, check P. NYGH, “The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort”, *op. cit.*, pp. 350 and following. It is interesting to highlight (*ibidem*, pp. 294-295) that, “[a]s Keller and Siehr have rightly pointed out, the concept of the autonomy of the parties in relation to choice of law is relatively modern [...]”, despite the fact that some of its elements can be traced back to Dumoulin, Huber and Story.

²⁷⁷ *Vid.* T. KADNER-GRAZIANO, “The Law Applicable to Cross-Border Damage to the Environment – A Commentary on Article 7 of the Rome II Regulation”, *Yearbook of Private International Law*, vol. 9, 2007, pp. 71-86, at p.72. In the same sense, *vid.* G. BETLEM “Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts”, in M. T. KAMMINGA & S. ZIA-ZAFIRI (eds.), *Liability of Multinational Corporations Under International Law*, The Hague, Kluwer Law International, 2000, pp. 285-305, at p. 290.

²⁷⁸ *Vid.* M. BOGDAN, “Some Reflections Regarding Environmental Damage and The Rome II Regulation”, *op. cit.*, p.97.

²⁷⁹ *Vid. supra*, “Basic concepts of conflict of laws (I)”.

After having presented the article's main features, it becomes clear why Article 7 is far from being a "classic" choice-of-law rule²⁸⁰. Its content-oriented character is blatantly present from the very first reading thereof. The relevant paragraphs of the explanatory memorandum to the EU Commission's proposal and of recital 25 in Rome II further depict a provision deeply enrooted in a very peculiar set of substantive values and objectives: the EU principles of environmental law and the *favor laesi* principle. It is precisely the article's content-oriented nature which has placed it on the spotlight: as regards academic analysis, Article 7 and its content-oriented nature have attracted much of the controversy surrounding the Rome II Regulation²⁸¹. This is only natural since Article 7 is an island of content-orientatedness in the middle of an ocean of closest connections and proximity. As it has been correctly referred, "[i]nterestingly, most of the objections to the Rome II Regulation's general rule [...], are dealt with in its specific rule on environmental damage, which reflects some of the Regulation's most explicit policy choices"²⁸². Precisely, in this respect, two positions have been identified by F. Grisel amongst academic commentators²⁸³: the first one would be adopted by European authors, who criticize Article 7 and support the general policy-choices – "*l'économie générale*" – of the Rome II Regulation, while a second group of authors, mainly from North-American academia, would defend Article 7 and criticize the ensemble of the Rome II Regulation²⁸⁴. In such a vein, following F. Grisel, the European position would argue that Article 7 prejudices subjects conducting transboundary activities²⁸⁵ and celebrate the fact that the Regulation

²⁸⁰ Vid. L. ENNEKING, "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, p. 307: "*The objective of this specific rule is completely different from the overall objective of the Regulation of providing legal certainty through neutral selection of the applicable law*".

²⁸¹ Cfr., for instance, S. C. SYMEONIDES, "Rome II and Tort Conflicts: A Missed Opportunity", *op. cit.*, with P. J. KOZYRIS, "Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' 'Missed Opportunity'", *The American journal of comparative law*, vol. 56-2, 2008, pp. 471-497. This is so, notwithstanding the fact that, during the legislative iter, "*non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation*" were extremely controversial, and thus were left out of the scope of the regulation. For a brief review of the question, vid. A. DICKINSON, "Privacy and Personality Rights in the Rome II Regime – Not Again?", published on July the 19th, 2010, <http://conflictoflaws.net/2010/privacy-and-personality-rights-in-the-rome-ii-regime-not-again/> (available online on April the 10th 2017).

²⁸² In such a sense, vid. *inter alia*, L. ENNEKING, "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, p. 310 and pp. 296-297. Furthermore, "[t]he Commission [...] 2003 submitted a proposal for the Rome II Regulation on the law applicable to non-contractual obligations, with the twofold aim of offering a higher level of legal certainty to individuals and economic operators in cross-border disputes, and of avoiding 'forum shopping' in such disputes, which leads to potentially different substantive results for the parties depending on which court is seized of the matter" (*Ibidem*, p. 294).

²⁸³ Vid. F. GRISEL, "Analyse critique de l'article 7 du règlement du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles ("Rome II")", *op. cit.*, pp. 150-152.

²⁸⁴ F. GRISEL (*ibidem*) only mentions a couple of names as examples of the authors inscribed in each of the referred tendencies: T. Kadner-Graziano and P. J. Kozyris as representatives of the first tendency, and S. C. Symeonides as a representative of the second one. R. J. Weintraub could be added to the second one (*vid.*, *inter alia*, R. J. WEINTRAUB, "The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither?", *Texas international law journal*, vol. 43, 2008, pp. 401-413).

²⁸⁵ Vid. F. GRISEL, "Analyse critique de l'article 7 du règlement du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles ("Rome II")", *op. cit.*, pp. 150-151 "[...] la règle de l'ubiquité de l'article 7

fosters legal certainty²⁸⁶. Meanwhile, the North-American position would consider that Rome II, despite its seventh article, does not struck a satisfying equilibrium between legal predictability and flexibility²⁸⁷.

On this respect, there is one opinion which deserves to be commented. K. Fach considers that Art. 7 provides a "*well-balanced solution*" in respect of the stakes present in situations of international environmental tort²⁸⁸. It is true that, in appearance, the article as it stands nowadays seems to provide a balanced mix of traditional ideas and approaches as regards torts in the conflict of laws – related both to proximity and predictability – and the policy objectives that the European legislator set for it. But, as will be seen *infra*, it needs to be assessed whether beneath this appearance actually lies a hidden problem: does the load of tradition actually outweigh the balance, rendering the rule useless in certain situations? In other words, any assessment on the article's effectiveness should seriously take into account whether it is actually capable of providing results in harmony with its content-oriented nature – stated goals, inspiring principles – under all possible situations that may come within its scope, for it may not be the case.

Before considering this question, many others need to be dealt with: it will only be addressed in Chapter 4 (Part II), after all the pieces of the puzzle of this dissertation get to be displayed. Up to this point, the broader picture of the intervention of private international law in environmental matters has been sketched: its core elements and their relevant implications for environmental occurrences have been presented. In order to complete the "positive definition" of private international law as an environmental legal tool, a final set of considerations needs to be introduced, among which an assessment of the functions that private international law may possibly fulfil in respect of environmental occurrences.

[...] *irait à la défaveur des acteurs ayant des activités transfrontières*". I suppose he actually means activities having a transboundary impact, for, in the frame of transboundary environmental torts, what may be "transboundary" is the pollution: thus, the impact or consequence of the activity, not the activity itself.

²⁸⁶ The only author cited by F. Grisel in respect of this assertion is C. Von Bar, but the work referred to – i.e. his contribution to the *Recueil* – largely predates the Rome II Regulation.

²⁸⁷ The assertion made by F. GRISEL in p. 152 that the first stream of academic thought privileges the protection of the alleged victim, and that the second one privileges the general protection of the environment seems incorrect to me. The first stream, which holds a more "classic" PIL position, wants a higher degree of predictability. This is not related at all to the issue of whether the rule, as a content-oriented rule, focuses its content on the victim or on the environment. Furthermore, he considers that: "[...] *le soutien accordé par la doctrine américaine à l'article 7 doit être relativisé, tant les objectifs sous-jacents de politique publique n'y sont pas pris en compte que partiellement. À l'inverse, la critique faite par la doctrine européenne des effets fortuits de l'article 7 mérite d'être prise en compte*" (p. 165). It is my contention, as it will be explained *infra*, that predictability needs to be put into perspective, and that since un-foreseeability lies on both sides (tortfeasor and victim) then the tortfeasor's foreseeability needs to give way to *favor laesi*, as a matter of "compensation of un-foreseeabilities".

²⁸⁸ *Vid.* K. FACH, "The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II", *op. cit.*, p. 317.

II. Functions of any choice-of-law mechanism dealing with environmental matters

As it was announced *supra*, after delivering a description of the most fundamental notions required in order to seize the object of this dissertation, this chapter further provides a reflection on what functions may choice of law perform in respect of the protection of the environment (and to what extent). The purpose of this second set of considerations is not simply to render the “positive definition” in this first chapter more comprehensive. Its aim is to ultimately allow assessing whether it is effective to intervene in the realm of international environmental catastrophes through choice of law means. In other words, determining the functions choice of law may perform may help establish whether it may effectively contribute to environmental protection, and ultimately contribute to a rise in the level thereof. As subtly indicated in the introduction to this dissertation, the notion of protection of the environment is to be understood in a wide sense, both comprising prevention and reparation / compensation of environmental damage. Therefore, in order to assess the effectiveness of the suggested kind of intervention from the standpoint of environmentally protective purposes, it is necessary to determine whether, and if so how and to what extent, choice of law may prevent environmental damage and / or compensate / repair it.

The point of departure of the analysis contained in the following pages is the assumption that any choice-of-law tool dealing with tortious matters is a tool of tortious liability at the international level and that, in consequence, it needs to lead to the fulfillment of, at least, the same functions that tort law fulfills at the domestic level. This assumption derives from the fact that, in its most classic and basic form (i.e. a neutral choice-of-law rule with a single connecting factor) choice of law shares the functions and participates in the effective implementation of rules of domestic law, for it channelizes them to the transnational level. This entails, consequently, that the analysis of the functions that choice of law may perform in respect of environmental protection will begin, even if only summarily, with an approximation to the functions of tort law, from a comparative (substantive) law perspective (A), before bringing the discussion to the field of private international law itself (B). The ensuing discussion may entail, at some points and to a certain extent, questioning some of the basic assumptions that were made in the introduction, which were necessary in order to present the object of this dissertation. Revisiting them now, and further analyzing some aspects related thereto, will, nevertheless, shed additional light on the effectiveness and usefulness of any choice-of-law tool which may be conceived, anywhere in the world, in order to deal with environmental issues.

A. The functions of tortious liability in comparative law

“La règle de droit poursuit toujours un objectif très général qui est l'organisation des rapports entre les hommes. Mais cet objectif général se combine avec, pour chaque règle

*de droit, des objectifs plus précis et souvent il s'agit de concilier des intérêts divergents, voire antagonistes*²⁸⁹

*"Despite contrary opinion, the process of determining the purpose, function, or "policy" underlying a rule of law is neither futile nor unworthy of the effort"*²⁹⁰.

As mentioned, the starting point selected in order to analyze the functions that choice-of-law-based mechanisms may perform in respect of environmental catastrophes is the ensemble of functions that tort law may potentially perform. This is only logical: since this kind of mechanism channels tort law to a transnational level it may be suspected to fulfill, at least, the same functions that tort law does.

Therefore, the reasoning will proceed in two steps: first a brief presentation of potential functions will be made (i). It will be followed by a reflection on the variable geometry of such functions (ii). These considerations will later lead to further developments within the realm of private international law.

i. The potential functions of tort law

It is said that "[t]he purpose of the law of tort consists in protecting basic human rights at the level of private law, that is to say horizontally between citizens *inter se*, with the legal remedies placed at their mutual availability"²⁹¹. But specifically, how is that policy goal articulated? Is this generic statement the only objective of the law of torts? Just as it was the case regarding preceding developments on the very notion of tort, identifying the functions of tort law is far from being an easy task. Once again, despite an important amount of academic literature on this topic, answers are not conclusive. And once again, it is not the purpose of this section to provide a thorough description of this question, but merely to sketch its main traits.

Despite the field's ancient origins, its functions are not well settled or defined²⁹². In comparative terms, none of the functions that will be presented in the following pages can be considered to offer a global and complete justification for all of the law of torts, nor to have constantly played a leading role throughout its history²⁹³: on the one hand, the exact

²⁸⁹ Vid. H. GAUDEMET-TALLON, "Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l'arc-en-ciel) - Cours général", *Recueil des Cours de l'Académie de Droit International*, vol. 312, Leiden, Martinus Nijhoff, 2006, pp. 171-172.

²⁹⁰ Vid. S. C. SYMEONIDES "The American choice-of-law revolution in the courts: today and tomorrow", *op. cit.*, p. 168.

²⁹¹ Vid. C. VON BAR & U. DROBNIG, *The interaction of contract law and tort and property law in Europe: a comparative study*, *op. cit.*, p. 26.

²⁹² Vid. A. TUNC - *International Encyclopedia*, *op. cit.*, p. 87. R. STEVENS (*Tort and Rights*, Oxford, OUP, 2007, p. 323) even asserts that tort law's functions "point in diametrically different directions" and acknowledges the failure of academia to produce "any satisfactory functionalist account" of tort law.

²⁹³ Vid. B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), Oxford, OUP, 1999, p. 36.

identification of those functions appears to be problematic; on the other hand, those functions seem to have evolved significantly throughout time²⁹⁴.

The first difficulty, the one pertaining to the exact identification of functions, is sometimes partially and implicitly acknowledged by announcing that assessments are limited to the “main” functions of tort law²⁹⁵. In this respect, although certain functions appear recurrently in national and comparative law treatises – notably, compensation and deterrence – overall it must be highlighted that listings of functions – as well as the relative weight given to the different functions therein – are far from homogeneous²⁹⁶.

As regards the second difficulty, the one pertaining to the significant evolution throughout time of the academic perception of the functions of tort law: the following pages will use as their basis, due to their academic significance, the contents of the *International Encyclopedia of Comparative Law*. This work considered, in the 1970s, the functions of the law of tort to be four: deterrence, compensation of victims, loss distribution within society, and guarantee of citizen’s rights. However, this listing – as explained by the *Encyclopedia* itself – already withdrew some functions which, historically, were considered to be relevant, such as the “punishment of the wrongdoer”. This is due to the fact that they were considered no longer in vogue due to changes in social conceptions. Further variations and evolutions in academic enumerations of functions have taken place in later decades, but they have generally maintained the three first functions mentioned by the *Encyclopedia*, sometimes making further additions²⁹⁷. Amongst these additions, at least since the early 2000s, it is not unusual to find – in assessments which clearly bear the influence of the *Economic analysis of law*²⁹⁸ – the “avoidance of economically inefficient behaviour” or similar notions besides the referred first three functions²⁹⁹.

²⁹⁴ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 87; B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), op. cit., p. 36.

²⁹⁵ Vid., as an example, W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, Ius Commune casebooks for the Common Law of Europe, Oxford, Hart, 2000, p. 18.

²⁹⁶ Cfr. with U. MATTEI, *Comparative Law and Economics*, op. cit., 1997, p. 240: “The function of tort law is also approached within a relatively homogeneous framework: compensation (over vs. under), deterrence (over vs. under), punishment, and the relationship with other systems of compensation and welfare”. In the light of the bibliography I have had the occasion to consult, I personally disagree with Mattei’s assertion on homogeneity. In order to check the variety of opinions I refer and their divergences vid., inter alia, A. TUNC - *International Encyclopedia*, op. cit., pp. 87-107; W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., pp. 18-32. For a comparative study with a focus on Spanish Law, vid. L. DíEZ-PICAZO, *Derecho de daños*, op. cit., pp. 41-48. For an assessment under English Law, vid. B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), op. cit., pp. 36-41.

²⁹⁷ Vid. inter alia the enumeration made by P. CANE, “Tort Law and Public Functions”, in J. OBERDIEK (ed.), *Philosophical Foundations of the Law of Torts*, Oxford, OUP, 2014, pp. 150-168, at p. 164. This author mentions: compensation, deterrence, loss distribution and “horizontal equality (between men and women, for instance, or between races)”.

²⁹⁸ For a summary of the core reasoning of economic analysis of law when applied to tortious matters, vid., B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), op. cit., p. 23-36.

²⁹⁹ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., pp.18-32. Nevertheless, L. DíEZ-PICAZO considers this “function” to be a manifestation of deterrence (vid. L. DíEZ-PICAZO, *Derecho de daños*, op. cit., p. 48 and pp. 206-217).

In the light of these considerations, far from being exhaustive, the following pages will briefly present a selection of possible functions³⁰⁰. In this sense, the most fruitful way to proceed will be to begin by focusing on the referred first three notions of the *Encyclopedia* (a to c). Following the footsteps of economic analysts of law, the assessment of the second of such possible functions, deterrence of anti-social conduct, will be intertwined with considerations on "*avoidance of inefficient behaviour*". Then, the assessment will be completed by briefly sketching other functions, amongst which the fourth function mentioned by the *Encyclopedia*, "*guaranteeing the rights of citizen*", and the punitive function (d and e, respectively)³⁰¹.

a. Compensatory function

The term compensation may comprise several aspects: first, compensation as an equivalent for what has been lost. Second, substitute – or solace – compensation. Third, equalization compensation ("*granted not because of what has been lost but because of what the victim has never had in comparison with others in a similar situation*"). It may be sustained that the compensatory function of tort law needs to be understood in a far-reaching sense, comprising all the above-referred nuances³⁰². Along these lines, the indemnification of the victim is frequently viewed as a "*basic function of civil liability*". To some this is undisputable³⁰³, and others even go as far as saying that compensation is "*the prime function of tort*"³⁰⁴. This assertion is maintained despite theoretical difficulties, and despite the practical obstacles victims may face when trying to achieve such purpose in everyday life:

i) Theoretically, it is conceptually difficult to establish the precise boundaries between harm that should be compensated, and harm that should not (Compensation to the victims of a fault only? Compensation to the victims of certain risks too? And if so, which risks?)³⁰⁵.

ii) Also, it must be acknowledged that the role to be played by tort law in dealing with damages is relatively small when compared with other institutions, such as private loss insurance, social

³⁰⁰ As an example, P. CANE alone (*The Anatomy of Tort Law*, Oxford, Hart, 1997, pp. 206-207) provides a very rich list of functions of tort law within Common Law systems, which he categorizes in 3 different sets: intrinsic (implicit) functions (which derive from "*the idea of tort law as a set of ethical rules and principles of personal responsibility*"), direct intrinsic functions (which relate to the parties of a given dispute), and indirect extrinsic functions (which relate to parties who are third to the said dispute, thus the remainder of society). The last two sets amount to more than a dozen functions.

³⁰¹ This assessment will need to be performed cautiously, for dissecting and analyzing different functions entails the risk of obtaining artificial conclusions, if their natural interrelation is overlooked.

³⁰² Vid. P.S. ATIYAH, *Accidents, compensation and the law*, London, Weidenfeld and Nicolson, 1978, pp. 480-485, as quoted by W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 20.

³⁰³ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 93 ("Functions of tort law").

³⁰⁴ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 19; B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), op. cit., p. 38.

³⁰⁵ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 94.

insurance, or public health services. This is so because tort law has lost the "*monopoly*" it once had in this respect³⁰⁶.

iii) Finally, despite the fact that – as a rule – *restitutio in integrum* is said to be the purpose of indemnification, empirical experience shows that quite frequently full or exact compensation is utopic, and adequate compensation is the most that victims can hope for³⁰⁷. Furthermore, insolvency of the tortfeasor, problems in bringing evidence, and other difficulties can further hinder in practice the fulfillment of the referred compensatory function³⁰⁸.

Other than this, it is said that compensation "*does, though, serve, not only to indemnify the victim, but to oblige the business community to pay the greatest respect to law and to remain as much as possible on the safe side of such borderlines*"³⁰⁹. Let us explore this aspect.

b. Deterrence of anti-social conduct / Avoidance of (economically) inefficient behaviour

Sometimes considered undisputed³¹⁰, sometimes considered tort law's main function³¹¹, sometimes seen as subsidiary³¹², academic opinions seem to be shared as regards the possible role of "deterrence of anti-social conduct" as a function of tort law. It is even doubted whether

³⁰⁶ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 20; A. TUNC - *International Encyclopedia*, op. cit., p. 94; B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), op. cit., p. 38.

³⁰⁷ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 95; W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 20. In a similar sense, vid. L. DÍEZ-PICAZO (*Derecho de daños*, op. cit., pp. 41-42) who considers that damages are per se irreparable, and that conceiving indemnification as a function of tort law is merely an optimistic view on the phenomenon, for it does not make occurred damage disappear from reality ("[...] conviene no perder de vista [...] la irreparabilidad del daño [...] Aunque exista la idea [...] optimista, de que indemnizar un daño es hacerlo desaparecer del mundo, este pensamiento no pasa de ser una cabal ilusión. Cuando se destruyen vidas humanas o bienes materiales, la indemnización no borra la destrucción").

³⁰⁸ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 19.

³⁰⁹ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 89. Even if, possibly, the same could be asserted in respect of individuals, the reference to businesses in the quote seems utmost appropriate taking into account the fact that this dissertation deals with environmental torts, which tend to be, in general, mostly business-originated.

³¹⁰ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 88.

³¹¹ H. KOZIOL (*Basic Questions of Tort Law from a Germanic Perspective*, Vienna, Jan Sramek Verlag, 2012, p. 75) considers that this is a general tendency in current times and criticizes it: "*The tendency, so common today, to reject the notion of compensation and place the focus on the deterrent function, for instance, thus contradicts not only positive law but also overlooks the fact that this would rip open a regulatory gap, as then no legal institution would fulfil the function of compensating damage*". In the same sense, *ibidem* (p. 78): "[...] the view taken by certain adherents of the economic approach that the notion of deterrence is therefore the only, or at least the decisive, aspect for the law of damages is misguided [...] according to its positive law construction in Continental European legal systems, the law of damages is in fact primarily directed at the objective of compensation".

³¹² Vid. B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), op. cit., p. 37.

it remains as a function nowadays or not³¹³. This latter position is based on the fact that, on the one hand, the mechanisms just referred – private insurance, social security, etc. – may erode its deterrent effect and that, on the other hand, other fields of law are considered to be more appropriate for fulfilling this function: "*According to some, [deterrence] may be better achieved by precise regulations enforced by administrative authorities (regulatory control), or by criminal law rules which relate the sanction to the degree of blameworthiness of the act and not to the degree of harm*"³¹⁴.

When considering deterrence in tort law, it is mandatory to briefly refer to the immense influence that "economic analysis of law" has had over the field in recent decades. As suggested in previous pages, since as early as the late part of the decade of the 1950s the "philosophy of tort law" and the "theory of tort law" have been determined and shaped, to a large extent, by the influence of the stream of economic analysis of law³¹⁵. Thereinafter, it has been a significant and fruitful stream of academic thought during the last 30 years of the 20th century, and the beginning of the 21st century, to say the least. Its assessments have played a determinant role in the development of comparative tort law during the referred period. Thus, its reasoning has impregnated the discourse of other streams of academic reflection, to the point of being intertwined with them.

Under this influence, academic literature distinguishes two different but interrelated kinds of deterrence³¹⁶: On the one hand, special deterrence which "*involves making rules, creating duties and sanctions for those who break them*". On the other hand, general deterrence, which involves allowing economic operators in the market to choose between engaging in a given activity and paying "*the costs of doing so, including accident costs, or given the accident costs, [engaging] in safer activities which might otherwise have seemed less desirable*". As it may be easily understood, general deterrence is said to work only in relation to activities which entail risks. The ratio of this kind of deterrence would be that despite the fact that "*free economy*" by itself may not suffice to assure justice, "*economic laws may sometimes and to a certain extent do bring [sic] rewards and sanctions to those who deserve them*"³¹⁷. In any case, "[t]he greatest objection to the deterrence theory, [...] is that it is inapplicable in those numerous cases where the plaintiff's injury is the result of error rather than blameworthiness"³¹⁸.

Furthermore, under the referred broad influence by economic analysis of law, discourses on "deterrence of anti-social conduct" by tort law are sometimes closely intertwined with

³¹³ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 25. Cfr. A. GUEGAN-LECUYER, *Dommage de masse et responsabilité civile*, op. cit., pp. 284-285. This latter author considers that tort law plays a determinant role in the prevention of mass-torts. She contends that, taking into account the amounts at stake in terms of damages, and interests arising thereof, tort law's deterrent effect cannot be neglected.

³¹⁴ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 25. Vid., in the same sense, B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), op. cit., p. 37.

³¹⁵ Vid. J. OBERDIEK, "Introduction: Philosophical Foundations of the Law of torts", in J. OBERDIEK (ed.), *Philosophical Foundations of the Law of Torts*, Oxford, OUP, 2014, pp. 1-13, at p. 1.

³¹⁶ Vid. A. TUNC - *International Encyclopedia*, op. cit., pp. 88-89 (quoting G. CALABRESI).

³¹⁷ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 93.

³¹⁸ Vid. B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), op. cit., p. 37. In the same sense, and providing further developments, Vid. A. TUNC - *International Encyclopedia*, op. cit., pp. 90-91.

considerations on avoidance of economically inefficient behavior³¹⁹. This latter notion actually refers to "*the idea that tort rules should provide incentives to avoid socially harmful behaviour*", meaning a behaviour that "*does not lead to an optimal allocation of resources*"³²⁰. This reasoning is based on the assertion that "[...] *a rule of law is fair and just only when it promotes economic efficiency, in that it leads to the maximum net aggregate social welfare* [...]"³²¹.

However, despite the fact that this latter aspect – avoidance of economically inefficient behavior – may be contended to be a synonym of deterrence, it is important to keep the distinction of these notions in mind because, in terms of policy, inefficient and anti-social conducts are not necessarily equivalent³²².

c. Loss distribution, Loss spreading

Tort law is sometimes presented as one of several tools that society has conceived in order to deal with the "*social problem*" of "*distribution of misfortune*"³²³ – amongst individuals within society. Despite the fact that, in a strict sense, tort law is rather a tool of loss allocation, meaning that it "*merely shifts losses from one individual to the other*"³²⁴, there can be, from a larger perspective a loss-distributing dimension to it. Thus, tort law and other institutions such as private loss insurance, social insurance, and public health services – referred *supra* as having reduced tort law's role in respect of compensation and deterrence – may "*distribute losses amongst many (individuals) and collectivize them*"³²⁵. Precisely, the two latter institutions originally arose out of the fact that there are situations where compensation appears to be desirable, but circumstances do not require liability to be borne by the tortfeasor. Therefore, it seems more appropriate to have loss "*pulverized*" – so that it becomes a light one to bear – amongst the collectivity³²⁶.

³¹⁹ When H. KOZIOL (*Basic Questions of Tort Law from a Germanic Perspective*, Vienna, Jan Sramek Verlag, 2012, p. 78) writes about "*a legal attempt to create incentives for socially efficient behavior*" he possibly mixes up deterrence and avoidance of inefficient behavior. Similarly, when R. STEVENS (*Tort and Rights*, *op. cit.*, p. 321) reflects on "*detering injury-causing conduct*" and resorts to economic analysis of law he is simply aiming at what has been referred *supra* as "deterrence", without distinguishing it from the hereby analyzed avoidance of economically-inefficient behavior.

³²⁰ *Vid.* W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, *op. cit.*, p. 27

³²¹ *Ibidem*.

³²² *Ibidem*: "*Although much criticized, in that it may seem to equate justice with efficiency [...], that approach rightly emphasizes the need to reduce the costs of accidents and to take efficient precautions to avoid them*".

³²³ *Vid.* L. DÍEZ-PICAZO, *Derecho de daños*, *op. cit.*, p. 41. The precise terms used in the original Spanish text are "*problema social*" and "*distribución de los infortunios*".

³²⁴ *Vid.* W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, *op. cit.*, p. 22; A. TUNC - *International Encyclopedia*, *op. cit.*, pp. 96-97.

³²⁵ *Vid.* W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, *op. cit.*, p. 22

³²⁶ *Vid.* A. TUNC - *International Encyclopedia*, *Cases, materials and text on National, Supranational and International Tort Law*, *op. cit.*, pp. 96-97

Tort law's loss-spreading function can work in two ways³²⁷: first, indirectly, where civil liability is covered by insurance, and thus becomes a "*mere channel towards loss distribution*". Secondly, it can manifest itself directly, through what can be called the "*workings of the market*", i.e. through the price mechanism. A loss originally borne by the tortfeasor may be pulverized on to the market – its customers – by the way of prices; "*the potential civil liability that weights upon suppliers of goods or services is a cost which will be reflected in the price of the product or the service that they sell*"³²⁸. In any case, all of these institutions have undergone parallel development throughout their evolution and become complementary³²⁹.

As it was the case with previously described functions, loss distribution equally faces limits³³⁰: First, it may not always be desirable for loss to be spread for it conflicts with the policy of deterrence. Secondly, loss-distribution does not seem desirable in cases of intentional damage. Thirdly, the boundaries of the subject-matter fields to be covered by loss distribution vary from a country to another – they roughly coincide with those within which insurance liability is recognized as valid in a given legal system. Furthermore, following the same academic assessment, there are what can be described as "economic limits": a society can bear only a certain share of "*pulverized*" losses, and an overload may cause economically detrimental consequences. In the same fashion, a given individual may only be able to deal with a given share of losses that it may be able to pass on to the market through the price mechanism. Beyond that point, the economic operator may be driven out of the market. Therefore, consequences need to be carefully assessed before passing a certain category of burdens to a certain category of actors.

d. Guarantee of citizen's rights

The fourth possible function of tort law is what, in my opinion, could be described as an overarching ratio of the discipline: the guarantee of citizen's rights. This function could be considered as an abstract summary of the different functions that – as it was seen *supra*, and will further be seen *infra* – tort law may fulfill when confronted with different thematic fields and situations. Thus, this function "*forms the basis on which the whole law of tort should be built. It might be seen as its justification and dictate its solutions*"³³¹. Quite probably the quotation that opened this section, on tort law's purpose being the horizontal protection of human rights³³², refers to this aspect.

³²⁷ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 97; W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 22.

³²⁸ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 22.

³²⁹ *Ibidem*.

³³⁰ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 97-99.

³³¹ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 99.

³³² For a thought-provoking re-conceptualization of this "philosophical explanation" to the functions of tort law, which furthermore clarifies the link between Human Rights and tort law in an accessible manner for private lawyers, vid. N.J. MCBRIDE "Tort law and human flourishing", in S.G.A. PITEL, J.W. NEYERS & E. CHAMBERLAIN, *Tort Law: challenging orthodoxy*, Oxford, Hart publishing, 2013, pp. 19-57.

Following the *International Encyclopedia of Comparative Law*, several descriptions and theoretical frameworks for this function can be found in legal scholarship, none of them being able to fully describe its precise boundaries: one position considers, for instance, that tort law stems out of a "*common aspiration to security and of the response of the judiciary to that aspiration*", amounting to a "*construction based on the idea that every encroachment on the integrity of persons and property should be compensated, except in few precise cases*"³³³. This does not prejudice, however, the fact that "*there are many damages against which the law does not afford any protection, for the simple reason that they are the simple and unavoidable consequences of the exercise of a right or a freedom*"³³⁴. Against this characterization as a "common aspiration to security", others prefer to accentuate the "frontier-setting" dimension of this function: tort law's first purpose would be to trace the frontiers – or to resolve the tension – between the scope of human freedom of action and the scope of the protection given to certain legal goods and interests³³⁵.

Overall, conceiving tort law as needing to guarantee of citizen's rights helps understand the alleged incorporation of human rights law influence into tort law throughout Europe³³⁶.

e. Other functions, amongst which punishment

Other than the four functions presented up to this point, other potential functions of tort law may possibly include, for instance, appeasement of the victim and fulfillment of – compensatory – justice, which are said to be functions narrowly related to the compensatory function³³⁷. Equally, reformation of the wrongdoer – in the sense of rehabilitation or *ex post facto* education – is sometimes considered to be a function in narrow relationship with deterrence³³⁸. Other accounts enounce, for instance, vindication, understood as knowing "*what really happened*" and preventing it from happening again³³⁹, and "*doing (corrective)*"

³³³ Vid. A. TUNC - *International Encyclopedia*, op. cit., pp. 99-103, especially p. 103.

³³⁴ *Ibidem*.

³³⁵ Vid. L. Díez-PICAZO, *Derecho de daños*, op. cit., p. 43. While the frontier-setting vocabulary is L. Díez-PICAZO's own ("*Función de demarcación*", "*delimitación de fronteras entre los ámbitos de libertad de actuación y aquellos otros en que se otorga una cierta dosis de protección a determinados bienes e intereses [...]*"), the reference to a tension ("*tensión*") is attributed to CLAUS-WILHELM CANARIS (LARENZ' SCHULDRECHT – no further info provided).

³³⁶ Vid. M. LUNNEY & K. OLIPHANT, *Tort Law – Text and Materials* (5th ed.), Oxford, OUP, 2013, pp. 28-32, especially p. 30. The referred authors comment on several impacts of the European Convention of Human Rights (*via* the Human Rights Act 1998) on English tort law, *inter alia*, by obliging courts to interpret domestic law in accordance with the convention, and by submitting States to liability for a breach of Art. 6 (right to a fair trial).

³³⁷ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 96. In the same sense, vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 19. As suggested *supra*, some functions are identified by some authors while discarded, considered outdated, or subsumed in the main ones by others, leading to non-homogeneous conclusions regarding the identification of the functions that tort law does fulfil.

³³⁸ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 92.

³³⁹ Vid. K. HORSEY & E. RACKLEY, *Tort law* (3rd ed), Oxford, OUP, 2013, pp. 17-18. Their account refers to the functions of the English law of torts.

justice" ("If I am responsible for harming you, then justice requires me to put things right"), as a distinct function from "compensation" and "deterrence"³⁴⁰.

Amongst the functions which are considered to be minor or outdated, the punitive function needs to be highlighted. Nowadays, tort law is considered by most authors not to play any significant role as regards the function of punishing socially detrimental behaviour, at least in European continental legal systems, and only marginally in Anglo-Saxon-influenced legal systems³⁴¹. Historically, this was not always the case. At the beginning of the lengthy evolution that has led to tort law as it is known in current legal systems, the punitive function was very present³⁴². This was so to the point that, in their origins, the frontiers between tort law and criminal law were blurred³⁴³. But the said evolution has entailed, at least as regards continental legal systems, a process of separation between rules whose purpose is indemnization and rules whose purpose is punishment. The result of this process being, purportedly, that the punitive function is currently almost exclusively fulfilled by rules on criminal law and, to a certain extent, by "disciplinary" rules within administrative law³⁴⁴. As regards the above-referred exception found in Anglo-Saxon-influenced legal systems, it is considered that the punitive function is only present in the tort rules of those few systems which contemplate punitive or exemplary damages – and in most cases only under limited circumstances³⁴⁵.

³⁴⁰ *Ibidem*, pp. 10-11.

³⁴¹ *Vid.* B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), *op. cit.*, p. 37 ("Punishment is [...] an aim which is best left to another branch of the law (criminal law)"; "[...] the punitive element in tort litigation remains minimal"). In the same sense, A. TUNC - *International Encyclopedia*, *op. cit.*, p. 87. Within French legal literature, one may find monographies which sustain opposing views on the issue. *Vid.* S. CARVAL, *La responsabilité civile dans sa fonction de peine privée*, Bibliothèque de droit privé, vol. 250, Paris, L.G.D.J., 1995. This author not only supports the existence of a punitive function of the "responsabilité civile" (thus, a larger notion which, however, comprises torts) along its compensatory function, but also considers that it would be beneficial if it was given a bigger role to play (pp. 379-384). *Cfr.* with A. JAULT, *La notion de peine privée*, Bibliothèque de droit privé, vol. 442, Paris, L.G.D.J., 2005. This author (pp. 273-275) contends that: "[...] il nous semble que la conception [...] qui voit dans la peine privée une institution autonome par rapport à la réparation, permet de rendre compte du mécanisme des manifestations de l'idée de peine privée qui connaît notre droit positif".

³⁴² *Vid.* L. DíEZ-PICAZO, *Derecho de daños*, *op. cit.*, p.44.

³⁴³ For a description of the evolution of the relationship between tort law and criminal law in France throughout history, coupled with an analysis on the reciprocal interpenetration of their respective functions, *vid.* G. VINEY, *Introduction à la responsabilité* (3rd ed.), Collection Traité de droit civil (sous la direction de JACQUES GHESTIN), Paris, L.G.D.J., 2008, pp. 161-181. The significance of this linking is highlighted, within the realm of private international law, by O. KAHN-FREUND ("Delictual Liability and Conflict of Laws", *Recueil des Cours de l'Académie de Droit International*, vol. 124, Leiden, Martinus Nijhoff, 1968, pp. 20-22). Following this author, delictual liability was submitted to the *lex fori* during a significant period in history because of its connexion with criminal law.

³⁴⁴ *Vid.* L. DíEZ-PICAZO, *Derecho de daños*, *op. cit.*, p. 44. In Spanish the term used is "*Derecho Administrativo sancionador*".

³⁴⁵ *Vid.* W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, *op. cit.*, p. 19; L. DíEZ-PICAZO, *Derecho de daños*, *op. cit.*, p. 44. *Vid.* as an enlightening EU case-law illustration the ECJ's decision in "*Manfredi*" (ECJ, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA*, joined cases C-295/04 to C-298/04, ECLI:EU:C:2006:461), where the Court gives green light to punitive damages within the realm of private enforcement of EU competition law, and acknowledges the deterrent effect of punitive damages.

Thus, modern treatises of comparative law barely mention punishment, and when they do so, it is mostly in order to discard it from the list of potential functions of modern tort law³⁴⁶. This position is frequently justified, *inter alia*: (i) on the basis of the dangers potentially entailed by the presence of punitive elements in a civil action unaccompanied by the procedural guarantees of a criminal trial and other related constitutional safeguards, (ii) on the basis – as regards European continental legal systems – of the necessary correlation between the measure of the damage and the measure of the reparation – and the idea that any monetary amount in excess of the measure of the damage should not be delivered to the victim but to the State –, or else, (iii) on the basis of philosophical considerations that can be traced back to the influence of nineteenth century criminologists³⁴⁷.

Nevertheless, it may be possible to question whether the alleged lack of punitive value of (punitive-damages-lacking systems of) tort law is absolute.

To begin with, if one is to consider that “punishment” necessarily includes the exercise of a certain share of public authority in order to distinguish it from simple “deterrence”, it may be possible to find punitive value therein under certain circumstances: private enforcement may be understood as a certain delegation of the protection of public interest from the State to the private subjects who trigger the said enforcement before the courts. Therefore, it may be possible to argue that wherever tort law serves private enforcement purposes it may potentially have punitive value (provided other elements concur)³⁴⁸. Nevertheless, however promising this first line of argumentation may be, it will be disregarded, in order to focus in a more interesting one: even assuming that punishment had completely faded away within the frame of purely domestic tortious situations as a consequence of the rise of criminal and administrative law, this is not necessarily the case in transnational situations. In a global context, where private international relations are determined by the enhanced international mobility of economic actors, and where the latter operate *de facto* in a realm of minimum governmental intervention, is tort law’s punishing value necessarily and completely gone?

L. Díez-Picazo contends that – notwithstanding the exception of punitive or exemplary damages, where available – the only way in which a punitive function may be found in rules

³⁴⁶ *Vid.*, exceptionally, in the opposite sense, P. CANE, *The Anatomy of Tort Law*, Oxford, Hart, 1997, pp. 206-207. This author explicitly mentions the punishment of the defendant (which engenders “a sense of vindication or satisfaction” in the plaintiff) as a function of tort law in the Common Law. *Cfr.*, however, with X. TUNIS & B. FOSSEPREZ, “Caractère indemnitaire ou punitive des dommages et intérêts – Rapport belge”, in B. DUBUISSON & P. JOURDAIN (dirs.), *Le dommage et la réparation dans la responsabilité contractuelle et extracontractuelle*, Brussels, Bruylant, 2015, pp. 237-310 (esp. pp. 239-252). They contend that, notwithstanding certain subliminal tendencies towards punitive value, indemnisation remains the core and “central” function of the payment of damages, despite exceptions and nuances (pp. 307-310). *Cfr.* also with H. KOZIOL (*Basic Questions of Tort Law from a Germanic Perspective*, Vienna, Jan Sramek Verlag, 2012, p. 52) who considers that the “notion of punishment is foreign to the private law”.

³⁴⁷ *Vid.* B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), *op. cit.*, p. 37; A. TUNC - *International Encyclopedia*, *op. cit.*, p. 87; M. MARTÍN CASALS, “Notas sobre la indemnización del daño moral en las acciones por difamación de la LO 1/1982”, *Estudios en homenaje al Código Civil*, Madrid, Asociación de Profesores de Derecho Civil, 1989, pp. 1231 & following (as quoted by L. DÍEZ-PICAZO, *Derecho de daños*, *op. cit.*, p. 46); L. DÍEZ-PICAZO, *Derecho de daños*, *op. cit.*, pp. 46 & 47.

³⁴⁸ As it will be seen *infra*, “The interplay between compensation and punishment: relativity (a quest for generic punishment in tort law)”.

which fulfill a compensatory function would be to conceive the notion of sanction in a very generic way: as simply linking a given behavior to certain consequences which may be seen as unfavorable by the author of such behaviour³⁴⁹. Although originally discussed by the referred author within a domestic mindset, this “generic” notion of sanction / punitive function may amount to unwind its full potential in a transnational context. Thus, it is this generic notion that will be addressed in the upcoming pages.

Having concluded this brief review of potential functions of tort law, let us turn to an assessment thereof.

ii. *Assessment of the main functions of tort law*

The previous section described a selection of potential functions of tort law as identified by legal scholars from different traditions (albeit, giving a significant weight to the considerations of the *International Encyclopedia of Comparative Law*). The current section aims at providing an evaluation of the interplay amongst some of them, as a step in the path towards ascertaining what role may tort law and choice of law play in the frame of human-caused environmental catastrophes. As it has been highlighted *supra*, on the one hand, compensation and, on the other hand, deterrence / prevention appear recurrently in different lists of functions – despite the fact that they may be valued differently from one assessment to another³⁵⁰. Since such a constant presence may be deemed an indicative of their relevance, it seems therefore fair to center this assessment of the functions of tort law on them. Thus, a first step in the assessment will lead to concluding that one of these functions is in a position of subsidiarity to the other (a). Then the assessment will continue with a second step which will concern compensation and the – frequently rejected – function of punishment (b). This is due to the fact that the above-referred possibility of potentially finding some sort of generic or “lighter” punishing value in tort law is worth being explored, in the light of the overall objectives of this dissertation. These two steps in the assessment will ultimately lead to considering that, whichever functions tort law may perform, they will only be performed in a chameleonic and subsidiary fashion. The assessment will conclude with a specific reference to the functions performed by tort law when dealing with environmental matters (c).

a. The interplay between compensation and deterrence: dependency and subsidiarity

³⁴⁹ Vid. L. DÍEZ-PICAZO, *Derecho de daños*, op. cit., p. 46. Following the said author, if this was the case (if tort could be “generically” punitive), it could not entail prejudice to the fact that: i) rules on extracontractual liability should not reach beyond the economic measure of the harm effectively suffered, and ii) rules on extracontractual liability cannot enter into play if no harm has been suffered, no matter how despicable the conduct of the author.

³⁵⁰ As put by M. FAURE (*L'Analyse économique du droit de l'environnement*, Bruxelles, Bruylant, 2007, p. 87): “Plusieurs fondements théoriques ont été proposés [...] Le débat sur le fondement de la responsabilité civile est encore vif aujourd’hui [...]”.

When comparing the compensatory and deterrent functions, a fundamental difference in approach is immediately noticed: they respectively focus upon different legal subjects. While compensation revolves around the position of the victim, deterrence is centered on the position of the injurer: it reflects an aspiration to prevent socially undesirable conduct that may potentially be caused by potential perpetrators of harm³⁵¹. In this sense, it may be argued that, since tort's remedies correspond largely with the victim's injury and not, in principle, with the gravity of the perpetrator's conduct (as it tends to be the case with criminal law's remedies)³⁵², compensation plays a leading role within tort law. In other words, the fact that "*the degree of blameworthiness of the conduct of the injurer has no effect, in principle, on the amount of damages to be awarded*"³⁵³ is a strong indicator of the primacy of compensation over deterrence within the realm of tort law.

Moreover, this primacy actually amounts to a relationship of dependency. On the one hand, it is contended that the deterrent effect of civil liability increases wherever "multiple damages" are awarded, or wherever damages are computed according to the wrongdoer's profit³⁵⁴ (i.e. deterrence increases wherever compensation increases). On the other hand, it is contended that wherever tort law's compensatory value is blurred by the intervention of institutions issued from other fields of law – as for instance, insurance – so is its deterrent value³⁵⁵ (i.e. deterrence decreases wherever compensation decreases). Both of these ideas point to the precise nature of the relationship amongst the referred functions: in the framework of tort law, deterrence – if there is any – is dependent on compensation; it may only be fulfilled if the tortfeasor effectively and personally pays the monetary compensation provided for.

But tort law's deterrence is not only dependent on the effectiveness of tort compensation. It is equally dependent on whether other fields of law with bigger deterrent value intervene or not in the case at stake. Wherever adequate administrative law and / or criminal law exist and are effectively enforced, tort law's deterrence is significantly diminished. Depending on the effectiveness of administrative / criminal interventions, tort law's deterrence may be completely erased, leaving only compensatory value. This is said to be so because "*the deterrent or admonitory effect of money compensation is generally less than that of the*

³⁵¹ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 25.

³⁵² Vid. B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), op. cit., p. 37. H. KOZIOL (*Basic Questions of Tort Law from a Germanic Perspective*, Vienna, Jan Sramek Verlag, 2012, p. 57) explicitly qualifies prevention as "secondary" in respect of "*the main aim of compensation*".

³⁵³ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 19. The extract goes on as follows: "*while even the slightest fault can lead to a heavy burden of damages, the most despicable act can lead to the award of only very small damages*". Nevertheless, these assertions need to be nuanced, for, as indicated above, in certain legal systems, under certain circumstances punitive or exemplary damages may be awarded. For a summary reflection on the existence an impact of punitive damages in different legal systems, vid. L. DÍEZ-PICAZO, *Derecho de daños*, op. cit., pp. 44-47.

³⁵⁴ Vid. A. TUNC - *International Encyclopedia*, op. cit., p. 89.

³⁵⁵ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, op. cit., p. 25: "*the deterrent edge of tort law is blunted by the fact that in practice damages are, far more often than not, paid by an insurer or social security authority rather than the tortfeasor himself, albeit the insurer or social security authority may, depending on the insurance policy and/or the applicable legislation, recover the money from the tortfeasor*".

*corporal punishment of criminal law (e.g. imprisonment)”; thus the comparatively “lighter consequence of a successful tort action, therefore, blunts its deterrent value”*³⁵⁶.

However, despite the relevance of compensation, and even if there is indeed a certain “hierarchy” between both functions, it is important to insist on one of the ideas referred above in respect of compensatory value, in order to get a proper picture of the situation: the compensatory value of tort law may equally be blunted by the intervention of other legal institutions³⁵⁷. As with other functions attributed to tort law by scholars, compensation is far from being its exclusive monopoly. Thus, in order to attain the objectives attributed to tort law, society has a wide choice amongst different techniques and other fields of law³⁵⁸ (as, for instance, the mechanisms stemming from the fields of social security and – the above-referred – insurances), which may displace tort law. Ultimately, this means that tort law’s compensatory value may also be downgraded to a secondary level, consequently placing tort law and thus all of its functions in background positions in respect of any another field of law, whenever any of the functions embodied in tort law are concurrently and more conveniently fulfilled by the latter.

b. The interplay between compensation and punishment: relativity (a quest for generic punishment in tort law)

Let us now focus on the possible punishing value of tort law. It was referred *supra* that, for the purposes of this dissertation, it will be assumed that the possible punishing value of tort law would be built upon a “generic” notion of sanction: as simply linking a given behavior to certain consequences which may be seen as unfavorable by the author of the said behavior. It was equally indicated *supra* that there is a fundamental difference in approach between compensation and deterrence. Interestingly, the same difference in approach is to be found between punishment – as mentioned, most typically embodied by criminal law – and compensation: punishment aims at intervening “ [...] *even where no harm has occurred, and it is linked primarily to the culprit’s fault*”³⁵⁹. There is thus a structural alignment between the

³⁵⁶ Vid. B. S. MARKESINIS & S. F. DEAKIN, *Tort Law* (4th ed.), *op. cit.*, p. 37. Cfr. with A. GUEGAN-LECUYER (*Dommage de masse et responsabilité civile*, *op. cit.*, pp. 284-285) who contends that tort liability would be superior to criminal liability in terms of deterrent effect (“*La responsabilité civile apparaît également supérieure à la responsabilité pénale limitée dans son champ d’action par le principe de légalité des délits*”). This latter assertion seems, in my opinion, exaggerated to say the least.

³⁵⁷ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, *op. cit.*, p. 25.

³⁵⁸ Vid. A. TUNC - *International Encyclopedia*, *op. cit.*, p. 105; Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, *op. cit.*, p. 18.

³⁵⁹ Vid. W. VAN GERVEN, J. LEVER & P. LAROCHE, *Cases, materials and text on National, Supranational and International Tort Law*, *op. cit.*, p. 19. This reflection does not strictly refer to “punishment”; it is conducted via a comparison between criminal and tort law. Nevertheless, this assertion needs to be nuanced for, as referred *supra*, in certain legal systems and under certain circumstances punitive or exemplary damages may be awarded. For a summary reflection on the existence an impact of punitive damages in different legal systems, *vid.* L. DÍEZ-PICAZO, *Derecho de daños*, *op. cit.*, pp. 44-47. For a proposal for re-conceptualizing punitive damages as “preventive damages” *vid.* H. KOZIOL, *Basic Questions of Tort Law from a Germanic Perspective*, *op. cit.*, pp. 56-57 (who quotes this idea as coming from G. WAGNER, and after presenting it, discards it).

notions of deterrence and punishment. This alignment between the referred functions is by no means surprising: sanctions, the core vehicle of punishment, are considered to be utmost deterrent *per se*, and thus one of the main tools of the legal modeling of social conduct. Consequently, the presence or the absence of punitive value in a given field of law is significant in determining to which extent that field of law may possess a deterrent value. The referred alignment between deterrence and punishment allows extending to punishment some of the conclusions suggested above in respect of deterrence: tort law's punishing value – if any – is equally dependent on effective compensation; it may only be fulfilled if the tortfeasor effectively and personally pays the monetary compensation provided for. Moreover, tort law's punishment – if any – will also be blunted by the effective intervention of other fields of law whose punitive value is greater than that which tort law presents. Thus, the potential punishing value of tort law is equally placed in a background position, reinforcing the above-referred idea of the “primacy” of compensation above other possible tort-law functions. However, beyond this position of dependence and subsidiarity, – potential – punishment additionally suffers from relativity. For an abstract victim, tort law bears *in abstracto* compensatory potential even if it can be *in casu* blunted depending on the configuration of several factors within the relevant legal order:

i) Effective *in casu* resort by the victim to tort-law compensation within a given legal order will depend on whether the intervention of other fields of law is thematically possible, i.e. it will depend on the specific subject-matter concerned. Example: while relying on social security schemes may make sense in the field of road accidents, it may make less sense or even no sense at all in the case of an environmental tort.

ii) Then, moreover, effective *in casu* resort by the victim to tort-law compensation within a given legal order will depend on the *in casu* effectiveness of the intervention of the other competing fields of law and institutions. Thus, a given institution will be chosen over tort law or *vice versa* depending on how “good” their solutions are for the victim (and on other factors such as legal organization, political choice, etc.).

iii) This means that, *in casu*, if a given legal order is *de facto* or *de iure* stripped from social security, insurance schemes, and etc. – either because such fields exist but are inefficiently developed, or else because they quite simply do not exist at all – tort law will be capable of deploying its compensatory value.

However, for an abstract tortfeasor, tort law does not necessarily bear *in abstracto* punishing value. Punishing value will only appear *in casu*, depending on several factors within the relevant legal order:

i) Effective *in casu* tort-law punishment over a potential tortfeasor within a given legal order will also depend firstly on whether the intervention of other fields of law is thematically possible: put otherwise, whether generic punitive elements may be present in tort law, and to what extent tort law may produce a deterrent effect (with or without such generic or “lighter” punitive elements) are questions whose answers will vary widely from one subject-matter field (road accidents, product liability, etc.) to another. Example: the intervention of criminal law in respect of the prevention of road accidents is probably more extended world-wide than its

intervention in environmental matters; probably fewer legal orders contemplate environmental crimes.

ii) Beyond this point, effective *in casu* tort-law punishment within a given legal order will, nevertheless, remain relative: it will not depend on the *in casu* effectiveness of the intervention of other competing fields of law and institutions (i.e., it will not be dependent on whether any other institution provides bigger punishment or deterrence than tort law or *vice versa*). Even where there is no efficient intervention by other fields of law, or simply no intervention at all, the potential punishing value of tort law will be dependent on an *in casu* cost-benefit analysis.

iii) This means that, unlike compensatory value, tort law does not hold any *in abstracto* / absolute punishing / deterrent value: if a given legal order is *de facto* or *de iure* stripped down from criminal and administrative law (be it because such fields of law exist but are inefficiently developed, or else because they do not exist at all) tort law will still need to be submitted to a cost-benefit analysis in order to find any possible “light” or generic punishment, or quite simply pure deterrent value³⁶⁰.

In sum, for the torfeasor, tort law does not have, in absolute terms, punishing or deterrent potential: its possible generic punishment, or else merely deterrent value, will always depend on a cost-benefit analysis.

This idea is better illustrated by a string of cases which, despite not dealing with environmental issues, stems from the realm of transnational corporate activity, and provides a logic that can be easily transposed to the environmental field:

BOX 4:

The General Motors rear-end collisions cases

The GM rear-end collision cases are a series of North-American cases, judged on the basis of American law “*theories of negligence and products liability*” which concerned whether

³⁶⁰ That being said, while a “legal competition” between criminal and tort law will generally be won by criminal law, a legal competition involving administrative law needs to be carefully assessed too. In other words, it is possible to assert that the logic of legal competition will generally go against tort law whenever it is effectively confronted with efficient criminal law, due to the more severe consequences stemming therefrom (*Cfr.* the assertion on “corporal punishment” presented *supra*). But when administrative law kicks in, so does relativity: this latter field of law, whose sanctions are mainly economic in nature, will be submitted to a cost-benefit analysis too. Within such framework, in order to be punitive or deterrent, administrative law needs to unbalance the potential tortfeasor’s economic calculations towards legal compliance (or else towards undertaking efficient measures of avoidance). This means that it has to be detrimental in one of two possible senses: it has to either individually amount to a significant economic sanction by itself, or else it has to “go beyond” tortious liability, working as an additional burden placed over the raw compensation accomplished by tort law. This is possibly why the European Institutions are so interested in the development of private enforcement of European Competition Law: the weight of European fines would be much more properly felt if, to begin with, private enforcement provided a full-compensation basis upon which fines amounted to be detrimental.

automobile manufacturer General Motors “*had willfully, intentionally, and unnecessarily exposed [...] the American public to death by fire, for monetary reasons*”³⁶¹. The following are a selection of only two out of “*a string of personal injury lawsuits stemming from fuel-tank fires that erupted in collisions*”³⁶². The first one has been chosen due to its relevance in terms of the amount of damages awarded; the second one due to the fact that critical evidence for the development of all other cases surfaced in the frame of its proceedings.

Anderson v. General Motors, involved a 1979 Chevrolet Malibu owned and driven by Patricia Anderson which was rear-ended by Daniel Marenco [sic], a speeding drunk driver on the night of December 24, 1993, while stopped at a Los Angeles traffic light. The impact crushed the Malibu's rear and pierced the fuel tank, which caught fire. Despite surviving, all occupants suffered burn injuries, notably Mrs. Anderson's four children, who were in the back seat, and her friend Jo Marion Tigner. All of them suffered severe disfiguring burns³⁶³. “*On July 9, 1999, the jury returned a \$4.9 billion verdict against GM, \$107 million in compensatory damages, and \$4.8 billion in punitive damages. On August 26, the trial judge reduced the punitive award to a still-record \$1.1 billion*”³⁶⁴.

In *McGee v. General Motors Corp*, a “*Florida case, a state jury in Fort Lauderdale awarded \$33 million to the family of a 13-year-old boy who burned to death in a 1983 Oldsmobile Cutlass station wagon*”³⁶⁵. The McGees were on vacation on July 3, 1991, in Virginia. As explained in the very text of the appellate opinion, they “*were passengers in a 1983 Oldsmobile Cutlass Cruiser station wagon owned by a family member, Jane Renze, who was also in the car. The Oldsmobile stopped at a toll booth near Virginia Beach*”. While stopped, the car was impacted by a homemade trailer which had disconnected from the truck that was pulling it, crossed four lanes of traffic, and hit it. The surviving occupants of the car described the impact as “*a little bump*”, a “*slight tap*”, “*more like a “thud” as though the car had been hit by a stone*”. Its consequences were, however, dramatic: “[t]he trailer tongue pierced the station wagon's gas tank, causing the tank to leak fuel, ignite, and explode”³⁶⁶. “*In the 1,500 to 1,600 accidents he had investigated, Trooper Kenneth Hicks had “never seen one that happened” like the one in this case. The trooper stated that the accident would have been a minor one if not for the fire*”³⁶⁷. As a result, the mother, father and daughter of the McGee family suffered very severe

³⁶¹ *Vid. General Motors Corp v. McGee*, 837 So.2d 1010 (2002) (at 1017). This is the appellate-level decision (by the District Court of Appeal of Florida, Fourth District; December 18, 2002). The lower level decision dates from 18 May 1998 (by the Broward County Circuit Court, Florida).

³⁶² *Vid.* WALL STREET JOURNAL, “How a Memo Written 26 Years Ago Is Costing General Motors Dearly” (29 September 1999) (<http://www.wsj.com/articles/SB9385366607816889>) (Last verified 4 October 2016).

³⁶³ Summary made from WALL STREET JOURNAL, “How a Memo Written 26 Years Ago Is Costing General Motors Dearly” (*op. cit.*) and “Appeal Pending In *Anderson v. GM - A Case Study for Civil Justice Reform*” (Washington, DC, June 21, 2000) <http://www.atra.org/newsroom/appeal-pending-anderson-v-gm-case-study-civil-justice-reform> (Last verified 4 October 2016).

³⁶⁴ *Vid.* “Appeal Pending In *Anderson v. GM - A Case Study for Civil Justice Reform*” (Washington, DC, June 21, 2000) <http://www.atra.org/newsroom/appeal-pending-anderson-v-gm-case-study-civil-justice-reform> (Last verified 4 October 2016).

³⁶⁵ *Vid.* WALL STREET JOURNAL, “How a Memo Written 26 Years Ago Is Costing General Motors Dearly” (29 September 1999) (<http://www.wsj.com/articles/SB9385366607816889>) (Last verified 4 October 2016).

³⁶⁶ *Vid. General Motors Corp v. McGee*, judgment, *op. cit.*, at 1015-1016. Except otherwise states, all quotations in this paragraph of the dissertation are taken from the referred appellate decision.

³⁶⁷ *Vid. General Motors Corp v. McGee*, judgment, *op. cit.*, footnote 2.

injuries, but survived, while the son died within two hours as a result of the extreme gravity of his burning³⁶⁸.

In both of the referred cases, it was argued that *“GM did not provide adequate safety measures on fuel systems because the fire-related deaths did not cost the company enough per vehicle to justify any added expense for safety”*³⁶⁹. These assertions were based on the content of a key piece of evidence, the so-called “Ivey memo”, an internal report written in June 1973 by Edward C. Ivey, then low-level engineer who *“was working on new fuel systems at the time for Oldsmobile, then GM's lead division for designing fuel tanks”*. This memo, formally titled *“Value Analysis of Auto Fuel-Fed Fire Related Fatalities”*, examined *“the cost to GM of deaths by post-collision fuel-tank fires”*, on the basis of the estimation that *“rear-end accidents in GM cars were causing as many as 500 deaths a year “where bodies were burnt”*³⁷⁰. Moreover:

*“[...] Mr. Ivey calculated the cost at \$2.40 a car-based on 41 million GM vehicles on the road at the time, rear-end collision fatality rates and an estimate that each human life “has a value of \$200,000.” The engineer went on to write in his memo, “This cost will be with us until a way of preventing all crash related fuel-fed fires is developed” [...] In more than a dozen depositions in both the Anderson and prior cases, Mr. Ivey had said under oath that he wrote the memo on his own, couldn't recall why he prepared it or who at GM he may have shown it to. The \$200,000 value for human life he relied upon, [said GM's lead counsel], was derived from government statistics and reflected a dollar value to society, not the company. He faults Mr. Ivey for “a poor choice of words”*³⁷¹.

Despite the relevance of its content, GM had managed to *“keep the Ivey memo out of court”* by contending that it did not reflect corporate policy³⁷². This strategy tumbled down when *“[d]uring [their trial against GM] the McGees offered evidence that GM management authorized the Ivey Report to know how much they could spend on fuel systems”*³⁷³. The said evidence are notes of two interviews that GM lawyers conducted with Edward Ivey in 1981, where one of the lawyers asserts: i) that Ivey actually wrote the report for Oldsmobile management, and believes it was probably for one of GM's lead fuel-system designers; ii) that *“[Ivey] characterizes the nature of his analysis submitted to [the lead fuel-system designer] and*

³⁶⁸ While they have been omitted in this text, the family's injuries are described in the appellate decision, which also mentions that the medical staff that treated them had to undergo psychological counseling.

³⁶⁹ *Vid.* General Motors Corp v. McGee, judgment, *op. cit.*, at 1017. This is the appellate-level decision (by the District Court of Appeal of Florida, Fourth District; December 18, 2002). The lower level decision dates from 18 May 1998 (by the Broward County Circuit Court, Florida).

³⁷⁰ *Vid.* WALL STREET JOURNAL, “How a Memo Written 26 Years Ago Is Costing General Motors Dearly” (29 September 1999) (<http://www.wsj.com/articles/SB9385366607816889>) (Last verified 4 October 2016).

³⁷¹ *Ibidem.* As further explained in General Motors Corp v. McGee, judgment, *op. cit.*, at 1021: *“The report also stated that “it would be worth approximately \$2.20 per new model auto to prevent a fuel fed fire in all accidents.” The report cautioned that it was “really impossible to put a value on human life” and that it was “impossible to design an automobile where fuel fed fires can be prevented in all accidents unless the automobile has a non-flammable fuel”.*

³⁷² *Vid.* WALL STREET JOURNAL, “How a Memo Written 26 Years Ago Is Costing General Motors Dearly” (29 September 1999) (<http://www.wsj.com/articles/SB9385366607816889>) (Last verified 4 October 2016).

³⁷³ *Vid.* General Motors Corp v. McGee, judgment, *op. cit.*, at 1021.

others as one to assist them in 'trying to figure out how much Olds could spend on fuel systems'
 374 .

Further evidence presented in the frame of the McGee proceedings is summarized in the following excerpt of the appellate court decision:

"During his time at GM, Elwell [a member of GM's staff] unsuccessfully proposed an engineering standard for fuel system performance that "impact forces below the threshold level of fatality should be free from the hazard of post collision fires"; in other words, if "people survive the accident, there is no excuse for having a fire which will then burn them alive." Elwell testified that even though such a standard was technologically and economically feasible by 1972, GM did not adopt it. Instead, GM chose to limit its safety standards to the minimum required by the federal government. According to Elwell, Roger Smith, the chairman of the board, told GM engineers not to spend "one penny more" on safety than needed to meet the minimum federal standards.

By 1974, GM's leading fuel systems engineers knew that the federal standard "was inadequate for safety with respect to fuel systems." As early as 1977, GM was aware of a problem with fuel tank punctures in the 1978 A car. At that time, there had been incidents where the differential had broken during rear impact and torn a hole in the gas tank, draining it in seconds. GM began looking at bladders and shields as soon as it was found that the 1978 A car was leaking under testing. Jack Ridenour, a GM automobile safety engineer, told Elwell that shielding the fuel tank, even at \$4.50 a car, was too expensive.

By 1981, Mike Barcelow, the release engineer for the 1978 A car, was aware that the vehicle's gas tank was leaking under testing at the minimal federal safety standards. Although GM engineers were looking at ways to solve the problem, they were constrained by the refusal of GM's management to spend a penny more than was necessary to meet the federal standards. According to Elwell, Oldsmobile continued to make the 1978 A car and sell it to the public knowing, "by their own definition, that it was unsafe" 375 .

³⁷⁴ Vid. WALL STREET JOURNAL, "How a Memo Written 26 Years Ago Is Costing General Motors Dearly" (29 September 1999) (<http://www.wsj.com/articles/SB9385366607816889>) (Last verified 4 October 2016).

³⁷⁵ Vid. *General Motors Corp v. McGee*, judgment, *op. cit.*, at 1020. It is important to note that this example is not isolated: E. T. Lear (E. T. LEAR, "National Interests, Foreign Injuries, and Federal Forum Non Conveniens", *U.C. Davis L. Rev.*, vol. 41, 2007, pp. 559-603, at p. 576) reports similar corporate conduct by Ford and Bridgestone: *"The Bridgestone/Firestone-Ford Explorer rollover experience illustrates how the ability to spread losses across markets worldwide influences corporate behavior. Bridgestone and Ford appear to have had notice of the tread separation and resulting rollover problem as early as 1993. Ford met with lawyers in Venezuela in 1997 about the problem. That same year, after 100 deaths and 400 accidents in Venezuela, Ecuador, and Colombia, Ford replaced the tires and fixed the suspensions on all Ford Explorers in those countries. Yet neither Bridgestone nor Ford initiated an American recall until August 2000, and then only after the large number of lawsuits filed in the United States attracted the attention of the American press. In the deterrence calculus, it was apparently cost effective for Ford and Bridgestone to continue offering products they knew to be dangerous, even fatal, in the United States for at least seven years, and more importantly, for three years after a significant number of injuries had occurred overseas"*.

Overall, “[...] *trial testimony showed that it would have cost General Motors \$8.59 per vehicle for a safer design but that the company had decided it would be cheaper to settle any lawsuits that arose*”³⁷⁶.

Overall, all of the reflections above point to an extremely relevant role of cost-benefit analysis in the possible existence of generic punishment within tort law and, moreover, in the definition of the interplay of the functions of the said field of law. As illustrated by the General Motors cases, in general terms, in order to determine to which extent civil remedies may amount to be a generic sanction, the economic impact of those remedies needs to be weighed against the economic benefit that the potential tortfeasor may derive from causing harm, as well as other economically-significant potential market sanctions. The notion of market sanction includes, notably, reputational damage and consumer “retaliation”, as well as penalties / increases in insurance policies, etc. But in its simplest terms, for tort’s compensation to be generically punishing or simply deterrent its payment needs to exceed a certain threshold. It needs to be so economically damaging that the mere prospect of having to face it renders the risk associated with the relevant course of action unworthy. This, of course, depends on the specific economic power of the potential tortfeasor, the (projected) status of its finances when the (possible) sanction materializes (if it does / in case it did), and its overall economic planning and strategy. Thus, the same amount of compensation may be ridiculous for a given tortfeasor and totally burdensome for another. Probably, within the frame of “common” / classic torts committed by individuals, generic punishment and deterrence remain fairly likely to materialize. However, it seems that as regards mass-torts, committed by economically-healthy corporations, it may more rarely be the case: economically-fit tortfeasors may simply absorb the impact themselves, or either transfer it onto the market through price-rising. This kind of consideration is integrated in American punitive-damages reasoning, as illustrated by an anecdote taken from the *Anderson* case referred above:

“Quoting from annual reports, [the plaintiff’s lawyer] cited GM’s \$3.7 billion advertising budget for 1998, \$10.8 billion cash on hand and \$13.7 billion available credit. [When addressing the appropriate amount of damages, he] didn’t ask for a specific amount, but made it seem to jurors that GM could absorb a multibillion-dollar hit -- and that it would take a number in that range to get the company’s attention. “What would it cost if General Motors was docked one week of pay?” [the lawyer asked], citing three years’ average annual sales of \$162 billion. “It certainly doesn’t seem like a lot to them” ³⁷⁷.

Thus, again, in order for compensation to be generically punitive it needs to overshoot a certain threshold. As it was suggested above – when dealing with the function of loss-

³⁷⁶ *Vid.* NEW YORK TIMES, “\$4.9 Billion Jury Verdict In G.M. Fuel Tank Case” (10 July 1999) <http://www.nytimes.com/1999/07/10/us/4.9-billion-jury-verdict-in-gm-fuel-tank-case.html> (Last verified 4 October 2016).

³⁷⁷ *Vid.* WALL STREET JOURNAL, “How a Memo Written 26 Years Ago Is Costing General Motors Dearly” (29 September 1999) (<http://www.wsj.com/articles/SB9385366607816889>) (Last verified 4 October 2016).

distribution –society will only “accept” the re-transferring of a certain amount of tort compensation through market prices. Beyond that given point, the tortfeasor will need to absorb it itself. On the one hand, that absorption may be economically “hurtful” for the tortfeasor. And, on the other hand, beyond tolerable “absorption”, the tortfeasor will be excluded from the market. Therefore, it is my contention, that it is in these latter cases, notably, where the loss amounts to driving the tortfeasor out of the market, that tort liability may truly become a generic sanction. Ultimately, all of this means that the potential existence of a generic sanction and / or of this kind of deterrence is totally subjective, and needs to be verified on a case by case basis.

Therefore, in sum, it is possible to conclude, that the presence of “generic” punishment and / or deterrence can only be verified individually in given situations through the performance of an *in casu* cost-benefit analysis. Consequently, it is likely that in many instances the potential deterrent effect of tort law may be significantly marginal – even where, in a given subject-matter there is no effective punitive intervention by other branches of law or where such intervention is deficient. How frequent or exceptional this is, is to be determined by statistics and empirical research. For the purposes of this dissertation, the preeminence of compensatory value, and the submission of generic punishment and / or deterrence to cost-benefit analysis will be retained as core ideas which will guide further developments *infra*.

Finally, before turning to the functions performed by tort law when dealing with environmental matters, it is important to close this sub-section by highlighting that all of these reflections will still hold true if the notion of generic punishment is given up on, and the analysis above is conducted, exclusively, in terms of mere deterrence: all that has been stated in previous pages can be just as equally predicated of deterrence, if need be. Thus, while these findings do not allow discarding deterrence, they largely diminish the case for tort-law-induced deterrence, *inter alia*, in instances of international environmental occurrences.

c. Specific reference to the functions performed by tort law when dealing with environmental matters

Since previous pages have demonstrated that the functions of tort law have a chameleonic nature, they thus entail the need to examine the interplay of functions that tort law may perform when dealing with environmental matters, in order to ascertain whether there are specificities in this field worth mentioning.

Within the realm of environmental occurrences, compensation remains tort law’s leading function. It must be acknowledged, however, that the field is prone to governmental intervention, and that irrespectively of what specific role the relevant public subjects play in any given case, their mere involvement may alter the interplay of functions. It may blunt compensation, to begin with, especially in those instances where public involvement consists on the provision of immediate economic compensation to victims. This was what was initially announced in the 2010 “MAL Alumina Hungary” disaster – the Ajka alumina plant accident:

BOX 5:**MAL Alumina Hungary**

On October the 4th 2010, probably the biggest ecological catastrophe in the history of Hungary took place in the area of Akja, where *circa* one million cubic meters of "red mud" (composed of iron-oxide and aluminium oxide amongst other chemical substances) broke out from a reservoir at a plant that the company *MAL Alumina* owned in the zone. The flood expanded over approximately 40 square kilometers, killing several people, and injuring more than 120³⁷⁸.

Although MAL Alumina stated in the days following the disaster that "it would release 110,000 euros in "rapid aid" to families caught up in the disaster [...]"³⁷⁹, initially, the first promise for a source of relief came from the Hungarian government. In declarations to the *Népszabadság* journal, First Minister Viktor Orbán stated, shortly after the occurrence, that the Hungarian government would pay indemnizations to victims³⁸⁰.

However, barely nine days after the catastrophe, the Company ended up being nationalized³⁸¹, and ultimately went under liquidation in 2013³⁸². In January 2016, managers and top employees of the company were acquitted from criminal charges in relation to the events³⁸³.

It is not only logical but humane to have public administrations step in and offer to provide urgent relief in cases of severe damage to human life and health. This course of action does, nevertheless, annihilate tort law's compensation role: inasmuch as somebody else provides redress, tort law's compensatory function will be obliterated. This is not altered by the fact that public subjects may later decide to claim from polluters reimbursement of the monetary relief they advanced to victims. Although polluters will not get off lightly, that reimbursement will not be articulated via a private-subject-to-private-subject tort action.

Perhaps the most relevant observations that may be put forward in respect of tort law's functions in environmental torts concern the potential for generic punishment and / or deterrence. It is contended that the huge costs that arise from decontamination are a powerful incentive for corporations to try to evade environmental remediation obligations³⁸⁴.

³⁷⁸ Vid. BBC, "Hungarian chemical sludge spill reaches Danube", October the 7th 2010: <http://www.bbc.co.uk/news/world-europe-11491412> (consulted on Oct the 17th 2016).

³⁷⁹ Vid. BBC, "The company behind Hungary's toxic spill", October the 8th 2010: <http://www.bbc.com/news/business-11501441> (consulted on Oct the 17th 2016).

³⁸⁰ Vid. El País, "¡No quiero volver a vivir aquí!", October the 7th 2010: http://www.elpais.com/articulo/sociedad/quiero/volver/vivir/elpepusoc/20101006elpepusoc_1/Tes (consulted on Oct the 6th 2016).

³⁸¹ <http://actmedia.eu/daily/company-producing-catastrophe-nationalized-in-hungary/30037> (consulted on Oct the 17th 2016).

³⁸² http://bbj.hu/business/court-orders-liquidation-of-mal_64904 (consulted on Oct the 17th 2016).

³⁸³ <http://www.euronews.com/2016/01/29/hungarian-court-acquits-managers-over-deadly-alumina-reservoir-spill> (consulted on Oct the 17th 2016).

³⁸⁴ Vid. J. DUPUIS & P. KNOEPFEL, "Institutional regimes, policy networks and their effects on the management of contaminated sites - The case of Bonfol industrial landfill in Switzerland", *Cahier de l'IDHEAP* (Institut de hautes études en administration publique), 279/2013, Chavannes-Lausanne, Chaire Politiques publiques et durabilité, 2013, p. 2: "[...] when it is confirmed that a site is contaminated and

By the same token, it may be argued that the threat of having to face the potentially enormous cost of decontamination may produce deterrence / enhance prevention: it may constitute a powerful incentive to try to avoid incurring in liability. However, this kind of deterrence-provoking reasoning is curtailed by its submission to the above-referred *in casu ex ante* economic calculations: as it was the case with General Motors above, cost-benefit analysis comes into play for every potential polluter, bringing along considerations of specific economic power and economic planning.

Notwithstanding what has just been asserted, possibly, the most relevant curtailment of tort law's potential for deterrence in respect of environmental matters comes from the fact that this is a field within which administrative and even criminal law play an intense role, at least within Western legal orders. It is especially the case of environmentally-relevant administrative law, which is composed both by prescriptive and sanction-imposing rules: the former establish the frontiers between licit and illicit behavior in respect of conservation and restauration of the environment; the latter ensure the mandatory character of the former through the threat of sanction³⁸⁵. In other words, in principle, since sanction-imposing administrative law constitutes a powerful incentive to comply with prescriptive environmentally-protective administrative law, the deterrent power of tort law is directly and significantly diminished (and then still equally submitted to cost-benefit analysis). Naturally, for these assertions to hold true, the fitness and quality of the relevant legislation is not the only factor to be taken into account: there needs to be an (administrative) authority controlling the – supposedly adequate – (administrative) law. Put otherwise, a guarantee of the effective (administrative) enforcement of the relevant legislation is required (a prohibition accompanied by threat of a sanction in the event of non-compliance without an authority behind which may effectively enforce it is the same as nothing).

Previous lines have insistently highlighted that the reasoning presented probably only holds true within a Western context: if the legal order to be considered is not a western one, then probably, environmentally-related administrative and criminal law provisions may be scarce, inefficient or simply non-existing, thus providing a bigger *marge de manoeuvre* for tort law intervention (where again the *in casu* cost-benefit analysis would come into play). There is, therefore, a potential for an enhanced role of tort law within non-western contexts (which is due to the wider margin within which the cost-benefit analysis may lead to deterrent outcome). The same "spatial relativity" holds true in respect of the second part of that very

that the contamination was caused by companies, the latter are not always inclined to acknowledge the act of pollution involved, as this is not exactly compatible with the label of sustainable development. Moreover, the sometimes enormous cost of decontamination constitutes a powerful incentive for the companies to evade obligations in relation to remediation".

³⁸⁵ Vid. A. CABANILLAS SÁNCHEZ, *La reparación de los daños al medioambiente*, op. cit., p. 31: "En la abundante normativa administrativa sobre el medio ambiente aparecen numerosas medidas de carácter preventivo y sancionador. Ello es lógico, porque en materia de medio ambiente es impensable la existencia de normas represivas sin la previa o coetánea promulgación de otras estrictamente preventivas que, en primer término, fijen los márgenes de lo lícito y lo ilícito para que puedan las represivas describir las infracciones, y, en segundo lugar, marquen los controles y medios positivos y previos para una conservación y restauración del medio ambiente, cuya conculcación dé contenido cierto a los injustos amenazados con sanción. Y, viceversa, tales normas preventivas alcanzaran su perfección cuando su obligatoriedad esté garantizada y motivada por la amenaza de las correspondientes sanciones".

same assertion, on the significance of the role of (administrative) authorities. In more specific terms:

i) This potentially enhanced role of tort law unfolds, for example, where prescriptive-administrative law exists but no sanction-driven administrative law exists, where the latter is defective, or where no authority can guarantee its enforcement³⁸⁶. It may also unfold where prescriptive-administrative law does not exist, but private law may provide a conduct-prescriptive rule.

ii) The previous point, however, may be nullified by deficiencies in private law which may render it useless³⁸⁷. And, as it was the case in respect of administrative law provisions, beyond the “quality” of private law there needs to be an effective judicial authority which may effectively enforce it. The existence of such authority needs to be understood *lato sensu*, thus meaning not only its very existence, but also the existence of an adequate access to justice, due process, and other sort of guarantees aiming at allowing judicial redress.

Possibly, all of these elements can be conceived as being part, either directly or indirectly, of the *lato sensu* cost-benefit analysis mentioned *supra*. In sum, within Western legal orders, tort law interventions in the field of environmental matters are in principle naturally prone to a lack of deterrent value, due to the concurrent – and sometimes powerful – intervention of administrative law (and sometimes even criminal law). Consequently, within the said legal orders it is very likely that tort law interventions will only carry a compensatory function, and / or only a secondary preventive / deterrent power. This latter point is so, irrespective of the possible role that tort law may play in “immediate prevention”, wherever injunctive relief is available before in the form of *ex ante* preliminary or preventive measures, i.e. legal action undertakable before the occurrence of a tort in order to avoid its materialization.

In the light of all preceding considerations, it is natural that it may be sometimes argued, “*that tort liability should not play a dominant role in environmental policy, but that a carefully structured liability regime can accomplish supplementary tasks*”³⁸⁸. With this last observation, let us consider the comparative tort law assessment to be completed. However, before turning to pure private international law considerations, let us examine an illustration of some of the points that have just been discussed.

³⁸⁶ As an illustration of these ideas, *vid.* the upcoming box on the “Nigerian example”, which depicts both the inadequacy of some environmentally-related fines and the shortcomings as regards the enforcement of environmental law.

³⁸⁷ *Vid.* equally, as regards this aspect, the upcoming box on the “Nigerian example”, which depicts the deficiencies in Nigerian tort law.

³⁸⁸ *Vid.* S. ROSE-ACKERMAN, “Public Law versus Private Law in Environmental Regulation: European Union Proposals in the Light of United States and German Experiences”, in E. EIDE AND R. VAN DEN BERGH (eds.), *Law and Economics of the Environment*, Oslo, Juridisk Forlag AS, 1996, pp. 13-39, at p. 15. The extract goes on as follows: “Furthermore, specialized private rights of action can substitute for tort suits in some areas where regulatory statutes play the lead role”.

BOX 6:**The Nigerian case**

While statements on the inadequacy of developing countries' legal systems, and their inability to cope with sophisticated corporate torts, are far from being uncommon³⁸⁹, it may be worth to briefly examine a specific example, as is the case of Nigeria. The following information and excerpts have been drawn from academic literature which, over the last three decades, has been devoted to environmental issues – and more specifically environmental torts – taking place in this African State. They should suffice to give a rough idea of the status of substantive law in this country in respect of the themes being dealt with by this dissertation³⁹⁰.

Amongst Nigerian legal scholars, there has been awareness of the deficiencies of the country's environmental-protection legal framework (both as regards its public-law and its private-law aspects) at least since the late 1980s. The following excerpt, by the Honorable Justice S.M.A. Belgore, dates from a 1989 collective work entitled "*The law and the environment in Nigeria*":

"The present state of the law is deplorable in that the law in this country has not adequately addressed itself to the latest social and technological developments. The law is colonial in many areas and despite our great assets in minerals we have left so much gap in our legislation that most of the offences are not covered by adequate sanctions in form of penalties. For example, Minerals Act (Cap 121 Laws of the Federation of Nigeria 1958) in Part IV under which are sections 46-61 cover [sic] protection of watercourses from pollution. The punishment for an offence under any of these sections is no more than N1,000.00 for salting and not more than N10.00 for polluting water in any water course [...] [The Act's] narrow definition of watercourse does not cover unseen underground water which is very abundant. Salting, though not defined in the general definitions of the Act under S.2, but [sic] its purpose is clear for it is the normal

³⁸⁹ *Vid.*, for instance, U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *op. cit.*, p. 363: "it is well known that the Third World postcolonial legal systems do not have the adjudicatory potential to cope with multinational enterprises". Additionally, this idea, which is narrowly related with discourses on the global "race to the bottom", may be found at several reprises, under different formulations, in the work of H. MUIR WATT: "In many cases, domestic law will be insufficient either because the right in question is unarticulated as such (for instance, the right to food) or because the conflict of laws rules of the forum will lead to the application of local law, whose standards of care/level of protection are too low to provide any effective redress" ("Private International Law beyond the schism", *Transnational legal theory, op. cit.*, pp. 402-403. *Vid.* also *ibidem*, pp. 386-387, as well as H. MUIR WATT, "Aspects économiques du droit international privé - Réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et de juridictions", *op. cit.*, pp. 279-280. These pages are preceded by specific consideration of issues revolving around environmental externalities, pp. 268-272).

³⁹⁰ For a description of the state of Nigerian environmental law in the late 1980s, *vid.* HONOURABLE PRINCE BOLA AJIBOLA, SAN, "The protection of the Nigerian environment through law" in F. SHYLLON (ed.), *The law and the environment in Nigeria*, Ibadan, Vantage Publishers, 1989, pp. 5-10. For an additional account of historical evolution of the oil and gas-related industry and legislation in Nigeria until 2003 *vid.* Y. OMOROGBE, *Oil and gas law in Nigeria*, Simplified series, Ikeja, Malthouse Press limited, 2003, pp. 16-29.

*colonial philosophy of deriving the greatest benefit for capitalist colonial nation at the expense of the colonial subjects [...]" (emphasis added)*³⁹¹

Belgore goes on to further explain the fact that Section 94 of the Act provides the sanction for various frauds concerning the nature, quality, quantity, value of minerals, which can range from 500 pounds to 5 years of imprisonment or both

*"But for offences concerning pollution, the penalty is a meagre N200.00 fine at the most. The reason for my going this far to explain the inadequacies of our laws is not to canvass for stiffer punishments but to advocate stringent controls by law of all matters we release into our environment"*³⁹² (emphasis added)

These ideas, which point to the *"obsolescence of the existing legal framework for the protection of the environment in Nigeria"*, and to a need for *"[e]ffective enforcement to control pollution"* (and *"[e]ffective prosecution where offences do occur"*), are recurrent amongst Nigerian authors in the same 1989 collective work³⁹³. While visions on the quality of the legal framework may occasionally be more optimistic, the latter point (i.e. that there is a severe problem of "control") is constant³⁹⁴. F. Olokesusi explains that the decline in tree density since the 1950s affects protected and unprotected areas alike, and that the fact that deforestation is not contained to unprotected areas is the direct result of inadequate enforcement. *"Success in nature conservation in a country, (a component of environmental management) depends largely on the proper implementation of nature conservation policies adopted using as a tool an efficient public administration"*³⁹⁵. It is clearly contended, thus, that Nigeria does not seem to achieve that kind of success³⁹⁶: overall, there is a combined call for the elaboration of a

³⁹¹ Vid. HONORABLE JUSTICE S.M.A. BELGORE, "The need for environmental protection law in Nigeria" in F. SHYLLON (ed.), *The law and the environment in Nigeria*, Ibadan, Vantage Publishers, 1989, pp. 1-4, at pp. 1-2.

³⁹² Vid. HONORABLE JUSTICE S.M.A. BELGORE, "The need for environmental protection law in Nigeria", *op. cit.*, pp. 1-2.

³⁹³ Vid., especially, F. SHYLLON, "Present and future institutional framework for environmental management in Nigeria", in F. SHYLLON (ed.), *The law and the environment in Nigeria*, Vantage Publishers, 1989, pp. 90-96, at p. 90 (from whose text the excerpts used are taken). Vid., moreover, M. IKHARIALÉ, "The koko incident, the environment and the law", in F. SHYLLON (ed.), *The law and the environment in Nigeria*, *op. cit.*, pp. 73-89, at p. 76, on the "volume of toxic wastes generated by Lagos alone every year": "there is no specific law, aside the sanitation regulations, that attempts to redress this grave problem". Furthermore, the same author, in p. 75: "The incessant problems of oil spillage and the resultant destruction of the eco-system of the oil-producing areas of the country was never given adequate national recognition. This was probably due to the fact that these disasters were largely confined to the remote rural areas of the country where press coverage is a rarity".

³⁹⁴ Vid., for instance, N. V. OKOYE, "Oil pollution control", in F. SHYLLON (ed.), *The law and the environment in Nigeria*, Ibadan, Vantage Publishers, 1989, pp. 61-72, at p. 71: "Nigeria has established a good legal framework towards the effective prevention and control of oil pollution. This legal framework should be translated into action". Vid., similarly, M. IKHARIALÉ, "The koko incident, the environment and the law", *op. cit.*, p. 75: "[...] until very recently there were no adequate legal responses to the emerging grave problems of environmental abuse in Nigeria".

³⁹⁵ Vid. F. OLOKESUSI, "Environmental legislation and administration in the context of nature conservation in Nigeria" in F. SHYLLON (ed.), *The law and the environment in Nigeria*, Ibadan, Vantage Publishers, 1989, pp. 11-22, at p. 13.

³⁹⁶ The same author (F. OLOKESUSI, "Environmental legislation and administration in the context of nature conservation in Nigeria", *op. cit.*, pp. 15-16) points to several problems in the "application and implementation of conservation legislation". The list is formed by 14 items; the most significant three of

better legal framework and for its better implementation / better enforcement. In other words, there is, in Nigeria, a “*need for concrete legislation, policies and action to control the pollution threat*”³⁹⁷.

If these developments on *stricto sensu* environmental law cannot be considered to be positive, unfortunately, the situation is not better as regards the aptitude of private law to cope with environmental torts. As explained by the Honourable Prince Bola Ajibola, SAN, during the pre-independence era “*environmental issues were often seen as and treated under the traditional common law tort of nuisance*” (this tort existed in Nigerian law, even before there was a “*discernible national policy towards preservation and protection of the environment*”)³⁹⁸. However, as explained by Ir. P. B. Onaji:

*“The law of nuisance is well known even in industrial countries to be so intricate as to be almost inapplicable to the circumstances of a modern industrial society in which a single householder (or small group) is attempting to defend himself by legal action against the invasions of his use of his land or his enjoyment of his home by neighboring industrial enterprises [...]. Moreover, few private individuals or groups have at their disposal the means, financial and technical, to prove necessary causative links between interference with the enjoyment of land and the operations of neighbouring factories, quite apart from the cost of bringing an action. This is especially true in a country like Nigeria where most of the sufferers of pollution discharges are extremely poor”*³⁹⁹.

While Nigerian private law has since incorporated further Common-Law notions, as the tort of negligence, and the so-called “*rule in Rylands Vs Fletcher*”⁴⁰⁰, there remains a call for reform of

them would be: “1. It is quite apparent that environmental legislation establishes binding policies and standards, provides the foundation for substantive and procedural regulations, and creates institutions to implement policies and enforce the rules. Unfortunately, Nigeria is yet to evolve an environmental jurisprudence. Few lawyers have been trained in the legal mechanisms for regulating environmental conservation and quality, with the result that the quality of the environmental management in the country continues to suffer. 2. Available evidence also suggests that little effort has been made to date to enforce most of the relevant laws. Information campaigns have not yet been undertaken to make the public (and the authorities themselves) aware of which plants and animals are protected and, as a result, ability to identify them is rare [...] Consequently, many of the protected animals are almost extinct due to poaching [...]. 3. Absence of a general environmental protection policy and central institution for better co-ordination of activities and formulation of policies”.

³⁹⁷ Vid. IR. P. B. ONAJI, “Legislation and technical needs for River pollution control in Nigeria”, in F. Shyllon (ed.), *The law and the environment in Nigeria*, Vantage Publishers, 1989, pp. 44-60, at p. 44. Furthermore, in p. 57: “*Legislation, establishing quality standards of industrial effluents and a carefully organized monitoring and enforcement action by Government is seen as the only realistic solution to the pollution threat*”. As regards standards, *vid.*, specifically, N. V. OKOYE (“Oil pollution control”, *op. cit.*, pp. 65-66) denounces the vagueness of the legal definitions of duty of care standards: “*In the 1969 Regulations [“Petroleum (Drilling and production) regulations (1969) Regulation 25”] references are made to conduct [sic] operations in a manner consistent with “good oilfield practice”, in a “proper and workmanlike manner” and to land pollution, though not in as much detail, scope and precise standard, as one would expect in similar environment laws in the United States, Canada or the United Kingdom*”.

³⁹⁸ Vid. HONOURABLE PRINCE BOLA AJIBOLA, SAN, “The protection of the Nigerian environment through law” *op. cit.*, p. 8.

³⁹⁹ Vid. IR. P. B. ONAJI, “Legislation and technical needs for River pollution control in Nigeria”, *op. cit.*, p. 49.

⁴⁰⁰ *John Rylands and Jehu Horrocks v Thomas Fletcher*, [1868] UKHL 1, is a 1868 decision by the UK’s House of Lords, enshrining a certain form of strict liability.

Nigerian tort law⁴⁰¹: *inter alia*, i) Nigerian tort law is not able to cope with the long periods of latency that often follow exposure to hazardous waste⁴⁰²; ii) “the imprecise and undefined phrases used [in the relevant legislation] make it difficult to ascertain what, if any, legal duty has been imposed upon the operator”; and iii) there is an “absence of any provisions enforcing strict liability” whenever, for instance, the operator is protected by a “license or lease”⁴⁰³. Furthermore, while “[i]n some [Nigerian] states there are edicts dealing with the [...] quantum of compensation”, this is not a generalized practice⁴⁰⁴. Overall, Y. Omorogbe provides in his 2003 monography a detailed account of the shortcomings of the torts of nuisance and negligence and the “rule in *Rylands Vs Fletcher*”⁴⁰⁵, amongst which: i) “under negligence, the burden of proof is on the plaintiff, and this is especially difficult to discharge without specialized knowledge, which is usually not available to the average community plaintiff”; and ii) “under the Rule in *Rylands v Fletcher* [...] even when the plaintiff is successful the remedies are likely to be insufficient”⁴⁰⁶.

As a consequence, the same author concludes that “[i]n summary, oil communities are inadequately protected by the law”⁴⁰⁷. Such an assertion, made on the state of Nigerian private law at the beginning of the 21st century is discouraging, taking into account that, back in 1989, M. Ikhariale contended that “Statutorily, we can make our territory unattractive and too risky for foreigners and nationals alike to dump waste indiscriminately. The time is ripe for us [...]”⁴⁰⁸.

B. Choice of law as a tool of non-contractual liability (tort) at international level

Up to this point, the assessment has been conducted in terms of value and functions of tort law in comparative terms. This has been done because the assessment began on the basis of the assertion that any given conflict-of-laws tort tool needed to fulfill at least the same functions that substantive tort law does, since it projects law to the transnational context. Previous pages have exposed and explained the inability of comparative law to provide a clear-cut image of the functions of tort law, which appear as chameleonic, relative and subsidiary. Their configuration depends on interactions with other fields of law, which vary from one legal order to another and which are further limited, as regards deterrence, by the *in casu* outcomes of cost-benefit analysis.

⁴⁰¹ Vid., M. IKHARIALE, “The koko incident, the environment and the law”, *op. cit.*, p. 76.

⁴⁰² *Ibidem*, p. 76. It seems that the referred Common-Law notions were later introduced in Nigerian Law, for they are accounted as part of Nigerian Tort Law in A. OMOTESHO, *The Law of tort in Nigeria - selected themes*, Surulere, Malthouse law books, 2007 (Chapter 6: nuisance, pp. 33-51; Chapter 10: Nuisance, pp. 71-81, Chapter 12: Strict liability torts (*Rylands V. Fletcher*) pp. 85-95).

⁴⁰³ Vid. Y. OMOROGBE, *Oil and gas law in Nigeria*, *op. cit.*, pp. 151-152. Note that this account is hard to conciliate with A. Omotesho’s account, which mentions that *Rylands v. Fletcher* has been introduced in the Nigerian legal system (Cfr. footnotes 400 and 402), and with Omorogbe’s own account in pp. 154 and following which mentions *Rylands v Fletcher* too.

⁴⁰⁴ Vid. Y. OMOROGBE, *Oil and gas law in Nigeria*, *op. cit.*, p. 152.

⁴⁰⁵ *Ibidem*, pp. 154-157.

⁴⁰⁶ *Ibidem*, pp. 154-155.

⁴⁰⁷ *Ibidem*, pp. 154-155.

⁴⁰⁸ Vid. M. IKHARIALE, “The koko incident, the environment and the law”, *op. cit.*, p. 79.

Taking these thoughts into account, the following pages will build on the insights provided by comparative law to get closer to a clearer picture of the functions that may be performed by private international law in respect of environmental matters. In order to do so, similar questions to those asked in previous pages will have to be asked, in respect of private international law, *inter alia*: which are the functions to be performed by choice of law when dealing with environmental torts? What is the relative weight or degree of intervention – if any – of each of such functions? To answer, the functions of PIL in general will be dealt with firstly (i); then, it will be the turn of the functions of choice of law when addressing torts in general (ii). Special attention will be paid, to whether private international law can fulfill additional functions which may go beyond those that tort law may perform.

i. The functions of private international law in general

Putting aside the specific functions that private international law – not only choice-of-law – may perform in respect of the political project that the European Union embodies (and more specifically, its role in building an “area of freedom, security and justice”⁴⁰⁹) the following pages aim at summarizing general and common views on what the functions of private international law are. Following H. Gaudemet-Tallon, when reflecting on the functions of this area of law, one is irremediably led to reflect in terms of objectives and methods. Since these objectives and methods are inextricably linked to each other – up to the point of sometimes “merging” – if a single term was required to describe the resulting canvas it would necessarily be “pluralism”⁴¹⁰: pluralism of methods and pluralism of objectives, which are frequently displayed in antagonistic terms, and may sometimes be conciliated⁴¹¹. The said “pluralism” is

⁴⁰⁹ *Vid.* Conclusions of the Presidency, European Council 15 and 16 October 1999, available on November the 22nd 2016 under the following address: <http://www.consilium.europa.eu/en/european-council/conclusions/pdf-1993-2003/tampere-european-council---presidency-conclusions-15-16-october-1999/>. For a comparative assessment, *vid.* A. MILLS “Federalism in the European Union and the United States: Subsidiarity, Private Law and the Conflict of Laws”, *U. of Penn. J. of International Law*, vol. 31, 2010, pp. 369-455.

⁴¹⁰ It is important to highlight that the term pluralism is not used here in the usual English-language sense thereof (thus, referring to a plurality of legal sources with diverse origins), but as it has been traditionally used in French-speaking private international law, following H. BATIFFOL’s 1973 contribution to the *Recueil des Cours*. In this latter sense, the term refers to the coexistence of the various legal techniques that can be resorted to in order to deal with private-law relations arising in the international scene. For an approach to the notion from a historic perspective, *vid.* H. BATIFFOL, “Le pluralisme des méthodes en droit international privé”, *Recueil des Cours de l’Académie de Droit International*, vol. 139, Leiden, Martinus Nijhoff, 1973, pp. 79-84. Batiffol qualifies this coexistence as being non-competitive / peaceful (“[...] *il ne s’agit pas d’une concurrence en quelque sorte sauvage* [...]”, p. 145).

⁴¹¹ As put by H. GAUDEMÉT-TALLON: (“Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l’arc-en-ciel) - Cours général”, *op. cit.*) “*les diverses sources, les objectifs poursuivis ne se distinguent plus nettement les uns des autres, qu’ils s’entremêlent, qu’on passe des uns aux autres sans toujours s’en rendre compte*” (*op. cit.*, p. 23); “*les liens entre méthodes et objectifs sont évidents*”, (p. 24); “[...] *en droit international privé, si les sources et les objectifs sont divers, ce n’est pas le fruit du hasard, ce n’est pas une simple juxtaposition ; il existe dans cette multiplicité des rapports logiques (rapports de hiérarchie, de cause à effet, etc.) qui évoquent l’idée de système. Certes, malheureusement, dans certains cas, le système apparaît peu cohérent ; ce sont les faiblesses du pluralisme* [...]” (p. 24); “[...] *parfois la conciliation entre des objectifs antagonistes est réussie et que l’on peut alors vraiment*

possibly further reflected in the plurality of views on this topic that exist: although common threads may be easily identified, the precise identification of the functions, objectives, and methods of private international law varies widely depending on the author consulted.

In his seminal work on the “philosophical aspects of private international law”, H. Batiffol considered that private international law’s solutions need to respond to three concerns: i) they must seek the equity and the utility demanded by private interests, the first of these two notions entailing a concern for the respect of every person, as a part of a quest for equality, even if this person is an alien; ii) they must take into account the general interests of the collectivity within which the relationships at stake are inserted, especially the interests of the collectivity where the relevant legislator or judge belongs; iii) as embryonic as the international society may be, its specific interests must be considered, since these relationships are one of its constituent elements⁴¹². From these concerns Batiffol concludes, further in the same piece of work, that private international law’s “*essential objective is to coordinate the incidence of legal systems in conflicts cases by reference to general ideas of natural law, social facts and doctrinal conceptions of the ends of justice as defined by individual, national and international values*”⁴¹³. Batiffol thus conceives PIL “*as an “order of legal systems”*”⁴¹⁴.

C. Kessedjian has taken Batiffol’s three prong list and developed it into a set of five objectives of private international law⁴¹⁵. Since objectives 2, 3 and 4 are respectively specific to the subfields of choice of law, choice of court and international recognition of judicial decisions, attention is to be devoted primarily to objectives 1 and 5, which are general. Following Kessedjian, PIL’s first objective is to ensure peace, in private relationships and amongst legal orders, so that the latter, instead of clashing with each other, may coexist in good terms: PIL ensures the fluidity and the coherence of the international ordering, to the benefit of private subjects. Furthermore, in the light of the specific objectives identified by the same author for each of the subfields of PIL (objectives 2,3, and 4), PIL undoubtedly aims, as a second general objective, at previsibility and legal certainty. While it is clear that this objective is by no means specific of PIL, Kessedjian considers that it takes a particular relevance therein since it is more complicated to ensure legal certainty when dealing with several legal systems which may potentially be involved in the same controversy.

As opposed to these rather brief accounts of objectives, it is possible to find more extensive listings. The very H. Batiffol identified an enumeration of objectives of PIL by H. E. Yntema’s as the most comprehensive one of their time⁴¹⁶:

parler du « pluralisme » des objectifs du droit international privé, mais qu’il n’en va pas toujours ainsi” (p. 172).

⁴¹² The English wording of the three concerns is a free translation by the author of this dissertation.

⁴¹³ This synthetic translation of Batiffol’s conclusions in *Aspects philosophiques du droit international privé* (Paris, Dalloz, 1956) is taken from H. E. YNTEMA’S, “The objectives of private international law”, *Canadian Bar Review*, vol. 35, 1957, pp. 721-742, at p. 724.

⁴¹⁴ *Vid.* H. E. YNTEMA, “The objectives of private international law”, *op. cit.*, p. 724.

⁴¹⁵ *Vid.* C. KESSEDJIAN, “Un code européen au regard des objectifs du droit international privé”, in M. FALLON, P. LAGARDE, S. POILLOT-PERUZZETTO (dir.), *Quelle architecture pour un code européen de droit international privé*, Peter Lang, 2011, pp. 107-132, at p. 116.

⁴¹⁶ *Vid.* H. BATIFFOL, “The Objectives of Private International Law”, *The American Journal of Comparative Law*, vol. 15-1-2, 1966-67, pp. 159-163, at p. 162: “Having rejected an approach in terms of state

*"[Private international law's objectives] are somewhat heterogeneous and in part artificial. They include, for example: uniformity of legal consequences, minimization of conflicts of laws, predictability of legal consequences, the reasonable expectations of the parties, uniformity of social and economic consequences, validation of transactions, relative significance of contacts, recognition of the "stronger" law, co-operation among states, respect for interests of other states, justices of the end results, respect for policies of domestic law, internal harmony of the substantive rules to be applied, location or nature of the transaction, private utility, homogeneity of national law, ultimate recourse to the lex fori, and the like"*⁴¹⁷.

References in Yntema's list to such notions as *"respect for interests of other states, justices of the end results, respect for policies of domestic law"* reflect the fact that the referred author belongs in the American PIL academic tradition. Accounts of objectives, functions and methodologies coming from the United States are deeply influenced by the profound changes that the field undertook in this country during the 20th century: It is well-known that during this century the so-called North-American "conflicts revolution" took place. This academic and case-law "revolution" shook the foundations of private-international-law thinking in the United States, and has subsequently had a significant impact in conflict-of-laws debate worldwide⁴¹⁸. One of the revolution's core pillars is the rejection of "traditional" conflict of laws methodologies, due to the conviction that in choice of law, *"the choice should be the result not of "the automatic operation of a rule or principle of selection but of a search for a just decision" in the case"*⁴¹⁹. This quest for *in casu* justice gave rise to a series of methodologies too rich to be dealt with in here. They, however, tend to revolve around certain common / general assumptions: in the United States, it is generally considered that *"[private international law] situations frequently require a choice between two principles of justice that are not opposed in fully domestic cases. These principles are that like cases be treated alike and that rules of law advance and express values and purposes accepted by society"*⁴²⁰. The assumptions: i) that no choice-of-law methodology is capable of juggling the referred principles⁴²¹, and, ii) that it is impossible to correctly serve the first of them in multistate cases,

interests, Yntema gave us what is doubtless the most complete list ever presented of all the possible objectives that exist in this branch of the law".

⁴¹⁷ Vid. H. E. YNTEMA, "The objectives of private international law", *op. cit.*, p. 734. It must be however acknowledged that these objectives are further "condensed" by Yntema himself in pp. 735 and following. He considers that they can all be merged into two different objectives: the *"principle or policy of security [...] which is the first principle of utility in Bentham's and most other schemes of legislation, and comparative justice of the end result, namely, its consonance with the results of comparative research, an objective that derives from the basically equitable purpose of conflicts law to individualize the treatment of foreign cases. These are obviously intermediate standards, the purpose of which is to ensure effective realization of more basic human interests and values in conflicts situations"*.

⁴¹⁸ Vid. C. G. J. MORSE, "Choice of Law in Tort: A Comparative Review", *The American Journal of Comparative Law*, vol. 32-1, 1984, pp. 51-97, P. 94: *"The scholarly writings that have collectively, contributed to the "American Conflicts Revolution" are well known in Europe, even though they may not always meet with approval. But it is legitimate to assert that American thinking has stimulated reconsideration of the traditional rules for choice of law in tort in European legal systems"*.

⁴¹⁹ Vid. H. E. YNTEMA, "The objectives of private international law", *op. cit.*, p. 727.

⁴²⁰ Vid. A. T. VON MEHREN, "Choice of Law and the Problem of Justice", *Law and Contemporary Problems*, vol. 41, 1977, pp. 27-43, at p. 30

⁴²¹ Vid. A. T. VON MEHREN, "Choice of Law and the Problem of Justice", *op. cit.*, p. 32.

led to focusing on the second one⁴²². And since, in “multistate cases”, *per definition* there is more than one set of values and purposes stemming from more than one society, choice of law came to be generally understood as the operation of an *in casu* choice between the clashing interests of the States involved in each given legal dispute. In the words of B. Currie, the father of the core North-American choice-of-law methodology, known as “governmental-interest analysis”: “[t]he central problem of conflict of laws may be defined, then, as that of determining the appropriate rule of decision when the interests of two or more states are in conflict—in other words, of determining which interest shall yield”⁴²³. Currie’s proposal to deal with choice of law situations begins with the assumption that courts should be expected “as a matter of course, to apply the law of the forum”⁴²⁴. The relevant court should identify the governmental policy enshrined in the law of the forum (and, if necessary, perform the same operation in respect of the foreign law). If the forum state has an interest in the application of its policy (i.e. if “the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy”), the law of the forum should be applied. This is so, even where the foreign state also has an interest in the application of its contrary policy. The law of the forum should *a fortiori* equally be applied whenever the foreign state has no interest⁴²⁵. Currie’s methodology has, of course, been criticized for its extreme parochialism⁴²⁶.

⁴²² *Ibidem*. The author acknowledges that “[i]n private-law contexts it is generally more important to preserve equality between the parties by regulating the controversy in the same way regardless of the forum in which the litigation proceeds than to advance the purposes of one of the concerned states particularly since, by hypothesis, those of another concerned state must be frustrated”. However, he rejects “equal treatment” because it “can be assured only if a uniform system of choice-of-law rules is accepted by all the states concerned and this system is uniformly administered”. Thus, (*op. cit.*, p. 33): “Although simplicity and ease of administration may still argue for traditional methods, functional or instrumental methods may seem more attractive because they can advance in practice at least one principle of justice and sometimes both. In this perspective, the rise in recent decades of functional or instrumental analyses is entirely understandable”.

⁴²³ *Vid.* B. CURRIE, “Notes on Methods and Objectives in the Conflict of Laws”, *Duke Law Journal* 1959, pp. 171- 181, at p. 173 (reprinted in *Selected Essays on the Conflict of Laws*, Durham, Duke University Press, 1963).

⁴²⁴ *Ibidem*, p. 178.

⁴²⁵ *Ibidem*. In turn, O. KAHN-FREUND, (“Delictual Liability and Conflict of Laws”, *op. cit.*, p. 27-29) considered *circa* 1968 that “today’s tendency to seek shelter behind the law of the court” is due to the will to “escape” the complexities and accidental nature of the *lex loci delicti*.

⁴²⁶ *Vid.* A. T. VON MEHREN, “Choice of Law and the Problem of Justice”, *op. cit.*, p. 34: the “automatic application of forum law in cases of true conflict often results in a self-serving parochialism” (p. 34); therefore, he provides a suggestion on how to solve the dilemma without falling into parochialism (p. 35): the principle of advancement is to be “applied in terms of the policies held by all the concerned states and the forum is to advance the policy or policies that it prefers when a comparable clash occurs in a fully domestic case”. *Vid.* also F. K. JUENGER, “Mass disasters and the conflict of laws”, *U. Ill. L. Rev.*, 1989, pp. 105-128. A heavy criticism can be found between pp. 105-108; then in p. 112: “In practice, interest analysis amounts to little more than a longwinded pretext for the refusal to apply foreign law. An action will rarely be brought in a “disinterested” forum, because such a forum usually lacks the minimum contacts required for jurisdiction. An “interested forum,” however, will usually apply its own law”. Defenders and detractors of CURRIE’S work have produced a profuse literature. For further criticisms, intertwined with summaries of the North-American developments during the 20th century, *vid.*, for instance, L. BRILMAYER, “The role of substantive and choice of law policies in the formation and application of choice of law rules”, *Recueil des Cours de l’Académie de Droit International*, vol. 252, Leiden, Martinus Nijhoff, 1995, pp. 60-98; G. KEGEL, “The Crisis of Conflict of Laws”, *Recueil des Cours de*

It is not the appropriate place here to get into further details in respect of this topic; excellent treatises by very authorized academics deal with these questions thoroughly⁴²⁷. Therefore, notwithstanding the importance of a description of the North-American conflict-of-laws panorama for any account of objectives, functions and methodologies in private international law, the analysis will be pursued on the basis of a more “classic” – yet more open and inclusive – account of objectives, reflecting a more international view. The said account is the one provided by H. Gaudemet-Tallon in her “General Course of Private International Law”, her 2005 contribution to the *Recueil des Cours* of the Hague Academy of International Law. Following Gaudemet-Tallon, private international law objectives are multiple. However, her account swirls around two pairings of two opposing values: conflicts justice *versus* substantive justice, on the one hand, and flexibility *versus* predictability, on the other⁴²⁸. It is amongst these four parameters that private international law revolves around, sometimes bending more towards one or two amongst them, some other times tending more towards the opposing ones. The following pages will mainly focus on the first coupling, for these values correspond with the two variations of multilateral choice of law rules – neutral and content-oriented – presented *supra*⁴²⁹.

The first coupling is composed by the notions of conflicts justice and substantive justice. The classic European and international understanding of private international law considers that the problem addressed by this field of law “*is how competence is allocated to make and apply laws across state and group lines. That is to say, how the competence to prescribe and apply law across state and group lines is distributed and maintained*”⁴³⁰. In other words, the said understanding entails conceiving this field as a branch of law which aims at “distributing spheres of legal influence”; as a consequence, seeking “conflicts justice” means “seeking to attain a fair balance when distributing prescriptive and adjudicative jurisdiction”⁴³¹. Conflicts

l'Académie de Droit International, vol. 112-II, Leiden, Martinus Nijhoff, 1964, pp. 180 and following (“Currie’s doctrine is radical”). Amongst defenders, *vid.*, for instance: H.H. KAY, “A Defense of Currie’s Governmental Interest Analysis”, *Recueil des Cours de l’Académie de Droit International*, vol. 215, Leiden, Martinus Nijhoff, 1964, for instance, pp. 133-134; L. STRIKWERDA, “Interest Analysis: no More than a “Protest Song”?”, in M. SUMAMPOUW ET AL. (ed.), *Law and Reality. Essays on National and International Procedural Law in Honeur of Cornelis Carel Albert Voskuil*, Dordrecht, 1992, pp. 301-313, for instance, p. 307.

⁴²⁷ *Vid.*, for instance, S. C. SYMEONIDES “The American choice-of-law revolution in the courts: today and tomorrow”, *op. cit.* *Vid.* also G. KEGEL, “The Crisis of Conflict of Laws”, *op.cit.* This latter author, beyond summarizing the North-American Revolution, contextualizes Currie’s thinking by providing summary explanations of notions which lie in the intersection of United States’ constitutional law and conflict of laws (pp. 165-176).

⁴²⁸ *Vid.* H. GAUDEMET-TALLON, “Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l’arc-en-ciel) - Cours général”, *op. cit.*, p. 171. A thorough analysis of these values had been previously performed by J. González Campos (*Vid.* J. GONZALEZ CAMPOS, “Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé”, *Recueil des Cours de l’Académie de Droit International*, vol. 287, Leiden, Martinus Nijhoff, 2000). González Campos’ assessments are considered *infra*.

⁴²⁹ *Vid. supra* “Basic concepts of conflict of laws (II)”.

⁴³⁰ *Vid.* W. NAGAN, “Theory and Method in Private International Law: A Policy-Oriented, Internationalist Perspective”, *Liber Memorialis François Laurent*, Brussels, 1989, pp. 916-917.

⁴³¹ *Vid.* H. GAUDEMET-TALLON, “Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l’arc-en-ciel) - Cours général”, *op. cit.*, p. 171. This paragraph is a free translation of the following text: “*Tout d’abord, il s’agit d’un droit qui cherche à répartir les sphères juridiques : le juge du for est-il compétent ou non, la loi du for est-elle applicable ou faut-il appliquer une loi étrangère ? Sur ce*

justice is composed of “*choice of law or multistate policies*” which include policies favoring uniformity of result (attaining international harmony of decisions) and respect for other State’s territorial sovereignty⁴³². When the reasoning is narrowed down to the subfield of choice of law, then choice of law’s very own objective, following Kessedjian, is to avoid perverting the legal systems involved in any private-international-law case. This is done by drafting rules which determine when each legal system possesses the legitimacy needed in order to rule over a given situation. By proceeding in this fashion, values inherent to each of the concerned legal systems are respected as much as possible, which leads Kessedjian to conclude that PIL aims at enshrining tolerance⁴³³. Thus, Struycken conceives conflicts justice in choice of law as being the identification of the “proper law” to be applied in a multistate case⁴³⁴. The said “proper law”, under the European approach to this subfield, is the one bearing the “closest connection” with the situation at stake.

Therefore, it is possible to contend that one of the possible functions of choice of law is to identify the “relevant” legal order for a private legal relationship which is simultaneously connected to several legal orders, in a neutral fashion, i.e. without regard to the end result⁴³⁵. In contrast with conflicts justice and its “neutrality”, the notion of substantive justice is related to the fulfilment of specific policy goals: it reflects the idea of ensuring given substantive results *via* choice-of-law rules; thus ensuring a just / fair result for the individuals involved in private international law cases⁴³⁶. The fact that substantive justice entails taking into account substantive policies when performing a choice of law does not mean “*that States must have*

plan, on recherche ce qu’il est convenu d’appeler la « justice conflictuelle » ; il faut trouver le juste équilibre dans la répartition des compétences judiciaires et législatives”.

⁴³² Vid. L. BRILMAYER, “The role of substantive and choice of law policies in the formation and application of choice of law rules”, *op. cit.*, p. 21.

⁴³³ Vid. C. KESSEDJIAN, “Un code européen au regard des objectifs du droit international privé”, *op. cit.*, p. 116.

⁴³⁴ Vid. A. V. M. STRUYCKEN, “Coordination and co-operation in respectful disagreement - General Course on Private International Law”, *op. cit.*, p. 226. He acknowledges having borrowed the expression from the English tradition. He further acknowledges that it was G. KEGEL who coined the expression “*justice of conflicts of laws*” (“*It is one of Kegel’s great merits to have delineated this concept, already in 1953*”, citing G. KEGEL, “Begriffs- und Interessenjurisprudenz im IPR”, in M. GERWIG, A. SIMONIOUS, K. SPIRO, T. SÜSS, E. WOLFF (eds.) *Festschrift Hans Lewald*, Basel, 1953). For a further nuance, Cfr. STRUYCKEN, “Coordination and co-operation in respectful disagreement - General Course on Private International Law”, *op. cit.*, p. 231 P. PICONE, “Les méthodes de coordination entre ordres juridiques en droit international privé : Cours général de droit international privé”, *op. cit.*, p. 56. For the first one the identification of the proper law is the core of conflicts justice with decisional harmony being a consequence therefrom, while for the latter the sequence goes the other way around.

⁴³⁵ Needless to say, this line is merely a rough summary of Von Savigny’s classic understanding of private international law and its functions and purposes (Vid. in this sense, the above-referred translation / edition of his classic work “System des heutigen Römischen Rechts” in French: K. F. VON SAVIGNY, *Traité de Droit Romain*, Paris, Panthéon-Assas, 2002).

⁴³⁶ Vid. H. GAUDEMET-TALLON, “Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l’arc-en-ciel) - Cours général”, *op. cit.*, p. 228. Moreover : “*Il importe de préciser ce que l’on entend par règle de conflit à caractère substantiel car, selon les auteurs, le contenu de cette catégorie peut varier. M’en tenant à l’acception la plus généralement reçue, je viserai ici les règles de conflit destinées à assurer un résultat déterminé et qui, pour ce faire, tiennent compte du contenu des lois en présence*”. As further explained (p. 232): “*Le développement, depuis plus de cinquante ans, des règles de conflit à caractère substantiel, avec leurs objectifs de « justice matérielle », doit certainement être mis en parallèle avec la « révolution américaine » même si, comme on va le voir maintenant, les techniques retenues sont sensiblement différentes*”.

some sort of particular substantive policy"; it simply means that *"whatever substantive policy States have, these substantive policies must be consulted in the choice of law process. It is up to States to make their substantive policies [...]"*⁴³⁷.

This stark contrast between conflicts justice and substantive justice does not mean that both cannot be simultaneously fulfilled. However, in most cases both objectives are not necessarily coinciding⁴³⁸: "[w]hat is considered the best law according to its content, that is substantively, might be far from the best spatially [...]"⁴³⁹. Despite the existence of conciliatory positions⁴⁴⁰, the depth of the ensuing dilemma has significantly marked the evolution of the field of private international law. And in the battle between both prongs of this dilemma, conflicts justice seems to be openly over-criticized: T. M. de Boer considers that the international uniformity of results (decisional harmony), one of conflicts justice's main manifestations, is a "universalist" myth that has declined after the 1960s⁴⁴¹. Accordingly, he further considers that there has been a tendency to *"renew the bond between conflicts law and substantive law"* on both sides of the Atlantic, however, channeled through different techniques: neo-statutarianism in the US and a renewal of bilateral conflictualism in Europe⁴⁴². F.K. Juenger considers that if a given choice-of-law rule does not lead to decisional harmony (uniformity of results), then it merely privileges *"geography"* over substantial justice. He further asserts that, since, ultimately, PIL cannot achieve decisional harmony, it should *"ought to promote substantial justice"*⁴⁴³. In any case, in the frame of a historic review of the international unification of private international law as an example of the "law of international cooperation", J.H.A. van Loon has observed that, at least: *"[t]raditional choice of law techniques are being used and adapted to further substantive policies [...]"*⁴⁴⁴.

⁴³⁷ Vid. L. BRILMAYER, "The role of substantive and choice of law policies in the formation and application of choice of law rules", *op. cit.*, p. 75.

⁴³⁸ Vid. H. GAUDEMET-TALLON, "Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l'arc-en-ciel) - Cours général", *op. cit.*, p. 173. Gaudemet-Tallon further explores in the following pages what she considers to be *"les méthodes les plus satisfaisantes pour concilier au maximum justice conflictuelle et justice matérielle"*.

⁴³⁹ Vid. G. KEGEL, "The Crisis of Conflict of Laws", *op. cit.*, p. 184.

⁴⁴⁰ L. BRILMAYER considers that it is important to find some sort of middle ground ("The role of substantive and choice of law policies in the formation and application of choice of law rules", *op. cit.*, p. 21): *"In the existing literature, writers tend either to value substantive policies over all other considerations in the choice of law process, or to elevate multistate choice of law policies to a pre-eminent position. Neither of these extremes is tenable"*.

⁴⁴¹ Vid. T. M. DE BOER, "Forty years on: the Evolution of Postwar Private International Law in Europe", in T. M. DE BOER (ed.), *Forty years on: the evolution of postwar private international law in Europe: symposium in celebration of the 40th anniversary of the Centre of Foreign Law and Private International Law, University of Amsterdam, on 27 October 1989*, Universiteit van Amsterdam. Publikaties van het Centrum voor buitenlands recht en internationaal privaatrecht, 5, Deventer, Kluwer, 1990, pp. 1-14, at pp. 2-4).

⁴⁴² Vid., T. M. DE BOER, "Forty years on: the Evolution of Postwar Private International Law in Europe", *op. cit.*, p. 13.

⁴⁴³ Vid., F.K. JUENGER, "Jurisdiction, Choice of Law and the Elusive Goal of Decisional Harmony", in M. SUMAMPOUW ET AL. (ed.), *Law and Reality. Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil*, Dordrecht, M. Nijhoff, 1992, pp. 137-147, at pp. 145-146.

⁴⁴⁴ Vid. J.H.A. VAN LOON, "The Increasing Significance of International Cooperation for the Unification of Private International Law", in T. M. DE BOER (ed.), *Forty years on: the evolution of postwar private international law in Europe: symposium in celebration of the 40th anniversary of the Centre of Foreign*

The second pairing of values which completes the four-parameter set being presented here is by no means peculiar to choice of law, or private international law. Other than having as functions the fulfilment of the two referred notions of justice, private international law equally aims at fulfilling two other “general” objectives⁴⁴⁵: providing predictability and flexibility as regards legal solutions of controversies. As explained by Gaudemet-Tallon, all legal systems are confronted with a double imperative: ensuring a certain degree of predictability and, simultaneously, providing a certain degree of flexibility, certain systems being more prone to the former and others to the latter. If the importance of predictability is paramount in mere domestic cases, it is even more so when individuals are confronted with the potential application of several different legal systems. Therefore, choice-of-court and choice-of-law rules need to provide sufficient predictability. However, in certain hypotheses, what seems to be appropriate in general terms for a category of situations may lead to contestable results in given specific situations. Therefore, it is necessary to introduce both in choice-of-court and choice-of-law rules elements of flexibility which may allow, if need be, to set aside the general rule⁴⁴⁶. The only specificity that Gaudemet-Tallon sees in private international law in this respect is that the transition from standards of predictability to standards of flexibility is sometimes so subtle that it becomes imperceptible⁴⁴⁷. Beyond this, private international law merely reflects the well-known fact that Common-Law systems tend to prefer flexibility, while civil law systems tend to prefer predictability, not specifically in respect of this branch of law, but structurally throughout all branches of law⁴⁴⁸.

Interestingly, beyond being paired in antithetic terms, the four parameters commented are cross-connected. For instance, Batiffol considers that the flexibility obtained by dealing with PIL problems through approaches, directives, and principles (required in order to obtain the specialization of solutions) leads to unpredictability (logically), but also to the lack of decisional harmony⁴⁴⁹. Along similar lines, Currie asserts that in the absence of a worldwide “*all-powerful central government*” (since “*independent sovereignties in the real world*” do not have “*identical laws*”) “*the administration of private law where more than one state is concerned will be affected with disuniformity and uncertainty*”⁴⁵⁰. W. Wengler goes even one step further,

Law and Private International Law, University of Amsterdam, on 27 October 1989 Deventer, Universiteit van Amsterdam. Publikaties van het Centrum voor buitenlands recht en internationaal privaatrecht. 5, Deventer, Kluwer, 1990, pp. 101-122, at p. 122.

⁴⁴⁵ Vid. H. GAUDEMET-TALLON, “Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l’arc-en-ciel) - Cours général”, *op. cit.*, p. 299. She qualifies them as “*deux objectifs généraux du droit international privé*”. The tension between these two values is precisely very neatly embodied in choice of law in the field of torts, as depicted by the brief review of historical developments in different legal systems (including the American conflict of laws) provided by the same author in pages 217-220.

⁴⁴⁶ *Ibidem*, pp. 299-300.

⁴⁴⁷ *Ibidem*, p. 171 : “[...] ensuite [...] le droit international privé se heurte, sans doute plus que d’autres branches du droit, à la difficulté qu’il y a à concilier une nécessaire prévisibilité et une indispensable souplesse et que l’on passe parfois insensiblement de l’une à l’autre”.

⁴⁴⁸ *Ibidem*, pp. 299-300 : “Mais il ne faut pas caricaturer la différence ; partout le droit prend en considération les deux nécessités et tente, tant bien que mal, de réaliser un équilibre entre elles”.

⁴⁴⁹ Vid. H. BATIFFOL, “Remarques sur l’opposition des directives aux règles en droit international privé”, in *L’Unificazione del diritto internazionale private e processuale (studi in memoria di Mario Giuliano)*, Padova, CEDAM, 1990, pp. 27-36.

⁴⁵⁰ Vid. B. CURRIE, “Notes on Methods and Objectives in the Conflict of Laws”, *op. cit.*, p. 173.

since he even doubts the constitutionality of escape clauses (a clear manifestation of the European view on conflicts justice) because they hinder the legal certainty principle⁴⁵¹.

Overall, these four parameters (which can be formulated either as values, objectives or functions) are deeply embedded in the notion of private international law, determining the identity of this branch of law. The precise configuration or dose of each of them present in each legal order around the globe varies substantially from one to another, however. They may even vary within a given legal order from one subject-matter to another. Let us, therefore, explore how the functions of private international law crystallize within the realm of torts in general.

ii. *Specific reference to the functions performed by private international law when dealing with tortious matters*

a. The traditional understanding of the interplay of functions in tort conflicts

Conflicts justice, substantive justice, predictability and flexibility. How do these four parameters (depicted above either as objectives, or general functions, or articulated through methods) crystalize within tort issues in private international law? Allegedly, the realm of torts is a field where private international law's pluralism of objectives and methods is strongly felt⁴⁵². However, it may be contended that conflicts justice (i.e. the goal of attaining an objective distribution of prescriptive jurisdiction⁴⁵³) and predictability have traditionally had a strong presence in this field, especially if one takes into account how extremely well-spread worldwide *lex loci delicti* is⁴⁵⁴. If one was to focus exclusively on the functions of ensuring conflicts justice and predictability – thus putting aside momentarily substantive justice and flexibility of solutions – this “place of the tort” would seem the most convenient connecting factor in the field: on the one hand, due to its “objective” character⁴⁵⁵; on other hand, because

⁴⁵¹ Vid. W. WENGLER, “L'évolution moderne du droit international privé et la prévisibilité du droit applicable”, *Rev. crit. dr. int. pr.*, 1990, pp. 657-674, especially at p. 668.

⁴⁵² Vid. H. GAUDEMET-TALLON, “Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l'arc-en-ciel) - Cours général”, *op. cit.*, p. 217.

⁴⁵³ Cfr. H. GAUDEMET-TALLON, “Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l'arc-en-ciel) - Cours général”, *op. cit.*, p. 217, who contends that the protection of the victim is also “omnipresent”: “[...] il s'agit toujours de trouver un rattachement qui permette une répartition objective des compétences législatives, mais le but de protection de la victime est aussi omniprésent [...]”.

⁴⁵⁴ For a review of the spread of the *lex loci delicti* connecting factor in Europe until the 1980s, covering 12 different countries, vid. C. G. J. MORSE, “Choice of Law in Tort: A Comparative Review”, *The American Journal of Comparative Law*, vol. 32- 1, 1984, pp. 51-97. For a review of the panorama until the 2000s vid. explanatory memorandum to the Rome II proposal, *op. cit.*, pp. 19-20. B. AUDIT (“Le caractère fonctionnel de la règle de conflit (Sur la « crise » des conflits de lois)”, *op. cit.*, p. 298) qualifies *lex loci delicti* as “règle de conflit traditionnelle”.

⁴⁵⁵ Vid. H. GAUDEMET-TALLON, “Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l'arc-en-ciel) - Cours général”, *op. cit.*, p. 217 : “Dans un premier temps, c'est évidemment au lieu du délit que l'on songe, et effectivement de très nombreux droits retiennent effectivement la

it plainly coincides with the common intuition borne by average citizens on the territorial application of laws⁴⁵⁶. Despite its advantages, this criterion of spatial connection (and the configuration of functions that materializes through it) does create problems. Firstly, due to its disregard of flexibility – and possibly substantive justice; secondly, due to the inherent difficulties that it brings along in certain scenarios.

As regards the first aspect, it must be noted that it was in this realm, and precisely due to an alleged excessive fixation on conflicts justice and predictability – to the detriment of flexibility and substantive justice – that the North-American “Revolution” started⁴⁵⁷. As a response, one of the proposals introduced during that period in American academia (although it came from a British author) was the suggestion of submitting tort liability to a new connecting factor: “the proper law of the tort”. At that time, the English choice-of-law rule in contracts was known as “the proper law of the contract” for it was based on the idea that “*the validity of a contract was to be governed by its “proper law” which was meant to be understood as “[...] the law, or laws, by which the parties intended, or may fairly be presumed to have intended, the contract to be governed [...]*”⁴⁵⁸. Morris’ idea was that there was “*room for a similar approach in the field of torts*”, and that “[a] *proper law approach, intelligently applied, would furnish a much-needed flexibility*”, for “*the rule enables proper weight to be attributed in a particular case to factors of constantly varying significance*”⁴⁵⁹. Its proposal is specifically that the proper law of a tort would be “*the law which, on policy grounds seems to have the most significant connection with the chain of acts and consequences in the particular situation*”⁴⁶⁰. This proposal has clearly had a deep impact on the Restatement (the second) of the Conflict of Laws, which submits issues in tort to the law bearing the “*most significant relationship to the occurrence*”⁴⁶¹.

compétence de la lex loci delicti. Ce rattachement au lieu du délit correspond aux objectifs de la justice conflictuelle : le critère est objectif [...]”.

⁴⁵⁶ While I have decided to mention this element at this point, for I believe that it corresponds with the function of the fulfilment of predictability, it must be mentioned that B. AUDIT (“Le caractère fonctionnel de la règle de conflit (Sur la « crise » des conflits de lois)”, *op. cit.*, p. 299) approaches this element from a functional perspective.

⁴⁵⁷ *Vid.* W. L. M. REESE, “Choice of Law in Torts and Contracts and Directions for the Future”, *Colum. J. Transnat’l L.*, vol. 16, 1977, pp. 1-2: “*Torts is the area that in recent years has created the major choice-of-law problems in the United States. It is the area with which most of the recent cases have been concerned and the one where the battle of conflicting theories has been most ardently waged*”. It must be noted however that the choice-of-law rule before the Revolution (thus in the first “Re-statement”) was worded in similar but not identical terms (J. H. C. MORRIS, “The Proper Law of a Tort”, *Harvard Law Review*, vol. 64-6, 1951, pp. 881-895, at pp. 883-884): “*criticism as there is seems to be concentrated on the Re-statement’s rule that “[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place*”.

⁴⁵⁸ *Vid.* J. H. C. MORRIS, “The Proper Law of a Tort”, *op. cit.*, p. 881.

⁴⁵⁹ *Ibidem*, pp. 883, 884 and 882 respectively.

⁴⁶⁰ *Ibidem*, p. 888. Furthermore (p. 887): “*Another advantage of the proper law of the tort doctrine is that it would facilitate a more rational approach to the interstate tort problem than the Restatement’s mechanistic last event doctrine*”. The “proper law of the tort” was not exempt from criticism: *vid.* A. A. EHRENZWEIG, “The Not So “Proper” Law of a Tort: Pandora’s box”, *Int’l & Comp. L.Q.* vol. 17, 1968, pp. 1-10, at p. 9. Ehrenzweig heavily criticized the proposal because he found that the English choice-of-law rule at the time was satisfactory. The rule, known as “double actionability”, stemmed out of the *Philips v. Eyre* case-law, and required that liability arose both under the law of the place of the action/omission and under the law of the place of the result. For further considerations *ibidem* pp. 4-5.

⁴⁶¹ Section 145 of the Restatement (second) of the conflict of laws: “145. THE GENERAL PRINCIPLE

Modern European private international law, in turn, has tried to strike a balance in respect of these issues with the combination of a generic submission of torts to “*the law of the country in which the damage occurs*”, tempered with an escape clause (as it was explained above).

The second issue referred *supra* is that, despite its seeming simplicity⁴⁶², *lex loci delicti* does lead in certain instances to difficulties in its implementation which may severely undermine its allegedly strong conflicts-justice and predictability dimensions, without necessarily leading to the fulfilment of any of the other two functions. A first sort of problems arises wherever the “place of the tort” is to be found in a location where no national sovereignty reaches, since the tort happens in the high seas, outer space, or etc. In these cases, it may be necessary to resort to a different connecting factor⁴⁶³. However, the main source of complexity in the referred respect is one that actually became obvious *supra* when reviewing the EU’s PIL provisions on environmental tort: complexity arises when there is a dissociation between the place where the action or omission giving rise to damage happens, and the place where the tortious result materializes. The subsequent question is how to interpret which is the “the place of the tort” in these so-called “complex torts” (“*délits complexes*”). Since arguments may be put forward in favour of either the place of the action / omission or the place of the tortious result⁴⁶⁴, it is not possible to fully discard, as a general rule, one of the options in favour of the other⁴⁶⁵. It is at this point that the two remaining parameters – flexibility and substantive justice – come into play. As explained by H. Gaudemet-Tallon, research in comparative PIL shows that those systems that have made a choice between both options have introduced “corrective elements” which allow reaching the discarded option, either by providing the victim with a choice –

(1) *The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in s 6.*

(2) *Contacts to be taken into account in applying the principles of s 6 to determine the law applicable to an issue include:*

(a) *the place where the injury occurred,*

(b) *the place where the conduct causing the injury occurred,*

(c) *the domicile, residence, nationality, place of incorporation and place of business of the parties, and*

(d) *the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue”.*

⁴⁶² Vid. H. GAUDEMET-TALLON, “Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l’arc-en-ciel) - Cours général”, *op. cit.*, p. 217: “[l]es obligations délictuelles sont, de façon très générale, soumises à la *lex loci delicti*. Il s’agit là d’un rattachement spatial qui, a priori, paraît évident et facile à utiliser. Et pourtant, en réalité il n’en est rien [...]”.

⁴⁶³ Vid. A. L. CALVO CARAVACA & J. CARRASCOSA GONZALEZ, *Derecho Internacional Privado* vol. II, *op. cit.*, p. 721. In a similar sense, H. GAUDEMET-TALLON (“Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l’arc-en-ciel) - Cours général”, *op. cit.*, p. 220) deals with the high seas and airspace (not outer space): “[...] le rattachement au « lieu du délit » pose problème. [...] Une jurisprudence assez conséquente existe en ce domaine et on constate que les réponses apportées à cette difficulté sont variées. Selon les cas, et selon les droits, on retiendra la loi du pavillon commun, ou la *lex fori*, ou la loi du territoire au-dessus duquel a eu lieu la collision aérienne, etc”.

⁴⁶⁴ Vid. B. AUDIT, “Le caractère fonctionnel de la règle de conflit (Sur la « crise » des conflits de lois)”, *op. cit.*, p. 301.

⁴⁶⁵ Vid. H. GAUDEMET-TALLON, “Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l’arc-en-ciel) - Cours général”, *op. cit.*, p. 221 : “*Dans ces hypothèses de délits complexes, la règle de conflit est nécessairement complexe elle aussi et il semble impossible de « localiser » de façon univoque la source du rapport de droit comme le voudrait la méthode savignienne [...]*”.

therefore, enhancing the substantive value of “victim protection” – or either by introducing an escape clause – thus, enshrining flexibility⁴⁶⁶.

b. The North-American understanding of the interplay of functions: functionalism, conduct-regulating and loss-distributing tort rules

As opposed to the rather objective construction of *lex loci delicti* presented hitherto (which has highlighted its fulfillment of conflicts justice), B. Audit actually makes a functional reading of this connecting factor: “[...] *l’application de la loi du lieu du délit [...] satisfait l’intérêt de l’État au maintien d’un certain ordre sur son territoire*”⁴⁶⁷. This position is actually tributary of a certain share of the American conflicts-thinking that rose, in respect of torts, during the “Revolution”, and, more specifically, of what S. Symeonides has qualified as “one of the major breakthroughs in American conflicts thought and perhaps one of its major contributions to international conflicts thought”⁴⁶⁸: the distinction between conduct-regulating and loss-distributing tort rules. This distinction lies actually at the point of junction between previous developments on the functions of tort law and considerations on methodology and functions of choice of law, for it entails resorting to an analysis of the functions allegedly fulfilled by substantive tort rules as means to solve tort conflicts. The distinction derives from the fact that there are “tort rules that are designed primarily to regulate conduct and tort rules that are designed primarily to allocate between parties the losses caused by admittedly tortious conduct”⁴⁶⁹. In his seminal contribution to the *Recueil des cours*, S. Symeonides explains that, during the process of demise of the *lex loci delicti* connecting factor in the United States, many courts realized that, notwithstanding the fact that many tort rules operate territorially, “some tort rules, or some rules implicated in tort cases, do not, or should not, operate territorially”⁴⁷⁰. A need for criteria which would allow identifying and differentiating either kind of rule arose.

⁴⁶⁶ *Ibidem*, p. 221. In p. 217 she mentions the techniques which in her opinion may ensure victim protection: “*diverses techniques sont destinées à assurer cette protection (édiction de règles de conflit à caractère substantiel, option laissée à la victime entre plusieurs lois, accord procédural)*”.

⁴⁶⁷ *Vid.* B. AUDIT, “Le caractère fonctionnel de la règle de conflit (Sur la « crise » des conflits de lois)”, *op. cit.*, p. 299.

⁴⁶⁸ *Vid.* S. C. SYMEONIDES, “Problems and Dilemmas in Codifying Choice of Law for Torts: The Louisiana Experience in a comparative perspective”, *The American Journal of Comparative Law*, vol. 38-3, 1990, pp. 431-473, at p. 441.

⁴⁶⁹ *Vid.* S. C. SYMEONIDES, “The American choice-of-law revolution in the courts: today and tomorrow”, *op. cit.*, pp. 154-160, notably at p. 154. In order to present the distinction, he traces back the history of unilateralism, and torts therein. He does so starting with the statuists and their *statuta realia* – laws operating territorially – and *statuta personalia* – laws which “follow” the person – going on with J. BEALE and how he codified the *Lex loci delicti* rule in the First Restatement of the (American) conflict of laws, then moving on to how the American choice-of-law Revolution tore down the *lex loci delicti* hegemony in the United States, and finally to the codifying efforts which have followed, on both sides of the Atlantic (for instance, the choice of law developments in Louisiana’s Civil Code, and the Swiss Private International Law act).

⁴⁷⁰ *Vid.* S. C. SYMEONIDES, “The American choice-of-law revolution in the courts: today and tomorrow”, *op. cit.*, p. 155

This need was fulfilled by the extremely well-known *Babcock v. Jackson* case⁴⁷¹, which put forward the referred conduct-regulating v. loss-distributing distinction.

“On Friday, September 16, 1960, Miss Georgia Babcock and her friends, Mr. and Mrs. William Jackson, all residents of Rochester, left that city in Mr. Jackson's automobile, Miss Babcock as guest, for a week-end trip to Canada. Some hours later, as Mr. Jackson was driving in the Province of Ontario, he apparently lost control of the car; it went off the highway into an adjacent stone wall, and Miss Babcock was seriously injured. Upon her return to this State, she brought [...] the present action against William Jackson, alleging negligence on his part in operating his automobile.

At the time of the accident, there was in force in Ontario a statute providing that "the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in [...] the motor vehicle" [...]. Even though no such bar is recognized under this State's substantive law of torts [...], the defendant moved to dismiss the complaint on the ground that the law of the place where the accident occurred governs and that Ontario's guest statute bars recovery. [...]

The question presented is simply drawn. Shall the law of the place of the tort invariably govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy? [...]

Although the traditional rule has in the past been applied by this court in giving controlling effect to the guest statute of the foreign jurisdiction in which the accident occurred [...], it is not amiss to point out that the question here posed was neither raised nor considered in those cases and that the question has never been presented in so stark a manner as in the case before us with a statute so unique as Ontario's. Be that as it may, however, reconsideration of the inflexible traditional rule persuades us, as already indicated, that, in failing to take into account essential policy considerations and objectives, its application may lead to unjust and anomalous results. This being so, the rule, formulated as it was by the courts, should be discarded. [...]

In conclusion, then, there is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction. Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn, as does the issue

⁴⁷¹ *Vid. Georgia W. Babcock, Appellant, v Mabel B. Jackson, as Executrix of William H. Jackson, Deceased, Respondent.* Court of Appeals of New York, May 9, 1963 [12 NY2d 473 (1963)].

For a contextualized analysis of *Babcock v Jackson* (which includes the review of subsequent case-law, and an overview of the Revolution and further developments) *vid.* W. L. M. REESE, “Choice of Law in Torts and Contracts and Directions for the Future”, *op. cit.*, pp. 1-17. The decision is further commented by S. C. SYMEONIDES in his contribution to the *Recueil* (“The American choice-of-law revolution in the courts: today and tomorrow”, *op. cit.*, pp. 89-92).

of the standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented”⁴⁷².

In his analysis of *Babcock v. Jackson*, Symeonides brings attention to the fact that the court considers the dispute to be about whether the plaintiff was barred from recovering damages from a road accident, but that the very court acknowledges that its decision would have been different under other circumstances. This would have been so, notably, if the controversy had swirled around whether the defendant was exercising due care while driving, i.e. whether “*the defendant offended against a rule of the road prescribed by Ontario for motorists generally or whether he violated some standard of conduct imposed by that jurisdiction*”⁴⁷³. In these cases

“[w]here the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place”⁴⁷⁴.

Following Symeonides, several significant consequences derive from this opinion, whose content he reports to have extended to other courts and other States. First, against the unitary submission of all of tortious liability to the *lex loci delicti* that preceded this decision, the process of determining the applicable law would thereafter be dependent on the specific issue at stake⁴⁷⁵. Second, accordingly, choice of law would have to respond to the fact that there are tort rules which aim at deterring conduct and tort rules which aim at distributing loss within societies, and that these elements should frame how to determine the – territorial or personal – spatial applicability of the said rules⁴⁷⁶:

⁴⁷² Text reproduced from the official website of the New York State Unified Court System official website as found on October the 21st 2016 (https://www.nycourts.gov/reporter/archives/babcock_jackson.htm).

⁴⁷³ *Vid.* S. C. SYMEONIDES, “The American choice-of-law revolution in the courts: today and tomorrow”, *op. cit.*, pp. 156-158.

⁴⁷⁴ *Vid. Babcock v Jackson*, judgment, *op. cit.*, at 485.

⁴⁷⁵ Interestingly, there is a coincidence at this point with J. H. C. Morris’ proposal (“The Proper Law of a Tort”, *op. cit.*, p. 892): “A third advantage of the proper law of the tort doctrine is that it would enable the problems to be broken down into smaller groups and thus facilitate a more adequate analysis of the social factors involved. The questions that may arise in the field of torts are, no doubt, less various than those that arise in the field of contracts. But they are numerous enough to suggest doubts as to whether the application of a single formula -the law of the place of wrong - can possibly produce socially adequate results”.

⁴⁷⁶ This paragraph reflects ideas found in S. C. SYMEONIDES, “The American choice-of-law revolution in the courts: today and tomorrow”, *op. cit.*, pp. 156-158, 160, 171, 172. Furthermore (p. 172): “[...] In this process, it helps to remember that these two principles [territoriality and personality of the laws] parallel the two fundamental objectives of the substantive law of torts — deterrence and compensation — and that contemporary states, although still “territorially organized”, are also “welfare states”. They seek to both “safeguard the health and safety of people and property within their bounds”, and to “prescribe modes of financial protection for those endangered”. When the objectives of one state conflict with those of another, territoriality is the starting point in conduct-regulation conflicts, and personality is the starting point in loss-allocation conflicts. To quote Judge Weinstein, once again, “the conduct regulation-loss allocation dichotomy is a proxy for the balancing of competing state interests”.

i) Territoriality should be the governing principle whenever conduct-regulating concerns are at stake, for “[a] state’s policy of deterring substandard conduct is implicated whenever such conduct occurs in or causes injury within that state’s territory, regardless of whether the involved parties are domiciled in that state”⁴⁷⁷.

ii) However, wherever reparation concerns for admittedly tortious conduct are at stake (therefore, involving conflicts between loss-distribution rules) territoriality needs not be the governing principle, and personality may come into the picture: “a state’s loss-distribution policy may or may not extend to non-domiciliaries acting within its territory, but does extend to its domiciliaries even when they act outside that state”⁴⁷⁸.

Despite his firm conviction on the immense value of this conceptual distinction, S. Symeonides acknowledges that it may not be as clear-cut and straightforward as it could be desirable, and that the core of its value is related to its ability to translate State-interest considerations⁴⁷⁹. Nevertheless, such value “is not to deny that in many instances loss-allocative and conduct-regulative motives or even purposes can co-exist in the same rule. The law is too complex a phenomenon [...] Some tort rules do fit into both categories”⁴⁸⁰. As a solution he suggests that in those instances where a given rule “embodies both conduct-regulating and loss-distributing functions, one should focus on the rule’s primary function and proceed accordingly”⁴⁸¹. This later idea, on focusing on a rule’s main function, will prove to be essential in Chapter 2.

Before turning to an assessment and critique of the conduct-regulating / loss-distributing distinction, let us close this section with yet another reflection which will become equally significant for further developments *infra*. During his review of the conduct regulation-loss distribution distinction in tort conflicts, Symeonides suggests that the 1991 Louisiana conflict of laws codification has adopted the distinction – or a narrower variation thereof – under a different terminology: “standards of conduct and safety”. He does, however, acknowledge that this terminology would indicate that the inspiration for Louisiana’s differentiation comes from Europe⁴⁸². When addressing the European version of the distinction, which he explicitly

⁴⁷⁷ Vid. S. C. SYMEONIDES, “The American choice-of-law revolution in the courts: today and tomorrow”, *op. cit.*, pp. 160.

⁴⁷⁸ *Ibidem*.

⁴⁷⁹ Vid. S. C. SYMEONIDES, “The American choice-of-law revolution in the courts: today and tomorrow”, *op. cit.*, pp. 160-161 & 171. *Cfr.*, however, with E. T. LEAR, “National Interests, Foreign Injuries, and Federal Forum Non Conveniens”, *op. cit.*, pp. 570 and following. This latter author’s assumptions on the territorial scopes of States’ loss-distributing and conduct-regulating interests clash with Symeonides’ assertions (N.B: Lear’s article deals with *Forum non Conveniens*, not properly with applicable-law issues. It does, however, reflect in terms of “American interests in compensation” and “American interests in deterrence” using arguments which are diametrically opposed to those used by Symeonides).

⁴⁸⁰ *Ibidem*, pp. 165-166.

⁴⁸¹ *Ibidem*, p. 167.

⁴⁸² Vid. S. C. SYMEONIDES, “The American choice-of-law revolution in the courts: today and tomorrow”, *op. cit.*, p. 159. He warns that both distinctions are not identical (for even if all tort rules were conduct-regulating, not all of them would prescribe “standards of conduct and safety”), but that in any event, he allows himself to use the terms interchangeably. H. GAUDEMÉTET-TALLON (“Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l’arc-en-ciel) - Cours général”, *op. cit.*, p. 226) also addresses this problem, although under different terms: “les droits internes de la responsabilité distinguent clairement les conditions de la responsabilité et ses effets ; il a été proposé de soumettre les conditions d’existence et l’étendue de la responsabilité à la loi du lieu où se produit le fait

qualifies as “parallel, but not identical” he explicitly refers to “rules of the road” as being a classic example of rules of conduct and safety. “They are designed to ensure the safety of the public by defining permissible and impermissible conduct and by imposing sanctions on violators”⁴⁸³. This is extremely interesting for, from a European perspective, “rules of safety and conduct” and the specific example of “rules of the road” are considered to be rules of administrative law and thus, public law. Despite the well-known fact that Anglo-Saxon systems of law do not tend to give great significance to the distinction between public and private law, and the fact that even in Europe it is delicate to trace the distinction neatly as regards this topic, it seems that the frontier between private law and administrative law in this regards is far blurrier than one could have guessed. Therefore, there is added value in the realization that actually, the – allegedly – “public law” character of standards of behavior and the ensuing territoriality of such rules may be questioned. The boundaries between, on the one hand, private law standards of behavior and public law standards of behavior, and, on the other, between private law standards of behavior (conduct-regulating tort rules) and loss-distribution tort rules may be much more artificial and less neat than traditional academic thought would hope for. Therefore, clear-cut assertions on the necessarily territorial character of – allegedly – “public” law rules may need to be put into question. This point will be dealt with in Chapter 4⁴⁸⁴.

c. Assessment of the distinction between conduct-regulating and loss-distributing tort rules

The conduct-regulating v. loss-distributing distinction can be questioned in two different respects:

i) First, even if the distinction was to be fully accepted, some of its consequences need not to: It is not clear why would States of conduct be the sole States having an interest in regulating a given conduct. There are situations where a certain State may have an interest in having its conduct-regulating laws applied personally to its nationals (inasmuch as the situation at stake is adjudicated before its courts). Conversely, there are situations where a certain State may

générateur, alors que les autres questions relèveraient de la loi du lieu où le dommage est subi. Ou encore, récemment, allant plus loin, un auteur a suggéré d'ériger la catégorie « réparation du préjudice » en catégorie autonome, distincte de la responsabilité, et propose un rattachement spécifique (loi d'autonomie, ou à défaut loi du « lieu où le résultat de la condamnation produirait ses effets pour compenser le préjudice, sauf l'inaction du demandeur »). Ces analyses sont intéressantes, mais, personnellement, il me semble qu'il est important, en droit international privé, de toujours maintenir la plus grande unité possible : le fractionnement des questions nées d'un fait délictueux, débouchant sur une pluralité de lois applicables, risque de ruiner la cohésion de la solution juridique donnée ; chaque droit de la responsabilité forme un ensemble cohérent et il me paraît préférable de choisir un système dans son ensemble plutôt que de morceler la situation en utilisant des rattachements divers”.

⁴⁸³ Vid. S. C. SYMEONIDES, “The American choice-of-law revolution in the courts: today and tomorrow”, *op. cit.*, p. 168-169: “Other examples are rules that prescribe safety standards for work sites, buildings, and other premises. These rules are primarily conduct-regulating, although they may well have an impact on loss allocation”.

⁴⁸⁴ In my opinion, this “blurry distinction” is a powerful counter-argument against the classic position of the strict territoriality of public law. Vid. Part II (Chapter 4) of this dissertation (“Challenges from the standpoint of the traditional doctrine on the spatial applicability of public law”).

have an interest in having its conduct-regulating laws applied to foreign nationals, inasmuch as the relevant conduct has an impact in its territory. Above-presented considerations on the configuration of state interests and the spatial application of laws hold true in relatively “simple” situations such as *Babcock* (where the victim and the tortfeasor reside in the same country, which is not the country where the tort took place). But it is disputable whether they still hold true, for example, in transboundary cases. The field of environmental torts provides the perfect example thereof: in a cross-border case, such as *Mines de Potasse* for instance, the state of injury may have interest in regulating the conduct of the tortfeasor due to its impact therein. If *Mines de Potasse* was framed in North-American conflict-of-laws terms, would the Netherlands not have an interest in regulating conduct in France that causes harm within its territory? While the Netherlands cannot have an expectation to control all conduct in France it can surely have an expectation to control conduct in France inasmuch as it has an impact in the Dutch territory. This reasoning is not extraordinary: it is a simple parallel of how the extraterritorial application of the European antitrust legislation is articulated⁴⁸⁵. The Netherlands have, furthermore, a legitimate expectation, coming from public international law, of not having its territory impacted by environmental nuisances coming from another State, as it will be seen in Chapter 2⁴⁸⁶. These considerations point clearly, in my opinion, to an idea introduced at the very beginning of this dissertation: the need to distinguish neatly all possible structural configurations in tort-related scenarios before making assertions on the configuration of state interests therein and before subsequently drafting choice-of-law rules or approaches⁴⁸⁷. In other words, there is a strong need to “dissect” and refine hypotheses even

⁴⁸⁵ *Vid.* the so-called “Wood pulp cases” (ECJ, *A. Ahlström Osaakeyhtiö and others v Commission of the European Communities*, judgment, joined cases 89, 104, 114, 116, 117 and 125 to 129/85, ECLI:EU:C:1988:447).

⁴⁸⁶ This will be explained in detail *infra*, Chapter 2, “Customary obligations and general principles of law”. It is interesting to note from the outset though that this, furthermore, perfectly demonstrates how the same situation can be framed in public international law terms or private international law terms. Then, possibly using private international law means the situation may be dealt with at private-subject level and diminish the diplomatic stakes. Overall the satisfaction of the biggest amount of subjects in this situation (two public law subjects and two private law subjects) will depend on how nicely their relationships are framed both in the legal and the informal levels [Ex. A payment of damages to the State of the victim through diplomatic protection which would not be then forwarded to the actual victim (though legal from public international law) would not satisfy the latter].

⁴⁸⁷ *Vid. supra*, “Environmental occurrences as mass-torts and environmental-damage typology”. To be clear, the conduct-regulation v. loss-distribution distinction and the ensuing State-interests reasoning work where the situation is structurally identical to the one depicted in *Babcock* (it works for “common residence” torts), but not for other situations. In some of his later work S. C. SYMEONIDES (“Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should”, *Hastings Law Journal*, 61, 2009, pp. 337-411, at pp. 349-350) has stressed the structural differences among different kinds of tort following their structural configuration, distinguishing between “common-domicile cases”, “Split-domicile intrastate torts” and “Cross-border torts”. But this classification is probably not detailed enough to address all possible stakes arising from tort conflicts. The author defines the “Split-domicile intrastate torts” as “cases [involving] torts in which the parties are domiciled in different states but both the conduct and the injury occur in the same state [...] In most of these cases, the latter state is also the domicile of either the tortfeasor or the victim [...]”. Can the “State interests” said to be identical where “the latter state” is the domicile of the victim as when it is the domicile of the tortfeasor, or when none of them are domiciled there? Furthermore, from a European perspective, while the victim-tortfeasor domicile element may have less importance, since choice-of-law rules are drafted at the “quasi-federal” level, it is likely that the “State interests” involved may not be identical when the choice-of-law rule operates within such quasi-federal context, as whether the rule operates in respect of a third-state context before the courts

more before initiating any legislative process. This point will be dealt with in Chapter 4. In any case, these ideas reinforce J. González Campos' assertion on the existence of a trend towards "diversification" in choice-of-law especially as regards rules on torts⁴⁸⁸. A "one-size-fits-all" approach does not seem to cater for the diversity of tort scenarios that complex and modern life can offer. There is, therefore, a need to distinguish neatly between different hypotheses before adopting choice-of-law solutions. This does not mean that, structurally, different situations necessarily need to be addressed through different rules, but that differences in structures need to be assessed first in order to then check which situations, bearing sufficiently similar structures, can be addressed through the same rules.

ii) Secondly, the very pertinence of the conduct-regulating *versus* loss-distributing distinction for choice-of-law purposes can be put into question, at least partially: is there not a certain contradiction between giving such a powerful role to the distinction, and the comparative law developments depicted *supra*, which pointed to a very weak conduct-regulating potential in tort law? In other words, is there not a discordance between the North-American construction presented in previous pages and the findings from comparative law presented above which questioned the deterrent potential of tort law? It may be argued, in order to overcome the difficulty, that one thing is the political will behind a tort law rule (or its "*underlying purpose*" in the terminology resorted to by Symeonides⁴⁸⁹) and another, the effective function that the said tort law rule actually fulfills in practice. It is precisely this dichotomy which has inspired this dissertation: the will to assess whether the political statements regarding the potential use of choice of law in environmental matters (or its underlying purpose as regards these matters, as seem by the legislator) correspond with the function it may effectively fulfill in practice.

These two criticisms to the conduct-regulating *versus* loss-distributing distinction complete the description of the general functions of private international law as applied to tortious matters and, thus, the overall description of the functions of private international law. Since the functions of tort in comparative law have already been addressed, all the main elements needed to answer the first structural question presented *supra* (namely, whether it is effective or not, in terms of environmental protection, to intervene in environmental matters through the means of content-oriented multilateral choice-of-law rules) have been introduced.

of a European State. This kind of problem is pointed to and dealt with by S. FRANCO in "The External Dimension of Rome I and Rome II: Neutrality or Schizophrenia?", in M. CREMONA & H.-W. MICKLITZ, *Private Law in the External Relations of the EU*, Oxford OUP, 2016, pp. 71-105. Overall, "*Shouldn't Member States have more consideration for their sister states' policies expressed in overriding mandatory rules, than for third states' policies?*" (p. 83).

⁴⁸⁸ Vid. J. GONZÁLEZ CAMPOS, "Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé", *Recueil des Cours de l'Académie de Droit International*, vol. 287, Leiden, Martinus Nijhoff, 2000, pp. 67-155 (Despite possibly being originally inspired in the very North-American developments that have been commented in this section of this dissertation, his opinion goes several steps forward). In a similar sense, H. GAUDEMET-TALLON praises the "logic" character of the trend towards "diversification" ("Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l'arc-en-ciel) - Cours général", *op. cit.*, p. 226).

⁴⁸⁹ Vid. S. C. SYMEONIDES, "The American choice-of-law revolution in the courts: today and tomorrow", *op. cit.*, p. 170.

III. The alleged effectiveness of intervening in environmental matters through the means of content-oriented multilateral choice-of-law rules

The first of the two structural questions put forward in the introduction of this dissertation aimed at ascertaining whether, from an environmental protection perspective, it was an effective political decision to resort to choice of law in respect of international environmental torts. This entailed considering whether by the means of a choice of law rule it was possible to effectively and positively contribute to the reparation / compensation and / or to the prevention / deterrence of environmental damage.

It may be recalled that it was assumed *supra* that a choice of law tool dealing with tortious situations needed to fulfill at least the same functions that such field of law does within domestic legal orders, notwithstanding the possibility that it also fulfilled some other functions of its own⁴⁹⁰. This assumption derived from the fact that, in its most classic and basic form (i.e. a neutral choice-of-law rule with a single connecting factor) choice of law shares the functions and participates in the effective implementation of rules of domestic law, for it channelizes them to the transnational level. This lead to a comparative-law analysis of the functions that tort law is capable of fulfilling which, in turn, lead to the following conclusions: i) that tort law's core function is compensation, since generic punishment and / or deterrence are dependent on the effective payment of compensation by the tortfeasor; ii) that generic punishment and / or deterrence are dependent on an *in casu* cost / benefit analysis; and iii) that the functions performed by tort law vary from thematic field to thematic field and from legal order to legal order because tort law's functions will be blunted wherever there are effective interventions by social security, insurance, administrative and / or criminal law.

These conclusions on the functions of tort law from a comparative perspective already provided a first part of the answer to the above-referred question. If choice of law intervenes in environmental torts by the means of a neutral multilateral choice-of-law rule with a single connecting factor it will simply channelize a given domestic system of tort law. This means that, other than fulfilling conflictual justice and predictability / flexibility, choice of law will then reflect the functions of tort in the specific configuration embodied in the most closely connected legal order. However, as it was seen *supra*, this means that, in general, since generic punishment and deterrence are submitted to cost-benefit analysis, they will be significantly difficult to achieve in respect of economically-powerful polluters. Thus, in these hypotheses only compensation may be easily fulfilled.

The above-referred assessment of the functions of tort law was followed by an assessment of the functions of choice of law, which led to the review of four different parameters – conflicts justice, substantive justice, predictability and flexibility – the attainment of which can be considered to be the functions that the field aims at performing. Amongst these, while the fulfilment of conflicts justice is per definition “neutral”, the fulfilment of substantive justice can very clearly accommodate the protection of the environment: choice-of-law rules in tort can be content-oriented towards attaining environmentally protective results. Therefore, in order to provide an additional element of response to the above-referred question it is

⁴⁹⁰ *Vid. supra* the introduction to “*Functions of any choice-of-law mechanism dealing with environmental matters*”.

necessary to consider if and how result-selective / content-oriented choice-of-law rules can effectively contribute to environmental protection. Whenever private international law deals with international environmental torts thought the “proxy” of a result-selective multilateral choice-of-law rule, conflictual justice concerns are mostly displaced by substantive justice goals. Supposing that the forum’s policy is to improve the degree of environmental quality, and that the said rule is drafted as to embody such a value, it will lead to the application of a legal order which will, in principle, foster the (environmental) policies that the forum wants to promote at the transnational level. Put in other words, generally, the designation of the applicable tort law will respond to the environmental values incorporated into the choice-of-law rule. However, while this is a positive statement of principle, it may be wondered what the specific environmentally-protective contribution of content-oriented choice-of-law rules is, and whether it may possibly vary depending on the configuration thereof being considered: single-connecting-factor or multiple-connecting-factor? And in the latter case, what kind of structure? Elective, alternative, *echelle de rattachements*, etc? In order to provide an answer, let us present two scenarios which may be deemed representative of the ensemble:

i) As regards the single-connecting-factor hypothesis, the relevant kind of connecting factor for the purposes of this section is any sort of embodiment of the *favor laesi* principle. In this sense, a rough example of a single-connecting-factor content-oriented multilateral choice-of-law rule could be a provision drafted along these lines: “the law applicable to damage arising from environmental occurrences will be the law leading to the most significant monetary compensation for the victim, amongst the legal systems linked to the case”.

ii) As regards the multiple-connecting-factor hypothesis, since it was announced at the beginning of this dissertation that European Union’s legislative choices would be addressed where needed, let us focus on the structure chosen for Article 7 of the Rome II Regulation. As already discussed⁴⁹¹, the choice-of-law rule at stake is not truly structurally alternative, but elective: despite the fact that the victim of the alleged environmental tort has control over whether the *lex loci actus* or the *lex loci damni* will ultimately be applied to the controversy, the latter will be applied if no choice is performed. This policy choice does not only respond to the fact that the EU Commission considers that “*the most commonly applied solution is the law of the place where the loss is sustained [...] or one of the variants of the principle of the law that is most favourable to the victim*”⁴⁹². Allegedly, (following the EU Commission’s explanatory memorandum and the recitals of the Rome II Regulation) choosing the referred structure is justified by two facts: on the one hand, the *lex loci damni* connection is “[...] conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries [...]”⁴⁹³. On the other hand, allowing the choice of the *lex loci actus* connection aims at establishing “[...] a legislative policy that contributes to raising the general level of environmental protection, [for a]pplying exclusively the law of the place where the damage is sustained could give an operator an

⁴⁹¹ Vid. *supra* “Presentation of Article 7, on environmental torts”, for an extensive preliminary assessment of the provision.

⁴⁹² Vid. explanatory memorandum to the Rome II proposal, *op. cit.*, pp. 19-20.

⁴⁹³ *Ibidem*.

*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 [...]*⁴⁹⁴.

What would the specific contribution to environmental protection of these examples of content-oriented rules be? Despite the appearances, both of the hypotheses just presented bear a structural resemblance: both amount to increasing compensation from an amount of “X” to compensation of “X+Y” through choice of law, be it *via* a single connecting factor or *via* a victim’s choice between several of them. This means that the structures described will certainly contribute to enhance environmental protection in the sense that a bigger compensation of environmental damage should increasingly improve the degree of environmental quality. Nevertheless, doubts may arise as to whether these structures may actually amount to produce any preventive / deterrent effect in respect of potential polluters. To be sure, the reasoning on deterrence / prevention made explicit by the selected EU explanatory excerpts that have been just reproduced could be extended to the single-connecting-factor example (which equally entails a “passage” from “X” to “X+Y”). And, possibly, the potential application of an “X+Y” legal regime instead of “X” entails:

- i) that there are bigger chances that the cost-benefit analysis performed by potential rogue polluters will bend towards not polluting, irrespectively of whether they are confronted with strict-liability or fault-based tort law.
- ii) that, when confronted with strict-liability tort law, responsible potential polluters will feel bigger stimuli / incentives to implement more significant preventive measures.
- iii) that, when confronted with fault-based tort law, responsible potential polluters may be confronted to a higher (“X+Y”) standard of behavior to abide with, in order to avoid paying compensation⁴⁹⁵.

But this optimistic reasoning seems to be at odds with previous developments. It is uncertain how the referred construction is precisely meant to be conducive to a policy of prevention when it was established *supra* that tort law all by itself can only amount to deterrence in very limited circumstances whenever the potential tortfeasor is economically powerful. Deterrence arises only where the cost-benefit analysis performed *ex ante* by the potential polluter results in economic stimulus towards not polluting, and this may hardly change by an abstract increase from “X” to “X+Y”. Therefore, also in respect of content-oriented multilateral choice-of-law rules only compensation may be easily fulfilled.

In sum, these reflections provide enough standing to provide an answer to the first structural question of this dissertation: is it effective to intervene in environmental matters through the means of multilateral choice-of-law rules? Yes, it is effective to do so if the goal to be attained is to obtain compensation in order to repair damages and improve the degree of

⁴⁹⁴ *Ibidem*.

⁴⁹⁵ Again, one may wonder what qualifies as “standards”: private law standards (as “*le bon père de famille*” in French-inspired systems of private law), public law standards (as administrative law provisions establishing maximal amounts of chemicals), etc. This question will be addressed *infra*, Part II, Chapter 4, “*Second congenital deficiency of Article 7 of the Rome II Regulation: challenges pertaining to environmental standards / tensions with Article 17 of the Rome II Regulation*”.

environmental quality *ex post* damage. Reparation and improvement will increase and improve even more whenever the relevant choice of law provision is content-oriented towards environmental protection. However, neither neutral nor content-oriented choice of law are certain to be able to provide *ex ante* deterrence, due to the impact of cost-benefit analysis, and the significant economic strength that potential corporate polluters generally tend to count with. The prevention provided by injunctive relief immediately prior to the rise of damage is also uncertain (albeit less so) for it will be dependent on whether the relevant tort law (as determined by the choice-of-law provision) contemplates or not the institution of injunctive relief.

The far-reaching outcomes of pushing these developments to their ultimate consequences will be dealt with *infra* Chapter 4, when the specific policy choices of the European Union get to be thoroughly dissected⁴⁹⁶.

⁴⁹⁶ *Vid. infra* Part II, Chapter 4, for further discussion in respect on this construction.

Chapter 2:

The “blocked fields”: relationship with other tools of environmental protection

The next step in order to assess the effectiveness, and amount thereof – if any – of the intervention of a multilateralist choice-of-law rule in environmental matters is to consider the position it may occupy in the panorama of the legal protection of the environment at an international level. This entails assessing its relationship with pre-existing environmental legal tools. As the need to limit the geographical scope of the operation is inevitable in order to make it feasible, such geographical scope will be circumscribed to the European Union: thus, as *supra*, specific references to given regional legal regimes in the following pages will be made to those regimes in force within the EU (therefore including the EU environmental PIL micro-regime).

For the purposes of this dissertation, the relevance of this step in the reasoning is not entirely related to the fact that adequately dealing with environmental problems frequently requires a multi-angle legal approach, encompassing elements from all relevant legal disciplines. It is not entirely related either to the fact that the complexity of real-life situations in a globalized world does not allow disentangling the public (international) law and private (international) law dimensions of legal disputes⁴⁹⁷. Its relevance derives mostly from two ideas: firstly, it derives from the fact that highlighting the relationships of a mechanism with other mechanisms serves somewhat as an indirect definition of the former, a certain form of definition through opposition which enlightens the understanding of the mechanism that is being analyzed. Secondly, the concern behind the referred operation is mainly linked to the political notion of effectiveness, which largely corresponds with the most basic understanding – in common language – of what effectiveness is⁴⁹⁸. Since, to the eyes of the general legal profession, other tools addressing different aspects of environmental stakes – amongst which tools of European substantive law, and public international law – have long pre-dated any prospective specific intrusion of private international law in the subject, the question to begin with would be why would there be a need for a new kind of legal tool. Intuitively and roughly, it can be sustained that the enactment of a new legal mechanism generally points either to the fact that a given society has gained consciousness on the evolution of reality, and thus requires new law in order to deal with its developments, or to the fact that the pre-existing legal instruments were not sufficient to adequately or fully deal with the problem that brought them into existence. Or to both. Consequently, these ideas frame the relationships that the new legal tool entertains with those which preceded it: Does the new mechanism fill the – old

⁴⁹⁷ As an example, of the contestation of the divide between public and private international law *vid.* H. MUIR WATT, “Private International Law beyond the schism”, *op. cit.*, p. 355 (whose goal is to “[...] raise awareness of the deleterious consequences of the dogmatic separation between public and private international law”). *Cfr.* S. MURASE, “Perspectives from international economic law on transnational environmental issues”, *Recueil des Cours de l’Académie de Droit International*, vol. 253, Leiden, Martinus Nijhoff, 1995, p. 300: “[...] the public law/private law dichotomy remains valid under the present international legal system [...]”.

⁴⁹⁸ *Vid. supra* “Introduction” to this dissertation. As referred *therein*, on the notion of effectiveness in the political sense, *vid.* L. PRIETO SANCHIS, *Apuntes de teoría del Derecho* (9th ed.), *op. cit.*, p. 85.

– normative space left blank / not reached by preexisting tools? Does it intend to mend their failures / malfunctions? Does it alternatively – or cumulatively – supersede such tools, either responding to a need of improvement or to changes in policies? Or else does it claim the – new – normative space created by changes in society? These questions, on their turn, frame the amount of effectiveness that the said tool may obtain.

In order to reach an answer to these questions, the path to be taken will be the following: First, a brief description of the main traits of the most relevant pre-existing environmental legal tools while be delivered (I). Second, building upon the general picture thus obtained, the relationships entertained by these tools and the EU environmental PIL regime will be sketched (II). As it will be then seen, those relationships will either be described as non-frictional or potentially frictional. Non-frictional relationships are those where each instrument addresses different stakes and, therefore, each of them is meant to occupy its own normative space. While where there is no friction there can even be – beyond neutral coexistence – complementarity, where there is friction a need to clarify the precise interplay of the legal tools arises. Since the manners in which these frictions may be avoided or solved establish the relative positions of tools, define how operational they can be and, ultimately, determine their worthiness, the focus of the analysis will be placed therein (III). Nevertheless, non-frictional relationships, amongst which, complementary ones will be briefly sketched (IV). Overall, the final result of these considerations will determine abstract effectiveness. This should lead us to a preliminary *in abstracto* answer to the question whether, at least in principle, a multilateralist private international law intervention may play any relevant role in the field of environmental protection.

In methodological terms, during the first part of the referred path (i.e., (I), it may be helpful to provide illustrations of how a given environmental occurrence can be approached from several different perspectives, thus potentially allowing for the intervention of different environmental tools. The referred illustrations will be adapted – transposed to a European context – from the infamous “Trail Smelter arbitration”:

BOX 7: The Trail Smelter Arbitration⁴⁹⁹

“A Canadian Smelter of Zinc and lead ores, located in Trail, in British Columbia (Canada) was alleged to cause damage to trees, crops, and land in the American State of Washington due to emissions of sulphur dioxide fumes from the plant. These fumes, proceeding down the

⁴⁹⁹ This summary of the case is taken from A. CASSESE, *International Law, op. cit.*, pp. 376-377. This author further explains (p. 377) that “[t]he issues raised in [this case] were still looked at in the perspective of State-to-State relations [...] In the Trail Smelter case it was damage caused by one State to the environment of the other that triggered the legal claim. Legally the issue was not viewed as different from damage caused to private or public property, for instance by the inadvertent penetration of a foreign State’s territory by armed forces [...] Later, the idea gradually emerged that natural resources may be relevant not to the individual States that can exploit them but also to all members of the international community and could be used in the interest of mankind. Thus, for instance, in the Lac Lanoux case (1957) the Arbitral Tribunal, while taking a traditional view of international law regulating relations between neighbouring States, alluded to the possibility of natural resources such as the water of a lake being exploited ‘in the common interest of everybody’”.

Columbia river valley and otherwise, entered the US territory. The arbitral Court appointed by the USA and Canada was called upon to decide whether Canada was responsible for the damage and, if so, what indemnity it should pay to the USA. The [arbitral tribunal] was asked to apply 'the law and practice followed in dealing with cognate questions in the United States of America as well as international law' [...] In its second decision [1941] the [arbitral tribunal] stated that, generally speaking, every State has a duty at all times to protect other States against injurious acts by individuals within its jurisdiction; more specifically, 'under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence'. Consequently, the Court held Canada responsible for the conduct of the Trail Smelter and enjoined it to pay compensation to the USA. In addition, interestingly the Court also provided for future monitoring of the effects of the factory's activities on the environment, to prevent possible future damages to the US environment".

As it may be easily seen, the situation described could have been easily qualified as a case of international environmental tort taking place between private subjects. Nevertheless, the case was actually solved at the inter-state level through means of public international law. In *Trail Smelter* this possibly happened because non-judicial interactions between private parties proved unfruitful⁵⁰⁰, and soon thereafter the relevant sub-national governments intervened, paving the way for federal involvement in the situation on both sides⁵⁰¹. Whatever the specific reasons in *Trail Smelter*, this example justifies the methodological choice performed in the following pages.

⁵⁰⁰ *Vid. Trail smelter case (United States, Canada), UNO Reports of International Arbitration Awards, vol. III, 2006 pp. 1905-1982, at p. 1917: "As early as 1925 (and there is some evidence earlier) suggestions were made to the Trail Smelter that damage was being done to property in the northern part of Stevens County. The first formal complaint was made, in 1926, by one J. H. Stroh, whose farm (mentioned above) was located a few miles south of the boundary line. He was followed by others [...]. This investigation convinced the Trail Smelter that damage had been and was being done, and it proceeded to negotiate with the property owners [...]. Settlements were made with a number of farmers by the payment to them of different amounts. This condition of affairs seems to have lasted during a period of about two years [...] and on August 25, 1928, there was brought into existence an association known as the "Citizens' Protective Association". Due to the creation of this association or to other causes, no settlements were made thereafter between the Trail Smelter and individual claimants [...]."*

⁵⁰¹ *Vid. T. BALLARINO, "Questions de droit international privé et dommages catastrophiques", Recueil des Cours de l'Académie de Droit International, vol. 220, Leiden, Martinus Nijhoff, 1990, p. 312. This author mentions that American farmers decided to confer the protection of their interests to the federal government. He further considers that the intervention of the States may have been caused by the relevance of the damages and of the amounts claimed (p. 319). Moreover, he considers (p. 318) that there is, in general, a tendency by States to "monopolize" the legal action in the resolution of disputes in the frame of transboundary catastrophic torts.*

I. Pre-existing mechanisms of international environmental protection

The first part of the path towards ascertaining the abstract effectiveness of any multilateralist private international law intervention in the field of environmental protection would be to identify and describe the core aspects of the most relevant pre-existing environmental legal tools. As announced, the purpose of the following pages is not to conduct a thorough analysis of the different areas of law which may possibly deal with environmental issues, for excellent treatises and monographs already fulfil this task. Therefore, these pages will focus only on some very basic traces of some of the said areas of law; specifically, those which are strictly required in order to understand further developments *infra*. For the sake of clarity, (public) international law (A), human rights law (B), European law (C), WTO law (D), and so-called “soft law” (E) will be dealt with in sequence.

A. Public international environmental law

International environmental law, or the “international law of the environment”, as it is frequently called, is simply a branch of public international law, and not a separate or self-contained field of law: “[i]n some respects it is simply the application of well-established rules, principles and processes of general international law to the resolution of international environmental problems and disputes”⁵⁰². The roots of this branch can be traced back at least as early as the late 19th century and the beginning of the 20th century⁵⁰³. It was at that time that the first international conventions and bilateral treaties addressing certain – mostly economic-related – specific aspects of environmental protection were ratified⁵⁰⁴. Due to its richness, it is not possible to provide here a detailed and full account of the development of this branch through the last century⁵⁰⁵. Suffice it to say that two major intergovernmental conferences organized under the auspices of the United Nations have deeply determined its evolution⁵⁰⁶. The first one, the 1972 *United Nations Conference on the Human Environment*,

⁵⁰² Vid. P. BIRNIE, A. BOYLE & C. REDGWELL, *International Law & the Environment*, *op. cit.*, pp. 14 & 106; S. MURASE, “Perspectives from international economic law on transnational environmental issues”, *op. cit.*, p. 306; M. DIEZ DE VELASCO, *Instituciones de Derecho Internacional Público* (13th ed.), Madrid, Tecnos, 2013, p. 762. This latter author defines international environmental law as “*el sector de las normas del ordenamiento jurídico internacional que tiene por objeto la protección del medioambiente*”.

⁵⁰³ Vid. P. BIRNIE, A. BOYLE & C. REDGWELL, *International Law & the Environment*, *op. cit.*, p. 1 (who place the beginning of the development of modern international environmental law in the 1960s); T. LÁZARO CALVO, *Derecho internacional del medioambiente*, Barcelona, Atelier – Libros Jurídicos, 2005, p. 22.

⁵⁰⁴ As for example, concerns for the excessive exploitation of fisheries, or the protection of certain specific species of animals. As explained by T. LÁZARO CALVO, *Derecho internacional del medioambiente*, *op. cit.*, pp. 22, examples of this trend can be found in the following instruments: Convention pour la protection d’oiseaux utiles pour l’agriculture, Paris, 19 Mars, 1902; Convention entre la France et la Grande Bretagne concernant la pêche, Paris, 11 Novembre de 1967.

⁵⁰⁵ For thorough descriptions, Vid. P. BIRNIE, A. BOYLE & C. REDGWELL, *International Law & the Environment*, *op. cit.*, p. 1 and following (substantive aspects) and 43 and following (institutional aspects); T. LÁZARO CALVO, *Derecho internacional del medioambiente*, *op. cit.*, pp. 21 and following, 137 and following, 279 and following. For a brief summary of these same historical developments, *vid. also* M. DIEZ DE VELASCO, *Instituciones de Derecho Internacional Público* (13th ed.), *op. cit.*, pp. 763 & 764.

⁵⁰⁶ The road to these two major conferences is summarized (M. DIEZ DE VELASCO, *Instituciones de Derecho Internacional Público* (13th ed.), *op. cit.*, p. 763) as follows: “*Tras algunos desarrollos convencionales en el periodo de entreguerras lo cierto es que la carta de las N.U. no incluyó disposiciones sobre protección*

held in Stockholm (Sweden), was the first ever intergovernmental conference devoted to environmental matters⁵⁰⁷, and is thus considered by some authors to mark the birth of – modern – international environmental law⁵⁰⁸. The second one, the 1992 *UN Conference on environment and development* – best known as the Rio conference – amongst other milestones, placed the concept of *sustainable development* in the spotlight of discourses on worldwide environmental protection⁵⁰⁹. Throughout the periods delimited by the two referred

medioambiental y fue en 1949, cuando el ECOSOC convocó la conferencia de las N.U. sobre la conservación y utilización de recursos, que dio un primer e importante impulso para la acción internacional en favor del medioambiente. Tratados en número creciente fueron concluidos hasta la Conferencia sobre la Biosfera convocada en 1968 por la U.N.E.S.C.O, que abrió el camino para que la protección del medioambiente a escala mundial, en todas sus múltiples dimensiones, fuera por fin comenzada de modo organizado por N.U. a través de la Conferencia sobre el Medio Humano celebrada en Estocolmo del 5 al 16 de junio de 1972".

⁵⁰⁷ Two important features need to be highlighted regarding the 1972 Stockholm conference: On the one hand it saw the proclamation of the famous "Stockholm Declaration on the Human Environment" (whose provisions have a widely varying range of values: while some possess normative nature, others merely embody some degree of political orientation). On the other hand, it entailed the creation of the UNEP (United Nations Environmental Programme), a body within the United Nations system which develops and coordinates the environmental aspects of the action of other UN bodies.

Furthermore, as explained by P. LAMBERT ("Le droit de l'homme à un environnement sain", *op. cit.*, p. 566): "*La Déclaration universelle des droits de l'homme du 10 décembre 1948 ne formule pas expressément ce que l'on dénomme communément, aujourd'hui, « le droit de l'homme à l'environnement ». Ce concept apparaît pour la première fois sur le plan universel dans la Déclaration adoptée par la Conférence des Nations Unies sur l'environnement, réunie le 16 juin 1972 à Stockholm, connue sous le nom de « Déclaration de Stockholm ». Selon Alexandre Kiss, le lien entre les droits de l'homme et la protection de l'environnement a été établi précisément par cette Conférence*".

⁵⁰⁸ Vid. T. LÁZARO CALVO, *Derecho internacional del medioambiente*, *op. cit.*, pp. 137-141.

⁵⁰⁹ Five very important instruments were drafted in Rio. Once again, as it was the case with the instruments elaborated in the frame of the Stockholm conference, their implications, scope and legal value differ from one to another: The Rio Declaration on Environment and Development (which seeks to find a balance between the interests of developed and developing countries, and roughly depicts the contents and boundaries of the notion of sustainable development) ; Agenda 21 (a non-legally binding action programme on subjects as climate change, deforestation, protection of oceans, etc.) ; the Framework Convention on Climate Change and the Convention on Biological Diversity (Both establishing regulatory regimes on the consequences of the use of energy and natural resources), and the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forest.

As explained by P. LAMBERT (Vid. P. LAMBERT, "Le droit de l'homme à un environnement sain", *op. cit.*, p. 567): "[...] la « Déclaration de Rio sur l'environnement et le développement », réaffirme les principes formulés dans la Déclaration de Stockholm, en cherchant à en assurer le prolongement [...] Quoiqu'il en soit, ces deux textes, en dépit de leur importance indéniable, n'ont pas de caractère obligatoire : ils constituent l'expression réitérée du souhait que les principes qui y sont énoncés trouveront leur expression dans la législation interne de chaque Etat, ainsi qu'au niveau international".

The significance of the Rio Declaration is summarized by M. PAQUES (Vid. M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, pp. 43-44) as follows: "*C'est pour accorder le droit mondial à la nouvelle idéologie du développement durable que la conférence de Rio de Janeiro est convoquée par la résolution de l'ONU du 22 décembre 1989. L'ambition était d'écrire [...] une Charte de la Terre qui aurait été le pendant de la Déclaration universelle des droits de l'homme. L'acte final de Rio concède que ce n'était pas possible. Son intitulé modeste présente une «déclaration sur l'environnement et le développement». Ce texte non contraignant garantit une certaine protection de l'environnement enchâssée dans le développement. Le développement durable, présent à de nombreuses reprises dans la déclaration elle-même, fait l'objet de précisions dans l'Agenda 21. Il est consacré dans plusieurs conventions internationales adoptées dans la suite de Rio. Les décisions en matière économique et sociale doivent être respectueuses de l'environnement, en préserver la substance. Parmi les nombreux*

landmarks, international environmental law has flourished. It has done so, however, mostly from an “anthropocentric perspective”. Despite fluctuations in conceptions and approaches, “the environment as such does not have rights and there is little support for giving it ‘intrinsic value’ beyond the protection of ‘charismatic megafauna’ or the wilderness value of Antarctica”⁵¹⁰. Moreover, “there is no initial presumption in favour of protecting the environment”⁵¹¹, and it is considered that beyond “pure” environmental concerns, one of its main purposes is “the co-ordination of the conflicting interests of economic development and environmental protection”⁵¹². Other than this, it must be noted that while some institutions have been specifically created in order to prevent further degradation of the environment, this body of law is largely supported by supervisory and preventive mechanisms, for “no specific or ad hoc judicial procedure has been established to deal with cases of non-compliance with existing rules”⁵¹³.

Overall, this is a branch of law where “only a few general principles have evolved”⁵¹⁴, and thus the present international regulation of the environment lies largely on two sources: on the one hand, a significant number of different international instruments have come into existence, reflecting evolving conceptions and approaches to environmental policies⁵¹⁵. On the other hand, and in parallel, some rules of non-treaty-based public international law have been born, constituting a background thereto⁵¹⁶. As regards the referred plethora of instruments it must be highlighted that their nature and legal value is highly variable, ranging from mere political

instruments du développement durable, figure en bonne place le principe d'intégration [...] On note dans la déclaration une hésitation à garantir de manière nette un droit à l'environnement sain mais, malgré tout, une marche vers celui-ci. L'environnement y est largement conçu. Les écosystèmes sont visés, le champ est universel. Ainsi «Les Etats doivent coopérer dans un esprit de partenariat mondial en vue de conserver, de protéger et de rétablir la santé et l'intégrité de l'écosystème terrestre. Etant donné la diversité des rôles joués dans la dégradation de l'environnement mondial, les Etats ont des responsabilités communes mais différenciées» (Principe n° 7, première phrase). De nombreuses conventions mettent ces principes en application. La jurisprudence de la Cour internationale de Justice a considéré l'environnement comme digne de protection. Les organes de décision de l'OMC se sont inspirés de la déclaration de Rio pour interpréter l'article XX du GATT et apprécier la validité de règles nationales unilatérales qui protégeaient l'environnement par des mesures de nature à entraver les échanges. La Cour européenne des droits de l'homme a eu elle-même égard aux principes de Rio”.

⁵¹⁰ Vid. P. BIRNIE, A. BOYLE & C. REDGWELL, *International Law & the Environment*, op. cit., pp. 39 & 7: “almost all justifications for international environmental protection are predominantly and in some sense anthropocentric [...]”.

⁵¹¹ Vid. M. DIXON, R. MCCORQUODALE & S. WILLIAMS, *Cases and materials on International Law* (5th ed.), Oxford, OUP, 2011, p. 441.

⁵¹² Vid. S. MURASE, “Perspectives from international economic law on transnational environmental issues”, op. cit., p. 308. In a similar sense, vid. J. CRAWFORD, *Brownie's Principles of Public International Law* (8th ed.), Oxford, OUP, 2012, p. 352.

⁵¹³ Vid. A. CASSESE, *International Law*, op. cit., pp. 379-380.

⁵¹⁴ Vid. A. CASSESE, *International Law*, op. cit., pp. 379-380.

⁵¹⁵ Vid., inter alia, M. DIEZ DE VELASCO, *Instituciones de Derecho Internacional Público* (13th ed.), op. cit., p. 763: “Dentro de la protección del medioambiente como finalidad general, [una] primera perspectiva de combate contra la contaminación ha dado luego paso a otras estrategias cuyo objetivo no es simplemente la justa reparación sino esencialmente la prevención de los daños y la distribución equitativa entre los Estados de las cargas y beneficios de la utilización de los recursos medioambientales”.

⁵¹⁶ Cfr. A. CASSESE, *International Law*, op. cit., pp. 379-380, who limits this phenomenon to the law of the sea: “(2) Possibly one or two customary rules have crystallized on matters relating to the law of the sea [...]”.

declarations to legally-binding international conventions⁵¹⁷. Nevertheless, each of them bears a high degree of importance, as in many cases those which do not set legally enforceable obligations at least help crystallize developing embryos of international custom⁵¹⁸. Interestingly, both the elaboration of legally-binding instruments and the birth of rules of general public international law can potentially evolve freely, for there does not seem to be any environmentally-relevant norm of *ius cogens* in force⁵¹⁹.

Taking into account these ideas, a distinction will be traced in the following pages, differentiating within the *corpus* of international environmental law between conventional international law and other sources of international law. Thus, firstly, putting aside political declarations and other sorts of international instruments devoid of binding effect, specialized treaty-regimes dealing with specific aspects of environmental protection will be presented (i). Then, secondly, environmental obligations which have arisen under general public international law – and whose defense shall be assured by the mechanism of state responsibility – will be introduced (ii). However, since the resort to state responsibility is not the only mechanism provided for by public international law in order to try to ensure compliance with environmental obligations, a brief reference to diplomatic protection will be made (iii).

⁵¹⁷ Political declarations conform a substantial part of what has been called – *lato sensu* – soft law. As it will be seen *infra*, they share this label with other instruments which have a private origin. for (As an example of the use of their term in respect of public-origin instruments *vid.*, for instance, A. CASSESE, *International Law*, *op. cit.*, pp. 379-380: “(3) *General problems have been regulated through so-called soft law, that is, by means of a string of non-binding resolutions and declarations*”). However, as it will be seen, in the frame of this dissertation, the “soft law” label will be reserved for the private-origin instruments. For a traditional / classic approach to the role of the public-origin instruments, *vid.* S. MURASE, “Perspectives from international economic law on transnational environmental issues”, *op. cit.*, p. 314: “*we should avoid normative relativization by attaching undue legal effect to soft-law norms. Distinctions between non-binding soft-law and binding hard-law, that is, treaties and customs, should always be clearly recognized. It is true that some of soft-law instruments generate the creation and development of binding norms [...] it is normally after the crystallization into hard law that the previous soft-law is recognized as having served as a basis for law-making [retrospective perspective] [...] a prospective characterization of soft-law norms as having certain legal effects would blur the normative threshold [...]*”. It will be further seen that even within legally-binding international treaties, their effectiveness needs to be “relativized” for “(4) *Very numerous treaties have been concluded on specific matters; many of these treaties are however ‘framework’ agreements in that they only provide a general framework for further negotiation of agreements*” (*Vid.* A. CASSESE, *International Law*, *op. cit.*, pp. 379-380).

⁵¹⁸ *Vid.* T. LÁZARO CALVO, *Derecho internacional del medioambiente*, *op. cit.*, pp. 66-67.

⁵¹⁹ *Vid.* P. BIRNIE, A. BOYLE & C. REDGWELL, *International Law & the Environment*, *op. cit.*, 109-110. These authors assert, in respect of *ius cogens*, that “*no such norms of international environmental law have yet been convincingly identified*”. Furthermore, in footnote 23, it is explained that the ICJ, in paragraph 97 of its *Gabcikovo-Nagymaros* judgement, impliedly accepted Slovakia’s argument that none of the norms of environmental law on which Hungary relied was *ius cogens*.

i. *Conventional regimes***BOX 8: Trail Smelter model – Variation number 1**

A smelter of Zinc and lead ores, located in Oz, a Member State of the European Union, was alleged to cause damage to trees, crops, and land in the State of Ruritania, equally Member State of the European Union, due to emissions of sulphur dioxide fumes from the plant. Ruritarian farmers want to obtain redress on the basis of a “Convention on the liability for sulphur dioxide fumes”, ratified by both States. Additionally, both Oz and Ruritania have ratified an international convention “for the prevention of pollution from smelters”.

a. Introduction

It may be asserted that the core set of the most important international environmental legal obligations is conventional in nature⁵²⁰. By putting aside the 1972 Stockholm Declaration, the 1992 Rio Declaration, and the aforementioned myriad of non-legally-binding instruments, the present section aims at analyzing treaty-based environmental regimes only. As it may be understood, due to the immense amount of legally-binding instruments in force all around the world which address different specific aspects of environmental protection, this section merely aims at providing a basic sketch of the main features and structure of such ensemble⁵²¹.

The said ensemble is rather heterogeneous⁵²². As described by Cassese, some treaties and conventions are bilateral, although they are frequently multilateral; some of them have a universal scope, although quite frequently they are regional in character. However, a constant feature of theirs is that *“they cover very specific aspects of the environment”*. The said author believes that there is a clear preference by States to resort to conventions and treaties when dealing with the international protection of the environment. In his view this preference is due to the *“enormous economic interests are at stake”* which foster “prudence” and determine that States are *“not willing to be bound by general rules emerging in the international community as a product of the majority of States”*. Nevertheless, the same author considers that there has been a change in approach from a first generation of sectoral treaties to a second generation having – what he calls – a universalist and global approach. He mentions, amongst others, the 1997 Kyoto protocol (on Climate Change)⁵²³, and the 1992 Convention on Biological diversity⁵²⁴. Nevertheless, doubts can arise as regards this conceptualization for climate change and the protection of biological diversity may still be considered specific issues

⁵²⁰ Vid. M. DIEZ DE VELASCO, *Instituciones de Derecho Internacional Público* (13th ed.), op. cit., p. 766: “[...] está claro que el núcleo más importante de “normas internacionales medioambientales” es de naturaleza convencional, esté contenido en tratados específicamente orientados a la protección del medioambiente o en cualquier otro”.

⁵²¹ Vid. U. BEYERLIN & T. MARAUHN, *International Environmental Law*, Oxford, Hart Publishing, 2011, p. 277 refer that at the beginning of the 21st century *“there were about a thousand international agreements dealing with aspects of environmental protection”*, what amounts to being *“treaty congestion”*.

⁵²² This paragraph summarizes A. CASSESE, *International Law*, op. cit., pp. 383-385.

⁵²³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, December the 11th 1997; February the 16th 2005.

⁵²⁴ Convention on Biological diversity, Rio de Janeiro, June the 5th 1992; Entry into force, December the 29th 1993.

within the general area of the protection of the environment. Cassese further mentions, that a special category of treaties has been developed: framework conventions, which enshrine some basic principles or general guidelines, and provide for the future elaboration of further treaties laying down precise obligations. As he explains, their advantage is that they allow for a gradual agreement on specific legal obligations⁵²⁵. One of the most prominent examples of framework conventions may be found in the 1992 United Nations Framework Convention on Climate Change⁵²⁶, whose latest development is the 2015 Paris Agreement⁵²⁷.

b. Typology of conventions

After having roughly sketched the general features of the field, it is possible to present some ideas on how conventional regimes approach the phenomenon of environmental stakes. In general, it can be said that international environmentally protective action can present itself in three forms: *ex ante* regulation (regulation or control of the conducts of different subjects before damage arises), *ex post* reparation / compensation (once the damage has arisen), and "instrumental" action which aims at complementing or supporting other types of action⁵²⁸. Correspondingly, international environmentally protective regimes can be roughly classified in three categories which relate to such three forms of action. This is so, of course, notwithstanding the fact that, possibly, different forms of environmental action may be present in a given single Treaty. However, as matter of simplicity, it will be assumed that most treaties and conventions feature a single form of environmentally protective action. Thus, the constellation of environmentally relevant international conventions and treaties in force around the globe can be *grosso modo* classified in three different groups following the main function that they intend to fulfill⁵²⁹:

i) *Ex ante* preventive / regulatory conventions: these conventions contain regulatory mechanisms framing the everyday activities of subjects in order to avoid the production of damages arising from the said activities or else from accidents. An example thereof would be the International Convention for the Prevention of Pollution from Ships (MARPOL)⁵³⁰. It can be

⁵²⁵ As referred, this paragraph summarizes A. CASSESE, *International Law*, *op. cit.*, pp. 383-385. Also on framework agreements, M. DIXON, R. MCCORQUODALE & S. WILLIAMS, *Cases and materials on International Law* (5th ed.), *op. cit.*, p. 450.

⁵²⁶ United Nations Framework Convention on Climate Change, Rio de Janeiro, June the 4th 1992; Entry into force, March the 21st 1994.

⁵²⁷ Paris Agreement, Paris, December the 12th 2015; Entry into force, November the 4th 2016.

⁵²⁸ As a matter of simplicity, this description deliberately ignores the "immediate prevention" that is provided, where available, by tort-law injunctive relief. Needless to say, introducing this notion would not alter the description, for immediate prevention is nothing but "the other side of the mirror" of *ex post*-reparation.

⁵²⁹ For a similar classification, *vid.* P. GAUTIER, "Quelques réflexions sur les États, le droit des gens, et les dommages à l'environnement", *Revue belge de droit international*, vol. 1992/2, 1992, pp. 448-484, at p. 450.

⁵³⁰ As explained in the official IMO web page ([http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx); checked on June the 10th 2014): "The MARPOL Convention was adopted on 2 November 1973 at IMO. The Protocol of 1978 was adopted in response to a spate of tanker accidents in 1976-1977. As the 1973 MARPOL Convention had not yet entered into

asserted that this first group is largely majoritarian: conventional regimes focus primarily on prevention, be it directly or indirectly. As explained by Redgwell: “*The most widely ratified treaties [...] constitute international regulatory regimes which have become the most important sources of law on these subjects for almost all states*”⁵³¹.

ii) Ex post reparation / compensation conventions: certain international conventions establish liability regimes for specific kinds of damages caused to the environment. These conventions are very peculiar, for their policy choice is to channelize the liability for environmental tort to certain specifically designated private subjects, and do not address State responsibility / liability at all. Although it is clear that this approach is not to be neglected, this kind of convention is comparatively scarce. As examples of treaties in this group⁵³², the following can be mentioned: the “CLC” (International Convention on Civil Liability for Oil Pollution Damage)⁵³³, the International Convention on civil liability for Bunker Oil Pollution Damage⁵³⁴ and the Paris and Vienna Nuclear Conventions 1960 and 1963⁵³⁵.

force, the 1978 MARPOL Protocol absorbed the parent Convention. The combined instrument entered into force on 2 October 1983. In 1997, a Protocol was adopted to amend the Convention and a new Annex VI was added which entered into force on 19 May 2005. MARPOL has been updated by amendments through the years”.

⁵³¹ Vid. P. BIRNIE, A. BOYLE & C. REDGWELL, *International Law & the Environment*, *op. cit.*, p. 107. In a similar sense, *vid.* M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO, “Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge”, *op. cit.*, p. 616. These authors highlight the comparatively scarce amount of conventions addressing liability aspects, as opposed to prevention aspects.

⁵³² Several conventions in this group have never entered into force and thus will not be considered in further developments *infra* (Information on these conventions can be found, respectively, in M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO, “Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge”, *op. cit.*, pp. 630-638; pp. 634-638; pp. 638-640):

1999 Protocol to the Basel Convention (Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal);

Protocol of 2010 to amend the international convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea, 1996 (HNS PROT 2010) (neither the protocol, nor the 1996 convention have entered into force);

1989 Geneva Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD);

2003 Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents.

None of these instruments were in force on April the 14th 2017; *vid.* respectively:

<http://www.basel.int/Countries/StatusofRatifications/TheProtocol/tabid/1345/Default.aspx>;

<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>, choose the link “Status of multilateral conventions”;

http://www.unece.org/trans/danger/publi/crtd/legalinst_55_tdg_crtd.html;

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-16&chapter=27&lang=en

⁵³³ The CLC was adopted on the 29th November 1969; it entered into force on the 19th June 1975. It was amended by a 1992 Protocol, adopted on the 27th November 1992, which entered into force on the 30th May 1996.

⁵³⁴ International Convention on civil liability for Bunker Oil Pollution Damage, London, 23 March 2001, entered into force on November the 21st 2008; M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO (“Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge”, *op. cit.*, pp. 620-623) comment on this Convention and the

iii) Instrumental Conventions: this residual category is composed by all the conventions which do not fit perfectly into the two previous ones. As referred *supra*, the obligations agreed upon by the States which have ratified these conventions play a supporting role to obligations in the two first groups. This is the case for instance of the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) adopted on the 25th June 1998⁵³⁶. Instrumental conventions can be considered to a certain extent to indirectly embody a preventive function too. In many cases, the obligations assumed by States through these instruments are formal or procedural in nature, and in many instances, they only aim at ensuring that political debate sparks, information flows, etc. Since no proper substantive right is conferred, the environmental outcome of situations involving the “rights” embodied in such instruments is submitted to a large extent to political will. It is thus in such a sense that they can be considered to indirectly contribute to prevention.

c. Analysis of ex post compensation conventions

While these paragraphs suffice to obtain a rough and general idea of conventional regimes of international environmental protection, it is necessary, before dealing with customary international law, to pay further attention to the group of *ex post* compensation conventions:

i) These regimes of liability hardly ever aim at providing full compensation. This is said to be due to the enormity of the economic compensations that operators would potentially have to pay, which would discourage them from entailing these industrial activities in the first place⁵³⁷. This policy choice begs the question of its appropriateness from a damage prevention

previous one. They further mention a 1976 Convention on damage by oil from off-shore operations which never entered into force.

⁵³⁵ Convention on Third Party Liability in the Field of Nuclear Energy [Paris Convention - established on the 29th of July 1960 under the auspices of the OECD Nuclear Energy Agency]; Convention on Civil Liability for Nuclear Damage [Vienna Convention - established on the 21st of May 1963 under the auspices of the International Atomic Energy Agency (IAEA)]. The Paris Convention has been ratified by most West European countries; the Vienna Convention has been ratified by countries all around the world. These two Conventions have been linked by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of the 21st of September 1988 [Entry into force on the 27th of April 1992], and have been further completed by the Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material of 17 December 1971.

⁵³⁶ Other instruments imposing obligations of cooperation, communication, information, etc. can be mentioned, as for instance the 1991 Espoo Convention (Convention on Environmental Impact Assessment in a Transboundary Context, whose latest amendment dates from 2004). Some Conventions contain obligations which arise once the natural catastrophe has already arisen: on information, on the need to minimize the extent of damages, on situation-management, etc.). These are equally meant to be considered “instrumental” and thus preventive obligations.

⁵³⁷ *Vid.* M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO, “Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge”, *op. cit.*, p. 616: “La réparation intégrale des dommages est rarement envisagée, tant elle est potentiellement gigantesque et donc de nature à décourager toute entreprise industrielle”. *Vid.* also p. 619: limitations in the amounts of compensation are frequently accompanied by the establishment of a compensation fund. In a similar sense, *vid.* J. G. FLEMMING (“Mass tort”, in K. D. KERAMEUS (ed.), *XIV International Congress on Comparative Law - Athens 1994 - General reports*, Athens, Ant. N. Sakkoulas publishers, 1996, pp. 125-126), who suggests that the insurance industry would be incapable to cope with “the magnitude of multiple losses in mass torts” without the existence of caps on liability.

perspective. While it is true that, in principle, the core objective of these texts is to compensate / repair it is to be carefully considered whether in some instances the limitation on the amounts to be paid by tortfeasors does not indirectly hinder prevention efforts.

ii) As already mentioned, regimes of liability are channelized to private subjects. The only exception to this is the Convention on international liability for damage caused by space objects, open to signature at London, Moscow and Washington on the 29th of March 1972. Within the framework established by this Convention, States are liable for damage caused by space objects, and States are the beneficiaries of the regime put in place thereby⁵³⁸. Moreover, the nature of the legal obligations stemming therefrom and imposed on States correspond with the notion of “Strict” liability⁵³⁹. As it will be seen in the following section, this is also exceptional, for customary State responsibility is fault-based.

iii) Finally, the exact nature of *ex-post* reparation / compensation conventions needs to be analyzed. Previous pages have followed several public international law authors in taking the stance that these treaties belong in the realm of public international law. However, this dissertation assumed at its very beginning that they actually belonged within the realm of private international law – under a large notion thereof⁵⁴⁰. This divergence is deliberate. It helps bring to the spotlight the fact that depending on the criteria to be used when defining what is to be understood as “public international law”, “private international law” or simply “private law”, these conventions may deserve one label or another, and academics coming from different fields of specialization may have diverging views thereon⁵⁴¹. Amongst public international law academics, Maljean-Dubois goes as far as suggesting that not only these

⁵³⁸ This can be considered an exception only inasmuch as damage by space objects is considered environmental damage.

⁵³⁹ *Vid.* T. BALLARINO, “Questions de droit international privé et dommages catastrophiques”, *op. cit.*, p. 336. Ballarino asserts that the space regime corresponds with the exigence of the protection of the life and property of people who are total outsiders to the activities that cause the damage. This author further finds that the fact that liability does not lie in the operator, but in the launching State is a very important evolution, when compared with the oil-pollution and nuclear-regimes. Importantly for the remainder of this section, he qualifies this regime as a passage from the system of “civil liability” to a system of “state liability”. He insists on this point in pp. 338-340: the 1972 convention establishes a regime of public international law, not civil liability, where the prerogative of starting legal proceedings is held by the relevant “victim” state. He further discusses whether the convention’s regime is the only legal mechanism available in case of space-originated damage (i.e. whether it bars private actions between private victims and private satellite owners). After mentioning that the convention does not aim in any sense at private parties (and that it is not self-executing), he concludes that private actions are not barred and that private victims could choose this path for it would provide a more expedite resolution of the problem in comparison with the state-to-state path.

⁵⁴⁰ As explained *supra*, Chapter 1, some authors identify PIL exclusively with the multilateralist approach to conflict-of-laws (“la méthode conflictualiste”). Other authors consider that the presence of *règles d’application* in these conventions pleads for their consideration as instruments of private international law. In this study it will be assumed that uniform substantive law is directly meant to be considered private international law.

⁵⁴¹ *Vid.* C. BERNASCONI, *Civil Liability Resulting from Transfrontier Environmental Damage*, *op. cit.*, p. 4: (“unified set of rules for civil liability”); T. BALLARINO, “Questions de droit international privé et dommages catastrophiques”, *op. cit.*, p. 299 (“une règle matérielle spécialement édictée pour les rapports internationaux”). *Cfr.* with V. J. G. POWER, “The Commune de Mesquer case”, *JIML*, vol. 19, 2013, pp. 486-503, at p. 486; and with U. BEYERLIN & T. MARAUHN, *International Environmental Law*, *op. cit.*, p. 361. These later authors label the CLC as public international law.

conventions are indeed public international law regimes, but that their existence demonstrates that public international law has begun to overcome the Westphalian paradigm that public subjects are the only holders of rights and obligations under public international law⁵⁴². But can they actually be considered a sign that public international law is beginning to open itself to private subjects?⁵⁴³ Would it not be more appropriate to consider them uniform private law at the international level or else simply private international law? Could they be "transnational" law – notwithstanding the lightness and vagueness of such label?⁵⁴⁴ In order to go in-depth as regards these questions, let us analyze a given example amongst these conventions.

BOX 9: Brief Assessment of the Conventions on liability for oil pollution

The regime on civil liability for oil pollution is mainly composed by two international conventions, the CLC and the Superfund, which were brought into existence under the auspices of the International Maritime Organization (IMO). They date back to the late 1960s / early 1970s, although they were amended in the 1990s, by two protocols from 1992. As a result, the amended conventions entered into force on May the 30th 1996. For the sake of simplicity, they will be dealt with in sequence⁵⁴⁵.

⁵⁴² Vid. S. MALJEAN-DUBOIS, "La portée des normes de droit international de l'environnement à l'égard des entreprises", *Journal du droit international*, vol. 2012-1, 2012, pp. 93-114. For a description of the same core idea which highlights different aspects thereof, vid. J. M. SMITS, *Private Law 2.0*, op. cit., p. 7: "[...] the paradigm of a State monopoly in setting the rights and obligations of people. This paradigm finds its origins in the Peace of Westphalia of 1648. It is the idea of a State having exclusive control over a territory and over its people. The general picture is that it was only with the Peace of Westphalia that the existing 'chaotic void' of facts, politics and religion was slowly filled by the 'real' law of the sovereign states. State sovereignty thus became the fundamental ordering principle, making the law shift not only from fragmentation to coherence, but also from plural to monolithic".

⁵⁴³ As explained by M. DIXON, R. MCCORQUODALE & S. WILLIAMS (*Cases and materials on International Law* (5th ed.), op. cit., p. 150): "The place of individuals within the system of international law has been a cause of controversy for some considerable time. Traditionally, international law was a system of rules governing the relations between sovereign States, and many of the rules of the system still reflect this". The said authors point as exceptions to this traditional position only to rules in the realms of human rights law and personal criminal responsibility, as "[bestowing] individuals with both rights and duties under international law". For further observations and comments, *ibidem*, pp. 153-154.

⁵⁴⁴ In North-American legal literature, the label "transnational" is given to cases that in Europe would be considered as being the object of private international law. Vid. as an example of this use of the term, D. E. TREY CHILDRESS III, "Forum Conveniens: The Search for a Convenient Forum in Transnational Cases", *Virginia Journal of International Law*, vol. 53-1, pp. 157-180, at p. 158. However, the term, as thoroughly studied by P. C. JESSUP (*Transnational Law*, Oxford, OUP, 1956) intends to cover: "[...] all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories" (p. 2). The examples provided in pp. 3 and following cover indeed situations as diverse as negotiations between sovereign states, and corporate business activities in foreign countries.

⁵⁴⁵ As of December the 1st 2015, 134 States had ratified or acceded to the 1992 Civil Liability Convention, and 114 States had ratified or acceded to the 1992 Fund Convention.

Description and analysis of the “CLC” (*The International Convention on Civil Liability for Oil Pollution Damage*)⁵⁴⁶

As a matter of a principle, the CLC aims at governing the liability of shipowners for oil pollution damage under the principle of strict liability. However, the shipowner is generally entitled to limit his liability to an extent which is dependent on the tonnage of the ship. This scheme is competed by the creation of a system of compulsory liability insurance. In the next lines, the following aspects will be briefly addressed: firstly, the scope of the convention, secondly, the characteristics of the liability imposed.

Scope of the convention

As regards its material scope, the CLC is applicable to oil pollution damage resulting from spills of persistent oil from tankers. This means, from the outset, that damage caused by non-persistent oil (gasoline, light diesel oil, kerosene etc.) does not come within the material scope of the CLC. However, the Convention does cover “*spills of cargo and / or bunker oil from laden, and in some cases unladen sea-going vessels constructed or adapted to carry oil in bulk as cargo (but not to dry cargo ships)*”⁵⁴⁷. As it may be understood, the notion of “pollution damage” is central to defining the material scope of the CLC, which is defined in Article I.6, letter “a” of the convention in the following terms:

“loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; [...]”.

As further made explicit by letter b of the same Article, the notion of pollution damage covers preventive measures. The expenses incurred for these measures “*are recoverable even when no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage*”⁵⁴⁸. It is irrelevant where the measures to prevent or minimize pollution damage are taken as long as they aim at preventing or minimizing pollution damage within the territorial scope of application of the Convention. As regards this latter aspect, the CLC, following Article II, applies to pollution damage caused in the territory, territorial sea or exclusive economic zone or equivalent area of a State Party to the Convention. Therefore, “*the flag State of the tanker and the nationality of the shipowner are irrelevant for determining the scope of application*”⁵⁴⁹. Interestingly, this territorial scope of application corresponds with the content of Article IX in respect of jurisdiction over actions for compensation against the shipowner or his insurer. These actions may only be brought before the courts of the State Party to that

⁵⁴⁶ The ensemble of this sub-section is a summary made from: INTERNATIONAL OIL POLLUTION COMPENSATION FUND, *The International regime for compensation for oil pollution damage*, last consulted on January the 12th 2016 http://www.iopcfunds.org/fileadmin/IOPC_Upload/Downloads/English/DEC15E.pdf (This is an explanatory note made available by the said international organization on December 2015).

⁵⁴⁷ *Vid.* IOPC FUND, Explanatory note, *op. cit.*, p. 2.

⁵⁴⁸ *Ibidem.*

⁵⁴⁹ *Ibidem.*

Convention in whose territory, territorial sea or Exclusive Economic Zone the damage was caused.

Characteristics of the liability imposed

Three features define the nature of the liability embodied in the CLC. It is strict, it may be limited and it is channeled towards the shipowner. The fact that liability under the CLC is strict means that the owner of a tanker is liable even in the absence of fault for pollution damage caused by oil spilled from his tanker. However, he may be exempted from liability (Article III.2) if he proves that the damage:

“(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or

(b) was wholly caused by an act or omission done with intent to cause damage by a third party, or

(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function”.

Under normal circumstances, however, the aforementioned strict liability is limited in a measure which is dependent on the tonnage of the ship concerned: 4510000 Special Drawing Rights for a ship not exceeding 5000 units of gross tonnage. Above that tonnage 631 Special drawing rights are added for each additional unit of tonnage, up to a limit of 89770000 Special drawing rights which is the maximum amount to be paid by a ship of 140000 units of tonnage or over. Certain authors (Somers and Gonsaeles) highlight the “*close link in maritime law between strict liability and its corollary of limitation*”, as a historical and fundamental value in the field⁵⁵⁰. The shipowner can only be deprived of the right to limit his liability if it proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. However, in order to maintain the right under normal circumstances, the owners of tankers carrying more than 2000 tonnes of persistent oil are obliged to subscribe an insurance covering liability under the CLC. A certificate attesting the coverage must be carried on board for entry or exit of any port of a State party to the CLC, even for ships flying the flag of a State which is not party to the CLC. The certificate is further generally required from those ships which do fly the flag of a party.

A final aspect to be commented is that claims under the CLC can only be made against the registered owner of the tanker concerned – or his insurer. The Convention further explicitly prohibits, in Article III.4, any claim against the servants or agents of the owner, members of the crew, the pilot, the charterer (including bareboat charterer), manager or operator of the ship,

⁵⁵⁰ *Vid.* E. SOMERS & G. GONSAELES, “The consequences of the sinking of the M/S ERIKA in European waters: towards a total loss for international shipping law?”, *J. Mar. L. & Com.*, vol. 41, 2010, pp. 57-83, at pp. 63 and 76. They state that “*the centuries old liability system in maritime law risks being completely overthrown*”.

or any person carrying out salvage operations or preventive measures⁵⁵¹. It however leaves the possibility, where relevant, to seek to recourse against third parties – in accordance with national law.

This latter point is critical. Certain voices in academia consider that, under the CLC, not only liability is channeled to the registered ship owner only – and, therefore, claims against a number of other parties involved in the transport are not allowed – but also that “[a]ccording to the existing international liability and compensation regime, no additional claims can be made outside the conventional regime (Art. III, para. 4 CLC 1992)”⁵⁵². It is these same authors’ understanding that the European Commission interpreted the CLC in the same sense during the aftermath of the Erika shipwreck. They sustain that assertion on several policy statements made during the years that followed the shipwreck⁵⁵³:

i) The European Commission criticized the fact that the subjects explicitly protected by the CLC (operators, managers, charterers, etc.) are shielded from claims since they may well exercise as much control over the transport as the registered owner of the ship. In this respect, the Commission contends that *“this is counterproductive to the goal of including all players in the maritime industry in the liability regime as an incentive to behave more responsibly in order to avoid damaging the marine environment”*.

ii) The European Commission explicitly stated that the exclusive channeling of liability towards the registered shipowner could not be deemed appropriate in modern times. Thus, it has publicly lobbied so that the prohibition of claiming compensation from the other players involved in the transport of oil at sea is withdrawn. In this sense, the Commission insistently proposed that those European Member States parties to the CLC should try to trigger an amendment of the Convention in order to eliminate the above-referred protection. However, to this date, none of the requests put forward by Member States to the IMO has been successful.

In the view of all of the above, the referred authors conclude that, the European Commission’s understanding of the structure and system of the CLC is coincident with theirs, and that *“it [should] be very difficult for the [European Union] to impose additional individual liabilities on ship owners or any of the protected parties without being in conflict with the international conventions”*⁵⁵⁴.

⁵⁵¹ On this point, the IOPC Fund explanatory note (*op. cit.*, p. 3) includes the following language: *“This does not preclude victims from claiming compensation outside this Convention from persons other than the owner”*. It has been omitted from the main text because it is likely to have been inserted in the explanatory note following the *Commune de Mesquer* judgment. In other words, it is highly likely that the general international understanding of the text of the Convention may have been altered by the decision of the ECJ.

⁵⁵² *Vid.* E. SOMERS & G. GONSAELES, “The consequences of the sinking of the M/S ERIKA in European waters: towards a total loss for international shipping law?”, *op.cit.*, p. 63.

⁵⁵³ All of the following points are extracted from E. SOMERS & G. GONSAELES, “The consequences of the sinking of the M/S ERIKA in European waters: towards a total loss for international shipping law?”, *op. cit.*, pp. 63-64. These details will become relevant in the description of the *Commune de Mesquer* case *infra*, Chapter 2, “Accommodation” of material scopes”.

⁵⁵⁴ *Ibidem*, p. 64.

Description and analysis of the “Superfund” (*The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*)⁵⁵⁵

The second component of the International regime on oil pollution at sea is the above-referred Brussels Convention of 18 December 1971 on the establishment of an international fund for compensation for oil pollution damage, as amended by the relevant 1992 protocol. The Superfund is complementary and supplementary to the CLC:

i) Complementary in the sense that its provisions cannot stand alone, and becoming a party to the CLC is a prerequisite in order to become a party to the Superfund.

ii) Supplementary in the sense that the Superfund “*establishes a regime for compensating victims when the compensation under the applicable Civil Liability Convention is inadequate*”⁵⁵⁶. Access to compensation is limited to subjects suffering oil pollution damage in a State that is party to the Superfund, and who do not obtain full compensation under the CLC in one of the three following circumstances:

a) When no liability for the damage arises under the CLC; or

b) When the owner is financially incapable of meeting his obligations under the CLC in full and any financial security – his insurance – is insufficient to satisfy the claims for compensation for the damage; or

c) When the damage exceeds the owner’s liability under the CLC.

However, the Superfund will not provide redress in the following cases:

a) When the damage occurred in a state which was not a Member of the Superfund; or

b) When the Superfund proves that the pollution damage resulted from an act of war, when oil was discharged from a warship, or similar circumstances; or

c) When the claimant cannot prove that the damage resulted from an incident involving one or more ships.

The Superfund has established a worldwide intergovernmental organization, known as the IOPC Fund or the 1992 Fund, whose mission is to manage the regime created by the Convention. Membership to the organization is automatic upon ratification of the Superfund; by becoming a party to the latter, any given State becomes a member of the organization. The functioning of the organization is financed “*by contributions levied on any person who has received in one calendar year more than 150 000 tonnes of crude oil and heavy fuel oil (contributing oil) in a State Party*”⁵⁵⁷. In organizational terms, the IOPC Fund is composed of an Assembly, an Executive Committee and a Secretariat. The assembly, the “*supreme organ*” governing the Fund is composed of representatives of all the Member States to the Superfund. The executive Committee, whose main function is to approve settlements of claims, is

⁵⁵⁵ Again, unless otherwise indicated, the majority of the content of this sub-section is a summary made from the text of the above-referred IOPC Fund explanatory note.

⁵⁵⁶ *Ibidem*, p. 1.

⁵⁵⁷ *Ibidem*, p. 4.

composed by representatives of 15 of the Superfund Member States, and is elected by the Assembly. In practical terms, the function of settlement approval is an essential one, for it is submitted that empirical experience shows that the majority of claims are settled out of court. Nevertheless, for those cases where an agreement leading to a settlement is not possible, the only courts having jurisdiction for claims against the Superfund scheme are the same courts which have jurisdiction under the CLC – i.e. the courts of the “*the State Party in whose territory, territorial sea or EEZ or equivalent area the damage occurred*”⁵⁵⁸.

A final aspect to be highlighted is that, as it was the case under the CLC, compensation under the Superfund scheme is also limited:

*“[t]he maximum amount payable by the 1992 Fund in respect of an incident occurring before 1 November 2003 was 135 million SDR (US\$185.2 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention. The limit was increased by some 50.37% to 203 million SDR (US\$278.5 million) on 1 November 2003. The increased limit applies only to incidents occurring on or after this date”*⁵⁵⁹.

Interestingly, and conversely to the Somers’ and Gonsaeles’ opinion referred above, when reflecting on both this limitation and the CLC’s limitation, Faure and Wang highlight the fact that financial caps limitations in maritime law are an anachronism. The latter authors refer that their position is the one which can be considered as dominant in academic literature on the subject⁵⁶⁰. They further provide arguments arising from both economic analysis of law and historical trends which support the idea that these caps are a “*historical mistake*”⁵⁶¹.

Although most treatises on International protection of the environment take a clear public – international – law perspective, they do not address the fact that some of the regimes that they consider to be environmental public international law do not involve public law subjects, but private ones. To my mind, this entails a subtle “conceptual” slide. This slide can possibly find explanation on two facts: on the one hand, the relevant regimes are indeed environmental legal regimes at the international level, which facilitates their assimilation. On the other hand, from a formal perspective, international treaties are *per se* always public international law irrespective from their content. Nevertheless, from the perspective of their actual content, as highlighted by the assesment of the conventions on the liability for oil pollution, the conclusion differs widely: these treaties contain substantive law provisions establishing private-subject-liability for specific types of environmental damage. Thus, they

⁵⁵⁸ *Ibidem*, p. 4.

⁵⁵⁹ *Ibidem*.

⁵⁶⁰ *Vid.* M. FAURE & H. WANG, “Financial Caps for Oil Pollution Damage: A Historical Mistake?”, *Maastricht Faculty of Law Working Paper* 2007/6, 2007, p. 2.

⁵⁶¹ *Id.*, p. 31. For a detailed analysis of the Superfund – in relation with the CLC – *vid.* J. HAY, *Analyse économique du système international CLC/FIOPOL comme instrument de prévention des marées noires*, Serveur de thèses multidisciplinaire (Last consulted on December the 23rd 2015), <https://tel.archives-ouvertes.fr/tel-00422559/document>, especially pp. 167-176 (economic analysis of its structure and provisions). For a more succinct analysis, *vid.* M. REQUEJO ISIDRO, “El sistema de Convenios de responsabilidad y del FIDAC”, in S. ÁLVAREZ GONZÁLEZ & M. P. GARCÍA RUBIO (coords.), *La responsabilidad por los daños causados por el hundimiento del Prestige*, Madrid, lustel, 2007, pp. 139-166.

seem to actually be composed of private law, articulated through the means of international conventions. Despite this, it will be considered, for the purposes of this section of the dissertation, that the nature of these “ambiguous” conventions is debatable. Hence, they will be referred to as “the substantive conventions”, or similar denominations, in order to avoid any labelling.

ii. Customary obligations and general principles of law

Despite the major role played by Conventions, there are certain significant international environmental obligations which are not treaty-based. These obligations are embodied in international customs or in “general principles of law”, the other two major (non “subsidiary”) sources of international law mentioned in the well-known Article 38 of the Statute of the International Court of Justice⁵⁶². Their role is highlighted by Crawford, who considers that, despite the development of specialized treaty-based regimes “*the legal underpinnings of the protection of the environment continue to be institutions of general international law*”⁵⁶³. This is even more the case if one takes into account that in the absence of *ius cogens* (peremptory norms of international law), treaties and customs are not placed in any sort of hierarchical relationship and thus can mutually modify and repeal each other⁵⁶⁴.

Nevertheless, the number and identification of environmentally relevant customs and general principles varies largely depending on whose academic opinion is consulted⁵⁶⁵. Amongst potential “candidates” to the status of general principle one may find, for instance: a general principle requiring States to co-operate for environmentally protective purposes⁵⁶⁶; a principle requiring States to immediately notify of potential risks of damage to the environment arising from accidents that occur in their respective territories or in areas under their respective jurisdictions⁵⁶⁷; a principle obliging States to refrain from causing massive pollution of the

⁵⁶² It is traditionally understood that the study of the sources of international law takes as a point of departure the non-exhaustive list found in Article 38 of the Statute of the ICJ. For a detailed assessment of the system of sources of public international law, *vid.* J. CRAWFORD, *Brownie’s Principles of Public International Law* (8th ed.), Oxford, OUP, 2012, pp. 20 and following.

⁵⁶³ *Id.* J. CRAWFORD, *Brownie’s Principles of Public International Law* (8th ed.), *op. cit.*, p. 353.

⁵⁶⁴ On the relationship between customary international law and treaty law, *vid.* M. DIXON, R. MCCORQUODALE & S. WILLIAMS, *Cases and materials on International Law* (5th ed.), *op. cit.*, pp. 33-37; and J. CRAWFORD, *Brownie’s Principles of Public International Law* (8th ed.), *op. cit.*, pp. 33-34. For considerations on environmental *ius cogens* and *erga omnes* obligations, *vid.* U. BEYERLIN & T. MARAUHN, *International Environmental Law*, *op. cit.*, pp. 286-287.

⁵⁶⁵ *Cfr.* J. CRAWFORD who identifies six different principles (pp. 356-360) with A. CASSESE, *International Law* (2nd ed., Oxford, OUP, 2004) who identifies four (p. 487), one of them being present in both lists. Interestingly, J. CRAWFORD lists the preventive principle, the precautionary principle, the polluter-pays principle, and sustainable development. However, due to their “controversial” character, their consideration has been omitted. For yet another list with three obligations, *vid.* U. BEYERLIN & T. MARAUHN, *International Environmental Law*, *op. cit.*, pp. 285-286.

⁵⁶⁶ A. CASSESE (*International Law* (1st ed., *op. cit.*, p. 382) contends that this principle can be found both within the Trail Smelter arbitration and in principle 24 of the Stockholm declaration, and that it reflects the “*assumption that the environment is a matter of general concern*”.

⁵⁶⁷ As indicators of this phenomenon, A. CASSESE (*International Law*, 1st ed., *op. cit.*, p. 382) mentions the Vienna convention on early notification of nuclear accidents, and principle 18 of the Rio Declaration.

atmosphere or the seas⁵⁶⁸, etc. In a similar fashion, it may be contended and debated whether, within the realm of the law of the sea, the long process of elaboration of the 1982 Law of the Sea Convention has led to the crystallization of some international customs, which would have been codified in the very Convention⁵⁶⁹. More clearly, however, the obligation to conduct environmental impact assessments (EIA), has been recognized by the ICJ as a customary environmental obligation binding upon all States⁵⁷⁰.

Beyond this reduced number of general principles and customs there is one international obligation which is generally accepted as bearing a significant role within the branch of the international law of the environment. It is the "*Sic utere tuo ut alienum non laedas*" principle (or custom), i.e. the obligation imposed upon States not to allow their territory to be used in such a manner as to damage the environment of other States or areas beyond the limits of national jurisdiction⁵⁷¹. Put otherwise, States have the obligation to prevent, reduce and control transboundary pollution and environmental damage resulting from activities within their jurisdiction or under their control⁵⁷². Furthermore, it is said that "[i]n its generally accepted purport this principle is not State sovereignty oriented. In other words it is intended to protect not only the environment of each other State, as an asset belonging to it, but also the environment as a common amenity"⁵⁷³. Overall, this obligation can be considered to be the core of the whole system of international protection of the environment.

⁵⁶⁸ A. CASSESE (*International Law, op. cit.*) mentions this both in pp. 380 and 382, but does not provide any further explanation.

⁵⁶⁹ Vid. A. CASSESE, *International Law, op. cit.*, pp. 382-383. He identifies a "general obligation to 'protect and preserve the environment' laid down in article 192"; a "right of coastal States to conserve and manage living and non-living natural resources and to preserve the marine environment (codified in Article 56(a) of the Convention)"; a "right of coastal States to take measures in the territorial sea to conserve marine biological resources, to preserve the marine environment, and to prevent, reduce, and control marine pollution (codified in Article 21)". He further refers that "[s]ome commentators also contend that another area of emerging general norms is that concerning the conservation of marine living resources".

⁵⁷⁰ Vid. ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, judgment of April the 20th 2010, (ICJ reports 2010, p. 14). For a commentary vid. G. R. MONCAYO & M. MONCAYO VON HASE "The International Court of Justice and the Environment: the Recent Paper Mills Case" in U. FASTENRATH, R. GEIGER & D.-E. Khan (eds.), *From bilateralism to community interest: essays in honour of judge Bruno Simma*, Oxford, OUP, 2011, pp. 1024-1039. J. CRAWFORD lists the EIA obligation not as a custom but amongst its principles (*Brownie's Principles of Public International Law* (8th ed.), *op. cit.*, pp. 359-360).

⁵⁷¹ Literally, the expression translates as "use your own property in such a way that you do not injure other people's" (<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100504563>, Oxford reference, consulted on July the 26th 2016).

⁵⁷² Vid. P. BIRNIE, A. BOYLE & C. REDGWELL, *International Law & the Environment, op. cit.*, pp. 143 and following. A. CASSESE (*International Law, op. cit.*, p. 381) qualifies it as "The first and more general [principle]" of the international law of the environment.

⁵⁷³ Vid. A. CASSESE, *op. cit.*, p. 381. However, the implications of this "community amenity" status need to be further explored. This is *inter alia* because it is debatable whether it exists any *erga omnes* environmental obligation or not, and if so, which would be its practical significance. Vid. A. CASSESE, *International Law* (2nd ed.), *op. cit.*, pp. 487-488: "[...] the environment is no longer conceived of in a State-sovereignty-oriented perspective, as an asset that may belong to each State and in whose protection only the State concerned may be legally and practically interested. The environment has come to be regarded as a common amenity, as an asset in the safeguarding of which all should be interested, regardless of where the environment is or may be harmed. Nevertheless, the normal consequence of this approach has not been drawn on the legal plane: no specific obligation to protect the environment has

Interestingly, as subtly suggested in the previous paragraph, there are hesitations as regards the exact nature of this obligation, as academics do not seem to agree on whether it is a general principle of international law or in an international custom⁵⁷⁴. Furthermore, some consider it to be a generalization of the result of the arbitral award of the famous Trail Smelter arbitration – where it appeared for the first time⁵⁷⁵. Others consider it to be a sectorial application of more general obligation under public international law which bans every State from allowing the use of its territory to accomplish acts which contravene the rights of other States, as enounced in the ICJ's judgment on the *Corfu Channel incident* case⁵⁷⁶. The precise nature of the obligation is, nevertheless, irrelevant for the purposes of this dissertation since its relevance within the environmental realm cannot be contested: for starters, it reappeared and was reaffirmed both in the Stockholm and Rio Declarations – principles 21 and 2 respectively – before reaching the ICJ's case-law, in the *Legality of the threat or use of nuclear weapons* and in the *Gabcikovo-Nagymaros* cases⁵⁷⁷. But, moreover, it is precisely this obligation that conforms the core of the international environmental responsibility of States: such notion, as it may be easily inferred, is nothing but a concrete application of the general rules on international State responsibility to the environmental context, on the basis of the "*Sic utere tuo ut alienum non laedas*" principle⁵⁷⁸. The principle is to be considered a "primary obligation" (or "substantive" obligation) under public international law⁵⁷⁹. The breach of this

arisen in general international law with the characteristics of a community obligation, that is, an obligation towards all the other members of the international community, attended by a corresponding legal entitlement accruing to all the other member of the world community, to demand the fulfillment of the obligation [...]". In a similar sense, *vid.* S. MURASE, "Perspectives from international economic law on transnational environmental issues", *op. cit.*, p. 312: "[between the 1959's and the 1980s] large-scale environmental degradation and depletion gradually came to be considered a violation of the obligations *erga omnes* [...] Although these provisions are not understood as automatically conferring standing *action popularis* before an international tribunal to States other than the victim State, they nevertheless reflect the consciousness of the international community that environmental problems of this kind should be regarded as extending beyond the scope of the "reciprocal obligations" of States [...]".

⁵⁷⁴ While A. CASSESE and J. CRAWFORD consider it a general principle (*International Law*, *op. cit.*, p. 381, and *Brownie's Principles of Public International Law*, *op. cit.*, p. 359, respectively), P. BIRNIE, A. BOYLE & C. REDGWELL consider it a custom (*International Law & the Environment*, *op. cit.*, pp. 143-144).

⁵⁷⁵ *Vid.* U. BEYERLIN & T. MARAUHN, *International Environmental Law*, *op. cit.*, p. 39. Opposition to considering the referred principle a universalization of the solution of the Trail Smelter arbitration focuses basically on the fact that the arbitrators based their award both in International and American Law, as suggested *op. cit.*, p. 40. For a summary presentation of the core aspects of the principle, *vid. op. cit.*, 39-46.

⁵⁷⁶ P. BIRNIE, A. BOYLE & C. REDGWELL consider it a custom (*International Law & the Environment*, *op. cit.*, pp. 143-144). *Vid.* also ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, judgment of April the 9th 1949 (ICJ Reports 1949, P. 4).

⁵⁷⁷ *Vid.* A. CASSESE, *International Law*, *op. cit.*, p. 381. This author further mentions two decisions in 1979 and 1983 in the frame of the Dutch national "Mines de Potasse" proceedings.

⁵⁷⁸ *Vid.* U. BEYERLIN & T. MARAUHN, *International Environmental Law*, *op. cit.*, pp. 45-46.

⁵⁷⁹ *Vid.* para. (1) of the General Commentary to the ILC's *Draft articles on Responsibility of States for Internationally Wrongful Acts* ("ILC, Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission*, 2001, vol. II (Part Two)): "These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would

primary obligation entails the emergence of a "secondary obligation", whereby the breaching State is bound to repair the damage it has caused to the victim State by the mere breach of the "primary obligation" (no need for an actual damaging result, the simple breach of the rule entails the rise of the secondary obligation)⁵⁸⁰. The reparation will simply take the form established in the ILC's articles on the *Responsibility of States for Internationally Wrongful Acts*⁵⁸¹. In other words, since the ILC's articles do not establish any specific environmental legal consequences arising from the breach of the *Sic utere tuo ut alienum non laedas* primary obligation, only the "general consequences" enounced in the first referred text may apply.

However, the precise content of the referred primary obligation is not totally clear⁵⁸². Most authors contend that "*Sic utere tuo ut alienum non laedas*" is a due-diligence obligation⁵⁸³. This

involve restating most of substantive customary and conventional international law". Vid., for further comments, J. CRAWFORD, "State Responsibility" in R. WOLFRUM (ed.), Max Planck Encyclopedia of Public International Law, Oxford, OUP, 2006, point B.7 and following.

⁵⁸⁰ Vid. P. D'ARGENT ("Un heritage civiliste en droit international public?", in A. WIJFEELS (ed.) *Le Code civil entre ius commune et droit privé européen*, Bruxelles, Bruylant, 2005, pp. 213 and following, especially pp. 217 and 220) who, following this automatic character, establishes a parallelism with administrative sanctions. Furthermore, A. CASSESE, *International Law*, op. cit., p. 389: "Under general rules on 'ordinary' State responsibility [...] States incur international responsibility when they perform unlawful activities thereby bringing about damage to another State. The question arises however of whether the injuring State bears responsibility on account of fault (that is, if it failed to exercise due diligence) or instead regardless of any negligence, that is simply because of its risk-creating conduct. A further problem is whether States are responsible for activities that are not prohibited by international law, and nevertheless cause harm or damage to other States. These difficult questions are sometimes settled by treaty regulations [...] However, when no treaty provisions are applicable, the aforementioned legal issues remain largely unsettled. Indeed, it would seem that no clear-cut general rules have yet crystallized in this area, mainly because States are still reluctant to accept a legal regulation that might have serious economic consequences".

⁵⁸¹ Vid. ILC, *Responsibility of States for Internationally Wrongful Acts*, Yearbook of the International Law Commission, 2001, vol. II (Part Two). Vid. specifically, Part two "content of the international responsibility of a State", Chapter I "General Principles" and Chapter II "Reparation for injury". This instrument is closely linked with the ILC's articles on the *Prevention of Transboundary Harm from Hazardous Activities* and articles on *International liability in case of loss from transboundary harm arising out of hazardous activities*. However, these two latter instruments deal with the preventive and liability approaches to a different phenomenon: lawful, yet hazardous activities. For an assesement, vid. U. BEYERLIN & T. MARAUHN, *International Environmental Law*, op. cit., pp. 359-368: "Many usages of the environment are today considered indispensable and thus lawful in principle even though they include risks of damage to the environment [...] If such damage materializes, state responsibility does not apply as far as such pollution does not constitute a wrongful act" (p. 359). The examples provided therein relate to outer space and space objects.

⁵⁸² Vid. A. CASSESE, *International Law*, op. cit., pp. 389-390. This author contends that: "whatever solution is preferred in the general field of the law of State responsibility [...] in the particular field of the protection of the environment a solution favourable to the environment seems to commend itself. Arguably, States are increasingly feeling the need to safeguard the environment as a crucial constituent part of the common heritage of mankind, so much so that it has been enshrined in innumerable international instruments, some of them legally binding. The whole spirit and the very thrust of modern law of the environment should lead to opting for solutions capable of enhancing the safeguarding of the environment. It could therefore be maintained that, at least in the field of environment, fault or negligence is not required for State responsibility to arise (that is, a State may be held accountable, hence liable to pay compensation, for serious damage to the environment even if it acted with due diligence). By the same token, it could be asserted that a State may also be held responsible for lawful activities, whenever they result in serious harm to the environment. As indicative of the emergence of a

"due diligence" requires the introduction of policies, legislation, and administrative controls on public and private behaviour which need to be capable of preventing or minimizing the risk of transboundary damage to other States and to the global environment. Thus, "due-diligence" can be conceived as the conduct to be expected from a good government⁵⁸⁴. This means that States are not bound to completely avoid the occurrence of any environmental damage – which would amount to some sort of strict liability – but to keep a diligent conduct on environmental matters; thus some sort of fault-based liability. This entails that nowadays the only existing example of strict liability for environmental damage faced by States is the above-referred Convention on international liability for damage caused by space objects. Other than its fault-based nature, it is equally remarkable that the customary international environmental responsibility of the State suffers from a *de minimis* restriction: as recurrently pointed by certain authors⁵⁸⁵, not any damage to the environment would trigger the mechanism of State responsibility; it needs to be to be substantial.

It is also worth recalling, in order to conclude on this topic, what the subjective scope of application of the customary regime of environmental responsibility is. Despite the ideas on an eventual opening of international personality to individuals referred *supra* there is general consensus amongst scholars in considering that only public subjects can be subjects of public international law. Therefore, only public subjects can be bound by – and thus breach – "primary obligations"; only public subjects can be bound by – and thus fulfill – "secondary obligations", and moreover; only public subjects can be beneficiaries – and thus demand the fulfillment – of the "secondary obligations". As elementary as this information may seem, it will prove to be essential in order to understand some of the developments described *infra*.

Having reviewed treaty-based and non-treaty-based public international law, let us now complete this summary review of the relevant elements of the discipline by turning to the mechanism of diplomatic protection.

rule in this sense one may mention the Trail Smelter case [...], ad the accidents the Fukuryu Maru and Cosmos [sic], although in neither case has the relevant State admitted its responsibility".

Nevertheless, he goes on to admit (*op. cit.*, pp. 390-391) that: "[...] *In most cases harmful effects are caused by individuals or multinational corporations. It is still unclear whether States, in addition to being responsible for (a) the conduct causing environmental damage, of persons who are State officials or who act on behalf of the State, as well as (b) lack of due diligence in the case of damage caused by private parties of [sic] persons or entities not acting on their behalf, may also be held accountable for acts of private persons not involving any conduct or omissions of de iure or de facto State officials. However, the State's general duty to avoid as much as possible, or at any rate to be cognizant of, the commission of international wrongful acts on its territory, to some extent alluded to by the ICJ in the Corfu Channel case, might provide some basis for States' international liability*".

⁵⁸³ This is why the use of the "no harm" expression (as done by *Vid. U. BEYERLIN & T. MARAUHN, International Environmental Law, op. cit.*, pp. 39 and following) to refer to this principle can be misleading.

⁵⁸⁴ *Vid. P. BIRNIE, A. BOYLE & C. REDGWELL, International Law & the Environment, op. cit.*, p. 148.

⁵⁸⁵ *Vid. U. BEYERLIN & T. MARAUHN, International Environmental Law, op. cit.*, p. 41; *vid. M. DIEZ DE VELASCO, Instituciones de Derecho Internacional Público* (13th ed.), *op. cit.*, p. 768 (use of the adjective "sensible"); *P. BIRNIE, A. BOYLE & C. REDGWELL, International Law & the Environment, op. cit.*, p. 143 (use of the adjective "significant").

iii. Diplomatic protection

BOX 10: Trail Smelter model – Variation number 2

When Ruritanian farmers have exhausted all domestic legal mechanisms before Ozian courts, the State of Ruritania decides to resort to diplomatic protection. Ruritania seeks compensation for the fact that Oz has allowed its territory to be used in such a manner as to cause environmental harm to Ruritanian farmers.

Following Article 1 of the 2006 ILC's Draft articles on Diplomatic Protection (DADP), such notion

*"[...] consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility"*⁵⁸⁶.

The purpose of diplomatic protection has been described as triple-fold: i) preventing the violation of international rules concerning aliens; ii) obtaining the cease of a wrongful activity, and iii) obtaining reparation of the wrong⁵⁸⁷. It must be highlighted, though, that through this mechanism the State actually enforces a right of its own, and not a right of the concerned citizen⁵⁸⁸. This entails that individuals and / or legal persons cannot renounce to diplomatic protection, for it is a purely discretionary competence prerogative of the relevant State⁵⁸⁹. This, in turn, ultimately determines that the decision and the willingness to resort to diplomatic protection are largely submitted to political considerations⁵⁹⁰. Moreover, not only providing diplomatic protection is not mandatory for any State, but furthermore the State is free to decide whether it transfers all, part or nothing of the reparation to the concerned citizen⁵⁹¹.

⁵⁸⁶ For an overview of the historical evolution of diplomatic protection since the Middle Age, *vid.* J. CRAWFORD, *Brownlie's Principles of Public International Law* (8th ed.), *op. cit.*, pp. 610-612.

⁵⁸⁷ *Vid.* M. DIEZ DE VELASCO, *Instituciones de Derecho Internacional Público* (13th ed.), *op. cit.*, p. 923.

⁵⁸⁸ P. M. DUPUY & Y. KERBRAT, (*Droit International Public* (11th ed.), Paris, Dalloz, 2012, pp. 545-546), explain that the State suffers an indirect damage ("*dommage médiate*") as a consequence of the damage suffered by its citizen.

⁵⁸⁹ *Vid.* M. DIEZ DE VELASCO, *op. cit.*, pp. 923-926, where case-law is quoted in order to support the referred contentions. *Vid.* also T. BALLARINO, "Questions de droit international privé et dommages catastrophiques", *op. cit.*, p. 319: diplomatic protection is always exercised in a discretionary fashion. For a detailed assessment on the potential renouncement to diplomatic protection by the individual, *vid.* Cfr. P. DAILLER, M. FORTEAU & A. PELLET, *Droit International Public*, Paris, L.G.D.J., 2009, pp. 910-911.

⁵⁹⁰ *Vid.*, for instance, M. REQUEJO ISIDRO, "*Violaciones Graves de Derechos Humanos y Responsabilidad Civil (Transnational Human Rights Claims)*", The Global Law Collection – Legal Studies Series, Cizur Menor, Thomson Aranzadi, 2009, pp. 40-41.

⁵⁹¹ *Vid.* P. M. DUPUY & Y. KERBRAT, *Droit International Public* (11th ed.), *op. cit.*, p. 546. *Vid.* furthermore, pp. 548-549: J. DUGARD had suggested to the ILC that possibly, the development of Human Rights could have had an impact on diplomatic protection, giving rise to a customary obligation to provide diplomatic protection. However, the ILC rejected this idea.

Up to three requisites can be enounced for a State to be able to resort to diplomatic protection in respect of the situation suffered by a given individual or legal person⁵⁹²: a) the protected individual / legal person needs to be linked to the relevant state through nationality⁵⁹³; b) domestic legal remedies need to have been exhausted (as codified in Article 14 DADP); c) the protected person needs to have behaved correctly (the “clean hands” requirement)⁵⁹⁴. The most relevant element for the purpose of this dissertation is the second one, for it places diplomatic protection in a subsidiary position in respect of other legal tools.

Before closing this review of the tools provided by public international law and turning to other areas, the hypothesis of diplomatic protection needs to be distinguished from that of the consolidation of private claims in the hands of a State. When a State “takes over” private claims the situation resembles to a certain extent to that arising from the intervention of a mechanism of collective redress, for the State acts as a proxy and sues a private tortfeasor on behalf of private subjects before a civil court. The most infamous example of this kind of scheme is the Bhopal case, where “*the government of India [intervened] as parens patriae in representing the Bhopal victims before American courts and later in procuring a settlement with Union Carbide, the American part-owners of the toxic installation*”⁵⁹⁵.

B. Human rights law

BOX 11: Trail Smelter model – Variation number 3

When Ruritanian farmers have exhausted all domestic legal mechanisms before Ozian courts, they assign OZ before the European Court of Human Rights. They seek redress for a violation of their right to property (crops and lands).

⁵⁹² For case-law references and excerpts that shed light on these requirements *vid.* M. DIXON, R. MCCORQUODALE & S. WILLIAMS, *Cases and materials on International Law* (5th ed.), *op. cit.*, pp. 421-437.

⁵⁹³ *Vid.* the well-known Barcelona Traction case (*Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3) as one of the best-known examples of how the nationality linking needs to be understood.

⁵⁹⁴ This three item list comes both from from M. DIEZ DE VELASCO, *Instituciones de Derecho Internacional Público* (13th ed.), *op. cit.*, pp. 928-938 and P. M. DUPUY & Y. KERBRAT, *Droit International Public* (11th ed.), *op. cit.*, p. 549. Despite the fact that both sources mention the “clean hands” requisite, it must be noted that the first author acknowledges that is not generally required by international decisions and academia. Cfr. P. DAILLER, M. FORTEAU & A. PELLET, *Droit International Public op. cit.* only mention the other two requisites.

⁵⁹⁵ *Vid.* J. G. FLEMMING “Mass tort”, *op. cit.*, p. 143. It is acknowledged that the notion of *parens patriae*: “*is a judicial construct that does not lend itself to a simple or exact definition.*” It does not refer to a State’s purely sovereign interests, such as the “power to create and enforce a legal code, both civil and criminal” or to demand “recognition from other sovereigns. Nor does it refer to a State’s action as the legal representative of persons who are incapable of representing themselves. Nor does it refer to the State’s pursuit of “proprietary interests,” such as the ownership of property or the pursuit of business interests. Rather, it refers to the State’s assertion of “quasi-sovereign” interests. The Court has declined to give this vague term a precise definition, but has made clear that the State’s interest in protecting the health and wellbeing of its citizens from transboundary nuisances is the paradigm case of a quasi-sovereign interest that will support *parens patriae* standing” (*vid.* T. W. MERRILL, “Global Warming as Public Nuisance”, *Colum. J. Envtl. L.*, vol. 30-2, 2005, pp. 293-333, at p. 304).

Human rights are considered by certain authors to have evolved into “*a self-contained regime of international law, to the extent that the relevance of general principles of international law in the implementation of international human rights is increasingly questioned*”⁵⁹⁶. The significance of its international nature⁵⁹⁷ is uncontested, despite the fact that, on the one hand, they are considered to “*have originated in domestic constitutional documents before becoming part of the corpus of international law*”⁵⁹⁸, and on the other hand, the field suffers from the phenomenon of the “*fragmentation of international law*”⁵⁹⁹. This may be a consequence of the fact that, on the one hand, there is a common underlying philosophy running through the different fragmented regimes⁶⁰⁰, and, on the other hand, scholars have identified the “*development of a ius commune [in the field] particularly since the 1990s. This refers to the fact that international and national courts increasingly refer to one another, seeking inspiration in one another's case law and progressively building a common understanding of the values which – whatever the precise legal source where they are embodied – they seek to uphold*”⁶⁰¹.

In terms of sources, notwithstanding scholarly discussions regarding a possible role of human rights within the realms of customs and general principles⁶⁰², the effective enforcement

⁵⁹⁶ Vid. O. DE SCHUTTER, *International human rights law: cases, materials, commentary*, Cambridge, Cambridge University Press, 2010, pp. 11-12

⁵⁹⁷ For a discussion of developments pertaining to the referred international nature, vid. H. J. STEINER, P. ALSTON & R. GOODMAN, *International Human Rights in Context – Law, Politics, Morals* (3rd ed.), Oxford, OUP, 2008, pp. 58-61; O. DE SCHUTTER, *International human rights law: cases, materials, commentary, op. cit.*, p. 11.

⁵⁹⁸ Vid. O. DE SCHUTTER, *International human rights law: cases, materials, commentary, op. cit.*, p. 11. For a brief review of the specific incorporation of environmental concerns into national Constitutions through a right to a clean and healthy environment (or similar formulations), Vid. D. SHELTON, “Human Rights, Health and Environmental Protection: Linkages in Law and Practice”, *op. cit.*, pp. 56-58.

⁵⁹⁹ For detailed assessments of this phenomenon in general terms, which present somewhat opposed narratives thereof, cfr. M. A. YOUNG (ed.), *Regime interaction in international law: facing fragmentation*, Cambridge, Cambridge university press, 2012 with M. ADENAS & E. BJORGE, *A farewell to fragmentation: reassertion and convergence in international law*, studies on international courts and tribunals, New York, Cambridge university press, 2015. For a monographic assessment which focuses on the labour of the European Court of Human Rights and the Inter-American Court of Human Rights, vid. F. VANNESTE, *General international law before human rights courts: assessing the specialty claims of human rights law*, Antwerp, Intersentia, 2009.

⁶⁰⁰ Vid., *inter alia*, F. SUDRE, *Droit européen et international des droits de l'homme* (8th ed.), Paris, PUF, 2005, p.11, and pp. 38 and following.

⁶⁰¹ Vid. O. DE SCHUTTER, *International human rights law: cases, materials, commentary, op. cit.*, p. 11. For further developments on this “*emerging ius Commune of Human Righst*”, vid. pp. 31-36. There De Schutter explains that its formation is a result of the “*frequent cross-references between international and domestic courts interpreting provisions which, although found in different treaties or domestic constitutions, are similarly worded and have their common inspiration in the Universal Declaration on Human Rights*”. This, in turn, is possible because, as regards the content and origin of the legal rules, “*The Universal Declaration on Human Rights was derived from a comparison between the liberal constitutions of the Western nations*”. Further considerations as regards its “*autonomization*” into a “*separate legal regime*” and the idea of *ius commune* as a means to “*revive the idea of Human Rights as natural law*” can also be found in the referred pages.

⁶⁰² Vid. O. DE SHUTTER, *International human rights law: cases, materials, commentary, op. cit.*, pp. 50, 53-55. This author comments two possibilities as regards the incardination of human rights in general public international law: human rights as a part of customary international law and human rights as general principles of international law. For an optimistic take on the possible existence of a human right to the respect of the environment in international law, vid. A. KISS “Environnement, droit international, droits fondamentaux” in V. CHAMPEIL-DESPLATS, M. GHEZALI & S. KARAGIANIS (eds.) *Environnement et*

thereof requires drafting conventional sources. In this sense, the practical reality is that treaty-based developments at the universal level have been highly unsatisfactory⁶⁰³. Several facts sustain this assertion: first, the United Nations Charter only contains a very limited reference to human rights amongst the Organization's objectives – Art. 55, C of the Charter – which may have a very limited value⁶⁰⁴. Secondly, the 1948 Universal Declaration on Human Rights – which precisely originates from the political impossibility to include a “*statement of essential human rights*” in the Charter – is non-binding in nature. The fact that by 1966 two binding instruments – the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights – had codified into treaty form the Universal Declaration did not entail any significant progress⁶⁰⁵. Thirdly, as explained by Sudre, “[l]a prolifération des textes internationaux de proclamation des droits de l'homme ne doit pas faire illusion car la portée réelle de ces textes, quant à la garantie des droits, est très variable”⁶⁰⁶. In this sense, throughout the years a total amount of nine universal “*core human right treaties*” has been adopted, and yet the practical impact of all of these instruments has shown to be limited⁶⁰⁷. As regards, specifically, environmental elements within human rights law at the

renouveau des droits de l'homme – Actes du colloque de Boulogne-sur-Mer, 20-21 Novembre 2003, Paris, La documentation Française, 2006, pp. 125-137. *Vid.*, also, p. 125: “[...] nous pouvons parler aujourd'hui non seulement de la protection internationale de l'environnement par le droit, mais aussi d'un droit au respect de l'environnement, progressivement reconnu en tant que droit fondamental de la personne humaine”. Kiss' optimistic account is based on the first principle of the Stockholm Declaration; on Article 24 of the African Charter on Human and Peoples' Rights; Article 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights; Article 24.2 of the United Nations Convention on the Rights of the child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; and Article 4.1 of Convention C169 (“Indigenous and Tribal Peoples Convention”) of the ILO, 27 Jun 1989. It seems however that this optimistic position is maybe excessively optimistic. For a similarly optimistic account, based, in this case, on the European Convention on Human Rights, on the European Social Charter and on other developments fostered by the Council of Europe, *vid.* M. DEJEANT-PONS, “Les droits de l'homme à l'environnement dans le cadre du conseil de l'Europe”, in V. CHAMPEIL-DESPLATS, M. GHEZALI & S. KARAGIANIS (eds.) *Environnement et renouveau des droits de l'homme – Actes du colloque de Boulogne-sur-Mer, 20-21 Novembre 2003*, Paris, La documentation Française, 2006, pp. 75-101; especially p. 76: “La notion de “droit de l'homme à l'environnement” suit sa lente progression confortée en cela par des travaux qui tendent à en affermir les bases”.

⁶⁰³ *Vid.* M. REQUEJO ISIDRO, *Violaciones Graves de Derechos Humanos y Responsabilidad Civil*, *op. cit.*, pp. 35 and following for a description of what the author qualifies as deficiencies in the structural and institutional dimensions of the system of international law of human rights (“*rémoras de carácter institucional-estructural*” in Spanish).

⁶⁰⁴ *Vid.* O. DE SCHUTTER, *International human rights law: cases, materials, commentary*, *op. cit.*, p. 49. This author comments that it is questioned by scholars whether the provisions in the UN Charter which make reference to human rights impose legal obligations or simply define a program of action, and further develops these ideas.

⁶⁰⁵ *Vid.* O. DE SCHUTTER, *International human rights law: cases, materials, commentary*, *op. cit.*, pp. 14-17 and 19-20.

⁶⁰⁶ *Vid.* F. SUDRE, *Droit européen et international des droits de l'homme* (8th ed.), *op. cit.*, p. 179. He further clarifies: “Cette portée peut être appréciée par le biais de quatre critères : nature juridique (valeur obligatoire ou non) ; existence d'un droit d'action individuelle et nature de ce droit ; existence d'un droit d'action étatique et nature de ce droit ; possibilité de sanction judiciaire à une éventuelle violation”.

⁶⁰⁷ This is O. DE SCHUTTER's impression as suggested in *International human rights law: cases, materials, commentary*, *op. cit.*, pp. 14-17 and 19-20.

universal level⁶⁰⁸, it must be noted that most of these instruments came into existence before the protection of the environment became the object of international concern, thus entailing a lack of references to environmental issues therein, “*although the formulation of the right to health sometimes includes environmental matters*”⁶⁰⁹.

Overall, “*the modesty with which human rights were addressed within the UN encouraged regional organizations to set up their own system for the protection of human rights*”⁶¹⁰. As a consequence, the leading role as regards human rights protection nowadays is played by regional regimes, the three most prominent amongst them being those built, respectively, within the frameworks of the Organization of American States, of the African Union and of the Council of Europe⁶¹¹. Interestingly, both the *African Charter on Human and Peoples’ Rights*, and the *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights* have specific provisions bearing environmental content⁶¹².

⁶⁰⁸ For a general overview of the United Nations system in this respect, *vid.* J. DHOMMEAUX, “Le droit onusien face à la protection des droits à l’environnement”, in L. ROBERT (ed.), *L’environnement et la Convention Européenne des droits de l’homme*, Cahiers de droit international, Bruxelles, Bruylant, 2013, pp. 169-194. For another account thereof, which places the intersection of human rights and the environment in a wider global context *vid.* A. BOYLE, “Human Rights and the Environment: Where Next?” in B. BOER (ed.) *Environmental Law Dimensions of Human Rights*, The collected Courses of the Academy of European Law, vol. XXIII-1, Oxford, OUP, 2015, pp. 201-241. This author highlights the importance of procedural rights within the realm of human rights and environmental law, and further contends that, should a “*right to a decent environment*” crystallize, identifying what is a “*decent*” level of protection is highly subjective (p. 219).

⁶⁰⁹ *Vid.* D. SHELTON, “Human Rights, Health and Environmental Protection: Linkages in Law and Practice”, *op. cit.*, p.12: “[...] *The International Covenant on Economic, Social and Cultural Rights (ICESCR)* (16 December 1966), for example, guarantees the right to safe and healthy working conditions (art. 7 b) and the right of children and young persons to be free from work harmful to their health (art. 10–3). The right to health (ICESCR, art. 12) expressly calls on states parties to take steps for “the improvement of all aspects of environmental and industrial hygiene” and “the prevention, treatment and control of epidemic, endemic, occupational, and other diseases”. For further description of developments pertaining to the interface between human rights, human health and environment within the UN system (*lato sensu*) *vid. ibidem*, pp. 16-25.

⁶¹⁰ *Vid.* O. DE SCHUTTER *International human rights law: cases, materials, commentary*, *op. cit.*, p. 20

⁶¹¹ The specific regime of fundamental rights within the EU will be addressed *infra*.

⁶¹² *Vid.* D. SHELTON, “Human Rights, Health and Environmental Protection: Linkages in Law and Practice”, *op. cit.*, pp. 12-13: “*The approach of each differs, with the African Charter linking the environment to development, while the American Convention Protocol speaks of a “healthy environment”*. [...] Article 16 [of the African Charter] guarantees to every individual the right to enjoy the best attainable state of physical and mental health while Article 24 adds that “All peoples shall have the right to a general satisfactory environment favorable to their development”. [The Additional Protocol to the American Convention] also contains both a right to health and a right to environment”. Cfr. P. LAMBERT, “Le droit de l’homme à un environnement sain”, *op. cit.*, p. 569: “*Dans le premier cas, malheureusement l’article 24 n’attribue aucune véritable créance de l’individu envers l’Etat; cet article, le plus lapidaire de la Charte africaine, en fait un droit des peuples. Le second cas est plus précis mais se situe dans un contexte normatif et institutionnel particulier. Le droit reconnu par le Protocole additionnel devant la Commission interaméricaine n’est protégé que par la seule voie des rapports de l’Etat contractant (art. 19, § 6) et ne peut donner lieu à un recours individuel*”. For a review of the main features of the three regimes, *vid.* F. SUDRE, *Droit européen et international des droits de l’homme* (8th ed.), *op. cit.*, pp. 131-160 (on the Council Europe regime plus its interactions with the EU’s system), pp. 161-168 (on the American and African regimes), and pp. 168-162 (on a 4th instrument, the Arab Charter on Human Rights, Cairo, 15 September 1994, and the controversies surrounding it). For a comparative analysis of the InterAmerican and European regimes which focuses largely on “*participatory environmental rights*”, *vid.* R. PAVONI, “Environmental Jurisprudence of the European and Inter-American Courts of Human Rights –

Nevertheless, despite the fact that it does not contain a specific provision addressing environmental matters, the following lines will specifically focus on the third regime, the *1950 Convention for the protection of Human Rights and Fundamental Freedoms* (commonly known as the European Convention on Human Rights), for, as announced, this dissertation will focus on instruments in force in Europe.

The European Convention on Human Rights (hereinafter ECHR), as other international human rights instruments, governs the relationships between ratifying States and the individuals under their respective jurisdictions⁶¹³. This entails that its content is meant to be used by a private party against a State. Under the Convention, States have both positive and negative obligations: obligations not to breach / violate certain rights, and obligations to prevent private parties from breaching and violating those rights⁶¹⁴. However, despite the fact that judgments rendered by the European Court of Human Rights are mandatory for the States-party, no mechanism of enforcement has been established and, moreover, States may only be condemned to pay economic compensation, for no other form of reparation is envisaged in

Comparative Insights", in B. BOER (ed.) *Environmental Law Dimensions of Human Rights*, The collected Courses of the Academy of European Law, vol. XXIII-1, Oxford, OUP, 2015, pp. 69-106.

⁶¹³ Vid. F. SUDRE, *Droit européen et international des droits de l'homme* (8th ed.), *op. cit.*, pp. 110-111: "[...] l'Etat partie à une convention internationale protectrice des droits de l'homme n'est pas soumis seulement à l'obligation de garantir les droits protégés à ses propres nationaux : il doit se conformer à cette obligation à l'égard de tous les individus se trouvant sur leur territoire, quelle que soit leur nationalité [...] On mesure, au plan théorique, l'innovation que constitue cette procédure par rapport à la protection diplomatique traditionnelle". In the same sense, vid. O. DE SCHUTTER, *International human rights law: cases, materials, commentary*, *op. cit.*, p. 11. For an excellent explanation of the self-executing character of the ECHR in French, vid. F. SUDRE, *Droit européen et international des droits de l'homme* (8th ed.), *op. cit.*, pp. 189-200.

⁶¹⁴ D. SHELTON provides an example related to the right to life ("Human Rights, Health and Environmental Protection: Linkages in Law and Practice" *op. cit.*, p. 33): "[...] the Court [has] reiterated that the right to life provision of the Convention contains not only a negative obligation to refrain from the use of force by state agents, but also imposes a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction. This obligation applies to any activity, whether public or not, "in which the right to life may be at stake, and a fortiori in the case of industrial activities which by their very nature are dangerous, such as the operation of waste-collection sites." [...] The primary duty on the state is to put into place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life". Vid., in the same sense, M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, pp. 41-42: "L'obligation positive présente un intérêt particulier quand l'origine de la nuisance ne trouve pas sa cause immédiate dans l'action de l'Etat au sens large mais dans une action privée. Dans ce cas, il peut alors être reproché à l'Etat de ne pas avoir agi pour protéger le droit. Plus récemment, l'obligation positive a été mise en relation avec la nécessité d'agir avant que le risque se réalise (Taskin)".

These ideas are equally introduced by SUDRE by asserting that the ECHR has a certain "indirect" horizontal effect [SIC] (Vid. F. SUDRE, *Droit européen et international des droits de l'homme* (8th ed.), *op. cit.*, pp. 199, 244-248). Basically, SUDRE considers that "rien n'interdit au juge national de faire application de la Convention aux contentieux interindividuels", but through this reference, he mainly aims at the liability of the State for allowing a private person to violate the rights of an individual due to its lack of action, or by providing that third party with the means to commit such violation ("Lors que l'atteinte au droit protégé n'est pas directement imputable à l'Etat mais est le fait d'un tiers –personne privée-, l'effet horizontal de la Convention permet la mise en jeu de la responsabilité de l'Etat si la législation de ce dernier rend possible la violation d'un droit garanti par cette personne privée»). Therefore, "la violation d'un droit protégé par la Convention peut résulter d'une ingérence de l'Etat, d'une abstention de l'Etat constitutive d'une méconnaissance des droits garantis et d'une abstention de l'Etat permettant aux tiers de s'immiscer dans le droit garanti".

the system⁶¹⁵. Furthermore, redress through the ECHR bears a subsidiary character: a claim against a State-party to the Convention can only come before the European Court of Human Rights after all appeals have been exhausted in the concerned State⁶¹⁶. This entails that other tools need to be resorted to before envisaging resorting to the ECHR.

Despite not containing any specific provision enshrining a “human right to a healthy environment” – or similar formulations – or explicit elements pertaining to environmental matters, the European Convention on Human Rights has developed a – limited – environmentally protective dimension; some of the different rights embodied therein have indirectly given rise to a certain *corpus* of environmentally-protective applications⁶¹⁷. As it was the case with the above-referred universal human rights instruments, the Convention was drafted in a historical period where environmental concerns were not at the forefront of international politics, and the protection of the environment did not match with the moment’s traditional legal logic. Nevertheless, after the late 1960s the relevant legal instances started to interpret the text of the Convention and its first additional protocol extensively, thus allowing cases dealing with environmental occurrences to come before them, inasmuch as the occurrence affected also one of the rights explicitly protected by the Convention⁶¹⁸: amongst others, the right to life (Article 2)⁶¹⁹, the right to information (Article 10), the right to access to

⁶¹⁵ For a summary description of the main features of the system, *vid.* M. REQUEJO ISIDRO, *Violaciones Graves de Derechos Humanos y Responsabilidad Civil*, *op. cit.*, p. 40.

⁶¹⁶ *Vid.* Art. 35.1 of the European Convention of Human Rights. As explained by F. SUDRE (*Droit européen et international des droits de l'homme* (8th ed.), *op. cit.*, p. 200) quoting case-law of the European Court of Human Rights – hereinafter ECoHR: “*le mécanisme de sauvegarde instauré par la Convention revêt un caractère subsidiaire par rapport aux systèmes nationaux de garantie des droits de l'homme*”. It is interesting to note that, as regards cases coming before the UN Human Rights committee, exhaustion of local remedies is also required (*Vid.* D. SHELTON, “Human Rights, Health and Environmental Protection: Linkages in Law and Practice”, *op. cit.*, p. 18).

⁶¹⁷ *Vid.* N. DE SADELEER, “Droits fondamentaux et protection de l’environnement dans l’ordre juridique de l’UE et dans la CEDH”, *op. cit.*, pp. 35-36. Furthermore: “*En effet, une interprétation constructive et dynamique de la Convention a permis à ces préoccupations d’un ordre nouveau de s’insinuer progressivement dans l’interprétation des droits de l’homme de première génération, notamment les droits à la vie (article 2), à un procès équitable (article 6), au respect de la vie privée et familiale et du domicile (article 8), à la liberté d’expression et d’information (article 10), à la liberté de réunion et d’association (article 11) ainsi que le droit de propriété (article 1er du premier protocole additionnel) [...] Cela dit, il faut rappeler que dans la mesure où la C.E.D.H. se prononce sur des situations très factuelles, il est parfois difficile de tirer de ses arrêts des enseignements définitifs*”.

⁶¹⁸ *Vid.* P. LAMBERT, “Le droit de l’homme à un environnement sain”, *op. cit.*, pp. 568, 573 and 574. For a review of the Courts’s case-law from the perspective of its contribution to fostering sustainable development, *vid.* J. VERSCHUUREN, “Contribution of the case law of the European Court of Human Rights to sustainable development in Europe” in W. SCHOLTZ & J. VERSCHUUREN (eds.), *Regional Environmental Law – Transregional Comparative Lessons in Pursuit of Sustainable Development*, New horizons in environmental law and energy series, Cheltenham, Edward Elgar Publishing, 2015, pp. 363-386. For review of how the European Court of Human Rights “inspires” itself from international texts on environmental protection (such as texts from the Council of Europe, from the European Union, and from the wider international environmental context) when developing the referred environmental extensive-interpretation of the ECHR, *vid.* M. CHYSCLAIN, M.-N. PATAUD & M. TABONE “L’utilisation par la Cour européenne des droits de l’homme des instruments internationaux relatifs à la protection de l’environnement”, in L. ROBERT, *L’environnement et la Convention Européenne des droits de l’homme*, Cahiers de droit international, Bruxelles, Bruylant, 2013, pp. 83-90.

⁶¹⁹ Following S. LECOMTE & C. MOISAN (“Le droit à la vie et l’environnement”, in L. Robert, *L’environnement et la Convention Européenne des droits de l’homme*, Cahiers de droit international, Bruxelles, Bruylant,

justice (Article 6)⁶²⁰, the right to the respect of property (Article 1 of the first additional protocol), and the right to a private and family life (Article 8)⁶²¹. The following lines will be devoted to the latter right for two sorts of reasons. Firstly, Articles 6 and 10 need to be put aside for their usefulness seems to correspond with that of the “instrumental” obligations and conventions discussed *supra*. Secondly, amongst the three other articles, (which seem mostly capable of protecting the environment *lato sensu* and not the environment *stricto sensu*), Article 8 seems to be the most significant provision, in terms of case-law production⁶²². The European Court of Human Rights has established that Article 8 is applicable to environmental occurrences – therefore conferring redress to individuals whose right to a private and family life has thereby been breached and sentencing the infringing State – at least, in the following cases: i) the noise from airplanes in the surroundings of Heathrow airport; ii) smells and health-related nuisances related to the proximity of a water-treatment plant; ii) the lack of information regarding risks related to a chemical factory producing fertilisers; iii) noises coming from nightclubs; iv) nuisances related to the presence of a goldmine which performed cyanidation processes; v) the degradation of the quality of air related to the operation of a steel-producing plant; vi) electrosmog related to the presence of a mobile phone antenna⁶²³. Despite these multiple uses, the operation of the article is limited by certain elements which entail that the referred right is not absolute. Amongst the restrictions that pertain to the article itself, one can find the conferral of a certain degree of discretionality to States in their actions, the need for the infringement to attain a certain degree of severity, and a requirement of actual interference with the applicant’s private sphere:

2013, pp. 17-22, at 19), despite what may be thought, the European Court of Human Rights tends to resort more frequently to Article 8 than to Article 2 of the Convention. *Vid.* also M. PAQUES, “L’environnement, un certain droit de l’homme”, *op. cit.*, pp. 40-41: “Le droit à la vie garanti à l’article 2 de la Convention se situe au sommet de l’échelle des droits de l’homme; il conditionne tous les autres. Ce droit a déjà été invoqué en relation avec la protection de l’environnement; il connaît un regain d’intérêt dans la jurisprudence récente (affaire Oneryildiz relative au décès de riverains lors de l’explosion d’un dépotoir). L’Etat est débiteur d’obligations positives de mettre en place des législations préventives efficaces et dissuasives. [...] L’Etat doit imposer à «toute personne concernée par celle-ci l’adoption de mesures pratiques propres à assurer la protection efficace des citoyens dont la vie risque d’être exposée aux dangers inhérents au domaine en cause”.

⁶²⁰ *Vid.* D. SHELTON, “Human Rights, Health and Environmental Protection: Linkages in Law and Practice”, *op. cit.*, p. 50: “In the European system, Article 6, which provides judicial guarantees of a fair trial, has been construed as including a right of access to justice. Applicability of Article 6 depends upon the existence of a dispute concerning a right recognized in the law of the state concerned, including those created by licenses, authorizations and permits that affect the use of property or commercial activities”.

⁶²¹ For a summary review and assesment of the European Court of Human Right’s case-law on environmental issues, *vid.* J.-P. MARGUÉNAUD, “Environnement et renouveau des droits de l’homme – La jurisprudence de la Cour EDH”, in V. CHAMPEIL-DESPLATS, M. GHEZALI & S. KARAGIANIS (eds.) *Environnement et renouveau des droits de l’homme – Actes du colloque de Boulogne-sur-Mer, 20-21 Novembre 2003*, Paris, La documentation Française, 2006, pp. 101-107.

⁶²² *Vid.* M. PAQUES, “L’environnement, un certain droit de l’homme”, *op. cit.*, pp.40-41. In the same sense, *vid.* N. DE SADELEER, “Droits fondamentaux et protection de l’environnement dans l’ordre juridique de l’UE et dans la CEDH”, *op. cit.*, pp. 35-36 (“l’essentiel des décisions rendues par la Cour sont fondées sur l’article 8 de la Convention”).

⁶²³ List found, with references to specific cases, in M. PAQUES, “L’environnement, un certain droit de l’homme”, *op. cit.*, pp. 40-41.

i) State discretionality: States benefit from a certain degree of discretion in balancing the interest at stake, which can limit the operability of the article⁶²⁴. Environmental damage attributable to state action or inaction which impinges upon a person's private and family life which would constitute a violation of Article 8(1) may be excused under Article 8(2) provided certain conditions are met: it must result from an authorized activity of economic benefit to the community in general; there cannot be a disproportionate burden on any particular individual; and the measures must have a legitimate aim, be lawfully enacted, and be proportional. If these conditions are met, then the relevant State enjoys a margin of appreciation in determining the legitimacy of the aim pursued⁶²⁵.

ii) Attainment of a certain degree of severity: there is minimum level of gravity for claims to be considered. Article 8 cannot operate where the relevant damage is "*negligible in comparison to the environmental hazards inherent to life in every modern city*", and account needs to be taken of both the general environmental context and all the circumstances of the case, including the intensity and duration of the nuisance, and its physical and / or mental effects on the victim⁶²⁶.

iii) Requirement of an actual interference with the applicant's private sphere: since the Convention does not enshrine a right to nature preservation as such, Article 8 is not violated every time that environmental deterioration occurs. It will only be the case where the interference affects directly the individual's home, family or private life"⁶²⁷. This "anthropocentric" limitation on the operability of the article is rather natural; it has been asserted that "*the emergence of an environmental dimension in human-rights law has a strongly anthropocentric motivation, most notable in attempts to develop a new human right to a decent environment*"⁶²⁸. This limitation also embodies an observation made above, which deserves being further highlighted: due to its anthropocentrism, Article 8 – as well as Article 2 of the Convention, and Article 1 of the First Additional Protocol – will serve almost only to protect the environment *lato sensu*, and not the environment *stricto sensu*⁶²⁹.

⁶²⁴ Vid. D. SHELTON, "Human Rights, Health and Environmental Protection: Linkages in Law and Practice" *op. cit.*, pp. 35-36, on the notion of discretionality: "[In Powell & Raynor v. United Kingdom the] Court found that aircraft noise from Heathrow Airport constituted a violation of Article 8, but was justified under Article 8(2) as "necessary in a democratic society" for the economic well-being of the country. Noise was acceptable under the principle of proportionality, if it did not "create an unreasonable burden for the person concerned," a test that could be met by the State if the individual had "the possibility of moving elsewhere without substantial difficulties and losses".

⁶²⁵ *Ibidem*, p. 32.

⁶²⁶ *Ibidem*, p. 43.

⁶²⁷ *Ibidem*, p. 43. As explained by M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, p. 42: "[...] l'environnement concerné demeure étroit. Le passage par l'ingérence dans la vie privée ne permet de saisir que des nuisances ressenties par un individu dans son voisinage proche. Aussi les atteintes à l'environnement plus éloigné comme la biodiversité, les grands équilibres, qui ne bénéficient pas du relais de la vie privée, n'entrent pas dans le champ de la Convention".

⁶²⁸ Vid. P. BIRNIE, A. BOYLE & C. REDGWELL, *International Law & the Environment*, *op. cit.*, p. 7: "[...] Some advocates assert that such a right is indispensable for the enjoyment of other human rights and freedoms, but they usually fail to explain how competing environmental, economic, and social priorities can be accommodated in what necessarily becomes a judgment about what we value most".

⁶²⁹ This qualification ("almost only") is introduced because, although it may seem difficult at first sight, the environment per se may possibly obtain some limited protection through Article 8 in very limited

This summary description of the main features of the European Convention on Human Rights and its environmentally-protective dimension needs to be completed with a final comment on the ECHR's territorial scope of application in order to properly consider the potential practical relevance of the ECHR in respect of environmental protection⁶³⁰. Article 1 of the Convention provides that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". As explained by De Schutter, for the purposes of international human rights law, the notion of "jurisdiction" of a State is not necessarily restricted to the national territory of the said State. Therefore, for instance, the human rights obligations of a State occupying territories that belong to a different sovereign need to extend to the said territories under occupation, irrespective of whether such occupation is legal or illegal under international law, the relevant consideration being whether the occupying State exercises effective control thereof⁶³¹. While it is clear that Article 1 of the ECHR needs to be interpreted largely along these lines⁶³², the precise conditions and circumstances which allow going beyond a narrow understanding of the *ratione loci* applicability of the ECHR remain controversial and cannot be neatly extracted from the European Court of Human Rights' case-law⁶³³. This uncertainty is relevant because it impedes obtaining a clear answer on whether the ECHR may play any role in determining that a given State has breached positive obligations stemming from the ECHR whenever "merely

instances, as a by-product of the protection of the values enshrined therein. This is very subtly suggested by M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, p. 42, when he makes an assessment of the ECHR's decision in *Kyrtatos* (ECtHR, *Kyrtatos v. Greece*, judgment, application no. 41666/98): "[...] L'environnement «en tant que tel», n'est pourtant éloigné qu'en apparence, dans une courte vue. Mais le droit a toujours eu besoin de mettre des limites et on ne peut reprocher à la Cour de demander un lien direct. Les mots doivent conserver un sens et il est difficile de faire de la vie privée plus qu'une tête de pont de la protection de l'environnement. On notera encore la disposition de la Cour à accueillir les griefs dirigés contre la destruction d'une zone forestière voisine qui aurait pu affecter «plus directement» le «propre bien-être» des requérants. Pour aller plus loin la Cour fait simplement appel au législateur". Therefore, notwithstanding the need for legislative intervention in order to expand environmental protection in this realm, it is not to be discarded that there may be a certain expansion of the protection by " ricochet " under other factual circumstances.

⁶³⁰ For a general analysis of the potential extraterritorial application of Human Rights treaties (thus, going beyond the European Convention on Human Rights) *vid.* M. MILANOVIC, *Extraterritorial Application of Human Rights Treaties. Law, Principles and Policy*, Oxford, OUP, 2011. *Vid.* specially pp. 21-41 on the various meanings of the term jurisdiction, and p. 118 where the authors chooses "effective overall control of an area" as the notion he will focus on.

⁶³¹ *Vid.* O. DE SCHUTTER, *International human rights law: cases, materials, commentary, op. cit.*, p. 125.

⁶³² *Vid.* ECtHR, *Loizidou v. Turkey (Preliminary objections)*, judgment, application no. 15318/89. Along the same lines, *vid.* ECtHR, *Issa v. Turquie*, judgment, application no. 31821/96; ECtHR, *Al-Skeini v. United Kingdom*, application no. 55721/07.

⁶³³ This assertion is merely an adaptation to the context of the European Convention on Human Rights of general assertions made by DE SCHUTTER in different parts of his *Manuel* (P. 142 and p. 162, for instance: "whether States are under an obligation to respect their human rights obligations when acting through their agents outside their national territory [needs to be] answered in the affirmative, although the precise conditions which must be filled in order for any situation to be considered to be under the 'jurisdiction' of the State concerned remain somewhat contested"). However, page 154 of his *Manuel* regards specifically the ECHR, and suggests that "*Issa and others v. Turkey*" [ECtHR, *Issa v. Turquie*, judgment, application no. 31821/96], implicitly overrules "*Bankovic*" [ECtHR, *Bankovic and others v. Belgium and 16 other States*, decision on admissibility, appl. No. 52207/99] insofar as this latter decision seemed to imply that a State party to the Convention could not be held responsible for the consequences of acts going beyond the jurisdiction it might legitimately exercise under public international law, unless it occupies foreign territory where it exercises *de facto* governmental powers".

international” and / or “transboundary” environmental violations are committed by private parties.

As regards merely international environmental torts (i.e. those where the foreign element is the nationality of the tortfeasor, for the action and the result arise within the same State), De Schutter provides a general answer in respect of the ensemble of the international law of human rights. He considers that, as international law stands nowadays, no obligation has crystallized so far which would bind States to control private actors operating outside their national territory (in order to ensure that they do not violate the human rights of others)⁶³⁴.

As regards “transboundary” environmental torts (i.e. those where the place of action and the place of result are not coincident), providing an answer becomes somewhat more complicated. Let us slightly modify the third Trail Smelter variation in Box 11 above, in order to simplify the reasoning. What if the fumes had caused the death of ruritarian farmers? Could their relatives bring the Ozian Republic before the European Court of Human Rights for a violation of Article 2, right to life? It is difficult to find a perfectly equivalent precedent in the case-law of the European Court of Justice in order to attempt at providing a positive or negative answer. A transboundary environmental tort entails that the breach of positive obligations by the State has its effects in a second State, but the relevant actions / omissions take place within the first one. Moreover, a transboundary environmental tort does not involve the presence of any State agent or the assertion of control over the relevant territory. By deciding which of these elements to highlight and take into account to the detriment of others one may find bigger resemblance in different sub-sets of cases, therefore arriving at different conclusions⁶³⁵. It is

⁶³⁴ Vid. O. DE SCHUTTER, *International human rights law: cases, materials, commentary, op. cit.*, 162-163. Furthermore: “This is the case even as regards those private actors having the nationality of the State concerned, and whose behavior therefore a State may decisively influence and on whom it may impose certain obligations in conformity with international law”. Thus, “[t]he contemporary, mainstream view is that there exists no general obligation imposed on States, under international human rights law to exercise extra-territorial jurisdiction (understood here as a combination of adjudicative and prescriptive jurisdiction) in order to contribute to the protection and promotion of internationally recognized human rights outside their national territory. In principle, the international responsibility of a State may not be engaged by the conduct of actors not belonging to the State apparatus unless they are in fact acting under the instructions of, or under the direction or control of that State in carrying the conduct”. Further developments in pp. 163-172.

⁶³⁵ If one decided to highlight the fact that the hypothetical deals with State’s acts occurring within ECHR space but outside State’s own territory a relevant precedent could be *M. v. Denmark (ECtHR, M. v. Denmark, judgment, application no. 17392/90; violation of right to liberty and security of an East-German citizen by the actions of the Danish Embassy in the German Democratic Republic)* which, despite being very different in thematical terms, would lead to plead in favour of the extraterritorial application of the ECHR. However, in the opposite sense, therefore precluding the extraterritorial application of the ECHR, *vid. Mohammed Ben El Mahi and Others v. Denmark (ECtHR, Mohammed Ben El Mahi and Others v. Denmark, decision on admissibility, application no. 5853/06; Moroccan citizens acting against Denmark for permitting the publication of caricatures of Prophet Muhammad)*. For further considerations *vid. M. MILANOVIC, Extraterritorial Application of Human Rights Treaties. Law, Principles and Policy, op. cit.*, pp. 120-122, and 126-127. While he explicitly considers the hypothesis of transboundary environmental torts he only explains the problem without providing any sort of prospective answer. He further draws attention to the Aerial Herbicide Spraying case between Ecuador and Colombia (then pending before the ICJ, Case removed from the Court’s List at the request of the Republic of Ecuador on September the 17th 2013) and rhetorically asks if the Ecuadorian citizens affected by the facts would have rights under the InterAmerican Convention on Human Rights. Finally, it is worth noting that he also considers the hypothesis of a “killing in a territory outside the state’s

further suggested that, possibly, while within the national territory of a State-party the full range of Convention obligations come into play, in “extraterritorial scenarios” only negative obligations are in force⁶³⁶.

Interestingly, this hypothetical brings to the spotlight a second question, not related the territorial scope of application of the ECHR: under the light of the ECJ’s *Mines de Potasse* case-law, would the exhaustion of appeals in Ruritania be considered as fulfilling the exhaustion of remedies condition in respect of Oz? On the one hand, the judgment issued in the civil proceedings is *res judicata* before Ozian courts, by virtue of the Brussels I Regulation. On the other hand, the Ozian Republic can argue that it has not had the chance to be involved for the merits have not been adjudicated upon within its court system. The “cross-border” enforcement of the ECHR against Oz seems therefore difficult.

As a matter of a conclusion, it must be pointed that the protection provided to the environment by the ECHR does not seem to inspire very optimistic prospects. De Sadeleer’s account of the matter provides a bittersweet impression:

*"Le recours exclusif aux droits de l'homme, par le truchement de la Convention, pour protéger l'environnement paraît insatisfaisant. La preuve de leur violation exige la démonstration d'une atteinte souvent nettement plus grave (lésions graves, intoxications, troubles psychologiques profonds) que celle qui pourrait être invoquée dans un contentieux administratif ou civil (dépassement de seuil, absence d'autorisation, ...). Si la Convention apparaît ainsi d'un maigre secours, l'obligation positive faite aux États de mettre en place un cadre préventif adapté aux risques, complétée par des obligations procédurales pourrait contribuer à limiter le pouvoir discrétionnaire des États"*⁶³⁷.

After having considered human rights, let us explore the wide range of environmental tools found within the realm of the law of the European Union.

C. EU law

The richness of the European Union’s legal order allows for environmental values to manifest themselves in multiple instances. The following pages will approach the different environmental legal tools provided for by the European legal order *per* thematic subfields. Probably, these contents could have been presented differently, from the angle of the

control, but within the territory of a state party to the human rights treaty in question (espace juridique)", and asserts that, under the "restrictive" notion of jurisdiction put forward by Bankovic (mentioned supra), there should be no extraterritorial application. The question of whether "the obligation to protect human rights from [...] environmental nuisances also applies extraterritorially" has not received much attention. It is however dealt with by A. BOYLE, "Human Rights and the Environment: Where Next?", op. cit., at 232-237. The referred author considers that despite lack of precedents, a solid case may be made for a extraterritorial application of the relevant instrument in these cases.

⁶³⁶ Vid. O. DE SCHUTTER, "Globalization and Jurisdiction: Lessons from the European Convention on Human Rights", *Baltic Yearbook of International Law*, vol. 6, 2006, pp. 185-247, at p. 245.

⁶³⁷ Vid. N. DE SADELEER "Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", op. cit., pp. 50-51.

hierarchy of sources of EU law (thus analyzing first environmental elements in EU primary law, and subsequently, environmental developments in EU secondary law). However, it is probably neater to opt for a subject-matter approach, and thus address: i) environmental elements in EU fundamental rights law; ii) EU environmental law (both within primary and secondary law); and iii) environmental elements in EU internal market law. Let us deal with them in sequence.

i. Environmental elements in EU fundamental rights law

Not only environmental values may manifest themselves under multiple configurations within the European legal order; the same happens with human rights, to the point that it can be said that they present a polyhedral shaping. The history of the construction of such polyhedral human rights *acquis* is the story of a labour of love, which will be briefly dealt with in two stages. First, human rights as general principles of EU law and / or as constitutional foundations of the EU legal system will be reviewed. Then, the Charter of Fundamental Rights of the EU – as a codification of the EU’s human rights doctrine – will be presented. The fact that the EU itself was meant to become bound by the ECHR will not be treated, for efforts in such direction have proved to be unsuccessful so far⁶³⁸.

a. Human rights as general principles of EU law and / or as constitutional foundations of the EU legal system

Since the original text of the Treaties did not make any sort of reference to human rights, or any similar notion, the Constitutional Courts of some Member States, especially Germany, were concerned about the potential impact of the Supremacy of EU law over the Fundamental Rights provisions of their Constitutions⁶³⁹. As a response to these concerns, the ECJ developed, through its case-law⁶⁴⁰, the EU’s very own *acquis* of human rights as general principles of the

⁶³⁸ Vid. ECJ, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/13, ECLI:EU:C:2014:2454. F. SUDRE’s comments on the ECHR in the EU legal order can be found in his treatise, pp. 140-147, especially 144-146. As regards the EU’s accession to the ECHR, as explained by T. HARTLEY (*The Foundations of European Union law* (7th ed.), Oxford, OUP, 2010, pp. 151-152) following a 1990 Commission’s press release, the policy motivations were two: the eventual fear that EU acts could infringe the rights protected by the ECHR, and the risk that those rights may be interpreted in different ways by the ECJ and the European Court of Human Rights. “Finally, more than thirty years after the idea was first put forward, the Treaty of Lisbon gave the go-ahead: as amended, Article 6 (2) TEU now provides for the European Union to accede to the ECHR [...] So, in future there will be [three] foundations on which EU human rights law will rest: general principles of law, and the ECHR as a binding instrument, [...] and the Union’s own Charter of Fundamental Rights”.

⁶³⁹ For a detailed description, vid. T. HARTLEY, *The Foundations of European Union law*, op. cit., pp. 143-151. These pages have been the source from which the following summary has been made of.

⁶⁴⁰ The doctrine is developed in a series of well-known rulings, amongst which *Stauder v. City of Ulm* (ECJ, judgment, case c-26/69, ECLI:EU:C:1969:57); *Internationale Handelsgesellschaft* (ECJ, judgment, case c-11/70, ECLI:EU:C:1970:114; T. HARTLEY, *The Foundations of European Union law*, op. cit., p. 145 : This case “states that the concept of human rights applied by the Court, while deriving its validity solely from European Union law, is nevertheless ‘inspired’ by national constitutional traditions”); *Nold vs. Commission* (ECJ, judgment, case c-4/73, ECLI:EU:C:1974:51; T. HARTLEY, *The Foundations of European Union law*, op. cit., p. 146: This decision “first, it makes clear that a European Union measure in conflict

European legal order, inspired both by national Constitutions and by international human-rights treaties binding upon Member States⁶⁴¹. In practical terms this has meant that the ECHR has been indirectly introduced into the EU legal order, for the referred general principles “translate” the understanding of human rights law enshrined by the ECHR, as interpreted by the European Court of Human Rights, into the EU legal order⁶⁴².

Possibly, the corollary of the construction of human rights as general principles of EU law can be found in what Hartley has described as the proclamation of human rights as “*Constitutional Foundations of the EU system*”⁶⁴³. In its 2008 judgment in *Kadi and Al Barakaat*⁶⁴⁴ the ECJ created what the referred author considers to be “a ‘super category’ of legal norms, which derive their [hierarchical] status, not from their source, but from their function in the EU system”⁶⁴⁵. The ratio behind the said judgment is that despite the fact that, in the light of Article 351 TFUE, an agreement with non-member states may, under certain conditions, prevail over provisions of the EU Treaties, it cannot override “the constitutional foundations of the EU system”, such as its fundamental human rights⁶⁴⁶.

The expedience of the role of human rights as general principles of EU law and / or as constitutional foundations of the EU legal system for the objects of this dissertation is, however, scarce. A first limitation arises from the fact that the environmental content found therein is rather limited, as limited was the environmental content found within the ECHR. A

with fundamental rights will be annulled; secondly, it reveals a new source of 'inspiration' for these rights – international treaties”).

⁶⁴¹ Vid. T. HARTLEY, *The Foundations of European Union law*, op. cit., pp. 143-151.

⁶⁴² Vid. N. DE SADELEER, “Droits fondamentaux et protection de l’environnement dans l’ordre juridique de l’UE et dans la CEDH”, op. cit., pp. 27 & 35-36 : “[...] la Convention européenne des droits de l’homme [...] dont certaines dispositions connaissent par ricochet des questions environnementales, constitue une source privilégiée dans la détermination des principes généraux du droit de l’UE” ; “Même si le droit de l’U.E. ne consacre pas de manière autonome un droit à la protection de l’environnement, un tel droit émerge dans le sillage des droits fondamentaux consacrés par la Convention. Revêtant les caractéristiques d’un « État de droit », l’UE reconnaît ces droits fondamentaux « en tant que principes généraux » (article 6, §§ 1er et 3, TUE). Selon la jurisprudence de la Cour de justice, le respect des droits de l’homme constitue une condition de la légalité des actes de l’UE. Ne sauraient être admises dans l’UE des mesures incompatibles avec le respect de ceux-ci”.

⁶⁴³ The Court refers to them with various denominations which refer to the notions of constitutionality, principles, foundations, etc. For further details, vid. T. HARTLEY, *The Foundations of European Union law*, op. cit., pp. 98 and following.

⁶⁴⁴ Vid. ECJ, *Kadi and Al Barakaat International Foundation v. Council and Commission*, judgment, Joined cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461. Roughly speaking, this landmark case involved a conflict between the UN Charter and the EU Treaties, which, a priori ought to be solved by resorting to article 351 TFUE. As regards art. 351 TFUE, vid. T. HARTLEY, *The Foundations of European Union law*, op. cit., pp. 102-103: “[t]he European Court has even held that [a treaty with a non-member State concluded by a Member State before it joined the EU] can enjoy primacy over a provision in one of the constitutive treaties [ECJ, *Centro-Com*, judgment, case C-124/95, ECLI:EU:C:1997:8]. However, in *Kadi* it said that it can never enjoy primacy over provisions (such [sic] the protection of fundamental human rights that form part of the constitutional foundations of the Union)”.

⁶⁴⁵ For further details and first commentary on the case, vid. T. HARTLEY, “The Foundations of European Union law”, op. cit., pp. 98 and following.

⁶⁴⁶ *Ibidem*, p. 98

second limitation stems from the fact that “[i]n areas outside the scope of EU law [...] Member States are not bound by the EU concept of human rights”⁶⁴⁷.

b. The codification of the EU’s human rights doctrine: The Charter

On December the 7th 2000 the Charter of Fundamental Rights of the European Union was “solemnly proclaimed”. The Charter can be generally described as being mostly a codification of the case-law which has developed the aforementioned “general principles” doctrine. While immediately after its inception the Charter did not have legally-binding value by itself, after the entry into force of the Treaty of Lisbon this situation has changed: “Article 6(1) now gives the Charter the same legal value as the EU Treaties”⁶⁴⁸. As provided by Article 51 of the Charter:

“[its provisions] are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers”.

Taking all preceding developments into account, especially the fact that the EU is meant to potentially accede to the ECHR in the future, and the fact that Member States are already bound by the later text, one may ask what sort of added-value is provided by the Charter. Asking this actually amounts to asking, overall, what is the usefulness of the polyhedral configuration of human rights within the EU’s legal order. And the answer is that the European Court of Justice will have the possibility to avail itself of the Charter and of the general principles of EU law to extend the protection of fundamental rights beyond the limits borne by the European Convention on Human Rights⁶⁴⁹. The risk of inconsistency arising from this possibility are dealt with by Article 52(3) of the Charter itself, which establishes that

“[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”.

Therefore, as pointed by Hartley, since Article 52(3) does not apply to rights that find no counterpart in the Convention, the ECJ can choose to go as far as it deems necessary in respect of the meaning and scope of these rights⁶⁵⁰. From this standing point, it must be noted that Article 37 of the Charter contains a specific provision on environmental matters, which was not the case of the ECHR. The polyhedral configuration of human rights within the European legal order having been sketched, let us turn to this specific environmentally-relevant provision and briefly analyze it.

⁶⁴⁷ *Ibidem*, pp.155-156.

⁶⁴⁸ *Ibidem*, p. 154.

⁶⁴⁹ *Ibidem*, p. 152.

⁶⁵⁰ *Ibidem*, p. 155. (Nevertheless, confront with Art. 51.2 of the Charter: “This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties. Institutions and Member States within the scope of EU law”).

c. The content of Article 37 of the Charter

Article 37 establishes that

"[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

This article is placed, within the Charter, in a title named "solidarity", where it is accompanied by analogous proclamations concerning other social rights such as the protection of family life, the protection of health, the protection of consumers, etc., several of which are also the object of "integration clauses" in the EU Treaties⁶⁵¹. In the case of Article 37, its "integration" counterpart can be found in Article 11 TUE which reads as follows:

"Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development".

From the standpoint of its substantive content, Article 37 and the range of environmental protection provided therein are considered to differ from the protection provided by the ECHR: it is believed that the environment enshrined in this provision of the Charter is larger than the narrow environmental perimeter secured by the Convention, where only those environmental elements closely linked to the right to family and private life and domicile are protected. Therefore, within the Charter, the protection of the environment acquires an autonomous and self-standing status⁶⁵². Nevertheless, this first positive impression in respect of Article 37 needs to be nuanced in several respects.

First, the article establishes a relatively blurry objective by aiming at a high level of environmental protection, which is subsequently conditioned by the principle of sustainable development⁶⁵³. As explained by De Sadeleer: *"le développement durable a précisément pour effet d'affaiblir la portée de l'intervention protectrice [...], étant donné qu'il renvoie implicitement à une mise en balance des exigences environnementales avec les intérêts sociaux et économiques"*.

⁶⁵¹ Vid. M. FALLON, *"Le droit fondamental à l'environnement selon le droit communautaire"*, *op. cit.*, p. 82.

⁶⁵² Vid. M. PAQUES, *"L'environnement, un certain droit de l'homme"*, *op. cit.*, p. 58. Furthermore: *"[...] la part d'environnement que la C.E.D.H. protégeait par le biais du droit à la vie privée restera peut-être protégée par l'article 7 de la Charte [...] relatif à la vie privée, familiale et au domicile, rangé dans la catégorie des «libertés» et plus immédiatement exigible. L'interprétation officielle établit en effet que l'article 7 [...] correspond à l'article 8 de la C.E.D.H."*

⁶⁵³ Vid. N. DE SADELEER, *"Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH"*, *op. cit.*, pp. 29-30. Cfr. M. PAQUES, *"L'environnement, un certain droit de l'homme"*, *op. cit.*, p. 60: *"[l']exigence de «niveau élevé» dans la formulation de l'obligation d'intégration de l'environnement dans les autres politiques est une autre raison de rendre plus favorables à l'environnement les arbitrages auxquels procèdent tant les législateurs que les juges"*. This author insists (pp. 56-57) on the fact that *"L'effet interprétatif est déjà acquis"*.

Second, it is contended that, despite this first remark, the integration principle would be considerably reinforced by the Charter⁶⁵⁴. However, it is necessary to recall that Article 37 does nothing but impose on public entities an obligation "to act", by integrating environmental elements in all public policies⁶⁵⁵. Furthermore, those very public entities would be the only instances entitled to determine the range and nature of their environmentally-relevant acting⁶⁵⁶. In other words, Article 37 merely establishes an impersonal obligation whose addressees are public entities⁶⁵⁷, without identifying a potential beneficiary of its content⁶⁵⁸: no subjective right to a healthy environment is created by this provision, whose content is not self-executing⁶⁵⁹. Thus, Pâques sees in the approach embodied in Article 37 a cleavage with the situation of the "right to a(n) (healthy) environment" recognized in the legal systems of many of the Member States of the EU⁶⁶⁰.

In sum, as it was also the case of the ECHR, the overall assessment of the article cannot be positive because its legal value is considered to be weak⁶⁶¹:

⁶⁵⁴ Vid. M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, pp. 52-53. Despite constant references to integration, this author has equally tried to find a reference to autonomous value in Article 37: "L'article fait une place plus discrète à l'action autonome relative à l'environnement. C'est le mot « assurés » qui renvoie à la politique autonome de l'environnement. On peut le déduire de la comparaison avec un premier projet du texte de la Charte relatif à l'environnement qui ne faisait pas état de l'intégration. [...] Le « niveau élevé » s'impose ici aussi; c'est déjà le cas à l'article [191] du Traité CE. Il ne connaît pas, à l'article 37, les nuances relatives à la diversité des situations, introduites à l'article [191]. Il avait été établi que le Traité n'exige pas du législateur communautaire la réalisation immédiate d'une politique dans le domaine de l'environnement, dont le niveau de protection soit le plus élevé possible. A nouveau, le principe du développement durable vient imposer ses éléments d'arbitrage".

⁶⁵⁵ Vid. N. DE SADELEER, "Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", *op. cit.*, pp. 29-30. Vid., similarly, M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, p. 52-53. The reference in the main text to public entities and not to EU institutions is due to the fact that, following Article 51 of the Charter, its text is binding on Member States when the latter are acting within the realm of EU law.

⁶⁵⁶ Vid. N. DE SADELEER, "Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", *op. cit.*, pp. 29-30.

⁶⁵⁷ Vid. M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, pp. 56-57.

⁶⁵⁸ Vid. N. DE SADELEER, "Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", *op. cit.*, pp. 29-30.

⁶⁵⁹ Vid. M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, pp. 56-57: "[l]'effet direct de revendication est donc retiré à l'article, à la fois par la volonté des auteurs et par l'application du critère de la précision du texte, non concrétisé."

⁶⁶⁰ Vid. M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, pp. 56-57: "On y voit un décalage avec la situation du droit à l'environnement reconnue dans les Etats de l'Union". In this very sense, *vid.* M. PAQUES, "L'environnement, un certain droit de l'homme", pp. 56-57: "L'effet direct de contestation d'une mesure qui n'accomplirait pas ou violerait les obligations à tirer de l'article 37 n'est pas exclu pour peu qu'un recours utile soit ouvert. En droit communautaire, dans la plupart des cas, seuls des intervenants privilégiés ont accès au juge".

⁶⁶¹ Vid. N. DE SADELEER, "Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", *op. cit.*, pp. 29-30: "S'agissant davantage d'engagements pris par les institutions que de droits octroyés aux victimes des nuisances, l'obligation d'intégrer « un niveau élevé de protection de l'environnement » ne s'apparente pas à un droit-créance [...] Des droits subjectifs ne pouvant émerger que par l'entremise du droit dérivé (article 51, § 5, de la Charte), la force juridique de cette disposition est faible". After this statement he adds: "Cela dit, la violation de l'article 37 pourrait être invoquée par des requérants privilégiés dans le cadre du contentieux en annulation". As regards the need of secondary law in order to create individual rights, *vid.* M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, pp. 56-57 and, p. 64: "[...] la Charte appelle l'intervention des pouvoirs publics pour les servir ou les

*"[...] la Charte n'apporte pas grand-chose aux textes obligatoires du droit européen de l'environnement et qu'elle est en décalage par rapport au droit international et au droit des Etats membres eux-mêmes"*⁶⁶².

Consequently, it may be said that the human rights dimension of environmental protection within the EU legal order reflects mainly a political will and a – nuanced – policy choice, but adds very little to the effective protection of the environment. It certainly adds nothing from a litigation-oriented perspective.

ii. EU environmental law

Characterizing in a couple of paragraphs such a wide legal field as is the environmental law of the European Union is far from being a simple task. Any attempt, no matter how developed, will inevitably seem reductive and incomplete. The original Treaty establishing the European Economic Community did not contain any provision on environmental matters, be it from a strictly legal or from a policy perspective⁶⁶³. Nevertheless, the European legal order has been increasingly sensitive to the existence of environmental stakes since the beginning of the 1970s: the lack of formal consecration of environmental concerns in the Treaties did not hinder the rise of what has been described as a strong share of protection of environmental values⁶⁶⁴. Such values were progressively introduced into the European legal order through the elaboration of environmental legal instruments on the basis of what nowadays is Article 114 TFUE (former Article 95 TEC) which entitles the EU to adopt measures for the approximation of legal provisions in order to facilitate the establishment and functioning of the internal market⁶⁶⁵.

concrétiser et confirme leur rôle central dans la mise au point de la politique et le développement de l'action".

⁶⁶² Vid. M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, pp. 52-53.

⁶⁶³ Vid. L. KRÄMER, *EC Environmental Law* (6th ed.), London, Sweet & Maxwell, 2007, pp. 4-5.

⁶⁶⁴ Vid. M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, p. 39: *"L'absence initiale de consécration formelle de la préoccupation environnementale par un texte n'a pas empêché une protection très forte, des arbitrages favorables à la protection de l'environnement parfois contre d'autres droits antérieurement garantis"*. In similar terms, Vid. N. DE SADELEER, "Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", *op. cit.*, pp. 25-27: *"Alors qu'elle n'était pas évoquée en 1957 dans le Traité de Rome, la protection de l'environnement est parvenue, au fil des réformes institutionnelles, à s'imposer comme une des préoccupations essentielles des institutions"*.

⁶⁶⁵ Vid. M. FALLON, *"Le droit fondamental à l'environnement selon le droit communautaire"*, *op. cit.*, pp. 93-94: *"L'habilitation du législateur communautaire dans la matière du marché intérieur reflète une prise en charge progressive mais réelle du thème environnemental. [...] D'abord, le processus d'appropriation normative est d'ordre fonctionnel: il répond aux besoins de l'établissement et du fonctionnement du marché intérieur (art. 95 CE, § 1er). Autrement dit, point n'est besoin d'une habilitation spéciale explicite pour justifier une réglementation communautaire en matière d'environnement. Il suffit de démontrer qu'une telle réglementation est nécessaire pour agir sur des entraves existantes, par voie de suppression ou de réduction, mais aussi aux fins de prévention, voie ouverte à une politique proactive [...]"*. Vid. N. DE SADELEER, "Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", *op. cit.*, pp. 25-27; this author considers that the referred progression continues even during the 1990s: *"Ainsi les modifications successives apportées au Traité de Rome par le Traité de Maastricht et le Traité d'Amsterdam ont-elles*

Then, in the 1980s the entry into force of the Single European Act (SEA) entailed the introduction of what nowadays are Articles 191 to 193 TFUE (Articles 130 R to 130 T as modified by the SEA; later Articles 174 to 176 TEC), thus providing the EU with a specific and independent legal basis on environmental matters⁶⁶⁶. After that introduction, it has been considered that the width of the definition of the objectives of the EU's environmental policy barely leaves any area of environmental policy outside the scope of the competence of the EU⁶⁶⁷. However, this competence is not exclusive, but shared with the Member States⁶⁶⁸. On the basis of this shared competence, throughout time, a profusion of directives, regulations and decisions have been adopted. This legislative effort has crystalized into a significantly consolidated European environmental policy which runs through a wide range of different environmental stakes⁶⁶⁹. Amongst the referred instruments Directive 35/2004/CE on environmental liability plays a significant role⁶⁷⁰.

In the following pages *stricto sensu* EU environmental law will be presented: firstly, environmental elements in EU primary law (a); subsequently, environmental developments in EU secondary law (b). These two aspects will be accompanied by a reflection on the general nature of the *stricto sensu* environmental law of the European Union (and an exception thereto) (c), before dealing with the environmental elements that may be found in EU internal market law (d).

marqué une avancée progressive des préoccupations environnementales dans le cadre des actions et des politiques de l'UE".

⁶⁶⁶ Vid. L. KRÄMER, *EC Environmental Law* (6th ed.), *op. cit.*, p. 6. Vid. also M. FALLON, "Le droit fondamental à l'environnement selon le droit communautaire", *op. cit.*, p. 79 and pp. 93-94: "Le contexte du marché intérieur n'est pas le seul à établir une habilitation environnementale. Ainsi, l'article 175 CE constitue bien une base juridique autonome. Cela signifie que des mesures environnementales peuvent être adoptées, tout en respectant les exigences de l'article 174 CE, sans être tenues par la condition propre à l'article 95 CE, celle de l'affectation du fonctionnement du marché intérieur, à savoir la condition de l'existence, actuelle ou future, d'une entrave aux échanges qu'il convient de supprimer, réduire ou prévenir".

⁶⁶⁷ Vid. L. KRÄMER, *EC Environmental Law* (6th ed.), *op. cit.*, pp.5-6.

⁶⁶⁸ Vid. Article 4.2 TFUE.

⁶⁶⁹ As explained by L. KRÄMER ("Introduction to European Union environmental Law" in W. SCHOLTZ & J. VERSCHUUREN (eds.), *Regional Environmental Law – Transregional Comparative Lessons in Pursuit of Sustainable Development*, New horizons in environmental law and energy series, Cheltenham, Edward Elgar Publishing, 2015, pp. 313-338, at 321), the EU's environmental policy does not replace the EU Member States' environmental policies but, together with them, aims at reaching a high level of environmental protection.

⁶⁷⁰ 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, O.J. L 143, 30.04.2004, p. 56. Despite substantial scope and structure differences, the ELD was roughly "modelled" taking into account the North-American experience with CERCLA (*Comprehensive Environmental Response, Compensation, and Liability Act* of 1980). For a discussion of this point *vid.* N. ASKOUNES ASHFORD, "Reflections on Environmental Liability Schemes in the United States and European Union: Limitations and Prospects For Improvement" in BAR ASSOCIATION OF PIREAUS (GREECE) (ed.), *Environmental Liability: Theoretical Developments and Applications*, 2010, pp. 59-69.

a. *Stricto sensu* environmental elements in EU primary law

Articles 191 to 193 TFUE constitute Title XX of the TFUE, entitled “*Environment*”. Beyond confirming the competence of the EU in environmental matters, the referred articles establish a set of environmental objectives, principles and criteria, which avail the Union’s action in the field with coherence and strength⁶⁷¹. As provided by Article 191.1, the European Union’s policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems (and in particular combating climate change). Then, following the second paragraph of the same provision, the referred policy shall aim at a high level of protection, taking into account the diversity of situations in the various regions of the Union. It is submitted, however, that both this reference to a “*high level of protection*”, as well as the one found in the aforementioned Article 114.3 TFUE, do not necessarily mean the highest possible level of protection⁶⁷². The second paragraph of Article 191.1 TFUE also provides that the Union’s environmental policy shall be based in the so-called “*principles of environmental law of the European Union*”: the precautionary principle, and the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. The legal value of these principles is controversial. Taking into account these foundations, Article 192.1 TFUE provides that “*the European Parliament and the Council, acting in accordance with the ordinary legislative procedure [...], shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191*”. This is so without prejudice to fact that, as stated by Article 193 TFUE, “[t]he protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures [...]”.

As it may be already suspected from this very summary characterization of their content, Articles 191 to 193 TFUE are not self-executing provisions: “[these articles] *are not directly applicable. [They need] to be formalised and made precise by secondary legislation in order to become applicable for administrative bodies and courts or used for or against polluters*”⁶⁷³. This

⁶⁷¹ Vid. N. DE SADELEER, “Droits fondamentaux et protection de l’environnement dans l’ordre juridique de l’UE et dans la CEDH”, *op. cit.*, pp. 25-27: “le titre XX TFUE [...] ne se contente pas de confirmer la compétence de l’Union en matière d’environnement : des finalités sont édictées, des principes énoncés, des critères établis, appelant ainsi l’action de l’Union à gagner en force et en cohérence”.

⁶⁷² Vid. J. H. JANS & H. H. B. VEDER, *European Environmental Law* (3rd ed.), Groningen, Europa Law Publishing, 2008, p. 36. As regards Article 114 TFUE, *vid.* M. FALLON, “Le droit fondamental à l’environnement selon le droit communautaire”, *op. cit.*, pp. 93 and 107 : “[e]n suite, les termes de l’habilitation fixés en 1992 pour le marché intérieur attestent désormais de l’obligation de viser «un niveau de protection élevé » [...] (art. 95 CE, § 3). C’est dire si les objectifs de la politique du marché intérieur ne se réduisent plus à un rapprochement des législations nationales, par un nivellement des niveaux de protection au plus petit dénominateur commun: la politique poursuit, à côté de l’objectif d’harmonisation, un objectif propre, notamment environnemental. Cette forme d’appropriation connaît pourtant, comme la précédente, des limites. En effet, le texte n’oblige pas au niveau «le plus» élevé [...]”.

⁶⁷³ Vid. L. KRÄMER, *EC Environmental Law* (6th ed.), *op. cit.*, p. 6. In the same sense, N. DE SADELEER, “Droits fondamentaux et protection de l’environnement dans l’ordre juridique de l’UE et dans la CEDH”, *op. cit.*, pp. 28-29: “les articles 191 à 193 TFUE (articles 174 à 176 TCE), autour desquels s’articule la politique de l’environnement, sont des dispositions d’habilitation dépourvues d’effet direct”.

lack of self-executing nature is closely related with the – frequently denounced – inexistence of a fundamental right to (a clean and / or healthy) environment within the European legal order⁶⁷⁴. As explained by Fallon, despite appearances and multiple declarations in favour of the environment, the law of the European Union does not contain any fundamental right to the environment: having a specific set of general principles devoted thereto does not entail that a given right may be asserted and enforced under any and all circumstances. The general principles of environmental law of the EU bind the EU institutions and Member States, in the implementation of their policies⁶⁷⁵. Thus, overall, no provision in the EU Treaties forbids significant environmental risks⁶⁷⁶. This entails a significant difference between EU environmental law and EU competition law, as it will be seen *infra*⁶⁷⁷.

Despite these hindrances, environmental protection is, nevertheless, often characterized as an essential concern of the EU Institutions or a fundamental value of the Union's legal order⁶⁷⁸, and the ECJ has repeatedly asserted that it constitutes one of the Union's essential objectives⁶⁷⁹. This essential or fundamental character is expressed, *inter alia*, through the existence of the aforementioned "integration clause" in Article 11 TFUE, which aims at integrating a specific – environmental – goal in a set of policies or sectors which may be the object of EU action⁶⁸⁰. This clause, which was first placed in the title on the "environment", has been relocated since 1992 in the introductory part of the TEC and TFUE, amongst the "principles". Such repositioning is devoid of legal relevance, but not necessarily of political

⁶⁷⁴ Vid. L. KRÄMER, "Introduction to European Union environmental Law", *op. cit.*, pp. 322, 334 & 335; N. DE SADELEER, "Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", *op. cit.*, pp. 25-27, and 28-29: "*Or, jusqu'à ce jour un droit fondamental à l'environnement fait cruellement défaut dans les Traités fondateurs [...] Alors que de nombreuses constitutions nationales consacrent un droit constitutionnel à la protection du milieu, le statut d'un tel droit fondamental est plutôt complexe dans le droit de l'UE*". Vid., similarly, M. FALLON, "Le droit fondamental à l'environnement selon le droit communautaire", *op. cit.*, pp. 121-123 and 128-129.

⁶⁷⁵ Vid. M. FALLON, "Le droit fondamental à l'environnement selon le droit communautaire", *op. cit.*, pp. 105-106.

⁶⁷⁶ Vid. N. DE SADELEER, "Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", *op. cit.*, p. 29: "[...] aucune disposition de droit primaire n'interdit les risques environnementaux significatifs".

⁶⁷⁷ Vid. *infra*, Part II, Chapter 4, sub-section "Synthesis", within "Challenges from the standpoint of the doctrine on the autonomous determination of the spatial applicability of EU secondary law and related theoretical constructs".

⁶⁷⁸ Vid. N. DE SADELEER, "Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", *op. cit.*, pp. 25-27: "[...] la protection de l'environnement est parvenue, au fil des réformes institutionnelles, à s'imposer comme une des préoccupations essentielles des institutions. Inspirée tantôt par la crainte d'un effritement du marché commun, tantôt par le souci d'afficher une image moins mercantile, tantôt par le dessein de sauvegarder une nature menacée, une politique européenne a ainsi vu le jour il y a près de quatre décennies [...] La consécration du développement durable, l'obligation d'intégration, la consolidation des bases juridiques d'une politique spécialement consacrée à cet objet, l'affirmation de principes, l'accroissement constant du pouvoir du Parlement européen sont autant d'éléments qui militent en faveur de la reconnaissance d'une valeur fondamentale de l'ordre juridique de l'Union" (emphasis added).

⁶⁷⁹ *Ibidem*, pp. 25-27: "Les juridictions communautaires ont en tout cas pris la mesure de cette évolution, en affirmant que la protection environnementale constituait un des objectifs essentiels de l'Union".

⁶⁸⁰ Vid. M. FALLON, "Le droit fondamental à l'environnement selon le droit communautaire", *op. cit.*, p. 82: "Une telle clause vise à intégrer un objectif spécifique dans un ensemble de politiques ou secteurs se prêtant à des actions [de la part de l'Union]".

meaning⁶⁸¹. However, “[a]ttempts in the 1990s to set up a structured process in order to make the integration requirement operational remained without success and were abandoned”⁶⁸².

After having briefly reviewed the environmental elements present in primary law, let us briefly focus on some of the above-referred EU environmental law principles. As mentioned, Article 191.2 TFEU establishes that the Union’s environmental policy is based in the following principles: the precautionary principle, the prevention principle, the principle of rectification at source, and the “polluter pays” principle. There is controversy as to the legal value of these principles. Krämer explains that, while it is clear that, at least, they are “*general guidelines for [Union] environmental policy*”, it is debatable whether they need to be understood as “*binding rules of law which apply to each individual [Union] measure*” or not⁶⁸³. Winter explicitly asserts that, in his opinion, the principles contained in Article 191 TFEU “*can only become operative if transformed into rules*”⁶⁸⁴. Since they are not self-executing, they will be reviewed only summarily.

The precautionary principle was inserted in the Treaties in 1993, as a distinct notion from the prevention principle that had been present therein since 1987. Since the Treaties do not contain any definition thereof, the meaning, scope, and dimension of the precautionary principle are open to broad interpretation⁶⁸⁵. It is nevertheless contended that the principle entails, “[i]n case of scientific uncertainty, [the] use [of] the appropriate assessment procedures and preventive measures in order to avoid damage to human health and the environment”⁶⁸⁶. The General Court has equally had the opportunity to pronounce itself on the identity of the precautionary principle, defining it as “*a general principle of [EU] law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection*

⁶⁸¹ For a review of the historical development of the integration principle within the European legal order, *vid.* J. NOWAG, “The sky is the limit: on the drafting of Article 11 TFEU’s integration obligation and its intended reach”, in B. SJAFJELL & A. WIESBROCK, *The greening of European Business under EU Law – Taking Article 11 TFEU seriously*, Abingdon, Routledge, 2015, pp. 15-31. On the repositioning *vid.* M. FALLON, “Le droit fondamental à l’environnement selon le droit communautaire”, *op. cit.*, p. 82: “La révision de 1992 a ainsi hissé la valeur environnementale à un rang particulier, en déplaçant cette clause d’intégration vers la partie introductive consacrée aux «Principes». Si ce déplacement est dépourvu en apparence de toute portée juridique précise, puisque la clause antérieure possédait déjà une force opératoire certaine, il ne manifeste pas moins un ordre de priorité, aux incidences réelles et diffuses dont l’évaluation du poids exact reste cependant encore à faire”. *Vid.* also M. PAQUES, “L’environnement, un certain droit de l’homme”, *op. cit.*, p. 50: “Cette «migration» en tête du Traité est comparable à celle qu’a subie la règle de subsidiarité à la suite du Traité de Maastricht. On observera toutefois que la règle d’intégration n’en devient pas pour autant un principe applicable à toutes les matières de compétence communautaire non exclusive, différence avec le principe de subsidiarité. Son champ d’application demeure limité aux «exigences de la protection de l’environnement ». D’autres préoccupations transversales sont également établies par le Traité mais aucune ne bénéficie d’une mise en exergue comparable [...]”.

⁶⁸² *Vid.* L. KRÄMER, “Introduction to European Union environmental Law”, *op. cit.*, pp. 313-338, at p. 335.

⁶⁸³ *Vid.* L. KRÄMER, *EC Environmental Law* (6th ed.), *op. cit.*, pp. 4-5 and 15.

⁶⁸⁴ *Vid.* G. WINTER, “The legal nature of environmental principles in International, EC, and German Law”, in R. MACRORY (ed.), *Principles of European Environmental Law*, The avosetta series 4, Groningen, Europa Law Publishing, 2004, pp. 11-28, at 19. In the same sense, M. FALLON, “Le droit fondamental à l’environnement selon le droit communautaire”, *op. cit.*, p. 112: “pour le particulier l’article [191] n’est pas invocable comme tel pur engendrer des droits à son profit”.

⁶⁸⁵ *Vid.* L. KRÄMER, *EC Environmental Law* (6th ed.), *op. cit.*, pp. 23-25.

⁶⁸⁶ *Ibidem*, pp. 23-24.

*of those interests over economic interests*⁶⁸⁷. However, in commenting this decision Pâques points out that the precautionary principle only establishes a way of dealing with uncertain risks, a process. It does not establish by itself any prohibition, any obligation of abstention. In the frame of a review of legality, the principle may lead to a decision on the illegality of a given measure if there is a complete lack of deliberation on the pertinence of acting. Nevertheless, whenever there is a deliberation, the choice of acting or not to act can hardly be judicially controlled⁶⁸⁸.

Distinguishing the aforementioned precautionary principle from the principle of prevention is not as easy a task as it may seem at first sight. Krämer reports that other authors consider the pre-existing prevention principle to be a synonym of the precautionary principle. Since the prevention principle is not defined in the TFUE either, their opinion cannot be easily rejected⁶⁸⁹. De Sadeleer considers that the origins of the principle within the EU legal order are to be found in the European Community's first environmental Action Programme, which stated that "[t]he best environmental policy concerns preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects"⁶⁹⁰. Therefore, both principles would refer to the idea that "[m]easures are to be taken [early], to prevent impairment or damage occurring [which] makes economic sense, since it is normally far more costly to clean up or remedy impairment after it has occurred –if any remedy is possible at all"⁶⁹¹. The dividing line would be found, however, in the fact that prevention aims at eradicating a danger which is certain, while precaution would entail the adoption of provisory measures in the face of a risk which is linked to a recognized scientific uncertainty⁶⁹². In such a sense, "preventive measures [...] do not depend on the appearance of ecological problems; they anticipate damage or, where it has already occurred, try to ensure it has not spread"⁶⁹³.

Before turning to secondary law, let us perform a slightly more detailed analysis of the polluter-pays principle. This special attention will be justified by later developments.

BOX 12:

The Polluter-pays principle

As previously mentioned, the "polluter pays" principle, set out in Article 191 TFUE, is one of the core principles of EU environmental law. The very notion of the principle remains extremely difficult to grasp: on the one hand, because it contains multiple aspects; on the

⁶⁸⁷ Vid. ECJ, *Artegodan v. Commission*, judgment, case T74/2000, ECLI:EU:T:2000:173.

⁶⁸⁸ Vid. M. PAQUES, "L'environnement, un certain droit de l'homme", *op. cit.*, pp. 62-63

⁶⁸⁹ Vid. L. KRÄMER, *EC Environmental Law* (6th ed.), *op. cit.*, p. 25.

⁶⁹⁰ Vid. N. DE SADELEER, *Environmental Principles – From political slogans to legal rules*, Oxford, OUP, 2002, p. 68. In the same sense, L. KRÄMER, "The Genesis of EC Environmental Principles", in R. MACRORY (ed.), *Principles of European Environmental Law*, The avosetta series 4, Groningen, Europa Law Publishing, 2004, pp. 31-47, at p. 38.

⁶⁹¹ Vid. KRÄMER, *EC Environmental Law* (6th ed.), *op. cit.*, p. 25.

⁶⁹² Vid. M. FALLON, "Le droit fondamental à l'environnement selon le droit communautaire", *op. cit.*, p. 113.

⁶⁹³ Vid. N. DE SADELEER, *Environmental Principles – From political slogans to legal rules*, *op. cit.*, p. 60.

other hand, due to the lack of consensus regarding the precise characterization of its facets⁶⁹⁴. This nebulous nature manifests itself both in the understanding of the notion under public international law and in the understanding of the notion within the law of the European Union. Within the latter, an additional element further blurs the limits of the notion: this principle, which was introduced in the EC Treaty in 1987, has several "linguistic versions" depending on which language the Treaty is consulted in. Since "*all versions are of equal value and, like any other notion in [EU] law, the Principle [is to] be interpreted autonomously [...] without having to refer to national interpretations, it is difficult to determine its content*"⁶⁹⁵. Although the developments in the following pages will largely focus on the European version of the principle, reference will be made, wherever needed, to the public international law version thereof. This is so because its origins are to be found within the framework of the OECD⁶⁹⁶.

The polluter pays principle is arguably one of the oldest principles in European environmental law, dating back to the 1970s. Yet it has not really been developed – or in any case, very little – outside of the OECD area⁶⁹⁷ until its inclusion among the principles of the 1992 Rio declaration⁶⁹⁸. At its inception, the reasoning behind it was purely economic (or more precisely, cost-effective-oriented): traditionally, polluters emitted pollutants without taking into account the impact on other substances or on the environment as such. Given that waste absorption was considered a free service provided by the environment, the internalisation of the costs of pollution was never made. Thus, over the decades, this non-internalisation of negative "environmental externalities"⁶⁹⁹ has led to the current environmental problems. The internalisation of these costs (obliging polluters to bear them without passing them on to society) has, therefore, become necessary⁷⁰⁰.

Thus, in its original version, the principle meant, in broad terms, that polluters had to internalise the costs of preventing pollution, as required by public authorities, and reflect them – totally or in part – in the price of the goods and services they offered to the public. It was

⁶⁹⁴ Vid. S. A. ATAPATTU, *Emerging principles of International Environmental Law*, Series on International Law and Development, Ardsley, Transnational Publishers, 2006, p. 439. Vid. also N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, Bruxelles, Bruylant-AUF, 1999, p. 105.

⁶⁹⁵ Vid. L. KRÄMER, *EC Environmental Law* (6th ed.), London, Sweet & Maxwell, 2007, p.27.

⁶⁹⁶ Vid. N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit., p. 53. The principle was thereafter adopted by the ECC, the Council of Europe, the Conference on Security and Co-operation in Europe, the United Nations Economic Commission for Europe, and by UNEP. Vid. the same page in De Sadeleer's work for a list of instruments which mention and / or enshrine the principle.

⁶⁹⁷ Vid. N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit., p.54: "Le fait que sa reconnaissance dans des instruments conventionnels est récente, et que la portée géographique de ces derniers ne dépasse guère un cadre purement régional, conduit certains auteurs à douter que, dans l'état actuel du droit international, le principe du pollueur-payeur puisse d'ores et déjà former une règle coutumière".

⁶⁹⁸ Vid. S.A. ATAPATTU, *Emerging principles of International Environmental Law*, op.cit., p. 439.

⁶⁹⁹ Vid. N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit., pp. 50-51. This author compares the non-internalisation of negative externalities with the civil law notion of unjust enrichment.

⁷⁰⁰ Vid. S.A. ATAPATTU, *Emerging principles of International Environmental Law*, op.cit., pp. 438-440.

only later that the definition was expanded to incorporate the notions of liability and compensation for environmental damage⁷⁰¹. Let us therefore look closer at the principle's evolution, as a preamble to a more detailed analysis of the said liability dimension.

The evolution of the "polluter pays" principle

Despite similarities, influences, and parallels, a distinction needs to be made between the birth and the evolution of the principle within the OECD framework, and within the EU framework (as a reflection of its "double existence" both in public international law and European law).

The "polluter pays" principle in the OECD⁷⁰²

In the framework of the Organisation for Economic Co-operation and Development (OECD), the principle has undergone three main phases:

- 1) The principle emerged, in a rough form, in a *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*⁷⁰³. In the text, the abolition of State aids is recommended, as is the establishment of mechanisms to attribute to polluters the costs of measures to prevent and fight pollution, but with certain restrictions: the polluter could only be imposed with the expenses relative to the measures agreed by the public authorities for the environment to be in an "acceptable" state. Thus, at this stage, the principle only had a "fiscal" dimension, which was purely preventative / *ex ante*.
- 2) Then, in a Recommendation of the Council from 5 July 1989⁷⁰⁴, the OECD also decided to apply the principle to accidental pollution involving hazardous substances and, thus not only to chronic pollution. Henceforth, the cost of measures to prevent and fight against accidental pollution will have to be attributed to all potential polluters regardless of whether they contributed to it. However, the hoped-for internalisation was not totally achieved as only the cost of "reasonable" measures had to be borne⁷⁰⁵.
- 3) Finally, in 1991, a new recommendation of the OECD Council⁷⁰⁶ established that "sustainable and cost-effective management of environmental resources" no longer simply called for the internalisation of the cost of measures to prevent and fight against pollution but also the internalisation of the cost of environmental damage once this had been caused.

⁷⁰¹ *Ibidem*, pp. 439-440.

⁷⁰² *Vid.* N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, *op. cit.*, This section, unless otherwise stated, is a synthesis of pp. 54-68.

⁷⁰³ *Vid.* OECD, *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*; C(72)128(final), 1972.

⁷⁰⁴ *Vid.* OECD, *Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution*, C(89)88(final), 1989.

⁷⁰⁵ *Vid.* S.A. ATAPATTU (*Emerging principles of International Environmental Law*, *op.cit.*, p. 446) considers this recommendation as the origin of the tendency to cover liability as well.

⁷⁰⁶ OECD, *Recommendation of the Council on the Use of Economic Instruments in Environmental Policy*; C(90)177(final), 1991.

*The "polluter pays" principle in the EU*⁷⁰⁷

Within the European legal order, the original EEC largely aligned itself with the features drawn up by the OECD, from its first environmental action plan (1973-1976)⁷⁰⁸ and, more specifically, from *Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters*⁷⁰⁹. Since then, the principle acquired normative scope in the European framework, was integrated into the treaties through the Single European Act, and was taken up in all the environmental action plans, with slight changes in its meaning which are the result of the evolution of its scope⁷¹⁰. As for this evolution, like the one outlined for the OECD, it can also be summarized in three main phases, although these are slightly more complex, due to the particularities of the European political framework:

1) Originally, the principle's only role was one of economic integration at the European level. It was an instrument of harmonisation with a view to ensuring the smooth functioning of the Single Market and preventing distortions of competition. It was reflected in a ban – save for some exceptions – on State aids for financing anti-pollution investments. Thus, in this first phase, only a partial internalisation of costs caused by chronic and continuous pollution was guaranteed.

2) Then, in a second phase, redistributive and preventative roles were added:

- the first of these functions corresponds with the internalisation-of-chronic-pollution angle. Thus, the polluter-pays principle constituted a rule whereby a proportion of the profits that polluters make from their activities would have to be ceded to public authorities whose mission it is to control, monitor and fight against the pollution that they emit.

- the second role, the preventative one, manifests itself as an aspiration to impede / prevent chronic pollution. This was emphasized since very early on by the then EEC: it was believed that the adoption of anti-pollution norms, and particularly license fees, should spur polluters to take cheaper measures to reduce pollution they cause.

3) Finally, the rise of a "curative" dimension has been witnessed. This has resulted from a shift towards the right to compensation for damages and which, according to N. De Sadeleer, comprises a tendency towards full compensation⁷¹¹. A White Paper on environmental liability

⁷⁰⁷ Vid. N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit. This section, unless otherwise stated, is a synthesis of pp. 54-68.

⁷⁰⁸ Vid. *Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment*, O.J. C 112, 20.12.1973, p. 1.

⁷⁰⁹ Vid. *Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters*, O.J. L 194, 25.07.1975, p. 1.

⁷¹⁰ Vid. N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit., p. 59, for more details on the principle's evolution throughout the programmes.

⁷¹¹ Vid. N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit., p. 65: "Ces différentes fonctions a'avèrent parfois complémentaires, parfois exclusives l'une de l'autre".

published in 2000 focused on this aspect⁷¹². In it, the EU let go of the "traditional" notion to support this compensatory application of the principle⁷¹³. Thus, according to S. A. Attapatu, beginning with this White Paper, the Commission's choice to increasingly operationalise the polluter-pays principle through a system of liability can be clearly remarked⁷¹⁴.

In any case, as stated, it can be seen that the evolution of the principle in the OECE framework, and in the EU framework, despite the differences between them, largely correspond with one another and both, with more or less intensity, lead to the appearance of the "liability" dimension in the principle. The latter requires a more detailed examination.

The "liability / compensation" dimension of the polluter pays principle

As referred, it wasn't until the 1990s that the "liability" dimension gradually penetrated the polluter pays principle as part of its – arguably still on-going – evolution. The political and legal initiatives from this time⁷¹⁵ have opened the door to a fundamental re-design of the principle, which adapted it to the challenges that began to emerge in those years⁷¹⁶. Thus, by adding an *ex-post* obligation (on the costs of responding to damage) to the costs of prevention, the principle shifted away from pure prevention towards liability / compensation⁷¹⁷. In other words, it is precisely by relying on liability, that the principle could go a step further, since it would no longer merely force the polluter to pay a sum of money to cover the cost of projects carried out by public authorities, but also ensure that victims would obtain from polluters full compensation for damages that they suffered because of the latter's activities⁷¹⁸. But what configuration does this "liability dimension" of the principle take?

Generally speaking, liability systems are divided into two main groups: so-called "objective" or "strict" systems and those based on fault. In the former, the presence of damage and the existence of a causal link between the said damage and an act or omission of a subject are enough to give rise to an obligation to repair at the expense of the latter. However, in fault-based systems, the above reasoning requires an additional element to trigger liability: a fault "giving rise" to damages. *There is fault when a general or regulatory provision was violated by a subject or when it violates a general duty of care*⁷¹⁹. It is easy to understand why the need to prove fault has always been felt by the victims of environmental damage as a substantial obstacle: other than science-related difficulties, providing evidence of a violation of general norms of care and diligence is very problematic, because of the judges' wide margin of discretion as to its definition. In any case, when carrying out an exercise in comparative law

⁷¹² *Vid.* White paper on environmental liability, COM(2000) 66 final.

⁷¹³ *Vid.* S.A. ATAPATTU, *Emerging principles of International Environmental Law*, *op.cit.*, p. 448.

⁷¹⁴ *Ibidem*, p.450.

⁷¹⁵ As for instance the above-referred 1991 OECD Recommendation and the EU's 1993, Green Paper on remedying environmental damage (COM(93) 47 (final)).

⁷¹⁶ *Vid.* S. GAINES, "The polluter pays-principle: From economic equity to environmental ethos", *Texas international law journal*, vol. 26-1, 1991, pp. 482-483.

⁷¹⁷ *Ibidem*, pp. 482-483. Following N.DE SADELEER (*Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, *op. cit.*, p. 69), this dimension "garantit une forme de redistribution ex-post".

⁷¹⁸ *Vid.* N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, *op. cit.*, p. 69.

⁷¹⁹ *Ibidem*, p. 90.

nowadays, the result obtained is that systems of civil liability still rest largely on the idea of fault giving rise to damages⁷²⁰.

According to N. De Sadeleer, the *Lugano Convention on Civil Liability for damages resulting from activities dangerous to the environment* (the preamble of which speaks about "the desirability of providing for strict liability in this field taking into account the "Polluter Pays" Principle"), and the *Green Paper on remedying environmental damage*⁷²¹ (which considers that strict liability "is likely to encourage the operator to take all appropriate preventive measures to avoid the occurrence of damage") as well as other legal instruments from the 1990s clearly suggest that the polluter pays principle requires the establishment of a strict liability regime⁷²². This position is contested by L. Krämer, who asserts that the polluter pays principle does not presuppose that a system of liability needs to be based on strict liability or on fault⁷²³. But there are also nuanced opinions which, on the one hand would consider "[that applying] a system based on fault or strict liability system [should depend] on the activity in question" but which, on the other hand, would agree that, in general, "the modern trend is to rely on strict liability since it is increasingly difficult to establish fault by the polluter"⁷²⁴. Despite these divergent opinions, it can be said that nowadays there is a clear trend towards characterizing the principle's "liability" dimension as objective / strict, at least within the EU framework. A clear proof of this point lies in the attitude of the Commission, both reflected in the referred Green Paper, as well as sporadically in other texts. Thus, for example, in the very commentary on Article 7 in the explanatory memorandum to the Rome II Regulation proposal⁷²⁵.

General assessment of the scope of the principle in the European context

"L'apport du principe est en tout cas controversé lorsqu'il tend à conforter la responsabilité civile environnementale dans sa vertu indemnitaire. La responsabilité civile contribue pourtant dans une certaine mesure à prévenir à l'avenir la répétition des comportements dommageables"⁷²⁶.

It emerges from the preceding pages that there is generally an academic consensus regarding the *ex-ante* "dimensions" and elements of the polluter pays principle. What raises controversy is its *ex post* / liability dimension. But despite the difficulties to fully grasp the latter, two traits can be identified that either characterize it already, or are nowadays gradually becoming characteristics thereof:

⁷²⁰ Vid. N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit., p. 90.

⁷²¹ Vid. EUROPEAN COMMISSION, *Green Paper on remedying environmental damage*, COM(93) 47 (final).

⁷²² Vid. N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit., p. 91.

⁷²³ Vid. L. KRAMER, "Le principe du pollueur-payeur ("Verursacher") en droit communautaire, interprétation de l'article 130 R du Traité CEE", *Aménagement-Environnement*, vol. 1991-1, 1991, pp. 3-30, at p. 3.

⁷²⁴ Vid. E.T. LARSON, "Why environmental liability regimes in the United States, the European Community and Japan have grown synonymous with the polluter pays principle", *Vanderbilt journal of transnational law*, vol. 38-2, 2005, pp. 541-575, at p. 541.

⁷²⁵ Vid. Explanatory memorandum to the Rome II proposal, p. 21.

⁷²⁶ Vid. N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit., pp. 102-103.

1) Vocation to deliver full compensation for damage. Two types of arguments justify that the compensation for environmental damage be necessarily complete:

- On the one hand, the economic arguments in previous pages. If an internalisation of negative environmental externalities is what is sought, then it would be illogical and inconsistent with the objectives of the EU's environmental policy that the internalisation be partial.

- On the other hand, comparative law points towards the idea that in many systems of tort law the very nature and logic of tortious liability requires that the perpetrator of the damage erases at least all damage that her conduct (action or omission) produced ("*tout le dommage mais rien que le dommage*"⁷²⁷), and sometimes even more – wherever punitive or treble damages are contemplated.

Additionally, the in-full nature of the *ex post* compensation is also required by the principle's preventive dimension: prevention can nevertheless only flourish if the compensation is set at a level that it encourages the guilty party to take adequate measures to prevent the compensation for damage⁷²⁸. In this sense the perpetrator of polluting activity should fully assume all the consequences of her operations on the understanding that this is in return for the privilege of being able to operate and the financial benefits that she derives from this⁷²⁹.

2) Objective / strict character: if one wishes to truly ensure adequate compensation for damage, the hard core of civil liability (fault) will have to fade in favor of its purpose (compensation for damage). The need for full compensation is linked to the objective character, because to ensure maximum compensation, the responsibility will have to overcome the requirement of fault⁷³⁰.

In any case, what is clear and undeniable, as was correctly put forward by De Sadeleer is that a system based on fault is less effective in ensuring the compensation of damage⁷³¹. If, despite the evolution of the polluter pays principle, the objective character of the *ex post* dimension remains challenged by a part of academia, some thought will need to be given to types of action at the legislative level to strengthen it.

⁷²⁷ Vid. VARIOUS AUTHORS, "General Overview" in B. WINIGER, H. KOZIOL, B.A. KOCH, R. ZIMMERMANN (eds.), *Digest of European Tort Law, vol. 2, Essential cases on damage*, Berlin, De Gruyter, 2011, pp. 15-68, at pp. 25 and 68 (References to the full compensation notion in French law and within the system of tortious liability of the European Union. Vid. the reminder of the "General Overview" for a contextualization of the question).

⁷²⁸ Vid. N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit., pp. 102-103.

⁷²⁹ Ibidem, p.91.

⁷³⁰ Ibidem, p. 91.

⁷³¹ Vid. N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit., p. 92.

b. *Stricto sensu* environmental elements in EU secondary law

Upon the basis of the above-referred primary law a solid environmental policy and a rich *corpus* of secondary legislation have been developed. This *corpus*, constituted in a significant proportion by European Directives, counted in 2010 some three hundred legal instruments, (close to 8% of the EU's secondary law), and deals, through many different techniques and means of intervention, with a very wide array of environmental issues⁷³². The referred techniques and means include the introduction of command and control mechanisms, technical standards, information and oversight processes, taxation measures, etc. The issues covered range from the regulation of chemical substances to the protection of certain ecosystems and species of flora and fauna. Overall, the *corpus* has evolved since the 1970s at the pace and under the guidelines established by several "Environment Action Programmes", the latest of them (the seventh) reaching up to 2020⁷³³. Despite the fact that, as it may be obvious, even a light description of the content of such extensive legal *corpus* would largely exceed the frame of the present study, it may nevertheless be possible to provide a rough sketch thereof in two steps. First, by briefly introducing some of the main issues and themes covered by EU environmental law⁷³⁴; then by presenting two core ideas: a reflection on the general nature of EU environmental law, and a reference to a significant exception thereto.

Climate change. - Climate change is possibly the environmental sector where the EU's international policy efforts have been most obvious. The profusion of the EU's activity in this field, both externally and internally, has led to considering climate change, possibly, a fully autonomous and self-standing field within its environmental policy⁷³⁵. The EU is working towards the global goal of keeping the rise in global temperatures within 2 degrees Celsius of pre-industrial levels. In order to do so, the 2020 climate and energy package⁷³⁶, and the 2030 climate and energy framework⁷³⁷ conform the policy framework that is meant to allow the EU to progressively reduce its greenhouse gas emissions up to 2050, transforming it into a low-carbon economy⁷³⁸. A key piece in in this process of reduction of man-made greenhouse gases is the EU European Emissions Trading System, which "*works by putting a limit on overall emissions from high-emitting industry sectors which is reduced each year. Within this limit, companies can buy and sell emission allowances as needed. This 'cap-and-trade' approach*

⁷³² *Vid.* N. DE SADELEER, "Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH", *op. cit.*, pp. 25-27.

⁷³³ *Vid.* Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'; OJ L 354, 28.12.2013, p. 171–200.

⁷³⁴ This description covers the different environmental sub-sectors which are the object of EU environmental policies, and does not deal with "horizontal" aspects, such as, for instance, environmental impact assessment (*vid.* the EIA Directive; Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. L 175, 5.7.1985, p. 40).

⁷³⁵ *Vid.* L. KRÄMER, "Introduction to European Union environmental Law", *op.cit.*, pp. 327-328.

⁷³⁶ *Vid.* http://ec.europa.eu/clima/policies/strategies/2020_en#tab-0-0 (Last consulted on December the 1st 2016).

⁷³⁷ *Vid.* http://ec.europa.eu/clima/policies/strategies/2030_en (Last consulted on December the 1st 2016).

⁷³⁸ *Vid.* http://ec.europa.eu/clima/policies/strategies/index_en.htm (Last consulted on December the 1st 2016).

gives companies the flexibility they need to cut their emissions in the most cost-effective way"⁷³⁹.

Air pollution. - Since the 1970s, Air pollution has occupied a significant position amongst the European Union's core environmental concerns. This stake is mainly addressed by the Ambient air quality directive⁷⁴⁰, which sets concentration values per m3 of air for certain substances. Should these values be exceeded, Member States are obliged to implement clean-up programmes, which may be overseen by the EU Commission⁷⁴¹. Nevertheless, general compliance by Member States with many of the EU air quality standards have helped ensure *"that the most serious urban smog and acid rain episodes no longer occur at the rate and intensities we have seen in the past"*⁷⁴². Despite this positive outcome, several air-pollution issues still need to be addressed, amongst which, high levels of fine particles, excess nitrogen deposition (eutrophication) and ozone concentrations. This is done through the development of *"a clean air policy framework that reinforces national policies"* and aims at *"implementing the Union's international obligations in the field of air pollution"*⁷⁴³.

Water protection and marine and coastal policy. - Building on the basis of the so-called Water framework directive⁷⁴⁴, surface and groundwater protection is considered to be one of the main axes of environmental protection in the European Union. This protection spans over both fresh and salt water sources, making drinking and bathing quality two of its cornerstones. These include the establishing of river basin districts, waste water treatment, and mechanisms of international cooperation⁷⁴⁵. This is further complemented, on the marine and coastal dimensions, by an enhanced system of protection for the European marine environment, whose basis is Marine Strategy Framework Directive⁷⁴⁶. This latter directive *"aims to achieve Good Environmental Status (GES) of the EU's marine waters by 2020 and to protect the resource base upon which marine-related economic and social activities depend"*, and explicitly establishes the protection of marine biodiversity as a priority, so that it is *"maintained by 2020"*⁷⁴⁷.

⁷³⁹ Vid. http://ec.europa.eu/clima/publications/docs/factsheet_ets_en.pdf (Last consulted on December the 1st 2016).

⁷⁴⁰ Vid. Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, O.J. L 152, 11.6.2008, p. 1 (entered into force on 11 June 2008).

⁷⁴¹ Vid. L. KRÄMER, "Introduction to European Union environmental Law", *op. cit.*, p. 327.

⁷⁴² Vid. http://ec.europa.eu/environment/air/index_en.htm (Last consulted on December the 1st 2016).

⁷⁴³ Vid. http://ec.europa.eu/environment/air/index_en.htm (Last consulted on December the 1st 2016).

⁷⁴⁴ Vid. Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1.

⁷⁴⁵ Vid. This is a synthesis of the information contained in L. KRÄMER, "Introduction to European Union environmental Law", *op. cit.*, p. 326, and http://ec.europa.eu/environment/water/index_en.htm (Last consulted on December the 1st 2016).

⁷⁴⁶ Vid. Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), O.J. L 164, 25.6.2008, p. 19. The Marine Directive was adopted on 17 June 2008, and came into force on 15 June 2008. Its transposition period expired by 15 July 2010.

⁷⁴⁷ Vid. http://ec.europa.eu/environment/marine/eu-coast-and-marine-policy/marine-strategy-framework-directive/index_en.htm (Last consulted on December the 1st 2016). Furthermore: *"In order to achieve GES by 2020, each Member State is required to develop a strategy for its marine waters (or*

Biodiversity and conservation of nature. - The EU's biodiversity strategy aims to stop the loss of biodiversity by 2020, to consolidate the Natura 2000 network (*"the largest network of protected areas in the world [which] stretches across all the Member States and covers over 18% of the EU's land area"*) and to tackle the threat of invasive alien species⁷⁴⁸. Its two center pieces are the so-called the "Birds Directive"⁷⁴⁹ and the "Habitats" Directive⁷⁵⁰ (the latter actually deals, beyond endangered habitats, with endangered species of flora and fauna). Overall, this policy runs through a set of legal instruments which impose upon Member States the obligation to take effective conservation measures, and which is further focused on dealing with trade in endangered species and with tests of animals⁷⁵¹.

Chemical substances and products. - The EU's chemicals legislation, whose leading instruments are the so-called REACH⁷⁵² and CLP⁷⁵³ Regulations, is considered to be a comprehensive body of law which aims at ensuring a high level of protection of human health and the environment both by providing relevant information to consumers about potential risks and by restricting the use of dangerous chemicals⁷⁵⁴. Furthermore, *"[s]pecific groups of chemicals, such as biocides, pesticides, pharmaceuticals or cosmetics, are covered by their own legislation. In addition, the European Commission is addressing the challenges posed by endocrine disruptors, chemicals that interfere with the hormone system causing adverse health effects"*⁷⁵⁵.

Waste management. - The "Waste Directive"⁷⁵⁶ is the central piece of the European legislation on waste: it establishes general standards for waste management, and provides the

Marine Strategy). In addition, because the Directive follows an adaptive management approach, the Marine Strategies must be kept up-to-date and reviewed every 6 years".

⁷⁴⁸ Vid. http://ec.europa.eu/environment/nature/index_en.htm (Last consulted on December the 1st 2016).

⁷⁴⁹ Vid. Directive 2009/147, on the conservation of wild birds, O.J. L 20, 26.1.2010, p. 7.

⁷⁵⁰ Vid. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O. J. L 206, 22.07.1992, p. 7.

⁷⁵¹ Vid. L. KRÄMER, "Introduction to European Union environmental Law", *op. cit.*, pp. 323-324.

⁷⁵² Vid. Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, O.J. L 396, 30.12.2006, p. 1.

⁷⁵³ Vid. Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006, O.J. L 353, 31.12.2008, p. 1.

⁷⁵⁴ Vid. L. KRÄMER, "Introduction to European Union environmental Law", *op. cit.*, pp. 324-325.

⁷⁵⁵ Vid. http://ec.europa.eu/environment/chemicals/index_en.htm (Last consulted on December the 1st 2016).

⁷⁵⁶ In 2008 a new "Waste Framework Directive" (Directive 2008/98/EC) replaced the original 1975 directive, which had been amended throughout the years. For an overview of the deficiencies denounced in the original directive (as amended), *vid.* H.-J. KOCH & M. REESE, "Revising the Waste Framework Directive Basic Deficiencies of European Waste Law and Proposals for Reform", *J. Eur. Envtl. & Plan. L.*, vol. 2-8, 2005, pp. 441-457. For an overview of the developments and the changes brought by the 2008 directive *vid.* H. A. NASH, "The Revised Directive on Waste: Resolving Legislative Tensions in Waste Management?", *J. Envtl. L.*, vol. 21-1, 2009, pp. 139-149.

primary definitions for the notions of waste, recycling, and recovery⁷⁵⁷. The Directive “explains when waste ceases to be waste and becomes a secondary raw material (so called end-of-waste criteria), and how to distinguish between waste and by-products”⁷⁵⁸. From this standpoint, the Directive plays a key part in enshrining what nowadays is known as the European “waste management hierarchy”, following which the Waste legislation of the Member States of the European Union has to aim, first and foremost, at preventing the production of waste. If the production of waste cannot be avoided, then efforts should aim, hierarchically, at preparing for re-use, recycling, recovering, and finally, disposing of the waste⁷⁵⁹. Furthermore, the Waste Directive specifically enshrines, within the realm of European waste policy, the polluter pays principle⁷⁶⁰, and the “extended producer responsibility”⁷⁶¹.

Along the referred lines, the European Commission has adopted a “Circular Economy Package” whose aim is to “contribute to “closing the loop” of product lifecycles through greater recycling and re-use, and bring benefits for both the environment and the economy”⁷⁶². The overall aim is to turn waste into a resource so as to create a circular economy: “if one industry’s waste becomes another’s raw material, we can move to a more circular economy where waste is eliminated and resources are used in an efficient and sustainable way”⁷⁶³.

c. The general nature of the environmental law of the European Union, and an exception thereto

As announced, after this very brief review of the main sub-sectors dealt with by EU environmental law, it is necessary to present two reflections pertaining thereto. As regards the first of them: it is surprising that some of the main monographies on the environmental law of the EU do not even devote an explicit paragraph to the nature and the functions fulfilled by the rules of this sector of the European legal order⁷⁶⁴. This may be due to the fact that their authors consider that the said information can be inferred from the descriptions they provide of both the environmental policy objectives of the EU and its environmental law principles, or

⁷⁵⁷ Vid. L. KRÄMER, “Introduction to European Union environmental Law”, *op. cit.*, p. 329.

⁷⁵⁸ Vid. <http://ec.europa.eu/environment/waste/framework/> (Last consulted on December the 1st 2016). Furthermore: “The Directive lays down some basic waste management principles: it requires that waste be managed without endangering human health and harming the environment, and in particular without risk to water, air, soil, plants or animals, without causing a nuisance through noise or odours, and without adversely affecting the countryside or places of special interest”.

⁷⁵⁹ Vid. For further details on the 5 steps of the European waste hierarchy vid. L. KRÄMER, *EU Environmental Law*, Sweet & Maxwell, 2012, p. 330.

⁷⁶⁰ Vid. The reference to the polluter pays principle in Article 14 of the Directive is of extreme significance for it entails that the said Directive “impose[s] the application of this principle in national waste legislation”, which is understood by Krämer as having “far-reaching consequences” at the domestic level (Vid. L. KRÄMER, *EU Environmental Law*, *op. cit.*, p. 345).

⁷⁶¹ Vid. *supra* note 758.

⁷⁶² Vid. http://ec.europa.eu/environment/circular-economy/index_en.htm (Last consulted on December the 1st 2016).

⁷⁶³ Vid. <http://ec.europa.eu/environment/waste/index.htm> (Last consulted on December the 1st 2016).

⁷⁶⁴ Vid. L. KRÄMER, *EU Environmental Law*, *op. cit.*; vid. J. H. JANS & H. H. B. VEDER, *European Environmental Law*, *op. cit.*

more generally, from their analyses of the content of Articles 191 to 193 TFUE⁷⁶⁵. Truth be told, the task is anything but simple, for it is not easy to define the boundaries of what is precisely to be understood as "environmental law of the European Union" to begin with. Generally, when dealing with the problem of defining environmental law *in abstracto* – i.e. not necessarily related to the law of the EU, to public international law, or to any domestic legal system – authors frequently resort to highlighting its "multidisciplinary character" which entails considering that the notion comprises provisions of very varied nature: criminal, civil, administrative nature, etc⁷⁶⁶. Despite this conceptual difficulty, which may possibly be reproduced at the European level, the bulk of legal provisions that are academically considered to be European environmental law presents the features of what at the domestic level is usually understood as being "administrative law". This is due to the fact that it can be said – just as it is done in respect of the environmental realm within the Spanish legal order – that it essentially “*regula las relaciones del hombre con su entorno y no de los sujetos privados entre sí*”, it clearly contains “*manifestaciones autoritarias y su desacato puede ser objeto de importantes represiones*”, and that “*los instrumentos que maneja son los idóneos para la conformación por parte [de la autoridad] de las conductas privadas adecuándolas a los intereses colectivos*”⁷⁶⁷. Put otherwise, when attention is paid to the different criteria distilled in comparative law for classifying the forms that administrative activity can take, it can be acknowledged that the environmental law of the EU can possibly correspond to several different forms of administrative activity as reflected in those classification criteria: regulatory power exercised in respect of the ordering and control of the activities of private subjects – including powers of administrative planning –, *stricto sensu* regulatory power – understood as “*actividad de las Administraciones Públicas dirigida a imponer el marco jurídico de la actividad de los particulares en un determinado sector económico*”, etc⁷⁶⁸.

In any case, for the purposes of this dissertation, what matters the most is the fact that the referred “*conformación por parte [de la autoridad] de las conductas privadas adecuándolas a los intereses colectivos*” as a reflection of the “*potestades de ordenación y control de la actividad privada*” implies that, generally speaking, the core function of most of the legal provisions which conform the environmental law of the EU is the prevention of the incidence

⁷⁶⁵ As well as from other Articles in the Treaties which may give rise to environmental legislation. The typical example is Article 114 TFUE on the need of harmonisation of rules within the Internal Market. Article 114 and 352 were frequently used before the introduction of Articles 191 to 193 in order to enact environmental legislation.

⁷⁶⁶ Vid. M. VINAIXA MIQUEL, *La responsabilidad civil por contaminación transfronteriza derivada de residuos, De conflictu legum*, Estudios de Derecho Internacional Privado 8, Santiago de Compostela, Universidad de Santiago de Compostela, 2006, pp. 67-73; S. JAQUENOD DE ZSÖGÖN, “Derecho Ambiental: entre la interdisciplinariedad y lo transversal”, in M. CASTAÑÓN DEL VALLE (coord.), *Derecho Ambiental: Introducción a su normativa*, Sevilla, Instituto Andaluz de Administración Pública, 2002, pp. 23-43; R. MARTÍN MATEO, *Manual de Derecho Ambiental* (3rd ed.), Cizur Menor, Aranzadi, 2003, pp. 55-56.

⁷⁶⁷ Vid. R. MARTÍN MATEO, *Manual de Derecho Ambiental* (3rd ed.), *op. cit.*, p. 55.

⁷⁶⁸ The precise terms used in Spanish are the following: potestades de ordenación y control de la actividad privada – incluyendo la potestad de planificación administrativa, la de policía y la de ordenación singular de las actividades privadas-, potestad de regulación, etc. For a brief summary of the different classifications of administrative activity in comparative Administrative Law, and their reflection in Spanish academic work, *vid.* L. COSCUELLA MONTANER, *Manual de Derecho Administrativo – Parte General* (23th ed.), Cizur Menor, Aranzadi, 2012, pp. 565-566.

of damage to the environment⁷⁶⁹. This eminently preventive character is articulated through rules which regulate different aspects of the relationships between public authorities and – potential – polluters, such as the licensing or granting of administrative permits and authorizations, the imposition of duties of notification and communication of information, establishing of technical standards, etc⁷⁷⁰.

As referred above, a second aspect which characterizes the environmental law of the EU is that this general picture has a significant exception: Directive 2004/35/EC. This Directive is the only major piece of EU environmental legislation that properly takes a reparation / compensatory approach to environmental stakes. However, it does so in a peculiar manner. Let us explore its main features.

BOX 13: Brief assessment of the European Environmental Liability Directive

In the European Union, the liability approach to environmental law and policy-making was embodied – after a multi-decade-long policy debate – in the 2004 European Environmental Liability Directive⁷⁷¹. The following pages aim at presenting a summary account of the contents of the ELD and its core characteristics (A), which will lead to considering which approach to “liability” the ELD embodies, and what is the reasoning lying underneath such policy choice (B).

A. Structure and core elements of the ELD

As made obvious from its very first recitals, the ELD’s fundamental principle is that:

“an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced”⁷⁷².

In its first article (“subject matter”) the ELD establishes that its purpose *“is to establish a framework of environmental liability, based on the “polluter-pays” principle, to prevent and*

⁷⁶⁹ Vid. S. JAQUENOD DE ZSÖGÖN, “Derecho Ambiental: entre la interdisciplinariedad y lo transversal”, *op. cit.*, p. 24; R. MARTÍN MATEO, *Manual de Derecho Ambiental* (3rd ed.), *op. cit.*, pp. 48-49; F. MUNARI & L. SCHIANO DI PEPE, “Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity”, *op. cit.*, p. 176: *“the existing sectoral legislation appears much more focussed on prevention and standard setting than liability and reparation”*.

⁷⁷⁰ Obviously, other various kinds of provisions are established. These do not necessarily have a direct impact on the behavior of private subjects: obligations of control and monitorization borne by public authorities, planning obligations, etc.

⁷⁷¹ Vid. P. WENNERAS, “A Progressive Interpretation of the Environmental Liability Directive”, *J. Eur. Envtl. & Plan. L* 2, 2005, pp. 257-267, at p. 257. The author defines the legislative process that lead to the adoption of the ELD as a “struggle”, and highlights the ambiguities that the directive bears as a consequence of such convoluted birth: *“Probably because of the many difficult inter-institutional battles and the multitude of compromises that were needed, the Directive is in several respects somewhat ambiguously drafted. Furthermore, some provisions contain compromises which, prima facie, conflict with other provisions in the Directive, or even with principles of [EU] Environmental law enshrined in Article [191(2) TFUE]”*. For a thorough commentary of the ELD, *vid.* L. BERGKAMP & B. GOLDSMITH, *The EU Environmental Liability Directive - A Commentary*, Oxford, OUP, 2013.

⁷⁷² Vid. *European Environmental Liability Directive*, recital 2.

*remedy environmental damage*⁷⁷³. It applies to damage caused by any emission, event or incident taking place after 30 April 2007⁷⁷⁴. However, from this broad declaration of principle, the Directive develops into a restricted framework, curtailed by the narrowness of the definitions that determine its material scope of application. Under the ELD, “environmental damage” is restricted to three kinds of damage:

i) *“damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species”*. Other than designations made by Member States, the identification of the species and habitats protected is done through deferring the matter to the above-referred Birds Directive and Habitats Directive;

ii) *“water damage, which is any damage that significantly adversely affects the ecological, chemical and / or quantitative status and / or ecological potential, as defined in [the so-called Water Framework Directive 2000/60/EC], of the waters concerned”*;

iii) *“land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms”*.

The notion of “environmental damage” only covers damage caused by airborne elements if and inasmuch as the airborne elements cause damage to water, land, or protected species or natural habitats. Other than this, as it may be seen, not every species or habitat is necessarily protected by the ELD, and the relevant vector for considering land damage is not its ecological or natural value in itself. Further limitations in the reach of the ELD arise from other concepts which cannot be covered within this study, such as *“favourable conservation status”*⁷⁷⁵.

⁷⁷³ Vid. L. KRÄMER (“Introduction to European Union environmental Law” in W. SCHOLTZ & J. VERSCHUUREN (eds.), *Regional Environmental Law – Transregional Comparative Lessons in Pursuit of Sustainable Development*, New horizons in environmental law and energy series, Cheltenham, Edward Elgar Publishing, 2015, pp. 313-338, at p. 323) characterizes the directive as dealing with the *“restoration of the damaged environment”*.

⁷⁷⁴ Article 17. The article contains two additional rules that further clarify its temporal application; the ELD does not apply to: *“— damage caused by an emission, event or incident which takes place subsequent to [30 April 2007] when it derives from a specific activity that took place and finished before the said date, — damage, if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred”*.

⁷⁷⁵ For an extended discussion on the breadth of these categories of damage vid. U. SALANITRO, “Directive 2004/35/EC on Environmental Liability - Work Package 2 on “Instruments, actors and institutions”, Efface – European Action to Fight Environmental Crime (available online on May the 25th 2016 under: http://ecologic.eu/sites/files/news/2015/efface_directive_2004_35_ec_on_environmental_liability.pdf) pp. 7-12. Salanitro reflects on these elements from the standpoint of ascertaining whether the differences between the ELD and other environmental directives at this level could be either the consequence of a deliberate differentiation in material scope of application or the unwanted result of lack of coordination. While he generally considers that the ELD and the Directive 2008/99/EC, on the protection of environment through criminal law should be interpreted in a consistent manner, he identifies some problems with respect of other directives, as for instance, the expression *“water body”* in the Water framework directive and *“water concerned”* in the ELD. Also, he identifies the notion of *“environment”* in the ELD as being more reduced than the notion of environment under the Directive on the assessment of the effects of certain projects on the environment (Directive 2011/92/EU). Furthermore, P. WENNERAS, (“A Progressive Interpretation of the Environmental Liability Directive”, op.

Additionally, the ELD “does not apply to nuclear risks; similarly, it does not apply to activities the main purpose of which is to serve national defence or international security nor to activities, the sole purpose of which is to protect from natural disasters”⁷⁷⁶. Overall, the reach of the ELD is significantly diminished⁷⁷⁷. Despite having such a “reduced” scope, the ELD is celebrated by some commentators for enshrining the protection of the environment *per se*, independently of whether there is proprietorship by private subjects⁷⁷⁸.

The three above-referred kinds of damage may lead to two different “liability” regimes, strict-based and fault-based respectively, depending on the kind of activity undertaken by the relevant “operator” (Article 3 ELD):

i) If the activity in question is one of those listed in Annex III of the ELD (“activities deemed to be of actual or potential concern”⁷⁷⁹), the ensuing liability is strict-based. Put otherwise, wherever damage to protected species or natural habitats, to water or to land is caused or is threatened to be caused by an operator undertaking any of the Annex III activities, no negligence or fault on his part needs to be established in order for the operator to comply with the ELD provisions. However, in certain circumstances an operator may be excused of his financial responsibility⁷⁸⁰.

ii) If the activity in question is not one of those listed in Annex III of the ELD, the ensuing liability is fault-based (the regime only applies if the operator has been “at fault or negligent”).

The directive focuses both on “preventive action” (Article 5 ELD) and “remedial action” (Article 6 ELD). As regards preventive action, the ELD established that “[w]here environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator

cit., p. 262) largely reflects on how annex I undermines the extent of the definition of “biodiversity damage”.

⁷⁷⁶ *Vid.* EU Commission, “Environmental Liability Directive: A Short Overview” (hereinafter the “Commission’s note”), explanatory note available on May the 25th 2016 under the following URL: <http://ec.europa.eu/environment/legal/liability/pdf/Summary%20ELD.pdf>

⁷⁷⁷ *Vid.*, in a similar sense, L. KRÄMER, “Introduction to European Union environmental Law”, *op. cit.*, p.323. This author denounces that the “narrow scope” of the directive, amongst other elements, “limit[s] the efficiency” thereof.

⁷⁷⁸ G. WINTER, J. H. JANS, R. MACRORY & L. KRÄMER, “Weighing up the EC Environmental Liability Directive”, *Journal of Environmental Law*, vol. 20-2, 2008, pp. 163-191, at p.168: “The Directive’s most significant innovation is that liability is extended to environmental damage as such. In contrast to most civil liability schemes, liability is not dependent on whether the environmental good belongs to someone’s property. The water, habitat or soil damaged may be in private ownership but does not have to be”. For comments on other celebrated novelties brought along by the ELD, *ibidem*, pp. 167-172.

⁷⁷⁹ *Vid.* Commission’s note, *op. cit.*, p. 2.: “Among the activities concerned, one shall find large industrial installations; waste management operations; certain installations releasing polluting substances into air; installations discharging polluting substances into water; manufacture, use, storage, processing, filling, release into the environment and onsite transport of dangerous substances and preparations; contained use of genetically modified micro-organisms and deliberate release into the environment, transport and placing on the market of genetically modified organisms”.

⁷⁸⁰ *Ibidem*: “For instance, the ELD does not apply to cases where environmental damage or an imminent threat of such damage is caused by an act of armed conflict, hostilities, civil war or insurrection, or a natural phenomenon of exceptional, inevitable and irresistible character. The same holds true, *inter alia*, in respect of damage caused by nuclear risks, national defence activities and incidents, such as oil pollution by sea-going ships, in respect of which liability or compensation falls within the scope of certain international conventions (listed in Annexes IV and V to the ELD)”.

*shall, without delay, take the necessary preventive measures*⁷⁸¹. This mandate is further complemented by the obligations to provide information to the competent authority and to follow its instructions, where the operator is provided with them. As regards remedial action, the ELD provides that “[w]here environmental damage has occurred, the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

(a) all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and / or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services, and

*(b) the necessary remedial measures, in accordance with [Annex II of the ELD]*⁷⁸².

However, it is necessary to mention that the ELD contains several “defenses” that the polluter may rely on. Amongst these, the two most serious ones are the so-called “permit” defense and the “state of the art” defense⁷⁸³: *“Member States may allow the operator not to bear the cost of remedial actions where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:*

(a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event;

⁷⁸¹ It is interesting to note that P. WENNERAS (“A Progressive Interpretation of the Environmental Liability Directive”, *op. cit.*, pp. 259-260) considers that there is a significant divergence between the way the ELD conceives “preventive action” and the breadth of the precautionary principle in EU environmental law: “[...] it is to be expected that the Court will, when called upon, give an interpretation to the notion of imminent threat in the Liability Directive, in light of the precautionary principle, which is more stringent than the words “sufficient likelihood” suggest”.

⁷⁸² As explained by the Commission’s note, which provides a summary of the content of Annex II: *“Remedying of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the environment to its baseline condition. The ELD aims at ensuring that the environment be physically reinstated. This is achieved through the replacement of the damaged natural resources by identical or, where appropriate, equivalent or similar natural components, or, as appropriate, by the acquisition/creation of new natural components. If measures taken on the affected site do not allow achieving the return to the baseline condition, complementary measures may be taken elsewhere (for instance, an adjacent site). In any case, the scale of the remedial measures should be determined in such a manner as to compensate interim losses, that is, losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the environment is restored. Any significant risk of human health being adversely affected must also be removed.*

As far as remedying of land damage is concerned, the necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk of adversely affecting human health”.

⁷⁸³ *Vid.* P. WENNERAS, “A Progressive Interpretation of the Environmental Liability Directive”, *op. cit.*, pp. 262-263. This author has criticized that a permit defense runs against the very pillar of the ELD, the “polluter-pays principle”, and that the “state of the art” defense possibly runs against the precautionary principle.

(b) an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place”⁷⁸⁴.

Following Article 8, the operator shall bear the cost for the preventive and remedial measures taken pursuant to the ELD. This means that where the operator has not undertaken the relevant preventive or remedial measures herself (or paid a third party to take them on his behalf) and, consequently, the relevant competent authority has had to bear such costs (either because it performed the measures itself or because it paid a third party to do so), the competent authority is entitled to recover such costs. The competent authority is entitled to initiate cost-recovery proceedings against the operator within five years from the date on which the relevant preventive and / or remedial measures are completed or the liable operator is identified, whichever is the later. Along these lines, it is important to highlight that “[this] remedy is not a punitive one, and it does not consist in a cash award. Rather, the operator bears the costs of remedial measures, which restore damaged natural resources or services to the baseline condition or to a similar level”⁷⁸⁵.

Other than the referred provisions, *the ELD establishes that Member States have to “take measures to encourage the development of financial security instruments and markets [...] with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive”*. As of 2011, *“eight Member States had imposed mandatory financial requirements on operators, and more are expected to follow. As regards these requirements, insurance is accepted as financial security in the relevant Member States. In this respect, April 30 2007 should operate as the relevant date for the purpose of insurance for all member states”⁷⁸⁶.*

Finally, the ELD’s relationships with both domestic and international law should be clarified:

i) In respect to the domestic law of the EU Member States, the ELD does not forbid maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage (Article 16 ELD);

ii) In respect to international law, however, the ELD *“does not apply apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in its Annex IV, including any future amendments thereof, which is in force in the Member State concerned”⁷⁸⁷* (As a matter of an example, one of the conventions referred is the CLC). Some

⁷⁸⁴ Vid. Article 8.4 ELD.

⁷⁸⁵ Vid. U. SALANITRO, “Directive 2004/35/EC on Environmental Liability - Work Package 2 on “Instruments, actors and institutions”, *op. cit.*, p. 21.

⁷⁸⁶ Vid. AON, “A Bussiness guide to the European Union Environmental Laibility Directive”, p. 3 (available on April the 22nd 2016 under the following URL:

http://www.aon.com/attachments/risk-services/Environmental_Liability_Directive.pdf).

⁷⁸⁷ Vid. Commission’s note, *op. cit.*, p. 5.

authors consider that this exclusion significantly undermines the operability of the ELD and leads to some interpretative problems⁷⁸⁸.

This brief description of the content of the ELD should provide enough background to understand the implications of the ideas presented in the following section.

B. The ELD's approach to liability: legislative background and policy arguments

Natural or legal persons affected or likely to be affected by environmental damage, or having a sufficient interest in environmental decision-making, or who can allege the impairment of a right are entitled to request the competent authority to take action under the ELD⁷⁸⁹. Furthermore, those persons shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under the ELD⁷⁹⁰. However, beyond this, private-party involvement in the operation of the ELD is almost non-existent. Article 3.3 ELD provides that

"[w]ithout prejudice to relevant national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage".

Why was this policy choice made? What assumptions underpin such choice? As reflected in this excerpt, extracted from the web of the European Commission:

*"As the ELD deals with the "pure ecological damage", it is based on the powers and duties of public authorities ("administrative approach") as distinct from a civil liability system for "traditional damage" (damage to property, economic loss, personal injury)"*⁷⁹¹.

Put otherwise, *"Insofar as the ELD provides for the financial responsibility of an operator, it lays down a framework, based on the "polluter-pays" principle, which can be qualified as one of "environmental liability", even though liability under the ELD has few in common with standard*

⁷⁸⁸ Vid. P. WENNERAS, "A Progressive Interpretation of the Environmental Liability Directive", *op. cit.*, pp. 257-259. Vid., in a similar sense, G. WINTER ET AL., "Weighing up the EC Environmental Liability Directive", *op. cit.*, p. 173.

⁷⁸⁹ Vid. Article 12 ELD; "Request for action". For further information on difficulties related to the standing of NGOs to request intervention following this article *vid.* G. WINTER ET AL., "Weighing up the EC Environmental Liability Directive", *op. cit.*, pp. 174-175.

⁷⁹⁰ Vid. Article 13 ELD; "Review procedures".

⁷⁹¹ Vid. <http://ec.europa.eu/environment/legal/liability/> (Retrieved on March the 7th 2016). The excerpt goes on as follows: *"The Directive defines "environmental damage" as damage to protected species and natural habitats, damage to water and damage to soil. Operators carrying out dangerous activities listed in Annex III of the Directive fall under strict liability (no need to proof fault). Operators carrying out other occupational activities than those listed in Annex III are liable for fault-based damage to protected species or natural habitats. The establishment of a causal link between the activity and the damage is always required. Affected natural or legal persons and environmental NGOs have the right to request the competent authority to take remedial action if they deem it necessary.*

The Environmental Liability Directive entered into force on 30 April 2004. The EU Member States had three years to transpose the Directive in domestic law. The transposition of ELD was completed by July 2010".

*civil liability rules. [...] The ELD's own specific approach is shown by the role given to competent authorities to be designated by Member States. These competent authorities will ensure the effective implementation and enforcement of the ELD; they will also safeguard the legitimate interests of the relevant operators and other interested parties [...]"*⁷⁹² (emphasis added).

However, the referred policy choice was not always part of the ELD-project. As it is highlighted by some authors, the shift from a civil law to a public-subject-based compensation scheme only happened in the very last phases of the policy debate that led to the adoption of the ELD⁷⁹³. Precisely it happened in the proposal for a directive that the Commission presented in January 2002⁷⁹⁴. As explained by Wilde:

*"[r]ather than setting out a private right of action in respect of environmental harm, the proposal [sought] to enhance the powers of regulatory authorities to require polluters to remedy environmental damage or to conduct works in default and recover costs from the polluter retrospectively. [It restricted] the role of other interested parties to a mere right to request the competent authority to act. The extent to which this 'right' could be enforced would very much depend upon public-law mechanisms in Member States for challenging failures to act by public authorities"*⁷⁹⁵.

Wilde goes on to assert that the Commission did not properly explain the reasons that led to a shift from the approach put forward by the prior white paper⁷⁹⁶, where individuals and NGOs did not have such a marginalized role in the enforcement process. He points that the reason may lie in the influence and strong pressure from the industrial sector and its concern that *"NGOs pursue political agendas and that their role is incompatible with that of a regulator, which should display neutrality in the exercise of its functions"*⁷⁹⁷. Interestingly, it is equally highlighted by Wilde that the idea of focusing on an "administrative law system" in order to deal with damage to biodiversity and contaminated lands was an idea borrowed from the US legal system:

⁷⁹² *Vid.* Commission's note, *op. cit.*, p. 1. For a reflection on the terminological confusion that arises in respect of the ELD and the mis-use or inadequate use of different terms such as "civil liability", "public liability", "administrative Liability" and "environmental liability" *vid.* G. WINTER ET AL., "Weighing up the EC Environmental Liability Directive", *op. cit.*, pp. 166-167.

⁷⁹³ *Vid.* G. WINTER ET AL., "Weighing up the EC Environmental Liability Directive", *op. cit.*, p. 164: *"This administrative approach is significantly different from the line of discussion which had prevailed at Community level during the years of preparation of the Directive and which was largely based on a system of private law compensation"*.

⁷⁹⁴ *Vid.* Proposal for a Directive of the European Parliament and of the Council of 23 January 2002 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, COM (2002) 17 provisional. In 1989, the European Commission published a Proposal for a Council Directive of 4 October 1989 on Civil Liability for Damage Caused by Waste (COM(1989) 282 final). It focused on civil liability for damage caused by waste. This was followed by a Green Paper on environmental liability (Communication of 14 May 1993 from the Commission to the Council and Parliament and the Economic and Social Committee, Green Paper on Remedying Environmental Damage COM (93) 47 final), before being followed by the White paper mentioned *infra*.

⁷⁹⁵ *Vid.* M. WILDE, "Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence", *RECIEL*, vol. 12-3, 2003, pp. 284-294, at p. 293.

⁷⁹⁶ Commission of the European Communities White Paper of 9 February 2000 on Environmental Liability, COM (2000) 66 final.

⁷⁹⁷ *Vid.* M. WILDE, "Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence", *op. cit.*, p. 293.

“Restoration of the impaired environment was to be an administrative task, and was strongly influenced by the situation in the USA, where at Federal level environmental clean-up was in the hands of the Environmental Protection Agency. The Green Paper, the White Paper, and, in great detail, the explanatory memorandum to the proposal for a directive on environmental liability extensively compared the US situation with that of a future EU system. The Commission thought that the administrative law approach in the USA was reasonable; it only tried to avoid the very high litigation costs in the USA”⁷⁹⁸.

Although the “administrative nature” of the liability embodied in the ELD may seem to be easily controllable, an alternative reading of the ELD’s content was suggested back in 2005, immediately after its adoption. Wenneras acknowledged that the text of the ELD seemed to suggest *prima facie* individuals and NGOs were precluded from bringing suits directly against the operator, but rejected this interpretation as being a “*premature conclusion*”: in his opinion, Article 9.3 of the Aarhus Convention contains a requirement that conflicts with this interpretation. It requires that members of the public get access to judicial procedures to challenge acts and omissions in violation of environmental law by private persons as well as public authorities. Therefore, Wenneras considers that interpreting the ELD as not allowing proper “private enforcement” would entail a breach of the Aarhus convention⁷⁹⁹.

Overall, again, the Commission seems to conceive redress for damage to the environment itself as necessarily being “administrative” or “public” in nature. But why is it necessarily the case? It is pointed out by certain authors that “[i]t may well be that old divisions between private and public law have to be reconsidered in the light of contemporary environmental and other social challenges”⁸⁰⁰. Why is civil liability necessarily identified only with personal injury, damage to property and economic loss? Even beyond a “labelling” problem: why is it that the Commission conceives redress for damage to the environment itself as necessarily lying on the hands of public entities? It is my contention that this conception significantly hinders the possibility of developing a true “private enforcement” of environmental law in the European Union. As it will be further discussed *infra*, amongst other elements, the lack of a “right of action” for private parties in the ELD is a severe hindrance to said private enforcement⁸⁰¹.

As it has been explained, the notions of “liability” and “reparation” embodied in Directive 2004/35/EC have a limited reach, for this Directive deals exclusively with the responsibility of polluters towards public authorities, and not towards private subjects. Put otherwise, not only does the Directive cover only specific aspects of environmental liability but it also does not confer any right to compensation on the chief of polluters for the benefit of private parties. Therefore, no individual seeking reparation for environmental damage can avail itself of the text of the Directive (or, more precisely, the domestic transpositions thereof) to obtain

⁷⁹⁸ *Ibidem*, p. 165.

⁷⁹⁹ *Vid.* P. WENNERAS, “A Progressive Interpretation of the Environmental Liability Directive”, *op. cit.*, pp. 264-265. This point will be further addressed in Chapter 3.

⁸⁰⁰ *Vid.* G. WINTER ET AL., “Weighing up the EC Environmental Liability Directive”, *op. cit.*, p. 167.

⁸⁰¹ *Vid. infra*, Chapter 3, “Difficulties as regards environmental collective redress in Europe and the interplay with a further substantive problem”.

compensation⁸⁰². Some authors consider that this directive was a missed opportunity to additionally introduce a substantive civil liability regime for environmental damages all through the EU⁸⁰³. They believe that such option would have been in general terms positive, since it would have instituted across the EU a double-fold PIL and substantive regime as it is currently the case for product liability, dealt with both by Article 5 of the Rome II Regulation and by Directive 85/374/EEC on liability for defective products⁸⁰⁴.

Other than Directive 2004/35/EC, no major piece of EU environmental legislation deals with stakes related to liability and *ex post* reparation of environmental damage. However, one may sporadically find embodiments of the polluter-pays principle, whose beneficiary is a public subject, and that, therefore follow a similar logic to the one contained in the ELD. An example thereof may be found in Article 14.1 of the consolidated version of the 2008 Waste Directive, which establishes that: *“In accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders”*.

In sum, in respect of the nature and functions of the EU’s environmental legislation, it becomes necessary to distinguish between the bulk thereof, whose main function is clearly the avoidance of the production of environmental damage (thus, prevention), and the referred Directive 2004/35/CE (and some other sporadic provisions in other texts), which fulfill an interesting albeit limited role in respect of reparation / compensation.

d. Environmental elements in EU internal market law

Up to this point, from a litigation-oriented perspective, the EU legal order has provided only limited environmental weaponry: at the human rights level, despite their political significance, environmental contents are very weak in litigation terms. As regards *stricto sensu* environmental tools, relevant primary law provisions are not self-executing and, again, only provide added value in political, policy and law-making terms. It is only within the realm of secondary law that one may find relevant environmental ammunition.

Before moving forward, there is, however, an additional tool to be considered within the legal order of the European Union: whenever an environmental threat is embodied in a given kind of good or service or, possibly, in the establishment of a given kind of industry coming from a different EU member State, the importing state may directly ban its entry or establishment in

⁸⁰² *Vid.* F. MUNARI & L. SCHIANO DI PEPE, “Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity”, *op. cit.*, p.177: “[it] only covers selected aspects of environmental liability [and] does not give private parties a right of compensation towards environmental tortfeasors. [Thus] private parties seeking redress for damage suffered as a consequence of an environmental accident will not be able to rely on the provisions of the Directive”.

⁸⁰³ *Ibidem*, pp. 188 and 192. M. WILDE (“Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence”, *op. cit.*, p. 284) has acknowledged the existence of a “long-running debate regarding the necessity for a European civil liability regime for environmental damage” (thus in the sense of liability *inter private subjects*).

⁸⁰⁴ *Vid.* Council Directive 85/374/EEC, of 25 July 1985, on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. L 210, 7.8.1985, p. 29.

its territory⁸⁰⁵. Or it may else take protective measures equivalent to quantitative restrictions in imports. In other words, in order to protect the environment, despite the fact that the law of the internal market establishes the prohibition of free-movement restrictions and measures having equivalent effect (Art. 34, 49 and 56 TFUE), EU States may enact legislation that hinders the import of goods or services, or the freedom of establishment. This legislation may be “excusable”, for environmentally-related reasons, provided certain conditions are met: they need to either be justified by the explicit grounds established in the TFUE, or else, if indistinctively applicable to domestic and foreign goods and people, they need to be justifiable under case-law-derived mandatory requirements for the public interest. They furthermore need to be proportionate.

For instance, if the environmentally-protective measure in question is a quantitative restriction on the import of a dangerous good, Art. 36 TFUE provides that Article 34 does not preclude

“prohibitions or restrictions on imports [...] on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

As it can be noticed, this *numerus clausus* list⁸⁰⁶, does not explicitly mention the “environment” as a recognized justification. It does however comprise several of the sub-notions that were identified *supra* as possibly constituting the meta-concept “environment” – life and health of humans, animals and plants – within a given legal order⁸⁰⁷. Although, at first sight, these sub-notions may not permit reaching a wider notion of environment, it has been submitted that, since the case-law of the ECJ is unclear, “public health” could in some instances be interpreted as a proxy for “environmental protection”⁸⁰⁸. Against this optimistic reading, it has equally been submitted that Article 36 TFUE needs to be interpreted in strict terms and that the protection of the – wider – environment is therefore excluded from its scope⁸⁰⁹. Conversely, it must be noted that “the broader, judicially-developed, mandatory requirements [explicitly]

⁸⁰⁵ For a more detailed review of the intersection of environmental protection and EU internal market law, *vid.* L. LAVRYSEN, “The European Court of Justice and the Implementation of Environmental Law”, in R. MACRORY (ed.), *Reflections on 30 Years of EU Environmental Law - A high level of protection?*, The avosetta series (7), Groningen, Europa Law Publishing, 2006, pp. 417-449 (especially, pp. 417-436).

⁸⁰⁶ *Vid.* C. BARNARD, *The Substantive Law of the EU – The four freedoms* (2nd ed.), Oxford, OUP, 2007, p. 65. Furthermore: “[...] the Treaty allows national measures to take precedence over the free movement of goods where they serve important interests recognized by [the Union] as valuable (so-called ‘public goods’), provided that the national measures are proportionate and do not constitute a means of arbitrary discrimination or a disguised restriction on trade [...]”. *Vid.* also N. DE SADELEER, *Environnement et marché intérieur*, Commentaire J. Megret, Bruxelles, Éditions de l’Université de Bruxelles, 2010, pp. 382-383.

⁸⁰⁷ *Vid. supra*, Chapter 1, “The evasive notion of the environment”.

⁸⁰⁸ *Vid.* C. BARNARD, *The Substantive Law of the EU – The four freedoms* (2nd ed.), *op. cit.*, pp. 77-78. This being said, it must be borne in mind that, probably, the author of this comment does not conceive the notion of “environment” as a meta-notion in the sense in which this is done within this dissertation.

⁸⁰⁹ *Vid.* N. DE SADELEER, *Environnement et marché intérieur*, *op. cit.*, p. 383.

*include environmental protection*⁸¹⁰. Finally, as mentioned, the enacted measure needs to pass a proportionality test, which entails that the measure needs to be suitable to fulfill the explicit justification or the mandatory requirement it stands for, and needs to be the least restrictive measure amongst those which can reach the desired objective⁸¹¹. Since similar argumentations may be made *mutatis mutandis* in respect of the freedom of provision of services and the freedom of establishment, no further development is required here. What is the interest of this kind of tool? In certain situations, its practical outcomes can be similar to that of resorting to preventive actions, as exercised by private associations before national courts. The difference arises, however, from the fact that this kind of environmentally-protective tool not only has a more reduced scope (it is only available against “threats” embodied in goods and services coming from another Member State) but also in the fact that it lies in the hands of States and not in the hands of private parties.

D. (Brief commentary of) WTO law

Having concluded the review of the legal order of the European Union with a note on its internal market law, it may come as no surprise that the following legal tool to be considered stems from the law of the World Trade Organization (WTO). Its dynamics and usefulness (as an environmental tool in the hands of States against “foreign” environmental threats embodied in goods or services) come relatively close to those described when reviewing the so-called “substantive” law of the EU. Therefore, WTO law will only be very briefly dealt with⁸¹². The 1994 Marrakesh Agreements, which established the WTO, were the culmination of the efforts of the “Uruguay round” to develop a more comprehensive global trade legal system, building up on the experience obtained with the 1947 “General Agreement on trade and tariffs” (GATT). The text of the 1994 GATT provides in its Article XX that the “contracting parties” are allowed to establish measures “(b) *necessary to protect human, animal or plant life or health*” or “(g) *relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*”. However, despite the fact that WTO law is being presented as a tool possibly having pro-environmental uses, it must be acknowledged that the best-known environmentally-related GATT 1947 and WTO-related cases have actually led to rulings which have put into question the relevant domestic pro-environmental legislation⁸¹³.

⁸¹⁰ Vid. C. BARNARD, *The Substantive Law of the EU – The four freedoms* (2nd ed.), *op. cit.*, p. 77. For further developments on the “mandatory requirements” *vid. pp.* 115 and following.

⁸¹¹ For considerations on the so-called “test of proportionality” and its various elements in respect of the free movement of goods, *vid. C. BARNARD, The Substantive Law of the EU – The four freedoms, op. cit.*, pp. 119-126.

⁸¹² For a more detailed review of the intersection of environmental protection and WTO law, *vid. M. MONTINI, “International Trade and Environmental Protection; The treatment of National Measures Introducing Trade Restrictions on Environmental Grounds under WTO Law”, in R. MACRORY (ed.), Reflections on 30 Years of EU Environmental Law - A high level of protection?, The avosetta series (7), Groeningen, Europa Law Publishing, 2006, pp. 531-552; U. BEYERLIN & T. MARAUHN, International Environmental Law, op. cit., pp. 423-435.*

⁸¹³ As for instance classic cases such as the “Tuna-dolphin” saga (one of its core decisions being: APPELLATE BODY REPORT, *United States – Measures Concerning the Importation, Marketing and Sale of*

E. Environmental "soft" law: codes of conduct as a part of corporate social responsibility.

BOX 14: Trail Smelter model – Variation number 4

A smelter of Zinc and lead ores, located in Ruritania, a developing country, was alleged to cause damage to trees, crops, land and human health in its surroundings, due to its emissions of sulphur dioxide fumes. The smelter is run by AEKI, a European corporation, which has its corporate seat in OZ, a Member State of the European Union, and sells its products all over the EU. AEKI's code of conduct states that: "AEKI's low prices must never be achieved at the expense of people or the environment". The Ozian section of "Friends of the Earth", together with four Ruritanian farmers files a lawsuit against AEKI for environmental tort in Ruritania. The Ozian section of the "International Consumers Association" starts proceedings against AEKI for consumer deceit in OZ.

The term soft law is anything but univocal and unambiguous. At least two different sets of elements need to be distinguished therein. First, the term is used to refer to a set of instruments already dealt with *supra*: international instruments which, despite having a "treaty-like" appearance, are actually devoid of legally-binding effect – or put otherwise, those which in principle only have "political" value⁸¹⁴. This also includes all the "guidelines", "recommendations", "principles" and similar kind of documents which are produced by international and domestic public bodies and authorities, and which are equally devoid of any binding effect⁸¹⁵.

As opposed to this first public-origin sub-set, a second group of so-called "soft-law" instruments find their origins in private parties, be it individual private subjects, private groupings, professional associations, etc. While this rich phenomenon has many facets, their common denominator is that, traditionally, they have been considered to lack legally-binding value⁸¹⁶. Be it industry-established technical standards, professional associations' guidelines, or

Tuna and Tuna Products, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837) and the "Turte-shrimp" case (APPELLATE BODY REPORT, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755).

⁸¹⁴ For instance, many of the instruments elaborated in the frame of the Rio conference, such as Agenda 21. The use of the term "soft law" was deliberately omitted in the main text *supra*, in order to minimize confusion.

⁸¹⁵ As an example, although not strictly environmentally related, the "Ruggie principles": "Guiding Principles on Business and Human Rights", annexed to the final report to the Human Rights Council prepared by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/17/31).

⁸¹⁶ These private-party-originated instruments of soft-law need to be placed in the wider context of the debate on legal pluralism and "private global norm-production" (where certain sectors of academia assert that these instruments are indeed binding "law"). For a first approximation to the topic of "law beyond the State" – despite the fact that it mixes up many different phenomena with varying features – *vid.* J. SMITS, "Democracy and (European) private law: a functional approach", in M. FAURE & A. VAN DER WALT (eds.), *Globalization and Private Law – The way forward*, Cheltenham, Edward Elgar Publishing

so-called “codes of conduct”, under traditional legal thought these instruments represent nothing but social engagements which are generally understood as not being enforceable within most legal systems⁸¹⁷.

Codes of conduct – be they collective, as drafted for instance by an industrial association, or individual, as drafted by a given corporation for its own use – embody an advanced example of what is generally known as “corporate social responsibility”: public-image statements and commitments by corporations towards the communities where they seat, which go beyond what the relevant applicable law imposes, most notably in terms of labour and environmental rights⁸¹⁸. Notwithstanding the potential binding effect of this codes, as argued by “legal pluralism” defendants⁸¹⁹, the interest of these “codes”, from a traditional legal perspective, lies in the fact that, in many instances, they are used as pivotal elements in media and marketing campaigns in order to attract clients by projecting a “good guy” image. Due to this use, NGOs and civil society tend to be critic in respect of these codes: while corporations use them in order to cleanse their public image, they cannot be held accountable whenever they are breached.

Taking into account the referred features, private-originated soft-law should not even have a place in this summary catalogue of environmental legal tools. However, it is dealt with in here because, by exploring alternative ways of addressing it, this phenomenon may come to have a more solid role to play in environmental protection: it is hereby argued that a model of

Limited, 2010, pp. 15-28 (Places in the same category rules stemming from international organizations – in the most common sense of the expression as used in public international law – and rules stemming from private organizations, stemming from private actors, etc.). For a brief selection of examples on different forms of authority-issued soft law and private-party-issued soft law (presented as instruments or methods used to achieve harmonization of international trade law) *vid.* S. EISELEN, “Globalization and harmonization of international trade law”, in M. FAURE & A. VAN DER WALT (eds.), *Globalization and Private Law – The way forward*, Cheltenham, Edward Elgar Publishing Limited, 2010, pp. 106, 107, 111 and ff. For a reflection on how private soft law arrangements may produce binding outcomes (which actually amounts to demonstrating that its “hardening” occurs through delegation of State power by the relevant authorities), *vid.* D. LEHMKUHL, “How private governance arrangements may produce binding outcomes”, *Int’l J. Civ. Soc’y L.*, vol. 30, 2005 (pp. 35-55).

⁸¹⁷ As for instance the ISO 14001 standard. For an overview of (private) environmental standard-setting as an example of “private environmental governance”, *vid.* U. BEYERLIN & T. MARAUHN, *International Environmental Law*, *op. cit.*, pp. 302-308. For a defense of the lack of “greenwashing” character of the ISO 14001 standard and other initiatives such as the GRI guidelines, *vid.* O. PEREZ, “Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics”, *Theoretical Inquiries in Law*, vol. 12-2, 2011, pp. 543-579. This author contends that reducing these initiatives to “soft law” and “greenwashing” means ignoring their potential to bring along beneficial outcomes.

⁸¹⁸ For a rather critical overview of Corporate Social Responsibility (which highlights the risks of corporate self-regulation and of the substitution of public rules by private rules, and suggests *de lege ferenda* the creation of an international legal framing of corporate social responsibility), *vid.* I. DAUGAREILH, “Responsabilité sociale des entreprises transnationales : analyse critique et prospective juridique”, *Journal de droit européen*, n. 175 (19th year), 2011, pp. 1-5.

⁸¹⁹ For a detailed defense of the status of codes of conduct as binding “law”, *vid.* G. TEUBNER “The corporate codes of multinationals: company constitutions beyond corporate governance and co-determination”, in R. NICKEL (ed.), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, ARENA report 1/09, Oslo, ARENA (Centre for European Studies – University of Oslo), 2009, pp. 261-275, especially 271. This author considers codes of conduct to be the “constitutions” of multinational corporations.

alternative litigation may possibly be developed in order to “harden” the environmental elements found in codes of conduct. Possibly, characterizing the breach of these environmental elements in codes of conduct as unfair-competition and consumer-deceit practices and allowing civil society and competitors to sue breaching corporations on the basis of this characterization may lead to fostering environmental global governance. In other words, this proposal’s core contention is that unfair competition and consumer deceit proceedings, built upon environmental aspects of codes of conduct and triggered by western civil society, may be able to compensate for the failures of regular transnational litigation in respect of environmental damage occurred in third world countries. The alternative character of the model arises from the fact that, instead of having environmental problems directly dealt with in court, the model builds upon sets of parallel non-environmental proceedings.

This suggestion is largely inspired by the Californian *Kasky v. Nike* case⁸²⁰, which, despite being settled at the beginning of this century, hinted at the existence of grounds for holding American multinational corporations liable for consumer deceit as a result of false statements on the labour practices of their overseas subcontractors. In the frame of such proceedings the ensemble of Nike’s media advertising campaign – not specifically its code(s) of conduct – was put in the spotlight for possibly breaching unfair competition / consumer deceit legislation. Taking into account this precedent, conducted under the jurisdiction and the laws of the State of California, it may not be unreasonable to envisage adapting and replicating the experience elsewhere. The alternative sets of proceedings would be conducted by consumer associations, other NGO’s, or the breaching corporation’s market competitors – in their condition of direct or indirect victims of the misleading advertising articulated through the fictive endorsement of the code⁸²¹. The idea is, thus, that false greenwashing statements may result in liability of parent corporations towards western civil society or their competitors, irrespective of whether the actual environmental problem is caused by their non-western subcontractors and / or subsidiaries, or even by themselves. Taking into account the content of the European unfair commercial practices directive⁸²², and more specifically, Article 2 (letters e, f and g)⁸²³, Article

⁸²⁰ The highest-level decision on the substance of the matter was delivered by the California Supreme Court (*Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002)), finding against Nike. The US Supreme Court’s did consider the matter preliminarily and denied *certiorari* (*Nike, Inc. v. Kasky*, 539 US 654 (2003)) thus “facilitating” the settlement between the parties.

⁸²¹ This is due to the fact that, in most cases, codes of conduct will be an integral part of an advertising strategy not oriented towards the victims, but towards western consumers.

⁸²² *Vid.* Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, O.J. L 149, 11.06.2005, p. 22.

⁸²³ “For the purposes of this directive: [...] (e) ‘to materially distort the economic behaviour of consumers’ means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise; (f) ‘code of conduct’ means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors; (g) ‘code owner’ means any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it”.

5.4⁸²⁴, and Article 6.1.B⁸²⁵ thereof, it would not seem unrealistic to consider that this litigation model may be feasible in Europe.

The strategy suggested would go as follows: the relevant alternative sets of proceedings in western countries would work: (i) as leverage for negotiating a settlement in the frame of the regular environmental proceedings – thus permitting reparation of the damage and inducing prevention in the polluter and in other market players; (ii) as a “retaliation” tool, thus causing only prevention (again both towards the polluter and other market players), but not leading (at least directly) to the reparation of the damage. In respect of prevention, it is important to highlight that the media and public image dimensions of this model play an important role therein. Since public claims of endorsement to codes of conduct aim at attracting responsible consumers, the breach of the environmental aspects of such codes may potentially have a repealing effect, the fear of which may cause prevention among transnational corporations⁸²⁶. Proceedings need to be conducted in a State where jurisdiction over the western defendant immediately responsible for the breach of the code can be directly asserted. This avoids the difficulty of having to assert jurisdiction indirectly through the detour of veil-piercing theories – or analogous conceptual constructions – which would entail a struggle to reach a veil-piercing sensitive *forum*. Of course, amongst several potentially favorable *fora*, claimants would choose a venue whose approach to characterization and choice-of-law rules leads to the most favorable system of substantive law. In this respect, content-oriented choice-of-law rules enhancing consumer redress – where available – would prove to be very valuable. Obviously, the effectiveness of what is being suggested will be highly dependent on the wording of codes of conduct, whose text may be in many cases deliberately blurry and obscure. Furthermore, as a response to the suggested litigation strategy, defendants may try to play the easy move of contesting the relevant code of conduct’s binding character, mainly on the basis of its soft-law nature and voluntary endorsement. This aspect will depend, however, on the applicable law

⁸²⁴ “4. In particular, commercial practices shall be unfair which: (a) are misleading as set out in Articles 6 and 7 [...]”.

⁸²⁵ “1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise: [...] (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:

(i) the commitment is not aspirational but is firm and is capable of being verified, and

(ii) the trader indicates in a commercial practice that he is bound by the code”.

⁸²⁶ It is generally asserted, in respect of cases of environmental degradation that “[t]he scale, complexity and media attention arising from these cases constitutes a potentially powerful deterrent against bad practices by [Multinational Corporations]” (Vid. R. MEERAN, “Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States”, *op. cit.*, p. 1). Vid. in similar senses F. ALONGI, “The Shell Nigeria case and the environmental liability of parent companies for the conduct of their foreign subsidiaries”, in M. TIMOTEO (ed.), *Environmental survey 2013*, pp. 36-45, at p. 42 (“NGOs and advocacy groups might see the advantages in term of visibility and press coverage of bringing claims before European courts”), and C. OTERO GARCÍA-CASTRILLÓN, “International litigation trends in environmental liability: a European Union-United States comparative perspective”, *op. cit.*, pp. 554-555 (“For reasons that comprise, at least, marketing and economic interests, these companies are increasingly concerned with their corporate social responsibility results and these clearly include their environmental achievements”).

and, therefore, possibly, on the characterization that may have been operated – upstream in the choice-of-law process – by the relevant jurisdiction.

The possible indirect “solidification” of codes of conduct having been explored, this summary and non-exhaustive overview of environmental “tools” has been completed.

II. Outlining the relationships amongst international instruments

Now that the main international environmental legal instruments which may potentially collide with multilateralist private international law tools have been adequately identified and presented, the analysis of their interplay may proceed. As explained *supra*, studying such interplay ultimately aims at determining the place occupied by any multilateralist environmental PIL regime – as for instance, the one in force in the EU – in the panorama of international environmental legal tools. This, in turn, is a significant step in the path towards ascertaining the worthiness and effectiveness of any multilateralist intervention of PIL in environmental matters. Bearing these ideas in mind, the following pages will be devoted to reviewing the relationships that the above-described regimes entertain with the referred kind of multilateralist PIL tool, and determining their nature.

As briefly suggested *supra*, relationships between legal instruments can be described either as non-frictional or potentially frictional. It may be recalled that non-frictional relationships can be either totally neutral, or complementary⁸²⁷, a simple example of the latter being the relationship between administrative and tort rules in fault-based domestic tort systems. The following pages will focus on exploring the points of potential friction between PIL and the preexisting tools addressing environmental issues, due to their highly defining value. Once the points of potential friction identified, the following sub-sections will consider the manners in which frictions may be avoided, or solved when they crystallize. This will ultimately determine – *prima facie* – how operational a given international legal tool is.

Potential friction comes from the apparent coincidence of the material, temporal and spatial scopes of application of several tools coming from different – or even the same – legal order. Generally speaking, if the subject matter of two legal instruments is the same and no time or space-related “corrections”⁸²⁸ are introduced, then the potential friction becomes an actual

⁸²⁷ This is not to say that complementarity is not a source of difficulties. The exact identification of the boundaries of the scopes of application of each instrument is essential. Sometimes the mere existence of a multiplicity of instruments is a source of complexity by itself, even where the relationships between the instruments is clearly envisaged, because they come from the same legal order, say the EU legal order (consider, for example, the Brussels I Regulation and the Insolvency Regulation). Since defining the relationships between given instruments presupposes clearly disentangling their scopes of application, the remainder of this chapter will assume that this operation has been performed.

⁸²⁸ As an example of time-related adjustments, beyond typical transitory provisions and dates of entry into force, the relationship between the Rome I Regulation and the 1980 Rome Convention may be mentioned. As an example of space-related adjustments, the relationship between the Brussels I BIS Regulation and the domestic rules on international jurisdiction in civil and commercial matters may be mentioned.

and explicit clash⁸²⁹. Therefore, the material scopes of each of the instruments being assessed are the critical point to be considered in order to determine if each of them occupies its own normative space.

To begin with, it is possible to discard potential frictions when the description of the material scope of one tool explicitly excludes a theme that is dealt with by another tool⁸³⁰. An example of this could be, for instance, the negative definition of the material scope of the Rome II Regulation which excludes (Article 1.2.f) “*non-contractual obligations arising out of nuclear damage*”. This gives way to the application of the International regimes on liability for nuclear energy which have been built by an ensemble of Conventions and Protocols which stem out of the Paris “*Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960*”, and “*1963 Vienna Convention on Civil Liability for Nuclear Damage*”⁸³¹.

However, where there are no explicit subject-matter exclusions, complexities begin. Most instruments which, at first sight, may potentially seem to be in friction actually do not address exactly the same subject-matter: they usually deal with subject matters which may be similar or closely-related, but not identical. Moreover, as it can be deduced from the descriptions made in previous pages, several of the tools that are being considered are wide-range tools which, *inter alia*, can be used for environmental purposes. As a consequence, the problem being faced here is subtler. A precise and detailed identification of the actual boundaries of each instruments’ material scope is, thus, mandatory.

Therefore, it is my contention that, within resembling or even identical material scopes, potential friction between two legal instruments arises from two aspects, which determine the precise configuration of each of their material scopes: i) both of them aim at playing exactly the same role, or put otherwise, they intend to fulfill the same function as their primary function⁸³² (functional dimension of the scope of application); ii) Both of them impose obligations and confer rights upon the same subjects and, moreover can be resorted to by the

⁸²⁹ This idea will be further refined and precised *infra* (“*Avoidance of frictions and solutions to actual clashes amongst international instruments*”). For the time being, it requires no further development.

⁸³⁰ This need not be done in a given provision on the material scope of subject-matter of the instrument; it can equally be done in the “definitions” section thereof, if applicable. An example in this sense can be found in Article 2.(3).(b) of the MARPOL convention: “*Discharge does not include: (i) dumping within the meaning of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, done at London on 13 November 1972[...]*”.

⁸³¹ For a detailed description, *vid.* M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO, “Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge”, *op. cit.*, pp. 623-629. *Vid.* specially pp. 625-626: these conventions contain choice-of-law rules and other mechanisms indicating that the *lex fori* will be applied in order to determine certain questions not dealt with by the conventions themselves.

⁸³² As regard the reference to a “primary” or “main” function, *vid.* Chapter 1, “*The North-American understanding of the interplay of functions: functionalism, conduct-regulating and loss-distributing tort rules*”. It may be recalled that it is contended that the EU PIL mechanism has a huge impact in prevention (as an economic incentive not to pollute). This “second degree” preventive function only has a supporting / complementary / reinforcing role. It is not its primary role. Functions need to be assessed carefully: The European Enforcement Order has the same primary function as Brussels I’s recognition and enforcement regime. It does, however, have a more restrained object. The only reason why a *lex specialis* reasoning does not apply is because the EEO Regulation explicitly establishes the possibility to opt for the Brussels I regime (Recital 20, Art. 27).

same subjects⁸³³ (subjective dimension of the scope of application). Since friction, at the level of the material scopes of the instruments is determined by a functional and a subjective dimension, the quest for points of friction between the different regimes will be performed in two stages: First, the primary functions of the different tools presented *supra* will be considered. This functional test can be performed in two different manners which focus, respectively, on the specific functions performed by the tools, or else on the structures of the situations that they can cope with. Then, the subjective dimensions of the tools which fulfill the same primary functions will be explored. Both tests can be considered, to a certain extent two consecutive phases of a same filtering. Obviously, in order for two mechanisms to be in friction, both need to be in force in the same territory. In these following pages, it will be assumed that this is the case⁸³⁴.

A. Test 1: Functional test

As announced, the first test, the “functional” test, can actually be performed in two different manners: two different operations which can be considered, to a certain extent, two sides of the same coin. The first operation, is a *stricto sensu* functional test. It concerns the identification of the primary roles or functions fulfilled by each mechanism, in order to subsequently determine which mechanisms intend to fulfill the same primary function. Put otherwise, this first operation aims at identifying which challenges each mechanism may be able to cope with, and then which mechanisms aim at coping with the same one. The second parallel operation is a “structural” assessment and displays the opposite logic to the first one. It intends to identify which challenges a given mechanism may not be able to cope with, due to the fact that their structures do not allow for it. The complementary character of these two parallel operations comes from the fact that there is a certain correspondence between the function of a given legal tool and the structural configuration of the situations it can address.

i. *Stricto sensu functional assessment*

The premise underlying this test, as already described, is quite simple: there can only be friction amongst those mechanisms which fulfill the same primary function. As established *supra*, any environmental PIL mechanism fulfills primarily an *ex post* reparation / compensation function. Compensation will be, therefore, the relevant point of reference when considering the other legal mechanisms reviewed in previous pages:

i) As explained above, the preexisting conventional regimes of international environmental law can be classified into three groups, following the roles they fulfill in terms of environmental protection: preventive *ex ante* regulation regimes, *ex post* reparation / compensation regimes, and instrumental regimes. As equally mentioned *supra*, for the purposes of this dissertation, it

⁸³³ It should be recalled that there may be interventions by the State in its own right, *parens patriae* situations, collective redress mechanisms, etc.

⁸³⁴ It must be recalled that, in respect of conventional instruments of public international law, their binding character is the consequence of their ratification.

will be considered that the third group indirectly complements the first, equally fulfilling *ex ante* regulation / prevention. Consequently, only the uniform law conventions and the Space Liability Convention remain relevant, for only these instruments embody an *ex post* reparation / compensation logic⁸³⁵.

ii) The "*Sic utere tuo ut alienum non laedas*" international obligation, made enforceable through the mechanism of State responsibility, equally responds to an *ex post* compensation / reparation logic⁸³⁶.

iii) So is the case of both the enforcement of international obligations *via* diplomatic protection and the enforcement of the European Convention on Human Rights. Nevertheless, as explained *supra*, both of them have a subsidiary character, since access to these tools is restricted to situations where all possible national legal recourses have been previously exhausted.

iv) The multiple manifestations of human rights within the EU legal order do not provide much added value. Specifically, Article 37 of the EU Charter of Fundamental Rights is not self-executing and does not create any subjective right. It simply restates the integration clause of Article 11 TFUE, introducing it in the Charter.

v) Finally, as regards EU environmental law – putting aside the non-self-executing Treaty provisions which deal with environmental matters – it must be said that a similar classification to the one performed in respect of conventional public international law may equally be performed within this body of law. From this perspective, it can be considered that either directly or indirectly – through instrumental “obligations” – most of its content has a preventive / deterrent dimension. Only the ELD may be considered to instore an *ex post* reparation / compensation regime, and this only within the narrow limits described above.

Since only *ex post* compensation / reparation schemes can potentially be in friction with an environmental PIL mechanism, both *ex ante* regulatory (and instrumental) international legal regimes, and most of the immense body of European environmental law will be hereby dismissed. Moreover, in the same vein, the ECHR regime and the mechanism of diplomatic protection need to equally be dismissed: their subsidiary nature equally places them out of risk of friction.

ii. Structural assessment

As announced *supra*, a “structural assessment” will lead to similar conclusions in respect of most of the “preventive” regimes in public international law and European law. Certain well-

⁸³⁵ Other than the Space Liability Convention, this reference points to the CLC and the Paris and Vienna Nuclear Conventions (plus their “satellite” instruments).

⁸³⁶ This assertion presupposes: i) that either private parties can somehow (thus, through means of collective redress or similar) obtain “redress” (redress in a very large sense) for environmental damage *stricto sensu*, and / or ii) that the State can obtain redress for environmental damage *lato sensu* through the enforcement of the “*Sic utere tuo ut alienum non laedas*” obligation. This will be the assumption for now; these ideas will be revisited *infra* when dealing with collective redress (Part II, Chapter 3, “*The role of private claimants: collective redress*”).

identified environmental stakes – which have been the focus of international attention, and acknowledged as extremely relevant by public opinion – have only been the object of *ex ante* preventive / regulatory regimes and not *ex post* reparation / compensation mechanisms. In some cases, this is due to the (lack of) political will by the relevant polluter-harboursing States. However, in other cases, the fact that PIL or tort-based mechanisms are not resorted to is far more than a simple policy or legislative choice: the preventive / regulatory approach is the only possible approach. This is due to the fact that, in structural terms, those situations are not suitable for being dealt with by tort-structured mechanisms. Let us take as examples, damage to the ozone layer and climate change, for instance.

Firstly, although climate-change science has evolved immensely over the years, the truth is that climate-change-related occurrences face a comparatively higher degree of scientific uncertainty when compared with other environmental issues. Scientific uncertainty, in turn, entails, for instance, significant difficulties in demonstrating the existence of a causal link: is, for instance, a given tropical storm, which causes catastrophic damage in a given region, the result of climate change, or merely a non-human-induced natural phenomenon?

But secondly, and more importantly, it was sustained *supra* that subjects (tortfeasor and victim), and the neat identification thereof, are essential elements in the configuration of any tort: who are the relevant polluters liable for the rise in global temperatures and the ensuing rise of sea level that threatens the populations of small island developing states?⁸³⁷ The enterprises submitted to the European ETS? Asian car drivers? Or the North-American companies that produced the oil that fuels the said Asian cars? Would there be uncountable potential tortfeasors? And if several of these subjects were to be held liable, to what extent may liability correspond to any of them? And what effect would the lingering effects of greenhouse and ozone-depleting gases have in the apportionment of liability?⁸³⁸ Alternatively, are the populations of small island developing states the only victims of climate change? Who

⁸³⁷ For a summary reflection on the situation of small island developing States (as for instance, the situation of the sinking island states of Kiribati and Tuvalu in the Pacific Ocean), *vid.* A. STEINER, "Help small island states win their battle against climate change" (Retrieved online on August the 21st 2016, under the following link

<https://www.theguardian.com/environment/2014/aug/29/small-island-states-climate-change-sea-level>). The article mentions the fact that "[the] total combined annual carbon dioxide output [of small island developing countries], although rising, accounts for less than 1% of global emissions". Due to that small percentage, the main text does not consider the role of "contributory fault" in the reasoning.

⁸³⁸ There is a "buffer effect" in the climate-change phenomenon, *inter alia* due to the long-term stability of the relevant gases, which entails that even if worldwide emissions were cut to zero today, the climate-change dynamics would still go on for decades. *Vid.* in this sense, for instance, the explanation given in the "twenergy" webpage (an online initiative backed-up by the Spanish energy Endesa): "*Lo que mucha gente ignora es que los gases de efecto invernadero permanecen activos en la atmósfera mucho tiempo, por eso se les denomina de "larga permanencia". Así del CO2 emitido a la atmósfera aproximadamente el 50% tardará 30 años en desaparecer, un 30% permanecerá varios siglos y el 20% restante durará varios miles de años*" (<https://twenergy.com/a/emisiones-de-co2-458>, available online on March the 17th 2017). Similar, references may be found in other internet resources ("*La buena noticia es que si de alguna manera frenáramos todas las emisiones hoy, las temperaturas seguirían subiendo solo por una década aproximadamente, antes de estabilizarse*", found online on March the 17th 2017 under the following link: <http://www.portalinformativoindustrial.com/hidrocarburos/meta-del-mundo-debe-ser-cero-emisiones-de-co2-analisis/>).

would be the relevant victims of the loss in biodiversity that ensues from the rise in oceanic temperatures?

Arguably, although the two points made are so closely related that sometimes they may not be easily distinguishable, they both have a different impact on the causal link⁸³⁹: while scientific uncertainty questions the very existence of the causal link, blurred subject-identification occurs where, despite the existence of at least a rough causal link, it is not possible to clearly attribute the tort to any given subject, or it is not possible to clearly apportion the amount of liability that corresponds to each of several potentially liable polluters. Or else, were the identification of the victims is not feasible.

While it is hereby contended that climate change is structurally not prone to give rise to tort-based litigation, the opposite opinion has been asserted by D. A. Grossman⁸⁴⁰. The referred

⁸³⁹ It is important to insist that blurred subject-identification should not be confused with scientific uncertainty: the former notion corresponds with difficulties in the identification of relevant tortfeasors (or victims) among several potential “candidates”, due to the impossibility to attribute precise contributory quotas to their possible involvement in a given tort. Some may not have contributed at all, or the contribution of all of them may have been “minimal”, the tortious result only being the consequence of the accumulation of their multiple insignificant contributions. Alternatively, the current state of the development of science may not allow for a clear apportionment of the respective contributions of different potential tortfeasors. As opposed to blurred subject-identification, scientific uncertainty refers to the fact that, for instance, there are scientific questionings regarding whether climate change is solely due to human activity or not. There are, furthermore, situations of “multiple causation” or “causation per synergy”. As explained by A. CABANILLAS SÁNCHEZ (*La reparación de los daños al medioambiente*, op. cit., p. 19): “[...] se constata que ciertos fenómenos de contaminación no tienen como origen una causa única, sino que resultan de la combinación de diversos factores. Se habla así de la contaminación por sinergia, cuya característica esencial es la de ser provocada por unos hechos múltiples y diversos, que con gran frecuencia son difíciles de determinar de forma aislada”. It must be noted that while some legal systems may have developed legal presumptions and other sorts of legal techniques which may solve some of these problems when faced with “small-scale” situations (as for instance in respect of diffuse pollution of a river). Nevertheless, it seems very difficult to enforce such kind of tort-law techniques in the frame of “macro” situations, as for instance damage arising from ozone depletion to which factories all over the globe may have contributed. An example of these techniques may be found in the way that Japanese courts dealt with the infamous Minamata case. As explained by Y. NOMI (as reported by I. SPYRIDAKIS, “Summary of the session – Mass torts”, in K. D. KERAMEUS (ed.), *XIV International Congress on Comparative Law - Athens 1994 - General reports*, Athens, Ant. N. Sakkoulas publishers, 1996, p. 146): “[...] a new method concerning proof of causation [has been] used by the Japanese courts on a mercury poisoning case (the Minamata case). The Tokyo District Court has accepted in 1992 the probabilistic causation: if probability is of 50%, then the damage allowed to the plaintiff will be 50% of the total damage. This is an exception to the general rule which demands proof with great probability (over 60%)”. As regards so-called “proportional liability”, vid. I. GILEAD, M. D. GREEN & B. A. KOCH (eds.), *Proportional Liability: Analytical and Comparative Perspectives*, Tort and insurance law, vol. 33, Berlin/Boston, De Gruyter, 2013. These authors who study the potential of this notion within European legal systems (pp. 1-73). The study is based on several country reports: for instance, to varying degrees, Czech (p. 99), Danish (p. 117), French (p. 143), German (p. 165) and Spanish (p. 295) legal systems do not presently seem to allow room for the notion of proportional liability, while the English legal system seems to adopt a hesitating and changing approach thereto (p. 121). For further considerations on problems related to causation in comparative tort law, vid. J. SPIER (ed.), *The limits of liability: keeping the floodgates shut*, The Hague, Kluwer law international, 1996 (especially pp. 14 and following), and C. VON BAR, *The common European law of torts (Vol. 2 - Damage and damages, liability for and without personal misconduct, causality, and defences)*, Oxford, OUP, 2000, pp. 433-499.

⁸⁴⁰ Vid. D. A. GROSSMAN, “Warming up to a not-so-radical idea: tort-based climate change litigation”, *Colum. J. Envtl. L.*, vol. 28-1, 2003, pp. 1-61. While there is some other literature on “climate change

author defends the idea of “*applying tort law to hold fossil fuel companies and some of their reliant industries liable for at least some of the harms caused by global warming*” on the basis of product-liability and / or the North-American legal notion of “public nuisance”. The appropriateness of this idea is sustained, *inter alia*, by arguments issued from economic analysis of law that lead to conclude that “[p]lacing climate change “accident” cost on the fossil fuel companies would thus minimize these costs”⁸⁴¹. However, the feasibility of the ideas put forward by this article faces several hurdles, some of which are explained in the following lines:

i) The article fails to properly acknowledge that one thing is the scientific consensus on the existence of the human contribution to climate change, and another thing is having scientific means to measure contributions and attribute responsibility to given kinds of industries in given countries (and not others) for the damaging consequences of given climate-change-related event (“*climate change’s effects involve shifts in climatic activity, such as more intense and more frequent storms, not the creation of distinctive phenomena, like the “signature diseases” of asbestosis [...]*”)⁸⁴². The article timidly recognizes that “*the current state of scientific knowledge might not be sufficient to adequately prove specific causation*”, but tries to contour this problem by resorting to “generic” causation (“*whether it can be said that the [phenomenon], as a general proposition, causes the sort of injuries afflicting the plaintiffs*”)⁸⁴³. Nevertheless, it is difficult to see how this may be helpful overall in order to deal with climate change: the myriad of potentially liable subjects makes even generic causation potentially impracticable.

ii) The article further contends that the problem of the lack of specific causation can be mitigated if “*governments as opposed to individuals are the plaintiffs*”⁸⁴⁴, but this observation focuses on the victim side of the problem without properly addressing the bigger difficulty which lies on the polluter side of the problem. The article asserts, moreover, that “[w]hile hundreds of companies are probably too many to be sued individually, suits could be filed against representative defendants in a defendant class of utilities”⁸⁴⁵. However, it seems that until science evolves and the “individualization” of climate-change liability becomes feasible, it

litigation” it generally encompasses a wider, blurrier notion of “liability”, and whenever it deals with what may be called liability in tort, it is highly explorative. *Vid.* for instance, J. BRUNNÉE, S. GOLDBERG, R. LORD & L. RAJAMANI, “Introduction” in R. LORD, S. GOLDBERG, L. RAJAMANI & J. BRUNNÉE (eds.) *Climate change liability: transnational law and practice*, Cambridge, Cambridge University Press, 2012, pp. 3-7. At pp. 4 and 5 they recognize that they are dealing with a large notion which encompasses “[...] the liability of national and local governments in relation to what they do (or do not do) [...]” (therefore, this notion bears a different subjective dimension; it does not focus on liability by private tortfeasors). Moreover, in “Overview of legal issues relevant to climate change” (pp. 23-49) the same authors recognize (at pp. 32-33) in respect of “private liability” that “[...] indeed the very wide scope of such claims is one policy factor against their being permitted. No action of this type has yet succeeded. Few have been brought, almost all in the USA [...]”. *Vid.*, along the same lines, J. PEEL & H. M. OSOFSKY, *Climate Change Litigation – Regulatory Pathways to Cleaner Energy*, Cambridge, Cambridge university press, 2015, pp. 4 and following.

⁸⁴¹ *Vid.* D. A. GROSSMAN, “Warming up to a not-so-radical idea: tort-based climate change litigation”, *op. cit.*, pp. 4-5.

⁸⁴² *Ibidem*, p. 24.

⁸⁴³ *Ibidem*, p. 22.

⁸⁴⁴ *Ibidem*, p. 24.

⁸⁴⁵ *Ibidem*, p. 30.

may be more interesting for NGOs and representatives to sue Governments for lack of action to deal with climate-change, as it has been successfully done by the “Urgenda foundation” against the Government of the Netherlands⁸⁴⁶.

iii) The whole proposition is built upon the idea that the selected industries that would be targeted as tortfeasors would be held liable under North-American law due to the fact that they would hold a “degree of control” over the market of their products (as for instance, oil) similar to the one held by subjects who create an “illegal market for handguns”⁸⁴⁷. However, this reasoning ignores the fact that the products targeted are lawfully commercialized and thus situations are not comparable. Furthermore, since the proposed litigation model is further based on the intervention of public-law claimants, it would lead to the ironic outcome that governments would be suing companies for commercialising products that are lawfully put into the market⁸⁴⁸. In the end, it seems difficult that, at least for now, global warming may be solved by private-party-to-private-party tort litigation⁸⁴⁹. In fact, Grossman’s idea has been tried in practice on the basis of North-American law (whose institutions could have partially allowed to overcome the structural problem) and has failed: the Supreme Court of the United States has rejected the idea of holding corporations liable under tort for the alleged results of their greenhouse gases emissions⁸⁵⁰.

In sum, the structural assessment hereby suggested entails that any situation where: i) there is an excessive amount of scientific uncertainty, or else ii) there is no “subject” – or a hardly identifiable one – on either side of the tortious relationship, bears a structural configuration which cannot be easily comprised within the scope of tort-based mechanisms and, therefore, the scope of any multilateralist environmental PIL tool. Moreover, these situations are unlikely to be compatible with the enforcement of the “*Sic utere tuo ut alienum non laedas*” international obligation either, for such regime is equally only suitable for situations which have the same type of structural configuration⁸⁵¹. Overall, this means that regimes addressing situations which do not correspond with a tort-scheme cannot be in friction with the EU environmental PIL mechanism. Therefore, using a structural reasoning leads to the same conclusion as in the previous sub-section in respect of the potential for friction amongst different tools.

⁸⁴⁶ All the relevant information on the case can be found under the following link, last checked on September the 2nd 2016: <http://www.urgenda.nl/en/climate-case/>.

⁸⁴⁷ Vid. D. A. GROSSMAN, “Warming up to a not-so-radical idea: tort-based climate change litigation”, *op. cit.*, pp. 26-27.

⁸⁴⁸ *Ibidem*, p. 55.

⁸⁴⁹ As pointed by T. W. MERRIL, “Global Warming as Public Nuisance”, *op. cit.*, p. 332.

⁸⁵⁰ Vid. *American Electric Power Co., Inc. v. Connecticut* 564 US _ (2011).

⁸⁵¹ Along these lines, vid. A. CASSESE, *International Law*, *op. cit.*, pp. 390-391: “Some commentators have rightly noted that claims that a State bears international responsibility may have to face a host of other legal problems as well as serious practical hurdles: (1) It may be difficult to prove the existence of a causal link between the culpable activity and the harm, particularly in the case of air pollution or when it is asserted that the damage has arisen as a result of activities performed years before; furthermore, harmful effects may arise as a result of many concomitant factors [...] (2) It may prove difficult to identify the author of environmental harm, particularly in the case of long-range pollution [...] (4) The assessment of damages proves to be extremely difficult and complicated in view of the numerous factors that should be taken into account [...] As noted above, practice shows that in many instances States are inclined to pay compensation for their own risky activities without however admitting any international responsibility”.

B. Test 2: The subjective test

As mentioned *supra*, the procedure in order to identify frictions involves two steps. Fulfilling the same primary function is not sufficient for two legal mechanisms to be in friction; additionally, they have to be fully coincident in their subjective dimensions. This entails verifying several points: first, whether the holder of the rights channeled through each of those mechanisms is the same in both cases. Second, in situations of “representation”, whether the subject legally claiming the enforcement of the aforementioned rights is the same in both cases. Third, whether the debtor of the obligations channeled through each of those mechanisms is the same in both cases. Subjects become key elements in the production of a friction, and consequently in the definition of the relationships amongst regimes – and ultimately among legal orders. Not all legal tools are accessible to all sorts of subjects, and not all of them allow bringing into question the responsibility / liability of any sort of subject. Only the mechanisms which are accessible to the same type of subjects and aim at the same type of subjects can collide.

i) Consequently, the “*Sic utere tuo ut alienum non laedas*” obligation, as made enforceable through the mechanism of State responsibility cannot be in friction with any environmental PIL mechanism. As depicted by the Trail Smelter case they can potentially refer to the same situation but while the second one may only be used by public subjects against public subjects, the second one may be used by private subjects – or public subjects acting as private ones – against private subjects – or, again, public subjects acting as private ones.

ii) In previous pages, any potential friction between an environmental PIL tool and the ECHR was discarded because this latter mechanism requires the prior exhaustion of remedies before national courts, and thus places itself in a subsidiary position. However, from a subjective perspective, a further reason to discard friction arises from the fact that the ECHR can only be used against public subjects – States which have ratified it. Ratifying States may possibly be held liable, under certain circumstances, for violations of ECHR rights committed by private parties. But the ECHR can never be used against private parties directly. Similar assertions may be made in respect of enforcement through diplomatic protection.

iii) Within EU environmental law, it was established that only the ELD presents a potential for friction. Again, this potential may be discarded by resorting to the subjective test. Conversely to what occurs with the ECHR, the regime of the ELD may only be resorted to by public subjects against private polluters⁸⁵².

In the light of what has been explained, as regards legal instruments in force within the European Union, only the EU’s environmental PIL regime and the uniform law conventions may potentially collide: they fulfill the same primary function; in structural terms, they may potentially address the same sort of situations; and subjectively aim at allowing private actors to bring into question the liability of private actors. All of the other mechanisms, as already explained, entertain relationships of “peaceful coexistence”, “complementarity”, or else legal

⁸⁵² Article 3. 3. of the Directive: “Without prejudice to relevant national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage”.

competition. Consequently, their existence does not have any impact whatsoever in the eventual usefulness or effectiveness of a given environmental PIL regime⁸⁵³.

This conclusion is all the more interesting because, as referred *supra*, the legal nature of the above-referred uniform-law international conventions is subtly disputed between public international and private international lawyers, with the former claiming that such conventions demonstrate that public international law is starting to consider private subjects as legal subjects of international law⁸⁵⁴.

Let us now analyze how to address the friction.

III. Avoidance of frictions and solutions to actual clashes amongst international instruments

Previous pages have narrowed down and identified which environmental legal tools are potentially in friction in terms of their material scopes⁸⁵⁵: tools in potential friction are those tools which fulfill the same primary function (in this case a reparation / compensation function) and whose respective subjective dimensions overlap completely (same subjects on each side of the legal relationship). From this standpoint, the following pages will be devoted to analyzing how frictions (either potential frictions or actual clashes) amongst tools may be dealt with.

Before addressing how potential frictions that crystallize into clashes can be solved (C), a point already referred to *supra* needs to be briefly developed: as suggested, where the potential for a material-scope friction arises, legislators tend to frequently avoid it by resorting to adjustments in the temporal scopes of the tools or, alternatively, adjustments in their spatial scopes of application. Nevertheless, these techniques of avoidance only work under certain conditions, which will be explained immediately (A). Then, before focusing on the solutions to actual clashes, it may be helpful to recall the structure of the legal instruments which may potentially be in clash (B).

⁸⁵³ This assertion is of course made *in abstracto*. *In concreto*, if any given legal tool is placed in a position of legal competition with a PIL tool, different elements will determine which one is resorted to in practice. This of course would have an impact on the actual usefulness / effectiveness of PIL.

⁸⁵⁴ *Vid.* S. MALJEAN-DUBOIS, "La portée des normes de droit international de l'environnement à l'égard des entreprises", *op. cit.*

⁸⁵⁵ Potential frictions being considered here are frictions arising within the process of the application of the law before national courts dealing with given cases. A given court may find itself bound simultaneously, for instance, by an international instrument ratified by its Member State (but not by the EU), and by a European legal instrument. Actual clashes between international instruments ratified by the EU and obligations stemming from the very European legal order (i.e. clashes produced upstream) are solved by considering that the European legal order is a monist legal order and that public international law obligations that are binding upon the EU take precedence over EU law, in exception of "constitutional EU law". *Vid.* in this sense K. LENAERTS, "Droit international et monisme de l'ordre juridique de l'Union", *Revue de la Faculté de droit de l'Université de Liège*, vol. 2010-4, 2010, pp. 505-519, especially, 506-507 and 518-519.

A. Limits to techniques of avoidance of potential friction

It was mentioned *supra* that, generally speaking, if the subject matter of two legal instruments is the same and no time or space-related “corrections” are introduced, then potential frictions become actual and explicit clashes. Nevertheless, this assertion is only fully true under all circumstances when the concerned legal instruments belong in the same legal order or belong in hierarchically-related legal orders.

In these two sorts of hypotheses, the modulation of the temporal scope of a given instrument does not present any specificity worth being mentioned. Such modulation will entail establishing the precise conditions of the application in time of a given legal tool. Usually – although not exclusively – it will amount to establishing the explicit precedence of the latter regime over the prior one, which will be thus repealed⁸⁵⁶.

Beyond time-related adjustments, the most interesting technique used in order to avoid friction is the modulation of the spatial scope of application of different instruments. This kind of adjustment in respect of instruments which belong within the same legal order allows for the coexistence of different legal regimes therein, potentially catering for different political objectives depending on the spatial aspects of different situations. An example of this would be the introduction within a given legal order of different legal regimes for internal and international situations. Equally, the referred kind of adjustment may allow for multi-level governance where instruments come from two hierarchically-related legal orders. This will be so provided that the instrument in the hierarchically superior order limits its own scope of spatial application, thus providing room for the instrument in the hierarchically inferior legal order. An example of this is the coexistence of the Brussels I Regulation and domestic heads of international jurisdiction in the EU Member States.

Thus, the above referred adjustments suffice in order to ensure that potential frictions do not materialize into actual clashes amongst legal instruments coming from the same legal order, or from two different hierarchically-related legal orders. Otherwise, if time or space-related adjustments are not introduced, and the two relevant legal instruments belong within the same legal order, well-known principles of the general theory of law – principle of competence, principle of hierarchy, *lex posterior* principle, *lex specialis* principle – come into play in order to solve the clash. In a similar fashion, when the relevant instruments belong in hierarchically-related legal orders, hierarchy solves clashes. However, if the relevant legal orders do not entertain any sort of hierarchical relationship, then the assertion above needs to be nuanced.

In respect of possible time-related adjustments, there is not a single solution when there is potential conflict between the International and the European Legal orders. Each of them has different rules on how to address conflicts related to the application in time of legal instruments. From the standpoint of public international law, the relevant rules are contained in Article 30 of the Vienna Convention on the law of treaties, concluded at Vienna on 2 May

⁸⁵⁶ But this is not always necessarily the case. As equally mentioned *supra*, the Rome Convention is still in force as regards obligations which were born before the entry into application of the Rome I Regulation.

1969⁸⁵⁷. From the standpoint of EU law, a distinction needs to be drawn between international obligations which predate accession to the EU, and those which do not. Article 351 TFUE addresses the first category establishing that prior obligations prevail⁸⁵⁸, for as long as they do not lead to a violation of the Constitutional Principles of the EU⁸⁵⁹. As regards the second category, despite the equal value of the international obligation and the European obligation in front of the national judge, a certain preference for the European obligation is likely to appear, in order to avoid an action on failure to fulfill obligations / infringement proceedings⁸⁶⁰.

In respect of space-related adjustments, they would only work if both legal instruments limited their spatial applicability in a compatible and coordinated manner. Otherwise, potential friction would become an actual clash.

The problem faced at this stage of the reasoning is that the legal instruments that have been identified as being in potential clash in previous pages do not belong in the same legal order, and those legal orders do not entertain a hierarchical relationship to one another. Before exploring what happens in these situations, let us briefly recall the structure of the instruments which may potentially be in clash.

⁸⁵⁷ Article 30 - Application of successive treaties relating to the same subject-matter: "1. *Subject to article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.* 2. *When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.* 3. *When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.* 4. *When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.* 5. *Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty*".

⁸⁵⁸ Article 351 TFUE: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States".

⁸⁵⁹ Vid. T. HARTLEY, "The Foundations of European Union law", *op. cit.*, p. 98.

⁸⁶⁰ Vid. M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO, "Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge", *op. cit.*, p. 641 (This assertion pre-dates the Kadi judgments).

B. Analysis of the structures of the instruments in potential friction

Previous pages have identified as colliding legal tools in force in the EU, on the one hand, the uniform-law international conventions⁸⁶¹, and the EU environmental PIL mechanism:

i) The uniform substantive law regimes are articulated through international conventions containing, in general, up to three types of elements. First, a set of substantive uniform rules establishing a special regime of liability. Second, a scope rule (*règle d'applicabilité* in French), which is a special kind of choice-of-law rule "(whether legally established, whether deduced from a legal text through interpretation) which determines the spatial scope of application of the substantive rules to which it is attached"⁸⁶². And finally, (possibly) a set of rules on International Jurisdiction.

ii) In turn, the EU environmental PIL mechanism is composed by the combination of any relevant head of jurisdiction (potentially, Art. 4 or Art.7.2 of the Brussels I BIS Regulation, or else a head of jurisdiction taken from the national system of private international law of the relevant Member State) and the choice-of-law rule on environmental torts contained in Art.7 of the Rome II Regulation. Following its third article, the Rome II Regulation has a universal scope of territorial application, which means that such regulation is used to determine the law applicable to non-contractual obligations irrespective of the location in the world where the relevant events took place (In other words, despite the fact that its connecting factors may point to a State law which is not the law of a Member State of the European Union). This means that every single case of international environmental tort over which the courts of a Member State prove to have jurisdiction will trigger the use of the Rome II Regulation in order to determine the applicable law, irrespective of where the elements of the tortious relationship are located. Put otherwise, the Rome II Regulation – and thus the choice-of-law rule contained in Article 7 – is submitted to a *Règle d'applicabilité* (Article 3) which establishes its universal application.

Taking into account these structures, it is possible to conceive the clash in a number of different ways. As a matter of simplicity, the existence of rules on international jurisdiction in both types of mechanism will be omitted⁸⁶³. Therefore, the clash will be analyzed in respect of the remainders of both mechanisms, and can be conceptualized in two ways. The clash between the uniform substantive rules, and the substantive rules to which Art. 7 of the Rome II Regulation points to in a given case, arises either from: i) a clash between the scope rules in the uniform substantive law conventions, on the one hand, and the scope rule (Art. 3) of the Rome II Regulation, on the other; or ii) from a clash between the scope rules in the uniform substantive law conventions, on the one hand, and the regular choice-of-law provision in

⁸⁶¹ Although ratified by a majority of Member States, it must be recalled that not every single one of them has ratified these conventions.

⁸⁶² These are described by the ECJ as "a *criterion* [for a legal instrument] *to be applicable*" (vid. ECJ, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, judgment, *op. cit.*; paragraph 125). The definition is an English translation of F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), *op. cit.*, p. 129.

⁸⁶³ There is of course also a clash between the rules on international jurisdiction in the Conventions and the rules of international jurisdiction in European or – where applicable – domestic instruments. However, it may be solved in a rather similar way, hence why these pages do not focus on them.

Article 7 of the Rome II Regulation, on the other. Whichever conceptualization is chosen several possibilities can be envisaged in order to solve the clash.

C. Solutions to the friction

In order to either dilute or solve a clash like the one that is being dealt with, there are three main different solutions that may be resorted to⁸⁶⁴. First, when introduced by the legislator, compatibility rules may allow the coexistence of otherwise clashing legal instruments (i). Otherwise, either at a judicial or at a pre-litigation stage, a *lex specialis* reasoning may become the appropriate solution to the friction (ii). Finally, as an alternative to *lex specialis* or wherever this technique is not possible, the material scopes of the clashing instruments may possibly be “accommodated” by way of judicial interpretation (iii)⁸⁶⁵.

i. Compatibility rules

The insertion of a compatibility rule in one of the otherwise clashing legal instruments is the first maneuver which may solve frictions between mechanisms⁸⁶⁶. An example thereof may be

⁸⁶⁴ This list is by no means exhaustive. For instance, so-called “disconnection clauses” will not be dealt with. These can be defined as “*clauses providing that the application of the rules of a Regional Economic Integration Organisation (such as the EU) remain unaffected when the organisation becomes a party to the convention*” (Vid. P. A DE MIGUEL ASENSIO & J. S. BERGÉ, “The place of International Agreements and European Law in a European Code of Private International Law”, in M. FALLON, P. LAGARDE, S. POILLOT-PERUZZETTO (dir.), *Quelle architecture pour un code européen de droit international privé*, Peter Lang 2011, pp. 185-211, at 199). For a detailed assessment of disconnection clauses, vid. J. ETIENNE, *La coexistence de normes multilatérales et européennes : une étude de la déconnexion et de la substitution*, Louvain-la-Neuve, UCL, 2010.

⁸⁶⁵ Interestingly, U. BEYERLIN & T. MARAUHN (*International Environmental Law*, op. cit., pp. 277-279) conduct a reasoning similar to the one suggested in these pages, but only within the realm of international law. The focus on Art. 30 of the 1969 Vienna Convention of the law of the treaties, and the *lex specialis* and *lex posterior* rules. Furthermore, they mention a technique, “*harmonizing treaty interpretation*”, which seems to correspond with what has been called here as “*judicial accommodation*”, but no specific example thereof is provided.

⁸⁶⁶ “Reglas de compatibilidad” in Spanish. Vid. J.C. FERNÁNDEZ ROZAS & S. SÁNCHEZ LORENZO, *Curso de Derecho Internacional Privado* (7th ed.), op. cit., p. 603. Putting aside a slight difference in terms of vocabulary (“*replace*” vs. “*take precedence*”) the technique that seems to be embodied in Article 28 of the Rome II Regulation has equally been referred to in French legal literature as “*substitution*”. Following J. ETIENNE, *La coexistence de normes multilatérales et européennes : une étude de la déconnexion et de la substitution*, op. cit., p. 42: “[...] la substitution consiste à insérer, dans un acte de droit dérivé de l’Union européenne, une disposition spécifique en vertu de laquelle le droit de l’UE prévaut sur ou remplace, dans les rapports entre Etats membres, le droit conventionnel multilatéral de même objet, qu’il s’agisse d’accords bilatéraux conclus entre Etats membres ou de conventions multilatérales qui les lient à des Etats tiers. Bien souvent, la clause de substitution s’insère dans un complexe de dispositions organisant, sur le même mode que les traités et en application de principes fort semblables, les rapports entre l’acte de droit dérivé et d’autres instruments conventionnels de même objet. Outre la substitution, il est parfois énoncé que les accords tant antérieurs que postérieurs conclus par les Etats membres dans le domaine de l’acte unilatéral ne sont pas affectés, s’ils permettent d’approfondir l’objectif interne poursuivi par l’Union européenne”. This autor acknowledges that this phenomenon has not been studied thoroughly (p. 5). For further considerations vid. J. ETIENNE, *La*

found in Art. 28 of the Rome II regulation ("*Relationship with existing international conventions*"), which establishes that:

"1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation".

This provision partially transposes the philosophy underlying Art. 351 TFUE to international commitments by Member States with third countries which were ratified prior to the enactment of the Rome II Regulation⁸⁶⁷. Notwithstanding several opinions which qualify this article as transitional law⁸⁶⁸, or as a reflection of the "principle of priority in time"⁸⁶⁹, this provision seems to operate in a somewhat more sophisticated fashion than that⁸⁷⁰. Article 28 may be understood as suppressing the friction through the introduction of limitations on both the geographical and temporal scopes of the regulation. Rome II will give way to any convention laying down conflict-of-law rules on non-contractual obligations which cumulatively i) precedes the adoption of Rome II and ii) binds at least one State which is not a Member of the EU. Thus, the combination of a geographical and a temporal element determine whether a given instrument stemming from the international legal order can take precedence over this European legal instrument.

Nevertheless, the compatibility rule in Article 28 of Rome II does not suffice to solve the clash between Rome II and the uniform law conventions. To consider that Article 28 is needed in

coexistence de normes multilatérales et européennes : une étude de la déconnexion et de la substitution, op. cit., pp. 42 and following.

⁸⁶⁷ *Vid.* M. ILLMER, "Art. 28", in P. HUBER (ed.) *The Rome II Regulation: A Pocket Commentary*, Munich, Sellier – European Law Publishers, 2011, p. 443; A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations, op. cit.*, p. 661. P. A. DE MIGUEL ASENSIO AND J. S. BERGÉ assert that: "[...] although previous agreements between Member States and third countries are in principle not affected by EU law, such criterion applies only to the extent that agreements are compatible with EU law [...]" ("The place of International Agreements and European Law in a European Code of Private International Law", *op. cit.* pp. 193).

⁸⁶⁸ *Vid.* M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO, "Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge", *op. cit.*, p. 640. There they qualify a similar provision as "*droit transitoire*", Article 19 of the 2003 Kiev protocol: "*Article 19 - Relationship between the Protocol and bilateral, multilateral or regional liability agreements; Whenever the provisions of the Protocol and the provisions of a bilateral, multilateral or regional agreement apply to liability and compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters, the Protocol shall not apply provided the other agreement is in force for the Parties concerned and had been opened for signature when the Protocol was opened for signature, even if the agreement was amended afterwards*".

⁸⁶⁹ *Vid.* M. ILLMER "Art. 28", *op. cit.*, p. 443.

⁸⁷⁰ A more classic example of "transitional law" can be found, for instance, in Article 9 of the Marpol Convention ("*Other treaties and interpretation*"): "(1) Upon its entry into force, the present Convention supersedes the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, as between Parties to that Convention".

order to render the scope rules found in the uniform law conventions compatible with Rome II (i.e. to consider that those scope rules are prior “*conflict-of-law rules relating to non-contractual obligations*”) would entail considering as well that the theory of preemption of external competences of the European Union would prevent Member States from inserting scope rules in any future convention of substantive law dealing with international torts⁸⁷¹. Since such approach would be highly problematic, and would seem hardly reconcilable with the practical needs that Member States may face in future international practice, an alternative solution is needed⁸⁷².

It has been suggested that, in order to avoid this problem, Art. 28 should not be understood as aiming at the scope rules in any of the uniform law conventions, but limiting itself to conventions “[...] *which lay down conflict-of-law rules* [...]” in the strictest meaning of such expression (*règle de rattachement* in French)⁸⁷³. Thus, the theory of preemption would only reach *stricto sensu* choice-of-law rules and, subsequently, Member States would still be competent to ratify substantive-tort-law conventions containing scope rules⁸⁷⁴.

In the light of the insufficiency of Article 28 let us analyze further techniques which may be required to deal with the clash that is being analyzed.

ii. *Lex specialis reasoning*

As explained *supra*, the potential clash can be conceptualized, at least, in two different manners: i) as a friction between the scope rules in the uniform substantive law conventions, on the one hand, and the scope rule (Article 3) in the Rome II Regulation, on the other; or else ii) as a friction between the scope rules in the uniform substantive law conventions, on the one hand, and the regular choice-of-law provision in Article 7 of the Rome II Convention, on the other. Whichever conceptualization is chosen, since compatibility rules are not appropriate to solve the clash, the solution comes from a *lex specialis* reasoning: the interplay between the uniform law conventions and the Rome II Regulation can be conceived as a *lex specialis* - *lex generalis* relationship, which would entail the precedence of the uniform law conventions over the EU environmental PIL mechanism. This precedence may be conceptualized in three possible ways, the choice amongst which would not have any significant practical impact: i) it may be considered that the scope rules in the substantive law conventions are *lex specialis* in respect of the Scope rule found in Article 3 of the Rome II Regulation⁸⁷⁵; ii) it may be

⁸⁷¹ Vid. M. FALLON, “La relation du Règlement Rome II avec d’autres règles de conflit de lois”, *Revue de Droit Commercial*, vol. 2008-6, 2008, pp. 549-556, at p. 557.

⁸⁷² J. BASEDOW (“Rome II at Sea – General Aspects of Maritime Torts”, *op. cit.*, pp. 127-128) equally rejects, on the basis of a different reasoning, the idea that this clash may be solved by Article 28. He considers that the fact that there is a uniform law convention entails that there is simply no “conflict of laws” as required by certain linguistic versions of Article 1.1 of the Rome II Regulation.

⁸⁷³ Vid. M. FALLON, “La relation du Règlement Rome II avec d’autres règles de conflit de lois”, *op. cit.*, p. 557.

⁸⁷⁴ Probably the article only aims at the Hague Conventions on product liability and road accidents.

⁸⁷⁵ Vid. M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO, “Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-

considered that the scope rules, as the embodiment of a special kind of choice-of-law rule, take precedence over a “classic” multilateralist choice-of-law rule as the one in Article 7 of the Rome II Regulation; iii) finally, it may be considered that that, due to their specific and special character, substantive uniform law regimes take precedence over the EU environmental PIL mechanism: international substantive rules would thus be *lex specialis* in respect of multilateralist choice-of-law rules⁸⁷⁶. In sum, the end result is that the *lex specialis* principle solves the above-described clash by giving priority to the uniform substantive law conventions over any environmental PIL mechanism.

Although the *lex specialis* technique is the appropriate solution to the friction dealt with in these pages, it may not necessarily always help to solve this kind of issues: there may be frictions between two legal regimes that belong in two different non-hierarchically-related legal orders where *lex specialis* is not a workable solution, simply because, for instance, the overlapping parts of their material scopes deal with identical matters⁸⁷⁷. Thus, a third technique needs to be presented, notably because it has been resorted to in the field of environmental occurrences, in respect of a uniform law convention, and a European legal instrument different from Rome II⁸⁷⁸.

iii. “Accommodation” of material scopes

Whenever there is a clash between two legal instruments which stem from non-hierarchically-related legal orders, a third technique becomes relevant: the accommodation of the material scopes of the instruments in friction through judicial interpretation. This technique constitutes an alternative to the *lex specialis* reasoning, wherever it is judicially considered not feasible, or not appropriate. Possibly, the best manner in which the technique may be presented is through the analysis of a case-law example. Thus, the reflection in the following pages will be articulated around *Commune de Mesquer*⁸⁷⁹, a case that brings to the spotlight the interplay of

belge”, *op. cit.*, p. 615. Despite the fact that the reference pre-dates de Rome II Regulation, it follows this kind of logic.

⁸⁷⁶ *Vid.* M. ILLMER, “Art. 28”, *op. cit.*, p. 446. Probably the commentaries to Art. 2, 21 and 24-25 in the GIULIANO-LAGARDE report (*Report on the Convention on the law applicable to contractual obligations* by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I; Official Journal C 282, 31/10/1980 P. 0001) are meant to be understood in a similar way. *Vid.* also K. SIEHR, *The Rome II Regulation and Specific Maritime Torts: Product Liability, Environmental Damage, Industrial Action*, *RebelsZ*, vol. 74, 2010, pp. 139-153, at p. 147, explicitly qualifying the conventions as *leges speciales* taking precedence over the Regulation.

⁸⁷⁷ This was the situation in the IATA case, which will be dealt with *infra*, “The relevant precedent: the IATA air passenger rights case”.

⁸⁷⁸ As it will be seen shortly, the European legal instrument in question, the European Waste Directive, is only in friction with the CLC and the superfund because it is a legal tool that, in principle, only confers rights upon public subjects.

⁸⁷⁹ *Vid.* ECJ, *Commune de Mesquer v. Total France and Total International Ltd.*, judgement, case C-188/07, ECLI:EU:C:2008:359. Hereinafter simply “*Commune de Mesquer judgement*”.

two environmental legal regimes that belong to different legal orders (which do not entertain a hierarchical relationship to one another)⁸⁸⁰.

BOX 15: The *Commune de Mesquer* case

The factual roots of the case lie in a contract concluded by the Italian energy company ENEL and the French company Total International Ltd around 1999 for the delivery of heavy fuel oil intended to be used as fuel for electricity production. The fuel had to be carried from Dunkirk (France) to Milazzo (Italy). To this purpose, Total International Ltd bought the heavy fuel oil from Total raffinage distribution, now Total France SA, and chartered the vessel Erika to carry it⁸⁸¹. However,

*“On 12 December 1999 the oil tanker Erika, flying the Maltese flag and chartered by Total International Ltd, sank about 35 nautical miles south-west of the Pointe de Penmarc’h (Finistère, France), spilling part of her cargo and oil from her bunkers at sea and causing pollution of the Atlantic coast of France”*⁸⁸².

As a consequence of the ensuing events, the village of Mesquer – hereinafter simply “Mesquer” – started legal proceedings against both of the Total companies before the Tribunal de commerce de Saint-Nazaire (Commercial Court, Saint-Nazaire) on 9 June 2000, its goal being that the companies be held liable *“for the consequences of the damage caused by the waste spread on the territory of the municipality and be ordered jointly and severally to pay the costs incurred by the municipality for cleaning and anti-pollution measures, namely EUR 69 232.42”*⁸⁸³. Mesquer sustained its position on the European Waste Directive⁸⁸⁴. Conversely, the Total companies contended that the relevant applicable law was actually that arising from the above-referred CLC and Superfund, that following the provisions in both instruments their relevant obligations had already been fulfilled, and that, therefore, were not liable to the extent claimed by Mesquer⁸⁸⁵. After making its way up the French court system, the case

⁸⁸⁰ It is necessary to recall that the friction analyzed here concerns only the CLC & superfund, on the one hand, and the European Directive, on the other. Rome II does not collide with the Directive due to their different subjective dimensions.

⁸⁸¹ *Vid. Commune de Mesquer*, judgment, para. 24.

⁸⁸² *Ibidem*, para. 25.

⁸⁸³ *Ibidem*, para. 26. E. SOMERS & G. GONSAELES, “The consequences of the sinking of the M/S ERIKA in European waters: towards a total loss for international shipping law?”, *op. cit.*, p. 62. As precised by the referred authors, the action concerned “*residual damage*”, i.e. damage still pending after compensation by the “Superfund”, and related to “*costs incurred by the municipality for cleaning and anti-pollution measures*”.

⁸⁸⁴ *Vid.* Council Directive 75/442/EEC of 15 July 1975 on waste, O.J. L 194, 25.7.1975, p. 47.

⁸⁸⁵ Among the concepts for which liability was sought in the different proceedings before the different levels of the French court system the following claims can be found: liability for the death of “*thousands of seabirds wintering along the [French west] coast*” (channeled through an indemnification to a “*bird protection Non Governmental Organisation (NGO)*”, remedy for “*damage caused to the reputation and brand of many public undertakings*”, “*reimbursement of costs undertaken for cleaning and decontamination operations on [the] coastline*” (N. DE SADELEER, “Liability for Oil Pollution Damage versus Liability for Waste Management: The Polluter Pays Principle at the Rescue of the Victims”, *J. Env'tl. L.*, vol. 21-2, 2009, pp. 299-307, at p. 300). This later aspect is extremely significant: notwithstanding the

reached the ECJ *via* a reference for a preliminary ruling from the *Cour de Cassation* (French Supreme Court for Civil and Criminal matters)⁸⁸⁶. Basically, the *Cour de Cassation* wanted to know whether either the oil spilled, or the oil spilled and mixed with water and sediment could be considered “waste” under the Waste directive or not⁸⁸⁷. Up to this point nothing extraordinary; through the two first questions of the reference for a preliminary ruling the ECJ was only being requested to interpret a given notion as contained in a European legal instrument. It is the third and final question in the reference which puts the potential clash between international environmental obligations – indirectly – on the table. The question reads as follows:

“[...] can the producer of the heavy fuel oil (*Total raffinage [distribution]*) and / or the seller and carrier (*Total International Ltd*) be regarded as the producer and / or holder of waste within the meaning [the Directive] and for the purposes of applying Article 15 of that directive, even though at the time of the accident which transformed it into waste the product was being transported by a third party?”⁸⁸⁸

The ECJ provides an answer in rather cryptic terms. Certain academics have been as far as criticizing the judgment for being ambiguous⁸⁸⁹. Therefore, the ECJ’s response is hereby reproduced in almost integral terms:

fact that the first cleanup was “enormous”, secondary cleanup had to be conducted in 2000 and 2001 (*Vid. V. J. G. POWER, “The Commune de Mesquer case”, op. cit., p. 487*).

⁸⁸⁶ For the sake of clarity, it is necessary to recall that the court actually ruling on the substance of the case was the *Cour de Cassation*. Therefore, after the judgment commented was rendered by the ECJ, the matter returned to the *Cour de Cassation*, which ruled on the merits. However, as it may be understood, in many instances by establishing how the domestic court needs to interpret the law, the ECJ is indirectly / implicitly ruling on the merits. As stated in Article 267 of the Treaty on the functioning of the European Union (TFUE): “Article 267

(*ex Article 234 TEC*)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court [...]”.

⁸⁸⁷ Despite the fact that this point may be interesting and somewhat relevant for further developments (“*The TOTAL companies considered [...] that they were not liable for waste disposal costs on the grounds notably that the fuel oil which was accidentally spilled could not be treated as waste*”), it is not possible to deal with it. For a commentary on the part of the judgment that related to the notion of “waste”, *vid. N. DE SADELEER, “Liability for Oil Pollution Damage versus Liability for Waste Management: The Polluter Pays Principle at the Rescue of the Victims”, op. cit., pp. 301-304. Vid. also E. SOMERS & G. GONSAELES, “The consequences of the sinking of the M/S ERIKA in European waters: towards a total loss for international shipping law?”, op. cit., pp. 66-70.*

⁸⁸⁸ *Vid. Commune de Mesquer Judgment, para. 28.*

⁸⁸⁹ *Vid. C. ECKES, “Case C-188/07, Commune de Mesquer v. Total France and Total International Ltd., Judgment of the Court (Grand Chamber) of 24 June 2008 [2008] ECR I-4501; Case C-301/08, Irène Bogiatzi v. Deutscher Lufipool, Soci&t Luxair, European Communities, Luxembourg, Foyer Assurances SA, Judgment of the Court (Fourth Chamber) of 22 October 2009, not yet reported”, Common Market L. Rev., vol. 47, 2010, pp. 899-915, at p. 915. Vid. also E. SOMERS & G. GONSAELES, “The consequences of the*

"[...] Article 15 of Directive 75/442 does not preclude the Member States from laying down, pursuant to their relevant international commitments such as the Liability Convention and the Fund Convention, that the shipowner and the charterer can be liable for the damage caused by the discharge of hydrocarbons at sea only up to maximum amounts depending on the tonnage of the vessel and / or in particular circumstances linked to their negligent conduct. That provision also does not preclude a compensation fund [...] from assuming liability, [...]"⁸⁹⁰.

"However, if it happens that the cost of disposal of the waste [...] is not borne by that fund, or cannot be borne because the ceiling for compensation for that accident has been reached, and that, in accordance with the limitations and / or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the shipowner and / or the charterer, even though they are to be regarded as 'holders' within the meaning of Article 1(c) of Directive 75/442, such a national law will then, in order to ensure that Article 15 of that directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came. In accordance with the 'polluter pays' principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur"⁸⁹¹.

"The obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation [...]"⁸⁹².

On the basis of this slightly ambiguous answer, it will be sustained in the following pages that the ECJ actually performed an accommodation of the material scopes of the legal instruments involved, so as to dilute the friction and allow their "peaceful" and possibly complementary coexistence. This will be demonstrated sequentially, by first presenting some academic assessments of the decision (a) and, then, the case-law background that this decision is generally related to (b), before presenting a more appropriate legal precedent (c), and an alternative reading of the decision (d).

a. The Court's response: analysis and critique

The following pages will offer a review of the main opinions that academia has offered as to what is the actual content of the judgment, and as well as to the evaluation to be made of it. These opinions range from celebratory approvals to utter critiques. De Sadeleer for instance considers that:

sinking of the M/S ERIKA in European waters: towards a total loss for international shipping law?", *op. cit.*, p. 72.

⁸⁹⁰ *Vid. Commune de Mesquer* Judgment, para. 81.

⁸⁹¹ *Vid. Commune de Mesquer* Judgment, para. 82. A thoughtful critique on how and when (under which circumstances) there may or may not be a contribution to the risk can be found in E. SOMERS & G. GONSAELES, "The consequences of the sinking of the M/S ERIKA in European waters: towards a total loss for international shipping law?", *op. cit.*, p. 72.

⁸⁹² *Vid. Commune de Mesquer* Judgment, para. 83.

“[the] case ensures a correct application of the ‘polluter pays’ principle, which may not be emasculated by limitation or exemption systems resulting from international agreements to which the [European Union] is not party. The chain liability provided for by [the Directive] is thus supplementary to the Fund system. Victims of ecological damage may, therefore, be compensated on both international and [EU] law grounds”.

The said author, therefore, approves the ECJ’s decision for he considers that its reasoning is convincing and sound. He contends that an international obligation arising from a treaty which has not been integrated in the EU legal order may not impede a rule in a Directive from having its full effects in the light of the guiding principle of the policy to which the said directive relates. He celebrates the fact that the EU legal order retains its full autonomy, but concedes that the solution would have probably been different if the European Union had been party to the CLC and the superfund⁸⁹³.

Conversely, Power comments on the fact that there are two sides to the decision, and not all of them are necessarily positive: *“the availability of another route of redress such as the EU’s Waste Directive could present opportunities for those affected by pollution but problems for those who were involved in pollution”*⁸⁹⁴. He points to the fact that, despite possible consequences for the latter, the judgment consecrates the said availability. Moreover, he further contends that

*“[t]he case is extremely important because it not only decides that oil spilt from tankers becomes waste; it thereby gives the opportunity for third parties to claim compensation under the Waste Directive over and above any compensation which they could obtain under [...] international law. However, the case probably has a greater significance: it demonstrates how the [ECJ] will almost always ensure that no law (whether national or international) will stand in the way of EU law. And, in that regard, the result was perhaps not surprising: the [ECJ] has since the outset insisted that EU law is a special legal regime and has fought valiantly to ensure the supremacy of EU law over Member State law and that Member States or public international law do nothing to undermine EU law; this case is another example, but in a new field, of that intention and commitment by the EU’s highest court”*⁸⁹⁵.

In turn, Eckes highlights the fact that *“[t]he Court fully confirmed the autonomy of the European legal order and reminded national authorities that their first priority must remain European law”*⁸⁹⁶ even if, however, *“the ECJ could be criticized for failing to give a clear ruling on how [the CLC and the European waste regime] relate to each other”*⁸⁹⁷.

⁸⁹³ Vid. N. DE SADELEER, “Liability for Oil Pollution Damage versus Liability for Waste Management: The Polluter Pays Principle at the Rescue of the Victims”, *op. cit.*, p. 307.

⁸⁹⁴ Vid. V. J. G. POWER, “The Commune de Mesquer case”, *op. cit.*, p. 487.

⁸⁹⁵ *Ibidem*, p. 503.

⁸⁹⁶ Vid. C. ECKES, “Commune de Mesquer”, *op. cit.*, p. 903.

⁸⁹⁷ *Ibidem*, p. 915.

Along the same lines, Somers and Gonsaeles equally highlight the decision's ambiguous argumentation⁸⁹⁸, and are furthermore highly critical of its content:

*"The Court gives the impression that [European] law is being applied in order to circumvent the existing international liability and compensation system, in particular as regards the protection of the charterer in the 1992 CLC Convention and the limits of liability as conventionally agreed [...] Going around the system implies that it will be eroded and that it is just a matter of time before it will collapse – partially or entirely. And this cannot be the objective of [European] legislation anyhow"*⁸⁹⁹.

It is worth highlighting at this point that Somers' and Gonsaeles' understanding of the decision is based on the assumption that the judgment is exclusively motivated by environmental policy, as the result of an enhanced environmental concern which had grown in the years that followed the Erika shipwreck. As described by the same authors, the Erika shipwreck caused a swift and ambitious reaction by the European Union: during the period 2000 to 2005 the EU launched a series of sets of policy proposals aiming at improving the safety of seaborne oil trade, the so-called "Erika-I", "Erika-II" and "Third Maritime Safety Package". All of these policy proposals are considered to be the result of the European Commission's dissatisfaction with the available existing international schemes, and are said to have been enacted *"precisely with an eye [put on improving] the liability and damage compensation system actually in force"*⁹⁰⁰. Thus, the said authors consider that the underlying environmental motivation behind this political and policy background – which they acknowledge as being a *"a noble one"* – is what explains *"implicitly if not explicitly the ensuing ruling of the ECJ in the case Commune de Mesquer v Total where the Court apparently was guided by the principle of full and just compensation for victims of oil pollution as inspired by the polluter pays principle"*⁹⁰¹. Precisely, it is at this very point, the said "noble motivation", that lies the core of their critique: they criticize the application of *"general environmental law – developed from a terrestrial point of view – to the shipping industry"*⁹⁰². The distinction between environmental law as applied on land, and maritime law as a separate legal field seems to be of an essential nature for them. The said distinction, combined with their understanding of the historical roots of maritime law leads them to contend that

"[m]aintaining that it is not relevant whether we are dealing with the marine or the terrestrial environment is too simple and of a charming ingenuousness. It should be clear that it does matter. The marine environment is of an international character par excellence for which mainly global (or intentionally global) solutions concerning damage caused by vessels have been developed. Many of these legal rules, systems and schemes originate independently from traditional legal sources applicable on land. Whilst it is correct that an absolute separation between the different legal systems is untenable nowadays, the genesis of maritime and admiralty law is such that it is

⁸⁹⁸ Vid. E. SOMERS & G. GONSAELES, "The consequences of the sinking of the M/S ERIKA in European waters: towards a total loss for international shipping law?", *op. cit.*, p. 72.

⁸⁹⁹ *Ibidem*, p. 67.

⁹⁰⁰ *Ibidem*, p. 60. For a detailed explanation of the political position of the EU after the Erika shipwreck, and the evolution both in legislation and policy approach, *ibidem*, p. 60-64.

⁹⁰¹ *Ibidem*, p. 61.

⁹⁰² *Ibidem*, p. 57. The same idea with different wording can be found in p. 58.

*virtually impossible nor correct to simply apply terrestrial legal rules in a generic way at sea. In particular the legal system of limitation of liability for vessel caused damage should not be discarded – even implicitly – in order to fulfil certain policy ambitions whether valuable or not*⁹⁰³.

However, notwithstanding the fact that the assertions made by Somers and Gonsaeles as regards the political and policy background that ensued the Erika shipwreck are likely to be right, the reading on the ratio behind the *Commune de Mesquer* judgment defended in these pages is different. As it will be seen, it is hereby contended that, even beyond considerations as regards the supremacy of the European legal order, the ultimate explanation for the decision lies in the ECJ's conciliatory understanding of the interplay between legal orders. But before fully exploring this alternative understanding of the judgment, let us first briefly examine the contextual framework within which the judgment is usually placed.

b. The relationship between EU law and international law

It is not the purpose of the following pages to provide a review of the law of the external relations of the European Union, for excellent treatises on the subject exist⁹⁰⁴. Its actual purpose is, in fact, double: on the one hand, it aims at briefly sketching the context – case-law framework – where academia tends to place the *Commune de Mesquer* case. On the other hand, it aims at briefly recalling the legal tools that the law of the external relations of the European Union provides for addressing situations where the interplay between legal orders is at stake.

As regards the first point, the *Commune de Mesquer* case can be very easily linked with the ECJ's decisions in the *Mox Plant*⁹⁰⁵ and *Intertanko*⁹⁰⁶ cases, for both involve the relationship of the European legal order with environmental regimes in the international legal order, respectively the UNCLOS⁹⁰⁷, and the UNCLOS and the MARPOL conventions⁹⁰⁸. The first case considers whether by instituting dispute-settlement proceedings against the UK under the UNCLOS, concerning the MOX plant located at Sellafield (UK), Ireland had failed to fulfil its obligations under the Treaties of the EU. However, since the core of the case lies in interpreting the extent of the distribution of competences between the EU and its Member States, it is not the best possible comparison for *Commune de Mesquer*. In the second case, the ECJ considered whether the validity of a European Directive⁹⁰⁹ could be assessed either in the light of the MARPOL or the UNCLOS. Again, this is not either the best possible comparison for *Commune de Mesquer* for its core deals with whether certain international instruments can

⁹⁰³ *Ibidem*, p. 10.

⁹⁰⁴ *Vid.* P. EECKHOUT, *EU External Relations Law*, Oxford, OUP, 2011.

⁹⁰⁵ *Vid.* ECJ, *Commission v Ireland (Mox Plant)*, judgement, case C-459/03, ECLI:EU:C:2006:345.

⁹⁰⁶ *Vid.* ECJ, *International Association of Independent Tanker Owners (Intertanko) v Secretary of State for Transport*, judgement, case C-308/06, ECLI:EU:C:2008:312.

⁹⁰⁷ *Vid.* United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982.

⁹⁰⁸ *Vid.* International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978.

⁹⁰⁹ *Vid.* Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, O.J. L 255, 30.9.2005, p. 11.

be used as references to rule on the validity of European legislation. Outside the field of environmental matters, *Commune de Mesquer* has been put in relationship with other famous cases as *International Fruit Company*⁹¹⁰, *FIAMM*⁹¹¹ and the landmark judgment in *Kadi*⁹¹². However, these ECJ decisions are even less resembling to *Commune de Mesquer* than the previous ones, and therefore they will not be further commented. The only significant comment that could be made from *Kadi*, for instance, is that, as *Commune de Mesquer*, it has been heavily criticized for its parochialism⁹¹³ in its understanding of the interplay between the international legal order and the European legal order.

As regards the second point risen above, it must be recalled that the European legal order has developed several tools to manage the referred interplay with other legal orders, some of which were already mentioned *supra*. However, none of them is pertinent to deal with the *Commune de Mesquer* issues⁹¹⁴. As pointed by Eckes, there has been no “functional succession” – the EU has not assumed the place of its Member States⁹¹⁵ – so a solution cannot be found by conceptualizing the case under such terms. Moreover, this is not a case where France faces a conflict between international obligations binding on the EU and European obligations; France faces a conflict between international obligations binding on herself and European obligations. In these cases, it is usually helpful to resort to Article 351 TFUE⁹¹⁶, which introduces an exception to the principle of supremacy of EU law. As explained by Eckes, the Article:

⁹¹⁰Vid. ECJ, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, judgment, Joined cases 21 to 24-72, ECLI:EU:C:1972:115.

⁹¹¹Vid. ECJ, *FIAMM and FIAMM Technologies LLC, Giorgio Fedon & Figli SpA and Fedon America, Inc. v Council of the European Union and Commission of the European Communities*, judgment, joined cases C-120/06 P and C-121/06 P, ECLI:EU:C:2008:476.

⁹¹²Vid. ECJ, *Yassin Abdullah Kadi and Al Barakat International Foundation v Council of the European Union and Commission of the European Communities*, judgment, *op. cit.* As suggested *supra* note 644, *Kadi* is a landmark ruling where the ECJ addresses the relationship between public international law and the law of the European Union in relation with the UN Security Council Resolution 1333 (2000). For an in-depth assessment of *Kadi*, *vid.* I. GOVAERE, “The importance of International Developments in the case-law of the European Court of Justice: Kadi and the autonomy of the EC legal order”, *College of Europe Research Papers in Law*, vol. 2009-1, 2009.

⁹¹³Vid. G. DE BÚRCA, “The EU, the European Court of Justice and the International Legal Order after Kadi”, *Harv. Int’l L.J.*, vol. 51-1, 2010, pp. 1-52, at p. 3. The said author states that the ECJ in *Kadi*: “express[es] important parts of its reasoning in rather chauvinist and parochial tones”. *Vid.*, along the same lines J. KLABBERS, *Treaty Conflict and the European Union*, Cambridge, Cambridge University Press, 2009, p. 226. Klabbers equally considers that the subtle endorsement of the supremacy of EU law over international law enshrined in *Commune de Mesquer* is equally parochial, a position that “[...] would not be tolerated if coming from a State”.

⁹¹⁴For the sake of brevity only a few of them are dealt with in here. However, a profuse analysis of these techniques can be found in ECKES, “Commune de Mesquer”, *op. cit.*, pp. 905-914.

⁹¹⁵Several member States have ratified the CLC, but not all of them. If all of them had ratified it, under certain conditions, the EU could have “functionally succeeded” them. However, this is not the case, and therefore the EU is not bound by the CLC. *vid.* ECKES, “Commune de Mesquer”, *op. cit.*, at 905-909.

⁹¹⁶Vid. Article 351 TFUE: “The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States

“allows for a limited suspension of the supremacy of European law for international obligations stemming from treaties and agreements between the Member States and third countries concluded before the creation of the Community, in the event where the Member States have taken “all appropriate steps” but could not “eliminate the incompatibilities”⁹¹⁷.

However, the same author considers that “[l]ater amendments to a preceding treaty, by contrast, do not take precedence over European law”⁹¹⁸, which renders Article 351 TFUE useless in respect of the *Commune de Mesquer* case. Thus, in Eckes’ understanding, what is actually happening here is that the ECJ is forcing a sort of “consistent interpretation” in order to “avoid an open conflict” with the international regime on oil pollution at sea. “Consistent interpretation”, in European legal systems, is a notion that refers to the relationships between international and domestic law – as it is the case in France⁹¹⁹ – or, as it is more widely spread, to the relationships between European and domestic law⁹²⁰. It entails that in cases of conflict between two legal instruments arising from two different legal orders, courts need to make efforts to solve the conflict through interpretation. In here, however, the ECJ addresses the relationship between international law and European law, the former of which it has no jurisdiction over. Thus, the notion, if Eckes’ opinion was to be followed, would be used outside its natural realm. The ECJ is, at least, expanding the notion of consistent interpretation, if not resorting to a new one. This technique will be referred to hereinafter as “accommodative” interpretation. And this has become a sort of common *modus operandi*, for this kind of approach was already used in the IATA passenger’s right case. Let us analyze this case.

c. The relevant precedent: the IATA air passenger rights case

The purpose of this sub-section is to suggest the understanding of the *Commune de Mesquer* decision in the context of a radically out-of-the box framework: the IATA passenger rights case as the best comparable precedent. The IATA case relates to the interplay of the 1999 Montreal Convention and European Regulation 261/2004⁹²¹. Let us briefly present both instruments

shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude [...]

⁹¹⁷ Vid. ECKES, “Commune de Mesquer”, *op. cit.*, p. 909.

⁹¹⁸ *Ibidem*, p. 910.

⁹¹⁹ Vid. J.-P. JACQUÉ, “L’obligation d’interprétation conforme en droit communautaire”, *R.A.E. – L.E.A.*, 2007-2008/4, 2007/2008, pp. 715-717, at p. 715.

⁹²⁰ Vid. V. BOUHIER, “La généralisation du caractère préalable de l’obligation d’interprétation conforme”, *R.A.E. – L.E.A.*, vol. 2012-2, 2012, pp. 433-441, at p. 433. Vid. also L. DANIELE, “Vingt-cinq ans d’interprétation conforme : un principe encore en quête de définition?”, *R.A.E. – L.E.A.*, vol. 2007-2008-4, 2007/2008, pp. 705-714, at p. 705. For a summary analysis of how consistent interpretation operates between the EU and domestic legal orders, *vid.* K. LENAERTS, “Droit international et monisme de l’ordre juridique de l’Union”, *op. cit.*, pp. 514-515. For further reflection on the interplay between European and domestic legal orders, from an innovative perspective which conceives the said interplay as “hybridization”, *vid.* I. RADUCU & N. LEVRAT, “Le métissage des ordres juridiques européens (une “théorie impure” de l’ordre juridique)”, *Cahiers de droit européen*, vol. 43- 1/2, 2007, pp. 111-148.

⁹²¹ The controversial character of this decision led to a profusion of academic literature on the subject. As an example of the many commentaries on its content the following can be cited: J. KARSTEN, “Droit communautaire des passagers et droit privé européen”, *European Consumer Law Journal*, vol. 2006-4,

before addressing the problem at stake. The first of the referred legal instruments is an International Convention ratified both by the EU and its Member States⁹²². Structurally it contains: i) a set of uniform substantive rules on the carriage of passengers, luggage and cargo by air, focused, *inter alia*, on liability for damage sustained in case of death or bodily injury, damage to luggage, and delay; ii) a set of provisions on international jurisdiction of courts; and iii) a scope rule, which reads as follows:

"For the purposes of this Convention, the expression 'international carriage' means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention".

The second legal instrument at stake is European Regulation 261/2004⁹²³, which deals with the substantive rights of passengers in the event of denied boarding, cancellation or long delay of flights. Its content is submitted to a scope rule, contained in its third article, which reads:

"This Regulation shall apply:(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier".

As it may be understood, the territorial scopes of application of both instruments overlap, and so do their material scopes: both instruments deal with delays in flights, and the ensuing compensations that air passengers may be entitled to. Consequently, shortly after the passing of Regulation 261/2004 the validity of a substantial part thereof was questioned before the ECJ, *inter alia* on the grounds of an eventual incompatibility with the Montreal Convention. One of the core arguments raised to justify challenging the validity of the Regulation was founded on Article 29 of the Montreal Convention, which establishes that

2006); J.-P. KESTELOOT, "La protection des passagers en droit aérien", *Journal des tribunaux*, vol. 6256, 2007, pp. 125-131; S. GOLINVAUX, "Écarts d'Interprétation Dans l'Application du Régime de Responsabilité des Compagnies Aériennes vis-à-vis des Passagers", *European Journal of consumer Law*, vol. 2009-2-3, 2009, p. 508-520.

⁹²² The Montreal Convention is a "mixed agreement": "an [agreement concluded] jointly by the [European Union] and the Member States, coming partly within the domain of the exclusive competences [of the Union] and partly within the domain of shared competences" (Vid. E. NEFRAMI, *L'action extérieure de l'Union européenne - Fondements, moyens, principes*, Paris, L.G.D.J., 2010, p. 40).

⁹²³ Vid. Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, O.J. L 46, 17.2.2004, p. 1.

"[i]n the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable".

Nevertheless, in 2006 the ECJ ruled that the examination of the questions submitted to the court revealed no factor of such a kind as to affect the validity of the Regulation: the measures to assist and take care of passengers in the event of a long delay to a flight prescribed in Regulation 261/2004 constitute *"standardised and immediate measures"* aimed at redressing the damage arising from the inconvenience that delay in the carriage of passengers by air causes. These measures are not among those regulated by the Montreal Convention. The system prescribed in the Regulation *"simply operates at an earlier stage than the system which results from the Montreal Convention"*. That Convention governs the conditions under which passengers may bring actions for damages by way of redress on an individual basis. Therefore, it cannot be considered inconsistent with the Convention: *"[i]t does not follow from [...] any [...] provision of the Montreal Convention, that the authors of the Convention intended to shield [air] carriers from any other form of intervention [...]"*⁹²⁴. This position has been further justified on the basis, *inter alia*, of article 12 of Regulation 261/2004 which establishes that it shall apply without prejudice to a passenger's rights to further compensation on the basis of a different legal instrument. In such cases, the compensation granted under Regulation 261/2004 can be deducted from such complementary compensation⁹²⁵. As a consequence of what has been exposed, both legal instruments coexist as legal sources in force throughout the European Union.

Despite the fact that is not possible to deliver here an in-depth analysis of the IATA case⁹²⁶, it should be clear from the summary provided in previous pages why it is essential to the purposes of this dissertation:

i) Notwithstanding certain differences, the case is structurally the closest one to the *Commune de Mesquer* case. It is true that the Montreal Convention is a *"mixed agreement"*, and therefore, it binds both the European Member States and the European Union. However, the issue at stake in both cases is identical: an apparent incompatibility between two legal regimes, one stemming from the European legal order, the other one stemming from the international legal order. In each of the cases the international legal instrument contains a provision – Article 29 of the Montreal Convention and Article III.4 CLC, as it will be seen *infra* – which seems to restrain access to other legal instruments for the purpose of seeking additional redress.

⁹²⁴ *Vid.* ECJ, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*, judgment, case C-344/04, ECLI:EU:C:2006:10, at paras. 44-48. All preceding quotations are extracted from the referred paragraphs.

⁹²⁵ For an interpretation of Article 12 of Regulation 261/2004, *vid.* ECJ, *Aurora Sousa Rodríguez and others*, judgment, case C-83/10, ECLI:EU:C:2011:652.

⁹²⁶ For a more detailed assessment, *vid.* eg, I. KONING, "The enforcement of airline passengers' rights in Europe", *European Journal of Consumer Law*, vol. 2011-2, 2011, pp. 368-392, at p. 372.

ii) Beyond the structural similarity of both decisions, their holdings can be considered – notwithstanding minor differences – to be roughly equivalent: in both instances, through different – although similar – developments the ECJ achieves the accommodation of potentially conflicting legal obligations. While in the IATA case the ECJ takes advantage of the fact that the Montreal Convention has also been ratified by the EU to “refine” the scope of the remedies provided by each regime, in *Commune de Mesquer*, it simply molds the European Waste Directive to reach beyond the limits of the CLC. In both cases, the ECJ succeeds in making the pieces of the puzzle match by only forcing them to the minimum extent necessary.

These similarities between both cases, which arise in notably different subject-matter fields, lead to consider that the ratio behind the *Commune de Mesquer* judgment cannot be, at least not primarily, the desire to enhance environmental protection through the consecration of the polluter pays principle. Seemingly, the actual ratio behind the ruling is the ECJ’s will to maximize compatibility among different legal orders, possibly without undermining the supremacy of the EU legal order. Let us develop these ideas, and thus fully suggest and explain an alternative reading to the *Commune de Mesquer* decision.

d. An alternative understanding to the Court’s response

Globally considered, the above-referred academic assessments of *Commune de Mesquer* tend to understand the ambiguous language of the judgement as somewhat acknowledging: i) that there is an actual conflict between the two legal regimes involved in the case; ii) that the conflict is solved in favor of the supremacy of the European legal order over the international legal order; iii) that the ratio behind the decision lies either on the need to preserve the said supremacy at all costs, or on the need to ensure a higher degree of environmental protection than that provided for by the international regime on oil pollution at sea.

Nevertheless, it is this dissertation’s submission that the actual explanation, although possibly related to the notion of supremacy of the European legal order, actually lies in the special, conciliatory understanding that the ECJ has of the interplay of the European legal order and the international legal order: whenever there is the risk that European legal obligations and international legal obligations already in force may collide, the ECJ adopts a “compromising” approach. It resorts to what could be considered an extensive “consistent interpretation”. In those cases, without surrendering European policies, the ECJ aims at obtaining the compatibility of the international and European legal obligations involved.

In the *Commune de Mesquer* case, one may even wonder if there is actually a potential clash between the legal obligations involved, to begin with; everything depends on how the text of Article III.4 of the CLC is to be interpreted: is the list of subjects against which no claim is possible within or outside the CLC a *numerus clausus* list, or is it merely a list of examples? In other words, what is the ratio behind the article? Is it exclusively to preclude claims against the subjects listed therein, or is it to preclude any kind of claim against any other subject howsoever involved in the oil-spill (as contended by Somers and Gonsaeles)?

The *Commune de Mesquer* judgment authorizes Member States to respect their international engagements so long as the redress provided by the said engagements suffices to fully cover liability. Should this not be the case, then the producer of the product from which the waste derives needs to bear the remainder of the said liability. Taking into account: i) the fact that one of the Total companies was the charterer of the ship and the other was merely the “producer of the product”, and ii) the fact that only the total company acting as a charterer can contend that its role is explicitly shielded by the CLC, there is a way to read the judgment as entailing that there would be no conflict and no ensuing breach of any obligation. This would be the case if it was understood that all that the judgment imposes is that the remainder of the liability be channelized to the total company acting as “producer of the product”. In other words, unless one understands that the ratio of Article III.4 is to render the shipowner exclusively and solely liable, to the benefit of any and every other subject possibly involved, a compatible reading of relevant obligations is possible. A clear and upfront breach of the CLC would have arisen within the ECJ’s judgment if it had explicitly determined that the polluter pays principle had to be applied to render the charterer liable, but this is not done in the decision. If the ratio of the provision is understood as being the exclusive channeling to the shipowner, then the policy ratio is possibly slightly being circumvented, but only inasmuch as it is strictly necessary to dilute the conflict and “accommodate” the relevant obligations.

In sum, there are two possible options: it could be argued that there was indeed a clash between the two legal regimes at stake, and that instead of acknowledging its existence and explicitly forcing France to breach the CLC, the ECJ chose to save the face by covering the bruises with some legal make-up. Alternatively, it could also be argued that the ECJ conceives both legal regimes as being able to accommodate each other, therefore ignoring the potential existence of a clash between them and reaching an interpretative compromise that favors the European Waste Directive – without amounting to a hard-core breach of the international regime on oil pollution at sea. This dissertation takes the approach that the ECJ is actually opting for the second option. Or more precisely, the ECJ subtly suggests that that is what the French Supreme Court should do: the ECJ does not have jurisdiction to – explicitly and officially – interpret the CLC for the European Union is not a party to such convention; only most – but not all – of its Member States are. Opting for the second possible understanding of the judgment is the most appropriate approach, for it is not the first time that the ECJ has resorted to this kind of “accommodative” construction of legal regimes: it has done this, at least once before, in the above-referred IATA case.

There may be a point in highlighting – as Somers and Gonsaeles repeatedly do – the “global” nature of the oil pollution regime – its “*global approach to global problems*”⁹²⁷ – and its historical roots⁹²⁸, and therefore, in criticizing the disruption therein that the ECJ has introduced through *Commune de Mesquer*⁹²⁹. However, against historic arguments, the need

⁹²⁷ Vid. E. SOMERS & G. GONSAELES, “The consequences of the sinking of the M/S ERIKA in European waters: towards a total loss for international shipping law?”, *op. cit.*, p. 64.

⁹²⁸ *Ibidem*, p. 72.

⁹²⁹ *Ibidem*, p. 71. It is interesting to note, however, that in subsequent amendments of the EU waste directive, the producer of the product from which the waste derives has been “partially” taken out of the list of subjects which may be deemed to be liable. As explained by the same authors (*op. cit.*, at 78): “Whereas Art. 15 of Directive 2006/12/EC includes the producer of the product from which the waste

for evolution can be raised as a counterargument; this is the case when ancient roots of given policies do not match well with modern-times risk activities: maybe limitations in liability are not politically acceptable nowadays anymore as regards environmental torts.

There may be equally a point in saying that the ECJ's only ratio in *Commune de Mesquer* is, actually, the supremacy of the EU's legal order, without any consideration as to accommodation or compromise. However, even if that was the case, the outcome of the judgment would still be correct: if the chronology of France's international engagements is considered, the European Waste Directive should "prevail". When France entered into the original CLC the convention only prohibited suing the "subordinates" of the shipowner⁹³⁰. It is the CLC as modified by the 1992 protocol which introduces a wider range of exclusion from liability, covering more subjects, possibly all related subjects⁹³¹. Therefore, when the European Waste directive was introduced in 1975, there was no clash, both regimes were perfectly compatible⁹³². It is only with the subsequent amendment by the 1992 that the potential clash arose. Arguably, France – and the other Member States – should not have ratified the protocol. Arguably too, it was possibly difficult to foresee that the clash would arise, for it would have required predicting that oil mixed up with water and sediment would be considered "waste". However, it seems legitimate to argue that when the EU legislated it did not intend to make any imposition, and that the problem only arose out of the ulterior amendment of the Convention. It furthermore seems legitimate to assert that, since the usual rules of treaty interpretation, as contained in the Vienna Convention on the law of the Treaties, cannot be resorted to in order to solve the issues in *Commune de Mesquer*, it does not seem excessive to let the ECJ try to salvage the coherency of the European legal order as it does in its ruling. And the ECJ does so by trying to soften the clash, despite subtly pointing to the primacy of France's European obligations over its international obligations if it turns out to be that there is no way to fully "accommodate" both regimes.

In any case, before denigrating the *Commune de Mesquer* judgment, it may be worth considering what the alternative to this interpretative accommodation is. Forcing all EU Member States to engage with other nations in renegotiating the CLC was an unsuccessful approach. Would forcing all EU member States to withdraw the Convention be a preferable outcome? Is the accommodative interpretation not a better option despite its detrimental impact on the international credibility of the European actors involved?⁹³³

came within the potential payers, the Directive 2008/98 omits this potential liability and declares that it is a matter for the discretion of the Member States. Hence there is no obligation to force Member States to attribute liability to the producer of the product from which the waste originated as was the case with *Total*".

⁹³⁰ *Vid.* the original 1969 text of the CLC. Furthermore, *vid* C. J. S. HILL, *Maritime Law*, Lloyd's of London Press, London, 1989, p. 285.

⁹³¹ *Vid.* the text of the CLC as amended by the 1992 protocol. *Vid* also C. J. S. HILL, *Maritime Law*, London, Lloyd's of London Press, 1998, p. 438.

⁹³² *Vid.* ADVOCATE GENERAL J. KOKOTT, *Commune de Mesquer*, Opinion, ECLI:EU:C:2008:174, para. 96 (which points out that the part of the CLC which may clash with Article 15 of the Directive was introduced after the adoption of the said Directive).

⁹³³ *Vid.* E. SOMERS & G. GONSAELES, "The consequences of the sinking of the M/S ERIKA in European waters: towards a total loss for international shipping law?", *op. cit.*, p. 75: "Ignoring specific international legal solutions for global problems will undoubtedly influence the Community's position in

Notwithstanding this negative point, arguably, the overall result of the judgment has been positive in global environmental terms, for the European understanding seems to have been codified into the CLC, therefore opening doors around the world for an accrued environmental protection against oil pollution at sea: the ECJ's understanding of the interplay of legal regimes seems to have been subsequently adopted by the December 2015 International Oil Pollution Compensation Fund's explanatory note on "*The International regime for compensation for oil pollution damage*"⁹³⁴. In this sense, no disruption has been introduced in the said regime, *Commune de Mesquer* can simply be understood as a European contribution to the evolution of its understanding at a global level, therefore enhancing the global maritime and environmental protection against oil spills.

Overall, beyond retrieving the ultimate policy ratio and practical impact of the case, what matters for the purpose of this dissertation is that the accommodation of material scopes of legal instruments stemming from non-hierarchically-related legal orders is a third and final technique which may solve clashes between them. Having thus completed the review of the frictional dimensions of the interplay between pre-existing environmental legal regimes and the EU environmental PIL mechanism, it is necessary to briefly review the complementary dimension thereof. Then it will be possible to draw conclusions on the impact of these dimensions on the effectiveness and value of the intervention of multilateralist PIL tools in environmental matters.

IV. Brief review of non-frictional relationships

Previous pages have focused on relationships of friction and clash amongst environmental legal tools in order to sketch the place that may be occupied by multilateralist choice-of-law mechanisms in respect of environmental matters. But, as announced in the introduction to Chapter 2, it is worth to briefly turn to non-frictional relationships, i.e. relationships which permit the peaceful coexistence between different tools, which can thus fulfill different tasks, in harmony or else totally independently. Despite not being chosen as the focal point of this analysis, they will be briefly addressed here (especially those which can be described as relationships of complementarity), in order to provide a neater and more comprehensive view of the state of the question. Thus, let us briefly consider the legal instruments reviewed *supra*:

i) The "preventive" international conventions identified *supra* may complement any multilateralist environmental PIL mechanism: these conventions may provide the relevant standard of diligence needed wherever the substantive law ultimately applicable to the facts is fault-based and requires a "reference" in order to deal with the conduct of the alleged polluter.

the future and even more so if that Community is aspiring to become a regular State; it will then be treated as a regular State".

⁹³⁴ *Vid.* IOPC Fund explanatory note, *op. cit.*, p. 3.

In order for this “complementarity” to work, the relevant standard needs to be embodied in a self-executing provision⁹³⁵.

ii) The enforcement of the “*Sic utere tuo ut alienum non laedas*” obligation through State responsibility, which, as mentioned, does not lie in the hands of private subjects, may fulfill a complementary role in the sense that it embodies an alternative way to obtain *ex post facto* redress of environmental occurrences, however, by a different subject. Nevertheless, it is not simple to precise the contours of their interplay. Despite lying in the hands of different legal subjects (the State *versus* private parties), does resort by one of these parties to her tool bar the possibility of resorting to her tool to the other? If the reasoning is ultimately pushed to its limit, would an international agreement between Ruritania and Oz on the extent of the (environmental) “responsibility of the state” bar private actions?⁹³⁶ If it was the case the situation could not be described as one of “complementarity” but of mutual exclusion. However, Ballarino considers that “*the principle asserted in Trail Smelter must be understood as an obligation of reparation to be borne by the State, which is responsible for its territory, and not as an exclusion of any sort of action by individuals*”⁹³⁷.

iii) It is worth also mentioning that the interplay between the “*Sic utere tuo ut alienum non laedas*” obligation through State responsibility with respect to the *lex specialis* uniform substantive conventions has been addressed by several authors, which have qualified it as a relationship of “subsidiarity” or else of “solidarity”: when considering the uniform substantive law regime on nuclear liability, Murase mentions a residual responsibility of the state therein⁹³⁸. Bernasconi mentions also a residual role of the State, without however providing examples or identifying what regimes he has in mind⁹³⁹. Both authors probably have in mind the fact that as Handl says:

“those multilateral treaties that channel liability to the operator and / or owner of nuclear power facilities, nuclear vessels, oil tankers, and offshore oil and gas rigs do not constitute evidence of a rejection of the principle that a state is ultimately accountable

⁹³⁵ An example of the referred kind of provision may be found, for instance, in Point 4 of the first section (“Category A, B and C substances outside special areas and Category D substances in all areas”) of Regulation 5 (“Discharge of noxious liquid substances”) of Annex II of MARPOL 73/78 (“Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk”):

“(4) The discharge into the sea of substances in Category D as defined in regulation 3(1)(d) of this Annex, or of those provisionally assessed as such, or ballast water, tank washings, or other residues or mixtures containing such substances shall be prohibited except when all the following conditions are satisfied: (a) the ship is proceeding en route at a speed of at least 7 knots in the case of self-propelled ships or at least 4 knots in the case of ships which are not self-propelled; (b) such mixtures are of a concentration not greater than one part of the substance in ten parts of water; and (c) the discharge is made at a distance of not less than 12 nautical miles from the nearest land”.

⁹³⁶ Would such an agreement be self-executing? T. BALLARINO asks himself these questions in respect of the Mura case (“Questions de droit international privé et dommages catastrophiques”, *op. cit.*, p. 312-313).

⁹³⁷ *Vid.* T. BALLARINO, “Questions de droit international privé et dommages catastrophiques”, *op. cit.*, p. 319.

⁹³⁸ *Vid.* S. MURASE, “Perspectives from international economic law on transnational environmental issues”, *op. cit.*, p. 311.

⁹³⁹ *Vid.* C. BERNASCONI, *Civil Liability Resulting from Transfrontier Environmental Damage: a Case for the Hague Conference?*, *op. cit.*, p. 4.

*under international law for private activities under its control. These treaties establish the exclusive liability of certain private parties and therefore expressly consider only civil liability issues. By necessary implication, the issue of the potential international liability of the controlling state is left untouched. Some of these agreements also expressly deny the preemption of the public international law venue of compensation*⁹⁴⁰.

Thus, the conclusion would be similar to the conclusion just referred on the interplay with the "*Sic utere tuo ut alienum non laedas*" obligation: a sort of alternative complementarity which does not exclude resort by any given kind of subject to the legal tool that she is entitled to resort to. Along these lines, P. Gauthier suggests that some of these conventions may introduce a "solidary" or else subsidiary liability scheme involving States⁹⁴¹.

iv) Diplomatic protection and the ECHR will not be addressed here, for, as it has been repeatedly mentioned, they are necessarily placed in a subsidiary position.

v) As suggested *supra*, EU internal market and WTO law are not closely linked with environmental torts. However, the weaponry they provide, which is limited to immediate prevention of immediate threats of damage (the kind that tort law can equally provide through injunctive relief) and tort-derived injunctions are mutually exclusive: if, for instance, a given State prohibited the commercialization of a human-life-threatening good manufactured in State and such prohibition was withheld by EU internal market law or WTO law, there would be no need for an environmental NGO or a group of citizens to try to resort to injunctive relief under tort to avoid the dissemination of the good in the host State.

vi) Just as it was the case with preventive international conventions, preventive EU environmental law may complement any multilateralist environmental PIL mechanism by equally providing the relevant standard of diligence needed wherever the substantive law ultimately applicable to the facts is fault-based. In this case too, this "complementarity" will only work if the relevant standard is embodied in a self-executing provision, which means that, in the case of directives, the corresponding self-executing provision will be found in the relevant domestic transposition thereof.

The complementary role of preventive international environmental conventions and preventive European environmental law leads to further questions on the precise spatial articulation of preventive mechanisms with tort-based mechanisms, amongst which environmental PIL ones. This question will be dealt with *infra*⁹⁴². For the time being, it suffices to establish that they may potentially play a complementary role. Frictional and non-frictional

⁹⁴⁰ Vid. G. HANDL, "State Liability for Accidental Transnational Environmental Damage by Private Persons", *The American Journal of International Law*, vol. 74-3, 1980, pp. 525-565, at p. 530.

⁹⁴¹ Vid. P. GAUTIER "Quelques réflexions sur les États, le droit des gens, et les dommages à l'environnement", *op. cit.*, p. 449 (he quotes P. M. Dupuy as making such assertion and quotes the preamble of the Paris Convention on Third Party Liability in the Field of Nuclear Energy). This assertion is somewhat disputable, for it deals with two different kinds of subjects, and two different kinds of obligations within 2 different legal orders.

⁹⁴² Vid. *infra*, Part II, Chapter 4, "Second congenital deficiency of Article 7 of the Rome II Regulation: challenges pertaining to environmental standards / tensions with Article 17 of the Rome II Regulation".

relationships having been addressed (at different length), let us extract some conclusions on *in abstracto* effectiveness of the intervention of PIL in environmental matters.

V. Conclusion: The "default" role of choice of law

As established in previous pages, uniform substantive-law conventions have to be applied by priority. This precedence places any multilateralist environmental PIL tool in a subsidiary position. Put otherwise, these conventions "block" some of the playing field for multilateralist environmental PIL tools, as, at least at first, they will not be able to operate in respect of situations regulated by these uniform-law conventions. However, stressing some elements already described throughout Chapter 2, and going slightly further in their assessment will reveal that the "blocked" normative space is much more limited and not as "blocked" as it may seem *a priori*:

i) Firstly, there are limitations which result from the very condition of these conventions as sources of law under public international law⁹⁴³: it must be recalled, that as sources of law, treaties and conventions are only binding on the parties that have duly ratified them, and only as of the date of entry into force for each of them. Thus, the so-called principle of relativity of conventions ("*pacta tertiis nec nocent nec prosunt*") limits the legal effects of these instruments to those international-law subjects that have chosen to be bound by them⁹⁴⁴.

ii) Secondly, there are several sorts of limitations that raise from the limits introduced in the material scopes of these treaties⁹⁴⁵. The first one arises from the fact that there are no comprehensive, over-arching conventions on liability for environmental damages in force. The conventions in force have a sectorial approach; they only deal with specific kinds of environmental damage. This, combined with the fact that, actually, there is only a limited number of these conventions, entails that only very specific topics / environmental stakes are addressed⁹⁴⁶. As explained by Fallon, Fauvarque-cosson and Francq: "[...] *ces conventions ne*

⁹⁴³ As suggested above, from a formal perspective, every single international convention, as a source of law, is always public international in nature. However, from a substantive perspective (from the standpoint of its content, its subject-matter) the conclusion is most of the time different.

⁹⁴⁴ *Vid.* Art. 34 of the Vienna Convention on the law of treaties (23 May 1969).

⁹⁴⁵ *Vid.* J. BASEDOW, "Rome II at Sea – General Aspects of Maritime Torts", *op. cit.*, p. 128 : "[...] *the choice of law rules of the Rome II Regulation will govern any litigation that may arise outside the scope of the uniform law convention*".

⁹⁴⁶ In their developments, M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO ("Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge", *op. cit.*, pp. 616-618) mention only two general material scope conventions, and only one of them is what has been labelled as a "uniform law convention" *supra*. The first one would be the Convention of the protection of the environment between Finland, Denmark, Norway and Sweden, done at Stockholm on 19 February 1974. But this first convention does not contain rules on liability, and belongs in the instrumental and / or preventive categories. The second Convention mentioned is the 1993 Council of Europe "Lugano Convention" (Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment), which never entered into force.

*traitent que d'un type d'activités dangereuses, et ne visent parfois qu'une seule catégorie de personnes*⁹⁴⁷.

iii) A second sort of limitation introduced in the material scopes of these conventions derives from the – sometimes deliberate – narrowness of the definitions given to the terms used therein: only situations involving elements which fully correspond to the definitions of terms included in these conventions may be addressed by the latter. In other words, whenever one of the elements involved is similar to any defined term but does not perfectly fit into the relevant definition, the environmental occurrence will be excluded from the scope of convention⁹⁴⁸.

iv) Situations falling within the material scope of the conventions need to also fall within their territorial scope as defined by their scope rules⁹⁴⁹.

v) Even within the relevant scope of any given convention (as defined by its – territorial – scope rule and by the provisions that describe the subject-matter and establish the “defined terms”) the answers to the questions not provided for by the convention itself need to be found somewhere. Thus a background legal system is required. Putting aside conventions which directly establish that in those cases the *lex fori* will apply⁹⁵⁰, the backdrop legal order will be identified by resorting to the forum’s multilateralist choice-of-law rule, as for instance, Art. 7 of Rome II throughout the European Union⁹⁵¹.

In the light of the ideas that have just been presented, it can be concluded that, multilateralist environmental PIL tools can be considered some sort of “droit commun” or default regime in respect of international environmental tort occurrences⁹⁵². This default role has a double dimension: on the one hand, it is the general regime which comes into play in all of those domains where there is no specific uniform law convention and / or in those situations concerning States which have not ratified the existing ones. On the other hand, in certain

⁹⁴⁷ Vid. M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO, “Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge”, *op. cit.*, p. 590.

⁹⁴⁸ For example, “preventive measures” under the CLC need to be “reasonable”, following their definition in Art. I, 7, otherwise they do not come within the material scope of the convention. This raises the question of what would happen if somebody undertook action that could generally be considered to be a “preventive measure” but did not qualify as “reasonable” under the opinion of the relevant court.

⁹⁴⁹ Vid. M. FALLON, B. FAUVARQUE-COSSON & S. FRANCO, “Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge”, *op. cit.*, p. 590: “En réalité, en dépit de ce vaste tissu de textes européens et internationaux, le recours à la méthode conflictuelle demeure nécessaire, pour des raisons liées au caractère [...] limité de ces textes : -limité dans l'espace d'abord : un grand nombre de ces textes n'ont en réalité qu'une vocation régionale et déclarent ne pas s'appliquer aux dommages survenus sur le territoire d'États non contractants [...]”.

⁹⁵⁰ Vid. Art. 11 and Art. 14.b of the Paris Convention on Third Party Liability in the Field of Nuclear Energy.

⁹⁵¹ Vid. J. BASEDOW, “Rome II at Sea – General Aspects of Maritime Torts”, *op. cit.*, p. 128: “no uniform law convention contains a complete regulation of all issues that may arise in its application. Gaps are inevitable”. Vid. T. BALLARINO, “Questions de droit international privé et dommages catastrophiques”, *op. cit.*, pp. 379-370.

⁹⁵² Vid. along the same lines, K. SIEHR, *The Rome II Regulation and Specific Maritime Torts: Product Liability, Environmental Damage, Industrial Action*, *op. cit.*, p. 146.

instances these tools may operate in a fall-back position within a convention-regulated domain, as has just been explained. Finally, and significantly, multilateralist environmental PIL tools distinguish themselves from certain other kinds of mechanism because they are not, in principle, submitted to any sort of *de minimis* reasoning.

PART II: ASSESSING ENVIRONMENTAL PROTECTION BY MEANS OF PRIVATE INTERNATIONAL LAW IN THE EUROPEAN UNION

Up to this point, this dissertation has aimed at abstractly discussing multiple aspects of the intervention of private international law – any multilateralist regime thereof – in the realm of environmental matters. Now that this abstract task has been fulfilled, it is the turn to assess the very micro-regime which has served as an illustration whenever needed in Part I: the EU's environmental PIL mechanism. The following pages will aim at evaluating whether it presents any intrinsic deficiency which may significantly diminish its usefulness, or whether, on the contrary, it holds any significant potential to fulfill the environmental-policy roles that the EU had in mind when it was conceived.

Just like part I, part II will equally be composed of two chapters. Chapter 3 will constitute a transition from abstract to specific discussion. This transition will be articulated through the sequential presentation of the specific responses – or lack thereof – that the European Union has given to a series of not-strictly-choice-of-law-related problems which surround any kind of multilateralist environmental PIL tool. In other words, this first phase of assessment deals with what could be called a set of upstream difficulties in the conflict-of-laws process. While these difficulties derive from procedural or collateral aspects, the response or lack of response thereto largely determines the final effectiveness of the ensemble of the mechanism. Despite being EU-focused, this chapter will not refrain from resorting to comparative law, notably the law of the United States, whenever needed.

Then, Chapter 4 will deal thoroughly with the choice-of-law provision at the core of the EU's environmental PIL mechanism: Article 7 of the Rome II Regulation. Even if the said mechanism, as a private enforcement tool, is not subjected to the political complexities that the customary regime of environmental State responsibility is⁹⁵³, its actual effectiveness faces other constraints: it needs to be carefully evaluated from the standpoint of a possible misalignment, in certain scenarios, between the policy ratios where it is allegedly enrooted, and the actual practical outcomes it leads to.

⁹⁵³ Due to its nature and structure the customary regime is subject to the political will of the relevant State, which is sovereign in deciding whether to resort to the regime or not, i.e. whether to enforce the rights the regime is meant to protect or not.

Chapter 3:

Upstream difficulties in the environmental conflict-of-laws process and the EU's response thereto

As a means to initiate the assessment of the effectiveness of the specific EU conflict-of-laws intervention in environmental torts, Chapter 3 introduces and explores a series of difficulties which do not stem out directly from the core of the mechanism, its choice-of-law rule. These difficulties are “preliminary” in the sense that, in general, they can be said to lie upstream in the conflict-of-laws process. They have been grouped under four headings, although they actually revolve around two axes:

On the one hand, there is a series of problems which were subtly evoked in Part I of this dissertation, and which touch simultaneously upon the scope and the operability of the mechanism. These are the extent and content of the relevant definition of “environmental damage” (and “non-contractual obligation”) (I), and the subjective dimension of the mechanism – who and under which circumstances can resort to it – (II).

On the other hand, there is a duo of notions which are typically used in litigation for avoiding a ruling on the merits, and that will be denominated “procedural hurdles”, even if their nature is not, strictly speaking, actually “procedural”. These are the use of separate legal personality to build shields of networks of subsidiaries (III) and *forum non conveniens* (IV).

I. The concepts of environmental damage and non-contractual obligation in Rome II

Legal definitions of notions are the “keys” which unlock the “doors” of legal regimes, allowing or restricting resort to the legal instruments that compose them. This is so because, as mentioned in part I (both Chapter 1 and Chapter 2) concepts and definitions play a significant role in delimiting the material scopes of legal tools. The way in which definitions shape material scopes ultimately determines what kind of situations legal instruments can deal with. What lies outside a given material scope is excluded from the reach of the corresponding legal tool (this can happen, depending on legal systems, due to explicit exclusion, lack of explicit inclusion or to both)⁹⁵⁴. The idea of being able to identify what situations a given legal instrument is capable of dealing with is relevant in a double sense.

On the one hand, from the perspective of an environmental victim at the pre-litigation stage the delimitation of the material scope of a given instrument determines whether she can have access to it (victim-perspective effectiveness). Excessively narrow definitions may restrain the access of victims to legal instruments and give them the impression that the instrument is

⁹⁵⁴ Additionally, as seen *supra* Chapter 2, narrowing definitions is a technique which can be used to clarify and adapt the interplay between different legal instruments.

useless in respect of the social problem which they expected it to cope with. Taking this reasoning one step further, the accumulation of individual assessments in the referred sense determines what could be called effectiveness from a social point of view, for it determines whether the instrument corresponds with social expectations (social perception of effectiveness). Interestingly, this is a delicate point in respect of international legal instruments, for the need to accommodate different – possibly conflicting – social conceptions and interests may require compromises when wording definitions. These compromises may leave outside certain elements or aspects which under the reigning social conceptions in country A should make part of the problem at stake, but which are not necessarily part of it under the reigning conceptions in country B⁹⁵⁵.

On the other hand, sticking to the “political” sense of the term effectiveness, as used throughout Part I of this dissertation (i.e. understood as a given legal instrument’s ability to attain the policy objectives set forth by the legislator when it was drafted), notions and definitions establish the framework within which policy-driven effectiveness is to be tested. To a certain extent it could be considered that they are part of the reference / vector used to measure the said effectiveness⁹⁵⁶. Translated to the specific context of the Rome II Regulation this means that dealing with its notions and definitions is needed before beginning to explore the effectiveness of its environmental provision.

In the light of these reasons, ascertaining the precise meaning of certain key notions within the Rome II Regulation appears to be a sensible choice. These are the notion of “tort” or, in Rome II’s terminology, *non-contractual obligation* (*obligation non-contractuelle*, *obligación no contractual*)⁹⁵⁷, and the notion of *damage to the environment* (*atteinte à l’environnement*, *daño medioambiental*).

It may be recalled that the question of what tort is in comparative terms was dealt with in Chapter 1. In the framework of such process the conclusion was that, despite the immense difficulties in reaching a single all-encompassing definition of tort in comparative law, it was still possible to attain a minimum common denominator thereof: a minimum set of elements which necessarily conformed “tort” under the main tort systems, in a “necessary-but-non-sufficient” fashion. It was accompanied by an abstract and generic description of the potential extent of various notions of “environment” which did not refer to any specific legal order either. The said minimum common denominator was used, *inter alia*, in Chapter 2 as a part of the process of examining the normative space that private international law could occupy in respect of environmental occurrences. These approximations were sufficient for the purposes

⁹⁵⁵ It must be acknowledged that, in certain cases, it may lead to “minimum common denominators” which may be detrimental to certain substantive policies. On the other hand, they could have “federating effects”, as it is the case with autonomous definitions within the European legal order.

⁹⁵⁶ One could also consider that definitions and notions need to be tested against the policy background of the relevant legal instrument or provision before letting them frame the context within which the effectiveness of other provisions is going to be tested. But probably, unless there is an obvious divergence or contradiction between the latter and the former, definitions simply forge the said context.

⁹⁵⁷ It must be recalled that at the beginning of this dissertation “tort” was adopted as a generic term, not making any specific reference to any given legal order. Furthermore, it has been assumed throughout this dissertation that “tort” is to be understood – despite academic controversies – as being generally equivalent to “responsabilité délictuelle”.

of part I. However, notwithstanding the importance of these “abstract” notions, in practical terms, whenever a lawyer faces a situation which apparently bears the aforementioned *in abstracto* tortious structure and is related to what intuitively could be considered “the environment”, the referred abstract notions will not suffice⁹⁵⁸. It will need to be verified whether the situation faced can get through a two-step sifting, in order to ascertain whether the relevant environmental PIL mechanism can be resorted to⁹⁵⁹:

First, checking whether the relevant situation can be characterized as “tort” under the relevant legal definition of tort is needed: events which bear the referred minimum-common-denominator tortious structure and are environmentally-related but do not qualify *in concreto* as tort under the *lex qualificationis* cannot be “environmental tort” for PIL purposes⁹⁶⁰.

Secondly, taking the reasoning one step further, an environmentally-related event bearing a tortious structure, which may potentially qualify as tort under the relevant legal definition thereof, cannot be “environmental tort” if the relevant legal system does not contemplate the underlying damage as being “damage to the environment”⁹⁶¹.

Let us deal with both aspects in reverse order: first with the notion of damage to the environment, and then with the notion of tort itself.

A. *Lex qualificationis* (I): the notion of environmental damage in Rome II and its boundaries

As it may be recalled, the notion of environmental damage within the Rome II Regulation is to be construed from elements present in recital 24 and Article 7 of the Regulation (with the qualification that arises from Article 1.2.f). Recital 24 establishes that 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”.

⁹⁵⁸ This is not to suggest that the notion of “environmental damage” within a given legal order or legal regime may necessarily be deduced from the relevant definitions of “environment” and “tort” therein (an explicit definition of environmental damage may narrow the understanding of this concept), but it is a good point to begin the reasoning at.

⁹⁵⁹ Logically, both of those steps are related to the international dimension of the situation: they are simply the logical consequence of the fact that our world is composed by a multiplicity of systems of private law. Moreover, they correspond with the two notions that have been identified as worthy of being assessed in previous paragraphs.

⁹⁶⁰ There are other tools and means of addressing environmentally-related problems evicted by a given definition of tort, as it will be seen in following pages.

⁹⁶¹ Additionally, an environmentally-related event bearing a tortious structure which may potentially qualify as tort under the relevant legal definition of tort cannot be “environmental tort” – or tort at all – if the relevant legal system (*lex qualificationis*) does not contemplate the environment as a legal good worthy of protection under the law of torts or if the relevant definitions are excessively narrow. But this hypothesis being very specific it will be disregarded in the main text.

Article 7 adds that it applies to “*non-contractual obligation[s] arising out of environmental damage or damage sustained by persons or property as a result of such damage*”, to the exclusion, however, of “*non-contractual obligations arising out of nuclear damage*” as established by Article 1.2.f⁹⁶². This limitation in the extent of the notion of environmental damage is probably explained by the need to avoid clashes between international legal instruments (i.e., the purpose of this “adaptation” of the material scope of application of Rome II would be to facilitate the articulation of international sources⁹⁶³). Despite this restriction, “*the definition of environmental damage as laid down in the Rome II Regulation is a broad one and may well turn out to encompass many situations [...]*”⁹⁶⁴.

This large definition of environmental damage goes beyond the more restrictive notions of “pollution” resorted to by other international legal – and political – instruments. For instance, Article 1.1-4 of the *Montego Bay Convention on the Law of the Sea* (UNCLOS) establishes that:

“(4) ‘pollution of the marine environment’ means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities”⁹⁶⁵

⁹⁶² For a first approximation approximation to the definition of “*environmental damage*” within Rome II, *vid.* S. FRANCO, “Le règlement Rome II sur la loi applicable aux obligations non contractuelles”, in S. FRANCO, C. HENRICOT, S. SAROLEA & P. WAUTELET, *Actualités du droit international privé*, collection recyclages en droit, Anthemis, 2009, pp. 69-141, at pp. 127-128.

⁹⁶³ *Vid.* the description and references provided *supra*, Part I, Chapter 2, “*Typology of conventions*”. As explained, the amendments introduced to the Paris Convention and to the Brussels supplementary convention by the 2004 protocols aim at expanding very significantly the spatial scope of application thereof (*vid.* the amendments to the second Article of each Convention in the said protocols). Furthermore, both conventions contain multiple remissions to the *lex fori*. This, combined with the additional enlargement of the scope of application of the Vienna Convention by the 1998 protocol and the existence of the 1988 joint protocol (which aims at coordinating the Paris and Vienna regimes in order to create a comprehensive meta-regime whose spatial application is impressively large) makes the – subsidiary – application of Rome II to nuclear damage superfluous: very few situations escape therefrom. Probably it was considered that the very residual situations which would escape could be easily managed by domestic conflict of laws. An additional explanation could come from the political sensibility of the topic and its implications as regards sovereignty, as hinted by the explanatory memorandum of the Rome II proposal (p. 9). However, R. PLENDER & M. WILDERSPIN (*The European Private International Law of Obligations* (3rd), London, Sweet & Maxwell, 2009, p. 9) are very critical of this exclusion calling its grounds “*unconvincing*” and “*lame*” and noting, *inter alia*, that not all Member States are parties to the relevant conventions. A. DICKINSON (*The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, p. 233) raises a similar concern when he reflects on this provision from the stand-point of the *Čez* case.

⁹⁶⁴ *Vid.* L. ENNEKING, “The Common Denominator of the *Trafigura* Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law”, *op. cit.*, p. 312.

⁹⁶⁵ Surprisingly (and conversely to what happens with the chameleonic notions of environment found in various international legal instruments) different definitions of pollution in academia and international legal instruments seem to be mostly aligned. For an example of definitions found in academia, *vid.*, for instance, P. LAMBERT, “Le droit de l’homme à un environnement sain”, *op. cit.*, p. 565, footnote 2: “*La pollution se définit généralement en écologie comme « toute intervention de l’homme dans les équilibres naturels par la mise en circulation de substances toxiques ou nuisibles qui troublent ou empêchent*

In a similar sense, the OECD's 1974 *Recommendation of the Council on Principles concerning Transfrontier Pollution* states that:

*"[...] pollution means the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health harm living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment"*⁹⁶⁶.

Rome II's notion of "environmental damage" presents at least two main advantages over these traditional notions of "pollution". Firstly, it overcomes the controversy on whether pollution is a legal construct or a stand-alone factual element. As reported by De Sadeleer, the question swirls around whether "pollution" is to be identified with the breach of legal provisions (fixing an emission limit or a threshold of minimum environmental quality) or whether it is simply meant to arise from the impact of a given emission on the environment⁹⁶⁷.

Additionally, a second advantage arises from the fact that Rome II's notion of "environmental damage" is not limited to situations where damage results from the introduction of "*substances or energy*" into the environment. Thus, its formulation seems to be indeed broad enough as to encapsulate pollution within "*impairment*" / "*adverse change*" and go further as to comprise other detrimental situations which are not necessarily pollution-related. These may be, for instance, the endangerment of given animal species, or the over-exploitation of forests' timber resources, following the reference to the "*impairment of the variability of living organisms*", found at the end of recital 24. The term "*impairment of the variability of living organisms*", constitutes a reference to flora and fauna as singular elements, different from "*natural resources*". The term further seems to be inspired by Article 2 of the 1992 UN Convention on biological diversity⁹⁶⁸, for it refers to biological diversity, as it may be seen in the French

l'évolution naturelle du milieu », les sources principales de pollution étant, outre l'activité quotidienne de l'homme, l'industrie et l'agriculture".

⁹⁶⁶ Vid. OECD, *Recommendation of the Council on Principles concerning Transfrontier Pollution*, C(74)224, November the 14th 1974. The definition is to be found in the third paragraph of Title A (Introduction) of the Annex of the Recommendation.

⁹⁶⁷ N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l'Environnement*, op. cit., pp. 70-75. The first position entails that "*pour que l'on puisse parler de pollution, la substance rejetée dans l'environnement doit dépasser les normes de rejet ou de qualité des milieux récepteurs fixées par les pouvoirs publics*". The second one arises from the idea that "*[...] la pollution tient [...] de la gêne que la substance cause à l'environnement ou à ses victimes*". De Sadeleer solidly sustains the second position. Similarly, M. DIEZ DE VELASCO (*Instituciones de Derecho Internacional Público* (13th ed.), op. cit., p. 763) seems to equally sustain the second position. This author uses the above-referred UNCLOS definition of pollution to highlight the link between the notions of pollution and environmental damage: "*[...] un objetivo esencial de las normas internacionales medioambientales fue desde el comienzo de su desarrollo combatir la contaminación en todas sus formas, es decir (de acuerdo con una definición extraída directamente de la contenida en el art. 1.1-4 de la Convención de Montego Bay sobre el Derecho del Mar de 1982): la introducción por el hombre, directa o indirectamente, de sustancias o energía en el medioambiente natural, que produzca o que pueda producir efectos nocivos tales como daños a los recursos vivos, peligros para la salud humana y en general afectar de modo negativo a cualquiera de los usos a los que el propio entorno pueda destinarse. La noción de contaminación está, pues, vinculada directamente a la de daño, (potencial o real)*" (emphasis added).

⁹⁶⁸ Article 2 reads as follows: "*For the purposes of this Convention:*

language version of the Regulation, which directly mentions a "*détérioration de la diversité biologique*"⁹⁶⁹. Thus, the width of the notion of environmental damage is likely to comprise, for instance, situations such as a transboundary fire starting from a cigarette butt in Southern France, extending over to northern Spain and destroying more than 13.000 hectares of woods⁹⁷⁰.

The apparent width of the notion, which would be further comforted by the parallel width of the general notion of "damage" within the Rome II Regulation⁹⁷¹, is to be considered cautiously: some commentators consider that the content of recital 24 needs to be understood as being "*roughly in line*" with the definition of environmental damage included in Article 2 of the ELD⁹⁷². Since, as it may be recalled, it was contended *supra* that the ELD's notion of

"Biological diversity" means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems. [...]"

⁹⁶⁹ However, the Spanish language version is almost identical to the English one: *Por «daño medioambiental» debe entenderse el cambio adverso de un recurso natural, como el agua, el suelo o el aire, el perjuicio a una función que desempeña ese recurso natural en beneficio de otro recurso natural o del público, o un perjuicio a la variabilidad entre los organismos vivos.* In respect of the different linguistic versions of EU legal instruments, T. HARTLEY (*The Foundations of European Union law* (7th ed.), *op. cit.*, pp. 64-65) acknowledges that the interpretation of the EU's multilingual texts poses particular problems. This arises notably from the fact that "[a]ll the official languages except Irish are working languages of the Institutions. Union legislation is published in all the working languages, and it is generally accepted that all versions are equally authentic [...]". He further explains that, in order to overcome these problems, the ECJ is rather pragmatic: "*In practice, the European Court does not appear to have been troubled by linguistic differences in the texts. The reason is simple: [...] the Court does not put a great deal of weight on the literal meaning of the words. Policy considerations play a particularly important role [...] the Court adopts the meaning which, in its view, best accords with the purpose of the provision and the policy objectives pursued by the Court [...]*". Similar developments may be found in A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, pp. 199 and following.

⁹⁷⁰ Real-life example. *Vid.* the following link: <http://www.lefigaro.fr/actualite-france/2012/07/22/01016-20120722ARTFIG00130-incendie-a-la-frontiere-franco-espagnole.php> (last checked June the 3rd 2015).

⁹⁷¹ This is an expansion of an argument elaborated by A. DICKINSON for slightly different purposes (*The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, pp. 233-234 and pp. 139-140). When considering the notion of "nuclear damage" the referred author contends that the notion of damage in Article 2.1. of the Regulation – which is only a partial definition, or more precisely, a statement from which the notion of "damage" is to be inferred – has a "*broad meaning*", since the provision states that it covers "*any consequence arising out of*" relevant events.

⁹⁷² *Vid.* M. BOGDAN, "Some Reflections Regarding Environmental Damage and the Rome II Regulation", *op. cit.*, p. 100; R. PLENDER & M. WILDERSPIN, *The European Private International Law of Obligations* (3rd ed.), *op. cit.*, pp. 638-639. The latter authors contend that the content of Recital 24 of Rome II is "*clearly inspired*" by the definition of environmental damage found in Article 2 of the ELD: "*For the purpose of this Directive the following definitions shall apply: 1. 'environmental damage' means:*

(a) *damage to protected species and natural habitats, which is any damage that has significant adverse effect on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I; Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.*

environmental damage was rather reductive⁹⁷³, their opinion would entail the need to undertake a similar restrictive approach to Rome II's notion of environmental damage. However, a number of arguments may be put forward against this restrictive understanding of the notion, and thus in favor of a wide construction thereof:

i) While a “*roughly in line*” kind of interpretation would provide systemic coherence between Rome II and the ELD, it may well be counterproductive – ironically – from an environmental protection perspective: Not only it would entail shrinking the scope of the relevant environmental protection from a substantive perspective, but it would furthermore result in introducing a *de minimis* limitation in the notion as currently reflected in the Rome II Regulation. This would be so because, on top of the definition of “environmental damage”, the ELD contains a definition of what is meant to be understood as “damage”, which acts as some sort of *de minimis* restriction⁹⁷⁴. M. Bogdan precisely suggests interpreting both concepts of “environmental damage” in a coherent way and thus transposing the *de minimis* restriction into Rome II⁹⁷⁵. However, precisely, one of the advantages highlighted *supra* of private international law over public international law is that, *a priori*, choice-of-law-based mechanisms are not necessarily submitted to a *de minimis* reasoning⁹⁷⁶. Giving away the said advantage would entail a reduction in the level of environmental protection enshrined in Article 7 Rome II, and would furthermore run against the referred “wide” understanding of the general notion of damage within Rome II⁹⁷⁷. A. Dickinson asserts that the notion of damage in Article 2.1. of the Regulation has a “*broad meaning*”: “*The provision neatly sidesteps the questions whether a particular injury or loss is to be regarded as legally significant, and replaces it with a broad, fact-based concept requiring identification of the consequences arising out of tort / delict [...]*”. If the definition of damage within the ELD may restrict the notion of “environmental damage” within the said instrument, then the definition of damage within Rome II may expand the notion of “environmental damage” within the latter.

(b) *water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;*

(c) *land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms; [...]*”.

⁹⁷³ *Vid. supra* Box 13 (Part I, Chapter 2).

⁹⁷⁴ “*For the purpose of this Directive the following definitions shall apply: [...] 2. ‘damage’ means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly; [...]*”.

⁹⁷⁵ *Vid. M. BOGDAN, “Some Reflections Regarding Environmental Damage and the Rome II Regulation”, op. cit., p. 101.* This is further contended by R. PLENDER & M. WILDERSPIN, *The European Private International Law of Obligations* (3rd ed.), *op. cit.*, p. 639 (who, on their turn cite P. Stone): “*It clearly makes no sense to limit the scope of art.7 of the Regulation so that it does not apply to small scale disputes between neighbours [...]*”. The same authors acknowledge, nevertheless, that “*it may be difficult to know precisely where the boundaries should lie*”. In my opinion this interpretation clearly runs against the ratio of the relevant provision.

⁹⁷⁶ *Vid. supra* Part I, Chapter 2, “*Conclusion: The “default” role of choice of law*”.

⁹⁷⁷ As elaborated *supra* note 971. It is important however to recall that Article 2.1. of the Regulation is not properly a full definition, but a statement from which the notion of “damage” may be partially inferred.

ii) Moreover, parallel interpretation is by no means mandatory. As it stems out of the ECJ's *Falco privatstiftung* case-law⁹⁷⁸, a given concept may have its autonomous definition for PIL purposes, independently from what may be stated in other subfields of the European legal order. In this precise case, while the Directive does not create private-law causes of action, and focuses on environmental damage *per se*, Rome II does precisely focus on private-law causes of action and extends to environmental damage *lato sensu*. Therefore, divergences in interpretation of notions would be justified by the different nature and scopes of both legal instruments.

iii) As highlighted by A. Dickinson, during the Rome II legislative process the European Parliament expressed its desire to have an explicit reference to the "environmental damage" definition in Article 2 of the ELD inserted in Rome II, which was rejected by the Council. Ultimately, in the conciliation phase, current Recital 24 was introduced⁹⁷⁹. This explicit withdrawal of an explicit reference should further comfort the idea that, if a systemic interpretation is to be entertained, then the one to be performed is the one suggested *supra*: an *intra*-Rome II systemic reading of the definition of "environmental damage" in the light of the Regulation's very notion of damage.

iv) Recital 24 is precisely a recital. Even supposing that it was to be interpreted in the way that M. Bogdan and others contend, it has traditionally been considered that recitals in EU legislation only have an indicative value, i.e. their nature is not mandatory⁹⁸⁰. Therefore, the content of the recital may be freely shortened, widened or, eventually, even altered, by the ECJ's case-law. If a time comes when the ECJ is confronted with the need to pronounce itself on this point, other than the arguments put forward in previous paragraphs, it may avail itself of the principles of EU environmental law to construe the definition expansively. Nevertheless, it must be acknowledged that despite this "classic" position, recent academic work warns against (and criticizes) a political and case-law trend which is subtly changing the *statu quo* of the question⁹⁸¹: problematic / controversial points in the text of proposals of secondary EU legislation are being eliminated from the main text whenever they cannot be agreed upon and placed amongst recitals. This would give rise to a duality: recitals which merely correspond with the Treaty-based obligation to motivate EU acts *versus* recitals which would have a

⁹⁷⁸ Vid. ECJ, *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst*, judgment, case C-533/07, ECLI:EU:C:2009:257.

⁹⁷⁹ Vid. A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, p. 431.

⁹⁸⁰ Vid. P. CRAIG & G. DE BURCA, *EU Law – Text, cases and materials* (4th ed.), Oxford, OUP, 2007, p. 87. Recitals respond to the "duty to give reasons" enshrined in the former Art. 253 ECT / current Article 296 TFUE ("[...] Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties [...]"). In the same vein, C. OTERO GARCÍA-CASTRILLÓN, "International litigation trends in environmental liability: a European Union-United States comparative perspective", *op. cit.*, p. 568 ("However, recitals only help to explain what is intended by the text [...]").

⁹⁸¹ S. LEMAIRE ("Interrogations sur la portée juridique du préambule du règlement Rome I", *Recueil Dalloz*, vol. 31, 2008, pp. 2157-2161) deals with this question in detail. P. LAGARDE ("Rapport de synthèse", in S. COURNELOUP & N. JOUBERT, *Le Règlement Communautaire Rome II sur la loi applicable aux obligations non-contractuelles*, Travaux du Centre de recherche sur le droit des marchés et des investissements internationaux, vol. 31, Paris, Litec – L.G.D.J., 2008, notably pp. 199 & 208) touches upon the question within the context of Rome II, in the frame of a wider-subject article.

“prescriptive” content. Then, following the ECJ’s preference for teleological interpretation the content or the prescriptive recitals could possibly become mandatory *via case-law*⁹⁸². However, even in such a hypothesis, it must be recalled that recital 24 arises from an explicit opposition to the insertion of an explicit cross-reference to the ELD’s notion of environmental damage.

Notwithstanding these arguments, until the ECJ comes to rule over this notion, all questions pertaining thereto will remain open. As a caveat, nevertheless, the pro-environmental expansive reading hereby contended may possibly find its limits in the need to avoid characterization difficulties: there is a potential risk of overlap with other concepts, as for instance, product liability. What if due to an “*adverse change*” in air or water, derived from chemical leak from a nearby factory, the apples of a certain plantation became poisonous and, subsequently, damage was “*sustained by persons [...] as a result of such damage*”. Since the 1999 amendment to the Product Liability Directive⁹⁸³ it may be possible to sustain that this case needs be conceived in terms of product liability – a “process” not being necessary to consider the apple a product – and that damage compensation may be sought from the apple manufacturer. However, arguments could equally be put forward to conceive the case in terms of environmental tort and seek liability from the corporation operating the factory. While this kind of situation may possibly be solved, in many instances, by a *conditio sine quae non*, or even a *lex specialis* reasoning, it remains to be seen what the ECJ’s approach may be. In the mean time, should this kind of cases arise, plaintiffs may possibly try to concomitantly entertaining two different actions in tort, against the apple manufacturer and against the owner of the factory. It is even possible that this kind of situation may give rise to “characterization shopping” until the ECJ is actually required to rule on the issue.

All the considerations in previous pages have depicted the extent to which the content and breadth given to a crucial notion, as “environmental damage”, within a given legal instrument, such as Rome II, may significantly impact on the effectiveness of the relevant legal mechanism. But, further upstream in the sequence of reasoning, the very notion of “tort” reflected in the said legal instrument may equally have dramatic consequences on the usefulness of the referred legal mechanism.

⁹⁸² *Vid.* S. LEMAIRE, “Interrogations sur la portée juridique du préambule du règlement Rome I”, *op. cit.*, pp. 2159-2160. Interestingly, one of the examples she provides as having the potential to become consecrated through case-law has indeed acquired such condition: recital 7 of the Rome I Regulation in the *Hotel Alpenhof* case-law (ECJ, Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller, judgment, Joined cases C-585/08 and C-144/09, ECLI:EU:C:2010:740).

⁹⁸³ *Vid.* Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. L 210, 7.8.1985, p. 29 (Amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. L 141, 4.6.1999, p. 20).

B. *Lex qualificationis* (II): the impact of the chameleonic concept of tort on the protection of the environment

As mentioned, the reflections *supra* on a possible unitary notion of tort under comparative law have served only a guiding purpose. Ultimately, what may exactly be considered as tort – and what may not – is a question that each relevant judge or tribunal will answer. Usually, this will be done taking into account categories and conceptualizations under the *forum's* own law (*lex fori*) – although this point may vary from one legal order to another⁹⁸⁴. Such characterization will be performed by the judge before initiating the choice-of-law reasoning – possibly, even before initiating the private international law reasoning. As it is well-known, in the frame of the private international law of the EU, national judges do not use their own system of private law as *lex qualificationis* for characterization purposes: characterization is based on the autonomous concepts of the EU's system of PIL⁹⁸⁵. However, Rome II does not provide explicit definitions of the terms tort, delict, or non-contractual obligation⁹⁸⁶. In cases like this one, on the basis of the principle of coherent interpretation of the EU PIL instruments on “civil and commercial matters”, definitions from the realms of the Brussels Convention / Regulations, and the Rome Convention / Rome I Regulation can be transferred to the realm of the Rome II Regulation⁹⁸⁷. Therefore, the relevant answers are to be found in certain well-known ECJ rulings in the realm of international jurisdiction in “civil and commercial matters”: the autonomous definition of “matters relating to tort, delict or quasi-delict” arising from the *Kalfelis & Handte* case-law. These decisions define as contractual a matter which refers to “a situation in which there is [an] obligation freely assumed by one party towards another”⁹⁸⁸, and consider to be tortious “[any action] which seek[s] to establish the liability of a defendant and

⁹⁸⁴ Vid. J. C. FERNÁNDEZ ROZAS & S. SÁNCHEZ LORENZO, *Derecho Internacional Privado* (7th ed.), op. cit., p. 151: “El papel de la calificación ex lege fori termina al elegir la norma de conflicto que concluye con la localización o determinación del derecho extranjero aplicable”.

⁹⁸⁵ This is rendered explicit by recital 11 of the Rome II Regulation: “The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability”. On the notion of autonomous interpretation *vid.*, *inter alia*, M. AUDIT, “L'interprétation autonome du droit international privé communautaire”, *Journal du droit international (Clunet)*, vol. 131-3, 2004, pp. 789-816 (where he already forecasted some of the difficulties that this method would lead to).

⁹⁸⁶ While the Regulation does have an article named “Non-contractual obligations” (Article 1), the content thereof provides very little guidance:

“Non-contractual obligations

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo.

2. This Regulation shall apply also to non-contractual obligations that are likely to arise.

3. Any reference in this Regulation to:

(a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and

(b) damage shall include damage that is likely to occur”.

⁹⁸⁷ Vid. recital 7 of the Rome II Regulation, and Recital 7 of the Rome I Regulation. The latter reads as follows: “The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (5) (Brussels I) and 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)”. Therefore, the “transfer” of notions does not work unidirectionally, but whichever way it may be necessary.

⁹⁸⁸ Vid., ECJ, *Handte*, judgment, case C-26/91, ECLI:EU:C:1992:268, para. 15.

which [is] not related to a "contract" within the meaning of Article 5 (1) [of the Brussels I Regulation]"⁹⁸⁹.

Although this definition may seem relatively straightforward, it turns out to be blurrier than it may appear at first sight: it is problematic for it raises the issue of knowing where exactly to place the frontier between tort and contract law⁹⁹⁰. This apparently theoretical question, paradoxically, bears very precise consequences in practical terms in situations of environmentally-related harm inflicted on humans in their working places. These situations lie precisely on the frontier between a potential environmental tort and contractual liability in employment matters. An illustration of this phenomenon can be found in a "classic" British case, *Lubbe v. Cape*, which will equally serve as an illustration of the *forum non conveniens* and "subsidiarization" problems discussed *infra*⁹⁹¹:

BOX 16:

Lubbe V. Cape⁹⁹²

"My Lords,

1. The central issue between the plaintiffs and the defendant in these interlocutory appeals is whether proceedings brought by the plaintiffs against the defendant should be tried in this country or in South Africa.

2. There are at present over 3,000 plaintiffs. Each of them claims damages in one of the 11 writs issued against the defendant between February 1997 and July 1999. All the plaintiffs claim damages for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos and its related products in South Africa. In some cases the exposure is said to have occurred in the course of the plaintiff's employment, in others as a result of living in a contaminated area. The exposure is said to have taken place in different places in South Africa and over varying, but sometimes lengthy, periods of time, ending for claim purposes in

⁹⁸⁹ *Vid.*, ECJ, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, judgment, case 189/87, ECLI:EU:C:1988:459, para. 17.

⁹⁹⁰ Recent ECJ case-law has gone further in exploring this problem, but it is still far from solving all possible questions. *Vid.* ECJ, *Marc Brogsitter v Fabrication de Montres Normandes EURL and Karsten Fräßdorf*, judgment, case C-548/12, ECLI:EU:C:2014:148. The distinguishing criterion established by the ECJ therein (notably, par. 25 and 29) is the "purpose of the contract" ("l'objet du contract" in French, "el objeto del contrato" in Spanish). Taking into account the cases discussed in Boxes 16 and 17, the question remains open as to whether a potential obligation by a given corporation to ensure the safety of its employees stems from the relevant contracts or from some other more general upstream legal rule / duty. The answer to this question may even potentially vary from one legal system to another. For a commentary on *Brogsitter*, *vid.* S. SANCHEZ LORENZO, "Délimitation entre « matière contractuelle » et « matière délictuelle » dans l'Espace judiciaire européen (l'affaire Brogsitter)" (in L. D'AVOUT (coord.), "Chronique de droit international privé de l'UE (2014)", *Journal de droit international (Clunet)*, 2015, pp. 471-478.

⁹⁹¹ *Vid. infra* (this very chapter), respectively, "The problem of subsidiaries" and "Forum non conveniens".

⁹⁹² *Vid. Lubbe and Others and Cape Plc.* [2000] UKHL 41 (20th July, 2000); found online at the website of the British and Irish Legal Information Institute on May the 19th 2015 under the following link: <http://www.bailii.org/uk/cases/UKHL/2000/41.html>

1979. One of the plaintiffs (Mrs. Pauline Nel, suing as personal representative of her deceased husband) is a British citizen resident in England. All the others are South African citizens resident in South Africa. Most of the plaintiffs are black and of modest means. Instructions to sue have been given to English solicitors by more than 800 additional claimants.

3. The defendant is a public limited company. It was incorporated in England in 1893 under the name Cape Asbestos Company Limited, principally to mine and process asbestos and sell asbestos-related products. From shortly after 1893 until 1948 it operated a blue asbestos (or crocidolite) mine at Koegas and a mill at Prieska, both in the Northern Cape Province. In 1925 the defendant acquired the shares in two companies, both incorporated in 1916: these were Egnep Limited and Amosa Limited, which operated a brown asbestos mine and mill at Penge in Northern Transvaal. For practical purposes the head office of these companies was in Cape Town. In 1940 a factory was opened at Benoni, near Johannesburg, to manufacture asbestos products. It was owned by a wholly-owned subsidiary of the defendant. [...]

5. Although originating in South Africa, the defendant's asbestos-related business has not been confined to that country. From 1899 the defendant operated a number of factories in England engaged in processing asbestos and manufacturing asbestos products. A factory at Barking was run by the defendant from 1913 until 1962, and then by a wholly-owned subsidiary until the factory was closed in 1968. Another subsidiary, incorporated in Italy, operated a factory in Turin which made asbestos products from 1911 until 1968, with an intermission during the war years.

6. Some of the claims made in these actions date back to times when the defendant was itself operating in Northern Cape Province. But the central thrust of the claims made by each of the plaintiffs is not against the defendant as the employer of that plaintiff or as the occupier of the factory where that plaintiff worked, or as the immediate source of the contamination in the area where that plaintiff lived. Rather, the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss). Some 360 claims are made by personal representatives of deceased victims. As reformulated during the first Court of Appeal hearing the main issue raised by the plaintiffs' claim was put in this way:

"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 and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?" [...]"

[Emphasis in paragraph 2 added]

Further examples can certainly be provided. The following one is particularly interesting in a double sense: first, it is not asbestos-related, and, second, it depicts sufficiently recent events which involve one of the leading technological companies of our time. It therefore reflects that this kind of situations is far from being an anecdote from the past:

BOX 17:

Health problems suffered by Chinese employees from Apple sub-contractors in China

As reported by China Daily in 2011⁹⁹³, 137 employees of *United Win Technology* were victims of a toxic poisoning after using a chemical known as n-hexane in their workplace in order to clean touch panels, between August 2008 and July 2009. Victims have been diagnosed with muscular atrophy and damage to their nervous system. *"N-hexane is a colorless liquid with a slight pungent smell. Its potential risks and safe exposure limits are well known in the industry. Chronic exposure can cause extensive peripheral nervous system failure. Symptoms include tingling and cramps in the arms and legs, followed by general muscular weakness"*. However, by the time that the story was captured by the media (i.e. 18 months after the first worker was diagnosed) the victims were reported to be still uncertain about their true health condition. On top of the known risks of the substance, *"Investigators also found that the chemical was used without proper ventilation"*⁹⁹⁴.

United Win is a subsidiary of the Taiwanese corporation *Wintek Corp*, which is a supplier of iPhone components for *Apple*. *Apple* acknowledged the situation in its Apple Supplier Responsibility 2011 Progress Report. Despite the fact that the said report states that most of the 137 affected employees had returned to work, China Daily reports that one hundred of them left *United Win* with a one-shot compensatory payment ranging between 80,000 to 140,000 yuan (\$12,166 to \$21,291)⁹⁹⁵. The said payments were coupled with signed

⁹⁹³ Vid. China Daily, February the 18th and the 22nd 2011; <http://www.chinadaily.com.cn/business/2011-02/22/content12056021.htm> and <http://www.chinadaily.com.cn/business/2011-02/18/content12038447.htm> (Last consulted on April the 11th 2011). Interestingly, the article further hints to an awakening in Chinese society of the fact that they're suffering the negative consequences of being "the world's factory": *"The cost of China being the world's factory is sometimes paid by workers or the environment, and this is just one of many such instances. But calls for factory owners and big international brands to be socially responsible - to build a greener and safer supply chain and to alleviate harm to workers and the environment - have never been louder, environmentalists say. As public attention to misdeeds increases, they say, it will be more difficult for these major beneficiaries of "made in China" to dodge criticism."* It also points towards the idea (equally suggested above in "The Nigerian case" dealt with in Box 6 (Chapter 1), that *"The government should play a stronger part in effective enforcement [...]"*. This is furthermore complemented with the additional nuance that the government should be *"[...] taking pre-emptive measures to prevent accidents rather than just punishing those that violate safety or environmental regulations [...]"*.

⁹⁹⁴ Although the following comment relates more to the human rights dimension of the referred situation than to environmental aspects, it is interesting to note that, as reported by the article, their monthly income amounts to less than 3,000 yuan (US\$457), and their working-day amounts to 12 hours.

⁹⁹⁵ *"Yao Xiaoping, a 22-year-old from Shaanxi province, said the first thing he did after discharge from the hospital eight months ago was to negotiate with the company for compensation. "The company said I can only get that on a promise of leaving the factory and signing an exemption agreement, which means the company would not take any responsibility if my health conditions worsened in the future."*

agreements exempting *United Win* from responsibility should their healths worsen. The 37 employees who still worked in the company at the time that the story was published received a notification that the local government would provide them with “10,000 to 30,000 yuan in disability benefits from the social security fund that would be included in their pay”. However, beyond these elements, very little more has been done in order to address the situation of the victims. The article further reports: i) that the victims have unsuccessfully requested “to have an independent third party appraise our health conditions and give us due and fair treatment”, and ii) that several of them do not have the means to pay for the necessary medication beyond the 6 months of treatment paid by the company, despite the fact that they consider that their healths are not fully reestablished⁹⁹⁶.

Putting aside the facts that damages in the Apple case have been inflicted by an Apple supplier and not by Apple itself or an Apple subsidiary⁹⁹⁷, and that Apple is not a European corporation, both cases illustrate the complexity of the questions at stake: can these cases be characterized as environmental torts? Or else are these cases to be characterized merely as employment contract litigations where employee safety / safety at the work place is at stake? Is there an overlap between both categories? If one was to follow exclusively the notion of environmental damage that stems out of recitals 24 and 25 and Article 7 of Rome II, these situations could probably qualify as situations of environmental tort, for they relate to an adverse change in a natural resource (air) which results in “*damage sustained by persons*”. But the proper question in here is not whether this situation can qualify as environmental tort, but whether, upstream, it can qualify as tort at all. The environmental (*lato sensu*) implications are clear, but if upstream the situation cannot be characterized as tort, then downstream it cannot qualify as environmental tort. Again, as already mentioned, this is a question for which different national systems of private law may have different answers⁹⁹⁸, and in the frame of the system of private international law of the EU the answer to be delivered needs to be based on EU-wide *autonomous* interpretations of concepts⁹⁹⁹. If one was to follow literally and strictly the criteria referred *supra*, they would necessarily lead to sustaining that, by virtue of the ECJ’s case-law

Yao finally decided to quit in November, with 90,000 yuan in compensation. He returned to his hometown in Xuzhou and is still recuperating. Yao said his legs and hands still feel numb and that he is always tired after “very little physical exertion. I will try to find a new job after full recovery, although I’m not sure how long that would take. “To be frank, I don’t know what to do if the worst is to come,” Yao said. “The compensation would be a drop in the ocean for medical treatment of the disease” (emphasis added).

⁹⁹⁶ “Six months later, I stopped taking the medication when the company stopped paying for it, but I’m almost sure that I’m still not quite right [...] “I have no other choice but to continue working at the factory for fear the disease will return and the ensuing high costs of medication, which I cannot afford on my own.”

⁹⁹⁷ The issue of subsidiaries will be discussed in detail *infra* in this very chapter.

⁹⁹⁸ For a general comment on this problem in the frame of a similar context (carriage by air) *vid.* M. BOGDAN, “Aircraft Accidents in the Conflict of Laws”, *Recueil des Cours de l’Académie de Droit International*, vol. 208, Leiden, Martinus Nijhoff, 1988. Different systems of private law have different answers to the question of ascertaining whether actions seeking to establish liability for damages resulting from the death or injury of a passenger are actions in contract or actions in tort (p. 141 and following).

⁹⁹⁹ *Vid.* recital 11 of the Rome II Regulation, for an explicit acknowledgement of this point.

on the delimitation between contractual and delictual matters, the contractual characterization should prevail in the the *Lubbe* and *Apple* cases: they involve situations where “there is [an] obligation freely assumed by one party towards another”¹⁰⁰⁰. Thus, it cannot be said that the actions introduced by South-African plaintiffs and the potential actions by Chinese plaintiffs are not actions seeking “to establish the liability of a defendant and which are not related to a “contract” within the meaning of Article [7.1]”¹⁰⁰¹.

All of this being said, as long as the ECJ does not provide a specific clear-cut solution to this legal conundrum, arguments can also be put forward to support the opposite conclusion¹⁰⁰². It may be argued that the referred criteria seem to be excessively large and imprecise and would require further clarification by the ECJ: does the mere prior existence of a contractual bonding between both parties entail that any controversy that is not clearly and totally unrelated to the existence of the contract falls automatically and necessarily within the realm of contractual matters? The point is that, beyond the existence of a contractual relationship between subjects, it would be worth considering whether the precise obligation at stake belongs somehow within the frame of the said contractual relationship – directly, *per* the content of the contract, or indirectly, *via* contract-relevant *lois de police* or the applicable law – or whether it derives from a general duty of care – which would again derive from the applicable law. The criterion introduced by the Brogsitter case-law, the assessment of the “purpose of the contract” (“l’objet du contract” in French, “el objeto del contrato” in Spanish) remains unhelpful: whether a potential obligation by a given corporation to ensure the safety of its employees stems from the relevant contracts or from some other more general upstream legal rule / duty is a point that depends on the applicable law, and therefore, is a contingent one that may even potentially vary from one legal system to another. It is well-known that resorting to the applicable law to answer this kind of question leads to falling into a Tessili-like loophole reasoning¹⁰⁰³, which is extremely uncomfortable for practitioners and academics alike. Therefore, the simplest solution would be an ECJ-crafted answer¹⁰⁰⁴.

If the ECJ decided to resort to comparative law to obtain guidance as to how to explicitly solve this issue, it would find opinions which would entail relaxing the strict and literal interpretation mentioned *supra*; it has been suggested that the “residual nature” of tort law (“the fact that its operation requires no prior legal relationship between victim and tortfeasor”)¹⁰⁰⁵ can be read in a more extensive manner:

¹⁰⁰⁰ *Vid.*, ECJ, *Handte*, judgment, *op.cit.*, para. 15.

¹⁰⁰¹ *Vid.*, ECJ, *Kalfelis*, judgment, *op. cit.*, para. 17.

¹⁰⁰² *Cfr.* P. E. NYGH, “The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort”, *op. cit.*, p. 356 (arguments in the opposing sense). For a general overview of this problem in the private international law of the EU, *vid.* R. PLENDER & M. WILDERSPIN, *The European Private International Law of Obligations* (3rd ed.), *op.cit.*, pp. 49-70, and pp. 472-474.

¹⁰⁰³ *Vid.* ECJ, *Industrie Tessili Italiana Como v Dunlop AG*, judgment, case 12-76, ECLI:EU:C:1976:133.

¹⁰⁰⁴ For a review of how case-by-case-oriented the case-law of the ECJ has become on diverse aspects of contractual matters, *vid.* S. FRANCO, E. ÁLVAREZ ARMAS & M. DECHAMPS, “L’actualité de l’article 5.1 du Règlement Bruxelles I – Evaluation des premiers arrêts interprétatifs portant sur la disposition relative à la compétence judiciaire internationale en matière contractuelle”, *Revue de Droit Commercial Belge*, vol. 2012/02, 2012, pp. 127-144.

¹⁰⁰⁵ *Vid.* C. VON BAR, *The Common European Law of Torts*, vol. I, *op. cit.*, pp. 2-3.

*"[...] the law of delict must be contrasted with the law of contract. Since the former requires no legal connection between the parties, a claim for compensation cannot be based on a delict if the loss was sustained solely as a result of a breach of contract [...]"*¹⁰⁰⁶.

Following these considerations, if a claim for compensation is necessarily meant to be based on a contract when the loss is sustained solely as a result of a breach of contract, a claim may be based on a delict when the loss is not necessarily sustained on a breach of a contract. Put otherwise, a claim may be based on a delict when it is the result of the breach of a parallel legal obligation, or the breach of a legal obligation which could qualify both as belonging within and without the contract. Therefore, the referred "residual nature" of tort must be understood as allowing to consider as tortious those situations which would still give rise to a claim if the contract was not present¹⁰⁰⁷. This interpretation would lead to coherent and homogeneous outcomes in cases like *Lubbe*. As it can be seen in the highlighted passage of the excerpt reproduced: "[i]n some cases the exposure [to asbestos] is said to have occurred in the course of the plaintiff's employment, in others as a result of living in a contaminated area". Splitting the situation into two different causes of action, one under the law of torts and the other under the law of contracts, may seem counterproductive from the perspective of the sound administration of justice, when those causes of action arise from the same set of facts. Even more so if such characterizations lead to diverging private-international-law outcomes.

Nevertheless, as the law stands nowadays, the distinction does not have any significant consequence, in choice-of-law terms, in respect of *Lubbe*, or *Apple*-like cases which would come to be litigated before Member-State courts. Article 7 of the Rome II Regulation and Article 8 of the Rome I Regulation ("*Individual employment contracts*"¹⁰⁰⁸) point, in principle, to

¹⁰⁰⁶ *Vid.* C. VON BAR, *The Common European Law of Torts*, vol. I, *op. cit.*, p. 4. The excerpt goes on as follows: "[a]lthough regulations for compensation of damages which oust the law of delict can be found in other areas of law (e.g. family law), the law of delict has always and universally been seen as the sum of rules governing non-contractual liability".

¹⁰⁰⁷ In other words, wherever there are doubts as to whether a matter is tortious or contractual, tort would be the abstract element that would still be present if the contract was extracted away from the facts. The presence of a contract (as it would be the case either in the hypothesis of an aircraft accident or in the *Lubbe* and *Apple* cases) does not necessarily mean that the matter is automatically meant to be considered contractual. Von bar sustains that "[s]ince [tort] requires no legal connection between the parties, a claim for compensation cannot be based on a delict if the loss was sustained solely as a result of a breach of contract". However, if the loss was not solely sustained as a result of a breach of contract, whenever there is a contract, it may be discussed whether the matter is contractual or tortious.

¹⁰⁰⁸ "1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

the same applicable law. In principle, the employer will not be interested in contracting away from the law of the country where the employee carries out his work in performance of the contract, which, furthermore, will usually be the country of the *locus delicti*. Therefore, the distinction will only become relevant if the *locus delicti* paradigm is someday, somehow, overthrown from international environmental torts. Some suggestions in this sense will be presented in Chapter 4¹⁰⁰⁹.

This reflection closes the depiction of the impact that the content and width of key-notions may have on the usefulness of the EU's environmental PIL mechanism. But this aspect is not the only one that may have an unnoticed influence on the effectiveness of the said mechanism: subtle restrictions in its subjective dimension – i.e. hindrances or limitations on the identity of the legal subjects who may resort to it – may also have a significant impact therein. While these limitations cannot be labelled as “definitions” (at least not in a strict sense), they may undermine, as it will be demonstrated in the following pages, the policy objectives set when the relevant provisions were drafted.

II. The subjective dimension of the mechanism

As it was seen in Chapter 2, the designation of the legal subjects who may resort to a legal mechanism is an identity-defining element of the latter, and participates in the determination of its effectiveness. Moreover, as it has been just suggested, the potential of this element to restrict or enhance the effectiveness of a given legal mechanism is subtle yet immense. This aspect will be examined, in respect of the EU's environmental PIL mechanism, in the following pages, which will first deal with the roles that may potentially be fulfilled by the State (A) and, subsequently, with the roles that individuals may play *via* collective-redress means (B).

Beyond their face value, these developments will end up revealing that there is, actually, a gap in the enforcement of the environmental policy of the European Union. This gap arises from the poor articulation amongst various relevant sectors of EU law, amongst which EU PIL (notably the Rome II and Brussels I Regulations), and EU environmental law (notably the ELD). In order to reach this conclusion, it is relevant to recall some notions that have been introduced in previous chapters: there are 2 sets of legal goods, private legal goods (the environment *lato sensu*; individual health and life, and individual property) and public legal goods (the environment *per se*); two kinds of damage, environmental damage *lato sensu*, and environmental damage *stricto sensu* (or ecological damage); two kinds of subjects, private subjects and public entities; and, at least, two sets of relevant policies / values, *favor laesi*, and environmental protection *stricto sensu*. Throughout the next pages it will be important, not only to keep these notions in mind, but also to observe how the following questions will subtly arise: what legal good – a private and / or a public one – is the relevant “damage” inflicted on? Damage, thus, suffered by whom? private and / or public subjects? And, damage litigated by

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply”.

¹⁰⁰⁹ *Vid. infra* Part II, Chapter 4, “Corrective interpretation”.

whom – private and / or public subjects – against whom? The reasoning which leads to the above-referred conclusion begins with an analysis of the main positions that the State may occupy in this kind of disputes.

A. The roles of the State

i. The state as a defendant

Discussing the two core roles that the State, regional governments or other sorts of public entities may play in the frame of “private international” environmental disputes entails presenting diverging amounts of developments in respect of each of them. Dealing with the possible role of the State as a defendant requires almost no specific consideration beyond the classic theme, in international law, of the jurisdictional immunity of the State¹⁰¹⁰. Other than this, only two caveats – which are, to a certain extent, two sides to the same coin – apply:

i) Should the State accept to withdraw its jurisdictional immunity, it is unlikely, however, that Article 7 of the Rome II Regulation ends up providing the relevant choice-of-law solution. Following Article 1.1, the Regulation “[...] *shall not apply, in particular, [...] to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)*”. Since the most notable cases of public-body-related damage to the environment are those which derive from military operations, it is hard to imagine in which way a public body may cause

¹⁰¹⁰ For a short introduction *vid.* F. POIRAT, “Les immunités des sujets de droit international”, in J. VERHOEVEN, *Le droit international des immunités: contestation ou consolidation?*, Paris, L.G.D.J., 2004, pp. 11-60. For a summary of case-law developments around the world, from a private international law perspective, *vid.* H. MUIR WATT, “Une perspective internationale privatiste” in J. VERHOEVEN, *Le droit international des immunités: contestation ou consolidation?*, Paris, L.G.D.J., 2004, pp. 265-274. For further details, *vid.*, for instance, C. J. LEWIS, *State and diplomatic immunity* (3rd ed.), London, Lloyd’s of London Press, 1990, pp. 14-38 (state of the question at the end of the 1980s) and pp. 94-122 (overview of the different understandings of the *acta imperii-acta gestionis* distinction amongst several different countries); B. JÜRGEN, *State immunity and the violation of human rights*, The Hague, Nijhof, 1997, pp. 1-22 (introduction to the notion and its difficulties, especially pp. 4-7, which present developments in respect of torts under domestic law); F. HAZEL & P. WEBB, *The law of state immunity* (3rd ed.), Oxford, OUP, 2013, pp. 11-98 (updated review of general developments in respect of the notion, especially pp. 73-97, which introduce considerations in respect of immunities before civil international courts), pp. 284-335 (general overview of the 2004 UN Convention on the jurisdictional immunities of the State and their property) and pp. 463-478 (developments on the so-called territorial tort exception, i.e. discussion on whether actions in tort may be an exception to general immunity principles). For a recent and optimistic account of the state of the question in respect of severe violations of human rights (which contends that international law is evolving towards the denial of jurisdictional immunities in these cases), *vid.* A. BELLAL, *Immunités et violations graves des droits humains : vers une évolution structurelle de l'ordre juridique international?*, Brussels, Bruylant, 2011 (especially, pp. 232-234). For an overview with a specific focus on international human rights violations, *vid.* C. I. KEITNER, “Transnational litigation: jurisdiction and immunities”, in D. SHELTON (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford, OUP, 2013, pp. 794-814. For a detailed assessment of the state of the question from a pure “private law” perspective (i.e. the perspective of litigating actions in tort against States for violations of human rights), *vid.* M. REQUEJO ISIDRO, “Violaciones Graves de Derechos Humanos y Responsabilidad Civil (Transnational Human Rights Claims)”, *op.cit.*, pp. 76-104. This author discusses, in the midst of the uncertainties surrounding the jurisdictional immunities of the State, a possible “tort exception” thereto (p. 99) and that such immunity is unlikely to be absolute when confronted with actions in tort arising from human-rights violations.

environmental harm without its public authority being involved. While the operation of energy-producing infrastructures is likely to have an environmental impact, as long as the operation is not directly conducted by a public entity it will not entail any problem (even if the relevant company's major share-holder is a public body)¹⁰¹¹. In any case, the referred requirement, introduced *via* an addition to Art. 1.1 of the Rome II Regulation – which was later reproduced in the Recast of the Brussels I Regulation – has been labelled as “*superfluous*”¹⁰¹², for its content is understood as being comprised in an upstream-lying concept...

ii) ... the notion of “*civil and commercial matters*”. Will the relevant action against the State come, upstream, within the said notion, as generally required in order to access the regimes contained in the Brussels I BIS, Rome I and Rome II Regulations? This is to be determined by examining two factors, which define the autonomous notion of “*civil and commercial matters*”: on the one hand, the identity of the parties to the relevant action; and on the other hand, the nature of the legal relationship between them, and the legal and factual basis of the action. If none of the subjects involved is a State or a governmental or public authority, the dispute is a “*civil or commercial matter*”. If this is not the case, the dispute may still be a “*civil or commercial matter*” provided that it involves a private law relationship and the relevant public body is not exercising its public powers¹⁰¹³.

ii. *The state as a claimant: public entities as international environmental plaintiffs*

The previous caveats having been introduced, it is actually the potential role of the State as claimant that is worth assessing and exploring. Specifically, its role as a claimant in respect of environmental damage *per se*, for whenever the State positions itself as a claimant in respect of environmental damage *lato sensu* it is simply acting as an aggregator of a multiplicity of individual claims pertaining to human-life, human-health or property. M. Bogdan approaches the role of public bodies as plaintiffs from the idea that the environment *per se* is a public legal good, and that, consequently, ecological damage needs to be understood as being inflicted on

¹⁰¹¹ *Vid.* ECJ, *Čez*, judgment, *op. cit.*

¹⁰¹² Both A. DICKINSON (*The Rome II Regulation: the law applicable to non-contractual obligations, op. cit.*, p. 266) and R. SPLENDER & M. WILDERSPIN (*The European Private International Law of Obligations* (3rd ed.), *op. cit.*, p. 475). Moreover, M. REQUEJO ISIDRO (“*Violaciones Graves de Derechos Humanos y Responsabilidad Civil (Transnational Human Rights Claims)*”, *op.cit.*, pp. 80-81) calls into question the distinction and the way it has been operated in public international law in recent decades: “*¿Cómo encaja -si es que encaja- una demanda de responsabilidad civil por daños originados en la violación de un derecho humano básico en el marco de la distinción entre actos iure imperii y iure gestionis? [...] En realidad, lo cierto es que más allá de las dificultades para precisar la ratio de la calificación de una actividad estatal como iure imperii o iure gestionis, hoy se está abriendo paso la idea de que esta distinción que hace de la excepción de los actos de comercio el centro del movimiento contra la inmunidad absoluta, no es ya suficiente; no responde a la realidad política imperante*”.

¹⁰¹³ Further discussion on this point may be found in the following pages. In any case, this is how A. DICKINSON (*The Rome II Regulation: the law applicable to non-contractual obligations, op. cit.*, pp. 261-264) systematizes the case-law of the ECJ on the matter, with a special reference to *Lechouritou* (ECJ, *Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias*, judgment, case C-292/05, ECLI:EU:C:2007:102). It must be noted though, that *Lechouritou* expresses the idea in slightly different terms, focusing on “*the legal relationship between the parties to the action [and on] the subject matter of the action*” (paras 29-31).

the society at large, rather than on individuals. This is why, he believes that, in general, proceedings stemming therefrom are naturally prone to being “initiated by the State or another public instrumentality (for example a province or a municipality)”¹⁰¹⁴. Thus, in his opinion,

“[i]f the claim is brought by a public authority in the exercise of its powers rather than in its capacity as a private person (for example as the owner of the affected land), that claim is, pursuant to article.1(1), possibly excluded from the Scope of the Regulation as not being a “civil and commercial matter”¹⁰¹⁵.

While, respectfully, this opinion may be disagreed with, it constitutes an excellent starting point in order to discuss the role of the State as a claimant in respect of environmental damage *per se*. Two aspects need to be distinguished in respect of Bogdan’s assertion. On the one hand, Article 1.1 of Rome II does not seem to be relevant for these purposes, for it aims at cases where the State is the defendant and not the victim / claimant. Therefore, respectfully, it seems more appropriate to disregard the reference to the said Article. On the other hand, the remainder of Bogdan’s assertion refers to whether an action for damages to the environment *stricto sensu*, brought by a State against a private tortfeasor derives from the exercise of State power (or not). Or, in other words, whether it falls outside the European autonomous notion of “civil and commercial matters” (or not). This is actually a key point, and must be assessed on the light of the content of the Environmental Liability Directive:

i) As regards, firstly, the point itself – whether the referred actions by public bodies can actually come within the notion of “civil and commercial matters” – it must be acknowledged that a significant degree of uncertainty swirls around it. As pointed out by Plender and Wilderspin, after examining a core set of ECJ decisions that may be relevant to the question, the Court’s case-law on the Brussels Convention appears to be rather inconclusive in this respect¹⁰¹⁶. Overall, “it is difficult to distil clear principles as to where the line between a private law and a public law right should be drawn”¹⁰¹⁷. The first decision in the set, and the most relevant, since its facts correspond largely with the kind of scenarios which come within the scope of Article 7 of the Rome II Regulation, is *Rüffer*¹⁰¹⁸. In this case the State of the Netherlands tried to recover the costs incurred in removing a wreck from the bight of Watum (a public waterway, sovereignty over which was disputed at the time between the Netherlands and Germany) from the German waterman who had owned the vessel before it sank. The ECJ ruled that the concept of “civil and commercial matters” did not include this kind of actions,

¹⁰¹⁴ Vid. BOGDAN, “Some Reflections Regarding Environmental Damage and the Rome II Regulation”, *op. cit.*, p. 101.

¹⁰¹⁵ *Ibidem*, p. 101.

¹⁰¹⁶ Vid. R. PLENDER & M. WILDERSPIN, *The European Private International Law of Obligations* (3rd ed.), *op. cit.*, p. 642. Both these authors and Dickinson further comment, other than *Rüffer* and *Baten, Henkel* (ECJ, *Verein für Konsumenteninformation v Karl Heinz Henkel*, judgment, case C-167/00, ECLI:EU:C:2002:555). However, while the possibility of extending the meaning of “civil and commercial matters” as done in *Henkel* may be a promising argument (*vid. R. PLENDER & M. WILDERSPIN, The European Private International Law of Obligations* (3rd ed.), *op. cit.*, p. 643), the following pages will stick to the other two decisions and further introduce considerations on *Eurocontrol*.

¹⁰¹⁷ Vid. R. PLENDER & M. WILDERSPIN, *The European Private International Law of Obligations* (3rd ed.), *op. cit.*, p. 642.

¹⁰¹⁸ Vid. ECJ, *Netherlands State V. Reinhold Rüffer*, judgment, case 814/79, ECLI:EU:C:1980:291.

for it had been “brought by the agent responsible for administering public waterways [...] in order to recover the costs incurred in [...] the exercise of its public authority”. This finding was mostly based on the fact that

*“the Netherlands State had the wreck [...] removed in performance of an obligation which was assumed under Article 19 (1) (a) and 20 (2) (d) of the Ems-Dollard Treaty within the framework of the river-police functions conferred on it in that waterway by the said Treaty and that consequently it acted in this case as the body invested with public authority”*¹⁰¹⁹.

Moreover,

*“The fact that in this case the action [...] does not concern the actual removal of the wreck but the costs involved in that removal and that the Netherlands State is seeking to recover those costs by means of a claim for redress and not by administrative process as provided for by the national law of other Member States cannot be sufficient to bring the matter in dispute within the ambit of the Brussels Convention”*¹⁰²⁰.

However, in *Baten*¹⁰²¹, the opposite conclusion was reached. The case concerned “a legal action under a right of recourse brought by Gemeente Steenberg, a Netherlands local authority, against Mr Baten, resident in Belgium, in order to recover sums of money paid by that authority, by way of social assistance, to the divorced spouse and the child of Mr Baten”¹⁰²². The ECJ’s understanding was that:

*“the legal situation of the public body vis-à-vis the person liable for maintenance is comparable to that of an individual who, having paid on whatever ground another’s debt, is subrogated to the rights of the original creditor, or is comparable to the situation of a person who, having suffered loss as a result of an act or omission imputable to a third party, seeks reparation from that party”*¹⁰²³.

And consequently, it concluded that

“the concept of civil matters encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in civil matters”.

¹⁰¹⁹ *Vid.* ECJ, *Netherlands State V. Reinhold Rüffer*, judgment, *op. cit.*, para. 10. Para 9 gives further precisions: it refers that the “public waterway, [was] administered by [the Netherlands] in performance of an international obligation and on the basis of provisions of national law which, in the administration of that waterway, confer on it the status of public authority in regard to private persons”.

¹⁰²⁰ *Ibidem*, para. 13.

¹⁰²¹ *Vid.* ECJ, *Gemeente Steenberg v Luc Baten*, judgment, case C-271/00, ECLI:EU:C:2002:656.

¹⁰²² ECJ, *Gemeente Steenberg v Luc Baten*, judgment, *op. cit.*, para. 2.

¹⁰²³ *Ibidem*, para. 34.

As it may be seen, both *Rüffer* and *Baden* point to the need to analyze the rights and legal provisions lying at the very root of the situations at stake, and to disregard the fact that what comes before the relevant courts are rights “of recourse” and / or actions for recovery. Paragraphs 32 and 36 of *Baten* clearly state that, at the very root of the situation, the public entity based its position on private law provisions (from the Dutch Civil Code). In *Rüffer*, while from a formal point of view, the public authority based its positions on provisions which may be labelled as “public law”, it may be questioned whether the actual content of those provisions actually gave the public entity any sort of prerogative, exorbitant power or bettered its position in any way, with respect to the situation of private subjects. Let us compare it with *Eurocontrol*¹⁰²⁴. In this case what lied at the root of the situation was a claim that no private subject could sustain, for it derived from “the recovery of charges payable [...] to a national or international body governed by public law for the use of equipment and services provided by such body, [whose] use is obligatory and exclusive”¹⁰²⁵. This was not the case in *Rüffer*: had the sovereignty over the watercourse not been in dispute, the Netherlands could have possibly also resorted to civil law provisions on damage to property. It seems likely, therefore, that a parallel result may have been attained, *mutatis mutandis*, on the basis of private law rules. In other words, it seems possible to “translate” the claim at the root of *Rüffer* into private law terms without distorting it, for the “waterways police” did nothing that a private subject whose lands were damaged by a third party would not have done¹⁰²⁶. Moreover, it may be recalled that, in the frame of the *Commune de Mesquer* case commented in Chapter 2¹⁰²⁷, the village of Mesquer had had access to the superfund regime, as if it was a private party¹⁰²⁸.

From this stand point, it is possible to content that *Rüffer* was wrongly decided to begin with: What should matter is whether the State acts on the basis of any privilege which distinguishes it from any “standard” or regular plaintiff / private claimant. If a given State places itself before a court in equal position to any (private) legal person or natural person – in other words not acting in the exercise of exorbitant powers – and introduces a claim that a private party could have introduced, there would not be, in principle, any reason why the relevant action should be considered to be of public-law nature. And, thus, there would not be any reason why the relevant action should not come within the notion of civil and commercial matters¹⁰²⁹.

¹⁰²⁴ ECJ, *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, judgment, case 29/76, ECLI:EU:C:1976:137

¹⁰²⁵ ECJ, *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, judgment, *op. cit.*, para. 4.

¹⁰²⁶ Both Bogdan and Dickinson contend that a public entity’s claim would come within the notion of “civil and commercial matters” if “the public authority based its claim on a right to compensation for damage suffered by it as the owner of land” (A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, p. 432; for Bogdan *vid.* the quotation above). It seems to me that it is defensible that, had the sovereignty over the watercourse been out of question, the actual content of what the Netherlands did amounts to a “claim on a right to compensation for damage suffered by it as the owner of land”.

¹⁰²⁷ *Vid.* Box 15 (Chapter 2).

¹⁰²⁸ *Vid.* *Commune de Mesquer*, judgment, *op. cit.*, para. 29.

¹⁰²⁹ For a parallel but not identical reasoning, *vid.* G. BETLEM & C. BERNASCONI, “European Private International Law, the Environment, and obstacles for Public Authorities”, *Law Quarterly Review*, 2006, pp. 124-151, at pp. 128-137. These authors defend that the kind of actions that this section deals with is legitimately meant to be considered as stemming from the realm of civil law. They emphatically refer that, despite the conceptual difficulties that this may mean for countries of continental tradition, the exercise of this kind of actions by public entities at the international level necessarily needs to be

This impression is further reinforced by the fact that, as suggested by Plender and Wilderspin, the situation in *Rüffer* could have come within the frame of Art. 10 of the ELD – had the ELD been enacted some 30 years earlier – and “*Such a right [to the recovery of costs] could have perfectly well been granted to individuals*”¹⁰³⁰. This idea constitutes a perfect transition towards the second aspect announced *supra*...

ii) ...the assessment of this question in the light of the content of the ELD. It is contended that since the ELD “*does not itself establish a mechanism to enable the vindication of public authorities’ rights to obtain compensation in a cross-border case, those rights would be unenforceable if they could not be asserted through the mechanism of private law*”¹⁰³¹. Against this opinion, it has been equally contended that “[t]he cross-border recovery by Member State authorities of clean-up costs involves mutual legal assistance, which is properly the subject of a [...] measure under [Article 192 TFUE]” and, therefore, it is not apt for being channelized through private-international-law instruments¹⁰³². While several arguments may be put forward to support either of these positions, many more questions remain open and hinder any attempt at providing a solid answer. In this sense, the core right consecrated in the ELD is a right of recovery from the polluter which intervenes after the environment has been restored, not a direct right to redress. Would it therefore still be possible to consider that there may exist, under other legislation, an independent right to redress (i.e. not contemplated in the ELD) on the hands of public bodies? If so, would such right still come within “*civil and commercial matters*” and would it, therefore, come within the scope of Art. 7 of Rome II? If there is no such possibility and, thus, the content of the ELD is all that there is, then the latter interpretation referred would reduce the *effet utile* of the ELD in a transboundary context. In a similar fashion, considering that the right consecrated in the ELD (and / or any other possible right on the hands of a public entity in respect of environmental damage *stricto sensu*) is a “public-law” right that may not come within the notion of “*civil and commercial matters*” significantly reduces the *effet utile* of Article 7 of the Rome II Regulation¹⁰³³.

All of these considerations point to the possible existence of a gap in the articulation of the ELD and the Rome II Regulation in respect of redress for ecological damage at the international level, as referred above. If public entities cannot avail themselves of Article 7 Rome II in order to obtain redress for international environmental damage *stricto sensu*, then, who can? The

understood as being “private law”. Moreover, they suggest (pp. 135-137) a “green interpretation” of the notion of “*civil and commercial matters*” in order to include these actions therein: their contention is that the EU principles of environmental law (especially the polluter-pays principle) and the wider framework of EU environmental law impose such interpretation. They moreover content (p. 137) that actions by public entities within the framework of the CLC are considered to be “civil” in nature, and the same should happen within the context of the EU’s PIL.

¹⁰³⁰ *Vid.* R. PLENDER & M. WILDERSPIN, *The European Private International Law of Obligations* (3rd ed.), *op.cit.*, p. 643.

¹⁰³¹ *Ibidem*, p. 643.

¹⁰³² *Vid.* A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, p. 434.

¹⁰³³ For a discussion on the ambiguous nature (public law or private law) of the rights consecrated in the ELD, and other aspects of the articulation of the Directive with private law in general, *vid.* C. VON BAR, *Non-contractual liability arising out of damage caused to another (PEL Liab. Dam.)*, Coll. Principles of European law. Study group on a European civil code, vol. 7, Munich, Sellier, 2009, pp. 529-531 (Commentary of “Article 2:209: Burdens incurred by the State upon environmental impairment”).

following pages will explore whether private subjects may, with the potential support of collective-redress mechanisms, amount to fill the referred gap.

B. The role of private claimants: collective redress

The analysis of the possible role of public bodies, as potential plaintiffs, in respect of environmental damage *lato sensu* has provided worrying conclusions. It has, therefore, pointed to the need to explore the possibilities of involvement for private subjects, either individuals or environmental associations, in the redress of ecological damage caused by private parties. In order to start the assessment of the possible role of private subjects as plaintiffs in respect of environmental damage *per se*, it may be fruitful to revisit M. Bogdan's rather graphic opinion on the involvement of the State: as suggested *supra*, it seems natural to this author, that the relevant proceedings against private polluters be initiated by public entities since ecological damage needs to be understood as being inflicted on the society at large, rather than on individuals¹⁰³⁴. The full extent of this assumption can only be really seized when insisting, once again, on the nature of the seminal distinction in environmental affairs between environmental damage in a pure sense – ecological damage, environmental damage *per se* – and damage to persons and property arising from environmental occurrences – environmental damage *lato sensu*¹⁰³⁵. When reflecting in terms of private enforcement of environmental policy, it is clear that the second notion is not only capable of being channeled through private litigation, but moreover, is naturally prone to being channeled through such means. As it is logical, private subjects are entitled to introduce claims in respect of their health / lives and their properties¹⁰³⁶. In other words, they have an individual interest therein, prone to being claimed before the relevant – civil and / or commercial – court¹⁰³⁷.

However, the situation is different in respect of environmental damage *per se*. It is generally considered that the environment *stricto sensu* – therefore, without taking into account possible damages to human health and human property – is the object of a so-called “diffuse interest”; as a legal good it cannot be submitted to any sort of *depeçage* which would allow the introduction of individual claims concerning individualized parts thereof¹⁰³⁸. Whatever the relevant definition of environment, it is a “common” or “collective” legal good. Claims in respect of this common good, if not channeled through the intervention of a public subject,

¹⁰³⁴ *Vid. supra* “The state as a claimant: public entities as international environmental plaintiffs”, discussing M. BOGDAN, “Some Reflections Regarding Environmental Damage and the Rome II Regulation”, *op. cit.*, p. 101.

¹⁰³⁵ It must be equally recalled, as it has been repeatedly indicated *supra*, that the “environment” is a chameleonic notion and, *ad minima*, there are two different notions of environment – the classic notions: the environment *lato sensu*, human life and health plus private property; and the environment *stricto sensu*, containing a varying amount of sub-notions and legal goods – biodiversity, natural resources, etc.

¹⁰³⁶ So is the case, as regards property, for public subjects acting outside their *iure imperii*.

¹⁰³⁷ Moreover, as it will be discussed in upcoming pages, these claims may be introduced individually or else collectively by several environmental victims where legal means in this sense have been made available by the relevant legal system.

¹⁰³⁸ The use of the word *depeçage* is used in a metaphoric way, due to its graphic character, and does not relate at all to the technical sense thereof in conflict of laws.

require a “converter” in order to function properly within the realm of private law claims. This kind of “adaptation”, which may allow private subjects to fill the gap that, apparently, public entities cannot fill, may be achieved, for instance, through the introduction of so-called collective redress. Roughly speaking, collective redress may be characterized as various forms of (mainly procedural) legal mechanisms which may allow various private subjects to overcome the complexities arising from the diffuse nature of a given interest in order to access justice in respect thereof. In the light of these considerations, it seems necessary to review the current state of collective redress mechanisms at the European level (ii and iii), and to suggest solutions to the problems that will be encountered (iv, v and vi). Before doing so, a general presentation of the concept of collective redress will be delivered (i).

i. The notion of collective redress

As announced, the first issue to be addressed is presenting the content of what in the European Union has generally been labelled as “collective redress” (“*recours collectifs*” in French, “*acciones colectivas*” in Spanish). Under the term collective redress, it is possible to find multiple sets of interrelated and partially overlapping notions, whose precise boundaries vary from one legal system to another and are difficult to establish¹⁰³⁹. Collective redress is, therefore, from the offset, a blurry notion, and is often used in an inconsistent fashion in academic, policy and political literature. As a matter of principle, it could be said that “[c]ollective redress is a cost-sharing and procedure-consolidating mechanism by which the claims of a group of claimants with similar fact and legal issues are combined together in one action”¹⁰⁴⁰. This mechanism is sometimes put in relation with the notion of “access to justice”, and with the need to produce economies of scale in the administration of justice: allowing a

¹⁰³⁹ Vid. M. HELLNER, “Private International Law and Collective Redress. The Case of Antitrust Damages Claims”, in P. LINDSKOUG, U. MAUNSBACH, G. MILLQVIST, P. SAMUELSSON & H.-H. VOGEL (eds.), *Essays in honour of Michael Bodgan*, Lund, Juristförlaget I Lund, 2013, pp. 105-120, at 106: “In the white paper, the Commission suggests two kinds of complementary mechanisms of “collective redress” –namely representative actions brought by entities such as consumer associations or state bodies, and opt-in class actions in which victims pool together to combine individual claims into one joint action. However the terminology is far from settled. So called “collective actions” have also been used as a comprehensive term that encompasses (1) joint actions, i.e. actions brought by one or several plaintiffs against one or several defendants as traditional two-party actions that are joined because of a close connection between the actions; (2) pilot cases, where one case is brought forward by an individual plaintiff but there are a number plaintiffs with similar claims who hope to settle based on the result of the pilot case; (3) actions brought by associations, and (4) group actions”. Additionally, Z. S. TANG (Z. S. TANG, “Consumer Collective Redress in European Private International Law”; draft version of the article referred *infra*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079237, p. 2, available on May the 26th 2016; hereinafter distinguished from the published version by using the reference “DRAFT”) equally highlights the diversity of the proceedings being grouped under the “collective redress” heading: “there are many different forms of collective redress mechanisms existing in different Member States”.

¹⁰⁴⁰ Vid. Z. S. TANG, “Consumer Collective Redress in European Private International Law” (DRAFT), *op. cit.*, p. 1. The extract goes on as follows: “In the area of consumer litigation, it is introduced primarily to compensate the weakness of expensive and time-consuming court proceedings in small claims with the purpose to increase consumers’ access to justice. Consumer contractual claims are characterised as of small value, which largely discourages individual consumers from resorting to judicial action to protect their legal rights. Collective redress combines separate consumer claims into one single action and is believed helpful to resolve the litigation difficulty in consumer claims”.

significant number of individuals in the same situation to demand redress through a single legal action eases access to justice by eliminating the need for each member of the group to individually assume a trial's burden and expenses¹⁰⁴¹.

But other than allowing "*handling cases which involve individually recoverable claims more efficiently than would be possible if all individual similar claims were to proceed individually*", there is a second policy rationale underlying collective redress proceedings, which consists in allowing the resolution of "*cases that might otherwise remain unresolved (individually non-recoverable claims)*"¹⁰⁴². This is to be understood in two senses. Firstly, there are certain categories of claims, especially in the fields of competition and consumer law, which, due to the low value of the sustained damages, are non-viable unless aggregated¹⁰⁴³. Secondly, as it has already been mentioned, there are other kinds of claim, as environmental claims, which are not amenable to individual redress due to the common / collective nature of the underlying legal good. Therefore, the first approximation to the notion of collective redress offered *supra* is not fully comprehensive. It would be probably better to reflect on collective redress in larger terms – even at the risk of rendering the notion excessively vague – by considering it as an overarching notion, comprising several different kinds of proceedings capable of addressing diversely-originated common stakes shared by several individuals.

The reference to several kinds of proceedings cannot be overstated: numerous different kinds of proceeding-denominations, coming from different legal systems, may respond to these policy rationales and may thus come within the "collective redress" label. Just as diverse as those proceedings are, equally diverse are the categorizations used by academia to classify

¹⁰⁴¹ Vid. M. J. AZAR-BAUD, "La nature juridique des actions collectives en droit de la consommation", *Revue européenne de droit de la consommation*, vol. 2012-1, 2012, pp. 3-28, at pp. 17-18 : "[...] outre la réalisation des droits, les actions collectives répondent-elles donc à un objectif d'efficacité permettant de faire des économies d'échelle [...] Le fait de permettre à bon nombre de personnes qui sont dans la même situation de demander réparation à travers une action unique facilite l'accès à la justice en éliminant le besoin pour chaque membre du groupe d'assumer individuellement les dérangements et les frais afférents à un procès notamment au régime de preuve, aux plaidoiries des avocats pour faire triompher sa cause". The excerpt further explains the realisation of scale economies in the United States class actions system: "C'est précisément la raison pour laquelle parmi les conditions de certification d'une class action selon la Règle 23 (a) des Federal rules of civile procedure aux États-Unis, l'on exige l'existence de questions communes (common questions ou commonality), et dans d'autres systèmes l'homogénéité des droits individuels. L'effectivité du recours collectif dépend de l'adéquation du remède proposé. Or, c'est pourquoi permettre l'accès à la justice doit être évalué en termes d'effectivité des droits et de l'efficacité de la procédure. En ce sens, il est aisé de conclure que l'effectivité des droits d'incidence collective exige l'introduction d'une action de groupe dans les pays qui manquent d'un système d'actions collectives".

¹⁰⁴² Vid. E. FALLA, "(EU) Collective Redress Proceedings: New Challenges for Judges", *Revue européenne de droit de la consommation*, vol. 2012-3, 2012, pp. 461-492, at p. 477. This author acknowledges, nevertheless, that: "In collective redress litigations, the number of group members and the complexity of the case run, however, the risk of increasing the length and costs of the proceeding".

¹⁰⁴³ Vid. M. ELIANTONIO, "Collective Redress in Environmental Matters in the EU: A Role Model or a 'Problem Child'?", *Legal Issues of Economic Integration*, vol. 41-3, 2014, pp. 257-274, at pp. 257-258. The author further highlights the importance of "[...] difficulties in quantifying the low-value damages [...] suffered and in bearing the costs and risks of litigation". In this respect, "an intervention by the Commission would be appropriate to set up an adequate procedural framework. This framework could mitigate social losses arising from illicit business practices, and ensure the effective enforcement of European legislation [...]".

them. Within such varied range, the following three-tier categorization seems to be most graphic and simple¹⁰⁴⁴:

- i) “group action, where exactly defined claimants bring actions in one procedure to enforce their similar claims together. Each group litigant is a party in the litigation”¹⁰⁴⁵;
- ii) “test case procedure, under which mass individual claims are filed, and a leading decision is given to one case, which decides the common factual and legal issues of similar legal actions, and serves as an example for other similar cases”¹⁰⁴⁶;
- iii) “representative action, where an organisation, an authority or an individual brings actions on behalf of a group of individuals, who are not the real party of the litigation”¹⁰⁴⁷.

In the first two categories referred each claimant remains a distinctly autonomous litigating party: they “simply combine individual claims together, without creating a new litigating relationship or changing the nature of the dispute between each claimant and the defendant”¹⁰⁴⁸. However, the situation changes in respect of the third category: in this kind of proceedings, since the action is introduced by a “representative” on behalf of other subjects there is, actually, only one claiming party to that litigation: the said representative. This is so irrespective of whether that subject is “an authority, an organisation, or an individual, instead of a group of [claimants]”¹⁰⁴⁹.

Therefore, the two first categories correspond with the facilitation rationale expressed *supra*, for they relate to individually recoverable claims whose management is hoped to be rendered simpler. The latter, in turn, probably corresponds in most instances with the “individually non-recoverable claims” rationale¹⁰⁵⁰. When digging deeper into these notions, it becomes clear that the three categories, possibly grouped around the two aforementioned policy rationales, further correspond with two different understandings of collective or common “interests” which can lay beneath collective-redress structures:

- i) in a first sense, a common or collective interest can be understood as the interest of a community, a general and abstract entity which absorbs and overpasses the addition of the

¹⁰⁴⁴ As explained by Z. S. TANG, “Consumer Collective Redress in European Private International Law” (DRAFT), *op. cit.*, pp. 2-3: “It is important to note that there is no universal consensus on the ‘standard’ categorisation. Different studies may provide different definition to each type of collective redress and there are some special practices of Member States which are hard to be put in any category”. Cfr. this classification by Z. S. Tang with the one by M. HELLNER (“Private International Law and Collective Redress. The Case of Antitrust Damages Claims”, in A. NUYS & N. E. HATZIMIHAL, *Cross-border class actions: The European way*, Munich, Sellier, 2014, pp. 223-240, at pp. 224-225).

¹⁰⁴⁵ *Ibidem*.

¹⁰⁴⁶ *Ibidem*.

¹⁰⁴⁷ *Ibidem*.

¹⁰⁴⁸ *Vid.* Z. S. TANG, “Consumer Collective Redress in European Private International Law”, *Journal of Private International Law*, vol. 7, 2011, pp. 101-141, at pp. 107-110 (This is the published version of the article previously referred to as “DRAFT”).

¹⁰⁴⁹ *Ibidem*.

¹⁰⁵⁰ Most cases, but not all of them. In exceptional circumstances, the State, under a *parens patriae* configuration, may become a representative for individually recoverable claims, as in the infamous Bhopal tragedy.

individual interests of its members. This common interest is indivisible and transcends purely individual interests.

ii) in a second sense, a collective interest can simply be the juxtaposition of the individual interests of each of the members of the community, gathered together by the simple fact of their union.

There is, therefore, a duality of collective interests, which resonates in the very notion of collective redress, and entails different substantive and procedural implications¹⁰⁵¹. This last idea points to a key element in the understanding of the notion of collective redress: in all cases, collective redress mechanisms lie at the junction between substantive law and procedural law, which is why defining its legal nature is not simple¹⁰⁵². In my view, collective redress proceedings constitute a procedural docking for collectively-held interests. Therefore collective redress is useless for asserting substantive rights which are not amenable to collective claims and, vice-versa, no substantive collective claim can access justice if the relevant forum does not count a procedural docking to allow addressing such claim.

After this brief theoretical approximation to the notion, let us turn to the current *de lege lata* situation in respect of collective redress across the European Union.

ii. *Brief description of the European and Member-State panorama on general collective redress*

a. The statu quo ante

In respect of collective redress at the European level, the current state of the question could be summarized by the proverb "much ado about nothing". An intense public and academic

¹⁰⁵¹ The fragment of the main text which elaborates on two different understandings of collective or common "interests" is a rough translation of the ideas presented in M. J. AZAR-BAUD "La nature juridique des actions collectives en droit de la consommation", *op. cit.*, pp. 3-4. Azar-Baud actually quotes L. BORE, *La défense des intérêts collectifs par les associations devant les juridictions administratives et judiciaires*, Paris, L.G.D.J., 1997: "Le premier sens définit l'intérêt collectif comme celui de la collectivité, elle-même considérée comme une entité générale et abstraite qui absorbe et dépasse la somme des intérêts individuels de ses membres. Cet intérêt collectif est indivisible et transcende les intérêts purement individuels, étant supérieur à ceux-ci et d'une autre nature. Il a été appelé parfois intérêt égoïste, intérêts diffus ou intérêt collectif stricto sensu. Selon le second sens relevé, les intérêts collectifs concernent la somme des intérêts individuels. Il s'agit de la simple juxtaposition des intérêts individuels que les membres d'un groupe ont mis en commun par le fait même de leur regroupement. Ces intérêts ont été appelés également intérêts altruistes, pluri-individuels et de plus en plus fréquemment intérêts individuels homogènes. Ces deux manifestations du phénomène collectif traduisent l'aspiration à un droit commun et permettent de parler d'une dualité d'intérêts collectifs. Cette dualité affecte la notion même d'action collective et entraîne des implications substantielles et processuelles différentes selon le type de droit en jeu".

¹⁰⁵² *Vid.* M. J. AZAR-BAUD, "La nature juridique des actions collectives en droit de la consommation", *op. cit.*, pp. 4-5. Referring to the "actions collectives": "l'action en justice projette les liens entre le droit procédural et de fond. C'est pourquoi se prononcer sur la nature juridique de cette institution n'est pas aisé".

debate has sparked¹⁰⁵³, especially in recent years, as regards the need and possible feasibility of introducing a collective-redress mechanism at the European level. While some authors¹⁰⁵⁴ trace the origins of the said debate to the 2005 green paper “Damages Actions for Breach of the EC Antitrust Rules”¹⁰⁵⁵ (thus placing it the field of competition law), others¹⁰⁵⁶ consider that the actual starting point of the debate lies in the 1993 Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market¹⁰⁵⁷. The latter contained the suggestion of harmonizing injunctive relief (“*actions en cessation*”) throughout the EU and it thereafter gave birth to the 1998 European directive on the topic¹⁰⁵⁸.

However, by no means is the notion of collective redress a recent one, or European in its origin:

*“Some common law countries, such as US, Canada and Australia have already established mature and widely used ‘class action’ mechanism, which enables one or more individuals to bring an action on behalf of putative claimants against the same defendant. Each putative claimant is presumed to consent being presented in the action and being bound by the judicial decision, unless he actively gives notice to opt out. Compared to the common law countries with the class action tradition, collective redress in European countries is less developed. Although some countries, such as Austria, claim ‘a long-standing tradition of collective redress mechanisms’, these mechanisms are usually ‘limited in scope and effectiveness’ ”*¹⁰⁵⁹.

As of March 2017, there is no common standard across European Union Member States in terms of collective redress¹⁰⁶⁰. Overall, it has been reported that *circa* 13 Member States possess some kind of collective redress mechanism, be it general (Portugal, Sweden, Denmark, The Netherlands, and England & Wales), or sector-specific (Spain, Finland, Bulgaria, Greece,

¹⁰⁵³ As an example thereof, *vid.* Z. S. TANG, “Consumer Collective Redress in European Private International Law”, *op.cit.*, pp. 107-111. This author mentions that the four policy options identified in the Consumer Collective Redress green paper have attracted “*great interest throughout Europe*”.

¹⁰⁵⁴ *Vid.* E. FALLA, “(EU) Collective Redress Proceedings: New Challenges for Judges”, *op. cit.*, p. 461, footnote 2.

¹⁰⁵⁵ *Vid.* Green Paper on Damages Actions for Breach of the EC Antitrust Rules (COM(2005) 672 final).

¹⁰⁵⁶ *Vid.* M. J. AZAR-BAUD, “La nature juridique des actions collectives en droit de la consommation”, *op. cit.*, p. 8, footnote 44.

¹⁰⁵⁷ *Vid.* Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market, COM(93) 576 final.

¹⁰⁵⁸ *Vid.* M. J. AZAR-BAUD, *op. cit.*, p. 8, footnote 44. The author refers to Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, O.J. L 166, 11.06.1998, p. 51. This Directive was later repealed by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), O.J. L 110, 1.5.2009, p. 30.

¹⁰⁵⁹ *Vid.* Z. S. TANG, “Consumer Collective Redress in European Private International Law” (DRAFT), *op. cit.*, p. 1.

¹⁰⁶⁰ There is no significant development since Tang's published article, notwithstanding of course, the Commission's recommendation dealt with *infra*. For an early, yet extensive overview of the difficulties that the EU faces in respect of this kind of scheme, *vid.* L. CARBALLO PIÑEIRO, *Las acciones colectivas y su eficacia extraterritorial: problemas de recepción y transplante de las “class actions” en Europa*, Santiago de Compostela, Universidade de Santiago de Compostela, Servizo de Publicacións e Intercambio Científico, 2009.

Italy, Germany)¹⁰⁶¹. Specifically, it has been contended that those Member States which count with any kind of consumer-related collective-redress mechanism, mainly have “*largely domestic tools, with [their] effect[s] primarily limited to domestic claims*”¹⁰⁶². In the opinion of E. Falla, despite the significant divergence among different national litigation tools, there is one unfortunate point of convergence:

*“all forms of collective redress for damages within Europe have in common that they have not really been successful [...] the main problem of the national collective redress proceedings does not really seem to be a lack of procedural instrumentalities: it is mainly a lack of (i) judicial education, (ii) incentives for private disputes and (iii) guidelines in substantive law for specific judicial elaboration”*¹⁰⁶³.

Interestingly, a similar opinion could probably be predicated from the state of the question at the European level. This could be because, following the same author, after observing the evolution of the debate on collective redress “*one could, however, receive the impression that it is probably too early for a harmonized EU collective redress procedure to emerge. The radical divergence between Member States’ initiatives in this area mainly explains why the prospects for harmonisation are facing an impasse*”¹⁰⁶⁴.

Allegedly, it is this divergence which triggered the European Commission’s concerns: “[t]he Commission has not been insensitive to these issues and some initiatives have indeed been brought forward to tackle the problem on a European level”¹⁰⁶⁵. Following this, the Commission decided to take action in the matter. However, despite the fact that it is well understood that collective redress is a transversal stake cutting across consumer law, competition law, environmental law, and possibly other fields, the bulk of the work leading up to the present-day *de lege lata* scenario was performed in parallel, in a sectorial manner, in the fields of competition law and consumer law¹⁰⁶⁶. After the above-referred 2005 green paper in the field of Competition Law, a green paper on consumer collective redress was published in 2008¹⁰⁶⁷. It suggested four different policy approaches: “*Option 1 – No EC action*”, “*Option 2 – Cooperation*

¹⁰⁶¹ Vid. L. CARBALLO PIÑEIRO, “La construcción del mercado interior y el recurso colectivo de consumidores”, in F. ESTEBAN DE LA ROSA (ed.), *La protección del consumidor en dos espacios de integración: Europa y América: Una perspectiva de Derecho internacional, europeo y comparado*, Valencia, Tirant lo Blanch, 2015, págs. 1055-1094, at pp. 1060-1062.

¹⁰⁶² Vid. Z. S. TANG, “Consumer Collective Redress in European Private International Law” (DRAFT), *op. cit.*, pp. 2-3. As further explained by the same author in the published version of the same paper (pp. 107-111): “*It is necessary to note that the effect of existing collective redress mechanisms in most Member States is primarily limited to domestic claims. It is mainly because of the national legislation and funding for representative action by public bodies, such as a consumer ombudsman, which makes it difficult to represent consumers outside the country. The European Commission, however, has recognised the importance of introducing collective redress in a cross-border context. [...] As more and more consumers and businesses enter into transactions beyond their domestic market, a distinction in treatment between domestic and cross-border contracts is considered unrealistic and inappropriate*”.

¹⁰⁶³ Vid. E. FALLA, “(EU) Collective Redress Proceedings: New Challenges for Judges”, *op. cit.*, pp. 461-462.

¹⁰⁶⁴ *Ibidem*.

¹⁰⁶⁵ Vid. M. ELIANTONIO, “Collective Redress in Environmental Matters in the EU: A Role Model or a “Problem Child”?”, *op. cit.*, pp. 257-258.

¹⁰⁶⁶ Vid. E. FALLA, “(EU) Collective Redress Proceedings: New Challenges for Judges”, *op. cit.*, p. 461, footnote 2.

¹⁰⁶⁷ Vid. Green Paper on Consumer Collective Redress, COM (2008) 794 final.

between Member States", *"Option 3 – Mix of policy instruments"*, *"Option 4 – Judicial collective redress procedure"*¹⁰⁶⁸. The fourth policy option suggested involved the creation of *"a non-binding or binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States"*¹⁰⁶⁹. Nevertheless, after a period of very intense activity on the subject it was eventually understood that collective redress needs to be addressed from a horizontal perspective. This led to a further public consultation in 2011, *"Towards a Coherent European Approach to Collective Redress"*¹⁰⁷⁰. Subsequently, the European Parliament joined the movement on February the 2nd 2012 by calling *"for any proposal in the field of collective redress to take the form of a horizontal framework including a common set of principles providing uniform access to justice via collective redress within the Union and specifically but not exclusively dealing with the infringement of consumer rights"*¹⁰⁷¹. This ultimately led to the adoption by the European Commission of a horizontal / transversal Recommendation on June the 11th 2013¹⁰⁷². The following pages will comment some core aspects of the said Recommendation – hereinafter, the 2013 Recommendation.

b. The EU' s 2013 Recommendation on Collective Redress

1. The policy concerns behind the Recommendation

At first sight, the policy concerns behind the Recommendation correspond with what may be inferred from the discussion in previous pages of this dissertation. However, it becomes clear from a slightly less superficial reading of the Recommendation that one of its core axes is the

¹⁰⁶⁸ The first policy option can be summarized as no need for action at the European level *"and relies on the existing national and EC measures to achieve adequate redress for consumers"* (Green paper, p. 7, point 20). The second one *"involves developing cooperation between the Member States in order to ensure that consumers throughout the EU are able to use the collective redress mechanisms that are available in different Member States. This option would ensure that Member States having a collective redress mechanism open up their respective mechanisms to consumers from other Member States and that Member States who do not have a collective redress mechanism establish one. This could be achieved through either a Recommendation or a Directive. In parallel, a Recommendation could lay down a set of benchmarks which all Member States systems should satisfy"* (point 23, p. 8). As explained by Tang (*"Consumer Collective Redress in European Private International Law"*, *op. cit.*, p. 111): *"The European Commission suggests that if cooperation between Member States is established, the collective redress mechanism that is available in one Member State should be opened up to consumers from other Member States"*. The third policy option *"envisages a mix of policy tools, non-binding or binding, that can together enhance consumer redress by addressing the main barriers identified earlier"* in the green paper (point 32, p. 9). This option has been better summarized by Tang as being a *"mix of out-of-court dispute resolution mechanisms, including incorporating collective redress into the out-of-court dispute resolution mechanisms"* (Z. S. TANG, *"Consumer Collective Redress in European Private International Law"*, *op. cit.*, pp. 107-111).

¹⁰⁶⁹ *Vid.* Green Paper: Consumer Collective Redress (COM (2008) 794 final), p. 12, point 48.

¹⁰⁷⁰ *Vid.* Consultation: Towards a Coherent European Approach to Collective Redress (SEC(2011) 173 final).

¹⁰⁷¹ *Vid.* Commission recommendation of 11 June 2013 *on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, O.J. L 201, 26.7.2013, p. 60, recital 4. Furthermore: *"The Parliament also stressed the need to take due account of the legal traditions and legal orders of the individual Member States and enhance the coordination of good practices between Member States"*.

¹⁰⁷² *Ibidem*.

preservation of fundamental “*procedural safeguards and guarantees of parties to civil actions*”, in the view of avoiding “*the development of an abusive litigation culture*”¹⁰⁷³. In the back of the mind of the Commission lies, thus, the preoccupation that, while the introduction of collective redress should introduce symmetry in access to justice for victims of mass-harms and defendants, the legitimate procedural expectations of the latter could be endangered. This is explained in the following terms:

*“[...] an excess in facilitating multi- party claimants’ access to justice can create its own distortions. The excessive stakes in any particular collective action might indeed coerce the defendant to settle, irrespective of the merits of the individual claims. Generally unmeritorious actions commenced purely as a means of extracting a settlement from a defendant are known in the US and other jurisdictions as blackmail suits. Collective actions also entail the potential of being used as a means to further either the impression that there is a growth in what is termed litigation culture or the very existence of such a phenomenon”*¹⁰⁷⁴.

This approach is consistent with Article 6.1 of the European Convention of Human Rights, which must be read in the sense that “*the right of effective access to justice guaranteed [therein] is an indivisible right. A defendant’s right to procedural justice must be equally protected*”¹⁰⁷⁵. This further explains why recital 21 of the Recommendation highlights the fact that “[a] key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively”. Several different mechanisms are suggested in the Recommendation in order to achieve this goal, the most interesting of which can be found in recital 20 and points 8 and 9: in the name of the ever-present goal of avoiding an abuse of the collective redress institution, and in the “*interest of the sound administration of justice*” it is recommended that admissibility conditions be legally introduced. This means that courts should verify the fulfilment of these conditions on their own motion at “*the earliest possible stage of litigation*”, and “*manifestly unfounded cases*” should be discontinued.

It is in the same vein (avoidance of abuse of the collective-redress system), as coupled with the need to avoid conflicts of interests, that the Recommendation contains some provisions on collective redress funding. Point 14 of the recommendation suggests that “[t]he claimant party should be required to declare to the court at the outset of the proceedings the origin of the funds that it is going to use to support the legal action”. It is striking, however, that, while it is well-known that successful collective redress mechanisms worldwide are accompanied with public funding schemes, the recommendation remains silent in this sense¹⁰⁷⁶. The

¹⁰⁷³ Vid. the 2013 Recommendation, point 15. Furthermore: “*Elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule*”.

¹⁰⁷⁴ Vid. E. FALLA, “(EU) Collective Redress Proceedings: New Challenges for Judges”, *op. cit.*, 472.

¹⁰⁷⁵ *Ibidem*.

¹⁰⁷⁶ As explained by M. J. AZAR-BAUD (“La nature juridique des actions collectives en droit de la consommation”, *op. cit.*, pp. 22-23): “*Les procès collectifs sont, le plus souvent, des procès complexes et le coût peut s’avérer dissuasif pour les demandeurs, pour les organisations et à plus forte raison pour les particuliers. Le législateur québécois semble avoir cerné le fait que le recours collectif est d’abord et avant tout un instrument d’accès à la justice. C’est pourquoi, l’on attribue son succès notamment à l’aide*

Recommendation seems to be more concerned with suggesting a regulative framework for the issue of third-party financing, for it establishes, on the one hand, situations under which proceedings could be stayed by the relevant court, and prohibitions that Member States should introduce, both in order to guarantee the adequacy and “neutrality” of third-party financing¹⁰⁷⁷. The framework of “monetary” provisions is further integrated by points 29 and 30 which deal with “*legal representation and lawyers’ fees*” and point 13 which deals with the “*reimbursement of legal costs of the winning party*”. While the former points seek to avoid that the lawyers’ remuneration and its calculation create unnecessary incentives to litigation, and that “*contingency fees are avoided where it is possible*”, the last point simply aims at promoting the “*loser pays principle*”, i.e. “*that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party*”.

Overall, it seems that an excessive fear of enabling abusive litigation practices runs through the Recommendation. Since it clearly became one of its backbones, it may not be an overstatement to say that it possibly “froze” the potential of this legal instrument. Interestingly, it is considered that recommending a “prohibition of punitive damages” is a requirement in order to ensure the avoidance of the development of “abusive litigation”. As established in point 31:

“[t]he compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited”.

It may be recalled that one of the conclusions of Chapter 1 was that pure and simple compensation will not necessarily lead to deterrence¹⁰⁷⁸. One may not help but wonder how

financière publique, assurée par le Fonds d’aide aux recours collectifs. En moyenne, depuis les quinze dernières années, environ 63 % des recours ont été exercés avec des fonds publics en provenance du fonds concédés sur demande et sur satisfaction de certains critères d’attribution, notamment économiques, bien-fondé du recours, probabilité d’exercice d’actions individuelles. En outre, le Fonds d’aide ne fait pas qu’assurer le financement des recours car il diffuse de l’information aux citoyens”.

¹⁰⁷⁷ “15. The court should be allowed to stay the proceedings if in the case of use of financial resources provided by a third party:

- (a) there is a conflict of interest between the third party and the claimant party and its members;
- (b) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure;
- (c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail.

16. The Member States should ensure, that in cases where an action for collective redress is funded by a private third party, it is prohibited for the private third party:

- (a) to seek to influence procedural decisions of the claimant party, including on settlements;
- (b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;
- (c) to charge excessive interest on the funds provided”.

Moreover, point 32 contains a specific suggestion for the funding of compensatory collective redress.

¹⁰⁷⁸ *Vid. supra* Part I, Chapter 1, “*The alleged effectiveness of intervening in environmental matters through the means of content-oriented multilateral choice-of-law rules*”. *Vid. also* A. M. POLINSKY & S. SHAVEL, “The Economic Theory of Public Enforcement of Law”, *Journal of Economic Literature*, vol. XXXVIII, 2000, pp. 45–76.

private enforcement is meant to present a dissuasive dimension without resorting to any sort of “punitive” element. If the problem lies in the integrity and purity of continental private law standards, such as the fact that the measure of the victim’s compensation should be the damage suffered, then interesting “compromises”, as the below-discussed notion of *cy pres* compensation, should be carefully considered¹⁰⁷⁹.

Preceding paragraphs have presented, besides some very brief considerations on some of the 2013 Recommendation’s core provisions, the true policy rationale behind the Recommendation: protection of defendants against alleged abusive litigation. Again, the way the referred policy is articulated seems excessive: the exaggerated fear of abusive litigation is possibly hindering legitimate interests and needs that cannot be addressed without proper collective redress. This being said, let us focus on two selected controversial topics that, following the American class-action experience, require a more detailed attention, before concluding on the Recommendation by addressing its lack of binding character.

2. Opt in – Opt out schemes and their implications as regards fundamental rights

Probably, one of the most controversial and widely discussed points in respect of the implementation of collective redress at the European level is the one that regards possible choices in respect of the configuration of “*l’efficacité et les effets erga omnes de la res judicata*” in collective redress proceedings¹⁰⁸⁰. Traditionally, two different configurations are considered to be possible:

i) the opt-out system, following which the collective judgment is binding on all plaintiffs who have not manifested their intention to be excluded;

ii) the converse configuration, the opt-in system, where plaintiffs must manifest their intention to be bound by the judgment¹⁰⁸¹.

It has been asserted that an economic analysis would sustain choosing the opt-out approach. Following these voices, if it is assumed that judicial systems seek to solve disputes in the most just, but also in the less costly way, then it would be ineffective towards citizens, and towards the public administration of justice, to force individual processes against defendants whose behaviors have had similar impacts over a large number of victims¹⁰⁸². However, there are

¹⁰⁷⁹ *Vid. infra* “First enhanced solution (II) – The practical adjustment that needs to follow: *cy pres* compensation”.

¹⁰⁸⁰ *Vid.* M. J. AZAR-BAUD, “La nature juridique des actions collectives en droit de la consommation”, *op. cit.*, pp. 18-19. As regards the controversial nature of the question, focusing specifically on France: “Le débat acharné qui oppose les partisans d’un modèle ou de l’autre est l’une des raisons ayant ancré notamment la France dans une indécision ou indéfinition qui ne lui permet pas d’avancer vers un système efficace d’actions collectives”.

¹⁰⁸¹ *Ibidem*, pp. 18-19: “l’opt-out, système selon lequel le jugement collectif lie tous les [demandeurs] n’ayant pas manifesté leur volonté d’exclusion [...] le système opposé, dit d’opt-in, [où] les [demandeurs] doivent manifester leur volonté d’être atteints par la décision judiciaire”.

¹⁰⁸² *Ibidem*, pp. 18-19: “[...] si l’on admet que le système judiciaire cherche à régler les litiges de la manière la plus juste mais aussi la moins coûteuse, il semble inefficace à l’égard des justiciables et du

certain European countries – amongst which France – “where opt-out procedures may be contrary to the constitutional right of individual access to justice”¹⁰⁸³. From the perspective of the instauration of a European collective redress system, this creates a cleavage between European States who could envisage an opt-out system, and those who could not. In this sense,

“[...] the real divide concerns less the principle of collective redress than issues of procedural fairness or due process which recur under the heading of Public Policy of Member States and upon which European legal culture is not uniform”¹⁰⁸⁴. In this regard “[p]resumptive consent is considered to be insufficient to make a collective judgment or settlement binding on all interested parties –despite the extremely limited exercise of individual rights of suit in the absence of collective redress which finds its justification therein, and despite the fact that the effectiveness of ex post accountability mechanisms is thereby substantially diminished”¹⁰⁸⁵.

In order to overcome this difficulty, the Recommendation has chosen an opt-in configuration, which has been included among its “specific principles relating to compensatory collective redress”:

“Constitution of the claimant party by ‘opt-in’ principle

21. The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed (‘opt-in’ principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.

22. A member of the claimant party should be free to leave the claimant party at any time before the final judgement is given or the case is otherwise validly settled, subject to the same conditions that apply to withdrawal in individual actions, without being deprived of the possibility to pursue its claims in another form, if this does not undermine the sound administration of justice.

service public de la justice d’exiger une telle démarche individuelle face à des défendeurs dont les comportements ont eu une incidence similaire sur un grand nombre de victimes”. Furthermore: “Une première façon de mesurer les effets économiques de l’action de groupe consiste à se placer du point de vue du fonctionnement de la justice. La question est d’ordre pratique et consiste à s’interroger sur les économies de coûts que de telles actions permettent de réaliser au plan judiciaire. En effet, si l’action de groupe permet d’éviter la répétition de l’appréciation des faits ou de l’analyse juridique, elle doit avoir un impact positif sur les ressources judiciaires mobilisées pour trancher le litige. En particulier, les frais engagés par le système judiciaire et le temps consacré par les agents au traitement et à l’étude de dossier seront naturellement plus faibles qu’en cas de procès individuels multiples. Liée à cette question, dans l’expérience américaine, la coexistence des dommages-intérêts punitifs et de la rémunération des avocats en fonction des résultats (success fees) élèvent, parfois malheureusement, à la fois le montant des enjeux et les coûts des procès. De ce fait, les données sur les économies réelles au plan judiciaire réalisées grâce aux actions collectives ont été jugées pratiquement inexistantes”. The author, who focuses her analysis in the French legal system, concludes that the inexistence of this American-like kind of institutions in France allows relativizing the comment.

¹⁰⁸³ Vid. H. MUIR WATT, “Brussels I and Aggregate Litigation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation”, *IPRax*, vol. 2010-2, 2010, pp. 111-116, at p. 111.

¹⁰⁸⁴ *Ibidem*, p. 115.

¹⁰⁸⁵ *Ibidem*.

23. Natural or legal persons claiming to have been harmed in the same mass harm situation should be able to join the claimant party at any time before the judgement is given or the case is otherwise validly settled, if this does not undermine the sound administration of justice.

24. The defendant should be informed about the composition of the claimant party and about any changes therein”.

In the light of the above-referred concerns, it seems indeed that an opt-in scheme was the correct system to choose. Let us now move to a second controversial topic.

3. Legal standing

The question of legal standing within the frame of collective redress proceedings is intimately related to the different kinds of collective redress proceedings, different underlying policy rationales, and different kinds of legal interests evoked *supra*. Legal standing can be roughly defined as a requirement that *“the parties bringing the lawsuit [...] demonstrate that they are the appropriate parties to bring the case in front of a court”*¹⁰⁸⁶. As correctly pointed out by recital 17 of the Recommendation *“legal standing to bring a collective action in the Member States depends on the type of collective redress mechanism”*. In this sense, proceedings which merely cumulate actions which could have been viable on an individual basis, do not entail any difficulty¹⁰⁸⁷. The problem comes from so-called representative actions, which are defined by the Recommendation as a kind of action

*“which is brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation whereas those persons are not parties to the proceedings”*¹⁰⁸⁸.

As it may be recalled, representative actions are the natural channel for providing redress to so-called diffuse interests, i.e. those interests whose very nature entails that claims on an individual basis are not operational (as environmental interests). In this respect, recital 18 establishes that

“the legal standing to bring the representative action should be limited to ad hoc certified entities, designated representative entities that fulfil certain criteria set by law or to public authorities. The representative entity should be required to prove the administrative and financial capacity to be able to represent the interest of claimants in an appropriate manner”.

¹⁰⁸⁶ *Vid.* M. A. MARTIN, ““Standing”: who can sue to protect the environment?”, *Social education*, vol. 72/3, 2008, pp. 113-117, at p. 113.

¹⁰⁸⁷ Recital 17 further reads: *“In certain types of collective actions, such as group actions where the action can be brought jointly by those who claim to have suffered harm, the issue of standing is more straightforward than in the context of representative actions, where accordingly the issue of legal standing should be clarified”.*

¹⁰⁸⁸ *Vid.* the 2013 Recommendation, point 3.d.

This limitation on the access to legal standing to start representative actions is allegedly justified by the need to ensure that representatives “*serve the best interests of the group’s members*”. Thus, there seems to be an enhanced distrust from the side of the European Commission as regards representative actions. The said limitation is said to guarantee a satisfactory standard of “*adequate representation and legal ethics*”. As pointed out by E. Falla

“[w]hile this is an issue that arises in all agency relationships, in the case of collective redress the potential for abuse is aggravated by the absence of client control. Collective proceedings are peculiar because they concern group members who are generally unable to protect their own interests because of lack of knowledge, incentives or financial resources. This last feature presents the principal reason for collective actions being attractive in the first place. It opens the door to entrepreneurs who have recognized the potential of representing large numbers of victims to take advantage of the loss of control of litigation proceedings by the actual victims. Opportunities for self-interested behaviour and conflicts of interests will generally be greater in a context where individuals are disorganised and possibly dispersed than in a traditional agency relationship”¹⁰⁸⁹.

These concerns seem to have crystalized in points 4 to 7 of the Recommendation (“*Standing to bring a representative action*”):

“4. The Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. These conditions should include at least the following requirements:

(a) the entity should have a non-profit making character;

(b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and

(c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

5. The Member States should ensure that the designated entity will lose its status if one or more of the conditions are no longer met.

6. The Member States should ensure that representative actions can only be brought by entities which have been officially designated in advance as recommended in point 4 or by entities which have been certified on an ad hoc basis by a Member State’s national authorities or courts for a particular representative action.

7. In addition, or as an alternative, the Member States should empower public authorities to bring representative actions”.

¹⁰⁸⁹ *Vid.* E. FALLA, “(EU) Collective Redress Proceedings: New Challenges for Judges”, *op. cit.*, p. 466.

It seems, however, quite doubtful whether the referred restriction on access to the condition of representative is actually necessary. If the objective of the introduction of collective redress is to foster the development of a wide-reaching system of private enforcement, the limitation of standing does not seem the best way to proceed. Furthermore, the above-referred distrust could have been addressed through enhanced judicial surveillance of the representative's management of the proceedings. If the remaining objection against this model was the lack of correspondence between a single anonymous representative and a diffuse interest (as environmental protection), this could have equally been addressed by other means¹⁰⁹⁰. Having addressed the second major conflictive point of the Recommendation, it is possible now to deliver a brief assessment thereof.

4. Lack of binding character of the Recommendation

Beyond the criticisms pointed out in previous pages in respect of the excessive fear of abusive litigation and excessive distrust towards private representatives, there is a point for greater concern. As impressive an advancement the come into existence of this recommendation may seem, it is its very legal nature that justifies the bigger share of the disappointment suggested in previous pages: as it is well-known, a "recommendation" in the law of the European Union is one of weakest possible forms of legal intervention. As explicitly stated by Article 288 TFUE: "*Recommendations and opinions shall have no binding force*". The importance of "Recommendations" within the European legal order is such, that several general handbooks on EU law do not even mention them amongst the sources of EU secondary law and / or do not even have a "*recommendation*" entry in their indexes¹⁰⁹¹. Furthermore, there are even authors (Chalmers, Davies and Monti) who mention recommendations as being part of European "Soft Law", which they define as: "*Rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects. These instruments are an integral part of the Union legal order, reportedly accounting for 13 per cent of all EU law. They are used for a variety of purposes*"¹⁰⁹². However, when developing explanations on the subject, the same authors address several other categories of "soft instruments" not mentioned in Article 288 TFUE, without ever coming back to the "recommendations"¹⁰⁹³. Therefore, point 38 in the Recommendation ("*The Member States should implement the principles set out in this Recommendation in national collective redress systems by 26 July 2015 at the latest*") is, actually, pointless. This perfectly joins one of the common-place criticisms to soft law reproduced by the referred authors which reads as follows: "*soft law undermines*

¹⁰⁹⁰ As for instance, through the below-discussed notion of *cy pres* compensation. *Vid. infra* "First enhanced solution (II) – The practical adjustment that needs to follow: *cy pres* compensation".

¹⁰⁹¹ *Vid.* R. SCHÜTZE, *European Union Law*, Cambridge, Cambridge University Press, 2015, pp. 89-115, where he deals with direct and indirect Union law (regulations and decisions, *versus* directives, respectively). *Vid.* equally the index, p. 944.

¹⁰⁹² *Vid.* D. CHALMERS, G. DAVIES & G. MONTI, *European Union Law - Text and Materials* (3rd ed.), Cambridge, Cambridge University Press, 2014, pp. 101.

¹⁰⁹³ *Ibidem*, pp. 101-103.

*Union legitimacy because it creates expectations, but cannot bring about change”*¹⁰⁹⁴. Thus, in a nutshell, nowadays there is no binding law on collective redress at European level.

After a theoretical introduction to the notion of collective redress, and a brief panorama of its situation in Europe, let us focus specifically on some environmentally-relevant aspects thereof.

iii. Difficulties as regards environmental collective redress in Europe and the interplay with a further substantive problem

Since previous pages have delivered a general presentation of the current status of collective redress in Europe, the following ones will highlight some environmental aspects thereof. Recent academic accounts have had an excessively optimistic view in respect of environmental collective redress in Europe¹⁰⁹⁵. Amongst them, M. Elinantonio's asserts that, conversely to the embryonic development of consumer and competition-related collective redress, environmental collective redress is actually well-established, although not primarily EU-driven. This allegedly well-established framework arises from the so-called “Aarhus Convention” (Convention on access to information, public participation in decision-making and access to justice in environmental matters, done at Aarhus, Denmark, on 25 June 1998). In a nutshell, the Aarhus Convention is a United Nations Convention developed within the United Nations Economic Commission for Europe, and adopted by, among others, both the EU and its Member States¹⁰⁹⁶. The content of this convention, which is not a self-executing legal instrument, revolves around three so-called “pillars”, the three thematic fields enunciated in its title¹⁰⁹⁷. As explained by the British Institute of International and Comparative Law:

“[...] the Aarhus Convention requires Member States to ensure access to justice against infringements of environmental standards. All Member States have implemented this by introducing some form of collective injunctive relief, whereby non-governmental

¹⁰⁹⁴ *Ibidem*, p. 102.

¹⁰⁹⁵ *Vid.* M. ELIANTONIO, “Collective Redress in Environmental Matters in the EU: A Role Model or a “Problem Child”?”, *op. cit.*, pp. 257-258; and S. I. STRONG, “Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation”, *Arizona State Law Journal*, vol. 45, 2013, pp. 233-283, at p. 236: “European Member States currently offer some form of large-scale private relief at the national level, while European law offers collective redress to residents of all Member States in a select number of subject matter areas, including consumer, competition, intellectual property and environmental law as well as in cases involving injunctive relief”. The corresponding footnote [number 5] cites the European Environmental Liability Directive. I strongly disagree with this latter account: irrespective of how the notion of “collective redress” is meant to be understood in S. I. Strong's work, the ELD does not provides substantive rights to private parties, and does not contain procedural mechanisms akin to any kind of “collective redress”.

¹⁰⁹⁶ *Vid.* M. ELIANTONIO, “Collective Redress in Environmental Matters in the EU: A Role Model or a “Problem Child”?”, *op. cit.*, p. 261: “The Convention was adopted by the European Community on 17 February 2005 by Decision 2005/370/EC and is, therefore, binding upon the EU as such, as well as the Member States when they are acting within the scope of application of EU law”.

¹⁰⁹⁷ *Vid.* in this sense the following ECJ decisions: ECJ, *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, judgment, joined cases C-401/12 to C-403/12, ECLI:EU:C:2015:4; ECJ, *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, judgment, case C-240/09, ECLI:EU:C:2011:125.

organizations are given standing to challenge certain environmental administrative decisions”¹⁰⁹⁸

The core provision in this respect is the Convention’s ninth Article, whose content and ramifications within the European Union’s legal order can be summarized as follows:

“[...] Article 9(2) of the Convention provides that the contracting parties should ensure that concerned members of the public with (1) a sufficient interest or (2) maintaining impairment of a right (where the administrative procedural law of a state requires this as a precondition), have access to a review procedure to challenge the substantive and procedural legality of decisions concerning activities subject to the public participation requirements contained in Article 6 of the Convention itself. Article 9(2) covers projects which can have a significant environmental impact.

Furthermore, Article 9(3) provides for a general obligation for the parties to provide for wide access of the members of the public to review procedures to challenge the legality of all kinds of decisions affecting the environment.

With a view to aligning Member States’ legislation with Article 9(2) of the Convention, and before the Convention was actually approved, the EU has, amongst others, enacted Directive 2003/35/EC. This Directive has inserted Article 10a into the text of the Environmental Impact Assessment (EIA) Directive and Article 15a into the text of the Integrated Pollution Prevention and Control (IPPC) Directive. These provisions are an almost literal copy of Article 9(2) of the Aarhus Convention.

These Articles, like Article 9(2) of the Convention, propose two models of access to justice. They require parties to the Convention to provide access to a review procedure wherein qualified members of ‘the public concerned’ can challenge ‘the substantive or procedural legality’ of decisions that are subject to the participation requirements mandated by the said Directives. However, the provisions leave the parties free to decide whether to allow standing for the ‘public concerned’ only where the claimant can maintain the impairment of a right or when it is able to show a sufficient interest.

Articles 10a and 15a go on to state that what constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, according to these provisions, any NGO promoting environmental interests and meeting any requirements under national law shall be deemed as capable of showing sufficient interest. Such organizations shall also be deemed to have rights capable of being impaired in a legal system that has opted for a rights-based approach.

Articles 10a and 15a only affect procedural rules which are to be applied in a claim concerning an allegation that the provisions of the EIA Directive or the IPPC Directive

¹⁰⁹⁸ Extracted from the website of the BIICL. Text available on May the 25th 2016 under the following URL:
<http://www.masstortdefense.com/2011/05/articles/a-comment-on-the-eus-working-paper-towards-a-coherent-european-approach-to-collective-redress/>.

*have been violated. They do not apply, therefore, to environmental measures taken outside the scope of these Directives, such as in the case of measures taken for the protection of an endangered species under the Habitats Directive or permits to discharge waste water”*¹⁰⁹⁹.

While it is true that the referred legal framework exists and that, therefore, this is already a step forward in comparison with the status of competition and consumer-rights-related collective redress (where only the 2013 Recommendation is available), the above-presented optimistic account of the environmental collective redress panorama neglects two essential facts: Firstly, the transposition of the Aarhus regime into EU law only concerns one very specific kind of collective redress, i.e. collective redress over diffuse interests through the means of representative actions where the representative is an NGO. Secondly, the transposition of the Aarhus regime into EU law is, so far, a Public-authority / Administration-focused regime. It does not aim, therefore, at providing redress against private subjects, and it does not, therefore, contribute anyhow to environmental private enforcement. In respect of the latter, the Recommendation is the only European legal instrument to date.

These ideas entail that, although the description provided by M. Eliantonio seems to indicate that the European legal order currently complies with the international legal obligations that stem from Article 9 of the Aarhus Convention¹¹⁰⁰, this is possibly only true in part. The

¹⁰⁹⁹ Vid. M. ELIANTONIO, “Collective Redress in Environmental Matters in the EU: A Role Model or a “Problem Child”?”, *op. cit.*, pp. 261-264.

¹¹⁰⁰ The full text of Article 9 of the Aarhus convention reads as follows: “ACCESS TO JUSTICE :

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members

obligations arising from Article 9.2 of the Aarhus Convention are satisfied, but it is not necessarily the case for those arising from paragraph 3 of the same article, which establishes a more far-reaching obligation:

“3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment”.

In the light of all of the above, it cannot be said that the requirement of allowing “acts and omissions by private persons” to be challenged is fulfilled, unless it is intended that the Recommendation be understood as fulfilling this international obligation¹¹⁰¹. Nevertheless, this would be an erroneous interpretation since, as it has been already explained, a recommendation is not a binding legal instrument, and therefore, not capable of fulfilling the said international obligation. Thus, the necessary conclusion to be drawn is that “[a] more general provision on access to justice covering all environmental matters, which would transpose the requirements of Article 9(3), is currently lacking”¹¹⁰².

These brief considerations on environmental collective redress complete a summary overview of collective redress in the European Union. Collective redress is a complex legal notion; it is somehow anchored simultaneously at the crossroads of domestic procedural laws,

of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice”.

¹¹⁰¹ This is probably what the Commission subtly tries to do with its reference to the Aarhus Convention in recital 23 of the 2013 Recommendation: “(23) With regard to environmental law, this Recommendation takes account of the provisions of Article 9(3), (4) and (5) of the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (‘the Aarhus Convention’) which, respectively, encourage wide access to justice in environmental matters, set out criteria that procedures should respect, including criteria that they be timely and not prohibitively expensive, and address information to the public and the consideration of assistance mechanisms”.

¹¹⁰² Vid. M. ELIANTONIO, “Collective Redress in Environmental Matters in the EU: A Role Model or a ‘Problem Child’?”, *op. cit.*, pp. 261-264: “[...] The Commission had originally presented a proposal [Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003) 624 final](which would give effect to Article 9(3) of the Convention), but the Directive has to date not yet been adopted, since ‘Member States remained unconvinced that legislative action at EU level was needed to implement Article 9(3). Since 2012, however, the Commission has been preparing a new proposal for a Directive, which would take the legal situation in the Member States and the recent case law of the CJEU into account and has, for these purposes, undertaken some studies”.

international jurisdiction, and substantive rights and the recognition thereof¹¹⁰³. In environmental cases, beyond the convenience of judging together the private claims of individual claimants, it may be difficult to adjudicate on the common legal good “environment” without resorting to collective-redress techniques. Therefore, as already suggested, the absence of binding law on collective redress in the EU is problematic for environmental purposes, especially when placed in the broader context suggested in previous pages. As the law stands nowadays, environmental collective redress cannot be said to have reached more than an embryonic stage at the European level. While it is clear that, due to the insertion of the Aarhus regime within the European legal order, NGOs do have a significant¹¹⁰⁴ role to play within administrative environmental proceedings – proceedings against public entities – there is no legally-binding tool which may facilitate NGO-driven private enforcement – in private-law proceedings – of environmental policies. Put otherwise, despite the fact that M. Eliantonio considers that “[i]n order [...] to supplement the lack of interest or ability of citizens to bring claims in such cases, virtually all the Member States have provided for rules concerning the standing of ENGOs before their national courts”¹¹⁰⁵, such an assertion needs to be nuanced: it is only accurate as regards the realm of administrative-law proceedings, not necessarily in the realm of private-law proceedings. Even more so, since no legally-binding instrument provides for any kind of environmental collective redress mechanism not requiring NGO involvement, it may be fair to consider that, overall, environmental private enforcement has not even reached the alleged embryonic stage. In a nutshell, nowadays, notwithstanding possible scarce, isolated and non-comprehensive developments at Member-States level, there is no “converter” at EU level which may help “translate” the common legal good *stricto sensu* environment into private-law “terms”, in order to facilitate and allow its introduction, for redress purposes, in private-law proceedings.

Consequently, it does not seem that the (problematic) involvement of private subjects in the redress of environmental damage *stricto sensu* may be, in any possible sense, the solution to the difficulties detected *supra* in respect of the involvement of the State as a claimant in private proceedings. In the light of these developments, the “gap” in the enforcement of the environmental policy of the European Union announced *supra* should begin to become obvious.

¹¹⁰³ This assessment of the stakes is similar – although not identical – to the one made by M. FALLON (“Le droit fondamental à l’environnement selon le droit communautaire”, *op. cit.*, p. 125): “Au vrai, la problématique soulève des questions délicates en termes de conflit de lois, dans la mesure où elle affecte simultanément le droit de la procédure, le droit des personnes morales et le droit qui régit la demande au fond”.

¹¹⁰⁴ Both M. WILDE (“Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence”, *RECIEL*, vol. 12-3, 2003, p. 284) and ELIANTONIO (“Collective Redress in Environmental Matters in the EU: A Role Model or a “Problem Child”?”, *op. cit.*, p. 260) highlight the essential role of NGOs “where there [is] no private party able or willing to act”: “in certain environmental matters, individuals may not have an interest in, or may not be able to bring proceedings. The effectiveness of the enforcement of EU environmental law, therefore, can be seen as highly dependent on the effectiveness of the possibilities for environmental NGOs (ENGOs) to bring claims for alleged violations of environmental provisions”.

¹¹⁰⁵ *Vid.* M. ELIANTONIO, “Collective Redress in Environmental Matters in the EU: A Role Model or a “Problem Child”?”, *op. cit.*, p. 260.

However, the depth of the gap in respect of the position of private subjects is even bigger than it seems at first sight. Its depth can be clearly seized when the gap is assessed jointly with an additional difficulty which lies in an upstream and more substantive level of environmental-enforcement reasoning. As it may be recalled the 2004 European Environmental Liability Directive enshrined the EU's approach to so-called "environmental liability"¹¹⁰⁶, after a lengthy and arduous policy debate. One of the elements highlighted *supra* was that Article 3.3 ELD provides that

"[w]ithout prejudice to relevant national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage".

Thus, the ELD establishes a public-subject-driven liability mechanism, which, as explicitly stated, does not create rights to the benefit of private subjects. Consequently, it is my contention that, when analyzed jointly with the developments presented in previous pages, the content of Article 3.3 ELD unveils an additional major problem faced by environmental private enforcement in the EU: the lack of a private right of action in respect of *stricto sensu* environmental damage within the European legal order, other than constituting a major handicap within the ELD *per se*, severely undermines the overall possibilities of obtaining redress for environmental damage *stricto sensu*, before EU courts, altogether. It, therefore, becomes a true substantive failure as regards the effectiveness of the EU's environmental policy, and as much a hindrance to the development of a true environmental "private enforcement" in the EU as the lack of proper collective redress is.

All the developments in previous pages have pointed to the fact that the subjective dimension of the mechanism presents severe failures: the intervention of the State seems to be severely hindered by the narrowness of the notion of "*civil and commercial matters*", while the intervention of private subjects is blocked procedurally (by the lack of proper collective redress) as well as substantively (by the lack of a private "*right of compensation as a consequence of environmental damage*"). Possibly, the involvement of private subjects could solve the difficulties that arise in respect of the involvement of public subjects, if there was either a "procedural" adaptation (the enactment of binding means of collective redress), or a "substantive" one (the amendment of the "ELD") to the described legal framework. In order to address these problems, the next sections will present two possible "enhanced" solutions: each of them is capable of simultaneously dealing with both the procedural and substantive deficiencies. This is not to say that these are the only possible options; each of the European problems identified *supra* may be dealt with individually. However, in order to try to achieve efficiency in operationalizing environmental private enforcement, the "enhanced" solutions deserve being paid attention to. The first one entails a theoretical shift: reconceptualizing the environment, as a legal good, in more private-enforcement-friendly terms. In order to explore this possible path, the next pages will go back to, revisit, and dissect some of the intricacies of certain assumptions made *supra*, at the very beginning of the discussion on collective redress. Interestingly, as it will be seen, the first solution, with its more theoretical nature, will actually point to the convenience of adopting the second (rather pragmatic) one, which will be

¹¹⁰⁶ *Vid. supra* Box 13 (Part I, Chapter 2) for an assessment of the ELD which deals, *inter alia*, with the reduced and disappointing extent of the notion of environmental damage within the said directive.

extracted from comparative law: importing so-called citizen suit provisions from North-American Law.

iv. *First enhanced solution (I) - A theoretical shift? Re-conceptualizing the environment as a legal good*

The protection of the environment has been clearly identified by the European Union as one of the fields where the “private enforcement of rights granted under Union law in the form of collective redress is of value”¹¹⁰⁷. However, in the light of developments of previous pages, questions may be legitimately raised on whether it is certain that in the field of environmental protection, “[t]he possibility for private persons to pursue claims based on violations of such rights” may actually supplement public enforcement¹¹⁰⁸. From a European perspective, the stake lying behind the debate on collective redress is access to justice in order to ensure the effective enforcement of rights granted under EU law. As pointed out by the European Commission: “rights which cannot be enforced in practice are worthless. Where substantive EU rights are infringed, citizens and businesses must be able to enforce the rights granted to them by EU legislation”. In this sense, collective redress responds to the special significance of access to justice in the frame of mass-harm situations:

*“where the same breach of EU law harms a large group of citizens and businesses, individual lawsuits are often not an effective means to stop unlawful practices or to obtain compensation for the harm caused by these practices: Citizens and businesses are often reluctant to initiate private lawsuits against unlawful practices, in particular if the individual loss is small in comparison to the costs of litigation. As a result, continued illegal practices cause significant aggregate loss to European citizens and businesses”*¹¹⁰⁹.

Interestingly, the issue, in respect of environmental protection, is that the difficulties borne by its private enforcement do not derive from its claims being comparatively “small”. As it may be recalled, “nature” is generally considered to be a “common legal good”: one in respect of which the condition of right-holder lies in common hands, or put otherwise, one in respect of which the condition of right-holder is held collectively¹¹¹⁰. It is, therefore, a legal good which is

¹¹⁰⁷ Vid. the 2013 Recommendation, recital 7: “(7) Amongst those areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value, are consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection. The principles set out in this Recommendation should be applied horizontally and equally in those areas but also in any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant”.

¹¹⁰⁸ Vid. the 2013 Recommendation, recital 6, which has inspired the formulation of this idea: “(6) It is a core task of public enforcement to prevent and punish the violations of rights granted under Union law. The possibility for private persons to pursue claims based on violations of such rights supplements public enforcement. Where this Recommendation refers to the violation of rights granted under Union Law, it covers all the situations where the breach of rules established at Union level has caused or is likely to cause prejudice to natural and legal persons”.

¹¹⁰⁹ Vid. Consultation: Towards a coherent European approach to collective redress, *op. cit.*, p. 3.

¹¹¹⁰ Vid. F. LLODRÀ GRIMALT, *Lecciones de Derecho Ambiental Civil*, *op. cit.*, p. 17. The autor quotes R. Luquín Bergareche, and defines “el ambiente” as a “bien jurídico protegido de titularidad común”.

generally considered to belong to and to be enjoyed publicly by the ensemble of society. Nevertheless, as it may be easily understood it is not possible for society as a whole to collectively start civil proceedings in respect of damage inflicted on the *stricto sensu* environment. That is why stakes relating thereto would have probably been best addressed through public proceedings, as suggested by M. Bogdan, had the involvement of public bodies as claimants in cases of international environmental damage caused by private polluters not been severely undermined, as demonstrated *supra*. On the other hand, civil proceedings – as traditionally understood in western continental Europe – have a non-mandatory and rather individualistic nature: even when claims are aggregated, they focus on individual / individualized rights. Private subjects cannot introduce civil claims for damage to abstract legal goods, as the *stricto sensu* environment, and this is so irrespective of how many / which sub-notions are included in the relevant notion of *stricto sensu* environment (biodiversity, natural resources, etc.). Since private subjects do not hold rights directly over the environment but only a “diffuse interest”, no reparation can be obtained by a private subject for “damage to air” or “damage to water”, for instance¹¹¹¹. As put by M. Eliantonio:

“[...] in environmental matters, the hurdle to an effective enforcement of [...] law is not merely due to citizens being discouraged from bringing a lawsuit, but because there is no citizen who would be in a position to bring a claim in the first place. Such a situation would mainly occur when a certain rule [...] is not aimed at protecting individual rights, but merely at serving the general interest. Also, in such cases, there is no one who, according to the applicable national procedural rules, would have standing before a national court. This is the case in the field of nature protection law: most of the rules contained, for example, in the Habitats Directive and the Birds Directive, do not protect individual rights or interests and generally do not confer any rights on individuals, but serve the public interest of the protection of biodiversity. For this reason, in this area of law, with the exclusion of rather exceptional situations, no individual would have standing before a national court, as nobody could prove an infringement of his or her rights or interests by a public authority. While the issue of the effective enforcement of [...] law is one which is equally felt across the different policy areas, it is specifically in the framework of environmental law that it acquires a special significance. This is in light of the conception of the environment as a ‘common good’ and the rules aimed at protecting the environment as provided for the interest of no one and everyone at the same time”¹¹¹².

¹¹¹¹ Vid. F. LLODRÀ GRIMALT, *Lecciones de Derecho Ambiental Civil*, op. cit., p. 40: “[...] desde la perspectiva del Derecho civil [español], sólo se puede acudir a un procedimiento judicial civil si se ha producido una lesión de intereses privados perfectamente individualizados. Por tanto no se puede acudir a la vía civil alegando un simple interés ciudadano (un interés difuso) en la calidad del medioambiente (por ejemplo, para pedir la restauración del medio ambiente contaminado por una industria); ni alegando la vulneración del derecho humano a un medioambiente adecuado (Art. 45.1 CE); por cuanto, los particulares no tienen pretensiones civiles por daños a bienes abstractos, como es el medioambiente, si éstos no se concretan en una lesión a su persona o a su patrimonio. Tampoco cabe una pretensión civil al cumplimiento abstracto de las normas (ya que, en último término, supondría obtener una indemnización por un daño al aire o agua, por parte de una persona individual)”.

¹¹¹² Vid. M. ELIANTONIO, “Collective Redress in Environmental Matters in the EU: A Role Model or a “Problem Child”?”, op. cit., pp. 259-260.

In the light of these and prior considerations, it becomes clear that the real problem lying at the root of the procedural and substantive difficulties presented *supra* is the existence of a true conceptual, idiosyncratic and structural mismatch between the content and structure of the legal good “environment” and the notions, structure, tools, and mechanisms of “private law”: environmental protection is simply not structurally prone to being privately enforced, in the first place. This is the reason why, in my opinion, any debate revolving around its private enforcement needs to be structured around the following three questions: firstly, who does actually detain the condition of rights-holder over such *stricto sensu* environment? Secondly, can such rights-holder start private-law judicial proceedings in respect of environmental damage *stricto sensu* and, if not who can? Thirdly, which kind of remedy can be obtained?

The mismatch could be addressed by operating a theoretical shift at the level of the first of the “structural” questions, for instance, by re-conceptualizing the societal diffuse interest in the environment as “a form of public equitable proprietary interest in the environment”¹¹¹³:

“[A]ccording to Douglas J., the public should be regarded as having a form of beneficial interest in the environment capable of protection by the institutions of property. Gray has attempted to establish theoretical underpinnings for this assertion. In short, his thesis is that the public interest in the environment must be assimilated with the institutions of property in order to afford it effective protection. As the idea of property is central to the protection of interests in society, any right which is not framed in terms of property rights ‘is very apt to take second place’. Thus, Gray argues that the law should recognize a form of public equitable proprietary interest in natural resources”¹¹¹⁴.

¹¹¹³ *Vid.* M. WILDE, “Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence”, *op. cit.*, p. 292.

¹¹¹⁴ *Ibidem*, p. 289 (quoting K. GRAY, “Equitable Property”, *Current Legal Problems*, vol. 47-2, 1994, p. 157): “In adopting the terminology of equitable property we lock into the insidiously powerful leverage of the primal claim, ‘it’s mine’, and we harness this claim for more constructive social purposes. When important assets of the human community are threatened, we are able to say with collective force, ‘you can’t do that: those assets are ours’. When you pollute our air or our rivers or exclude us unreasonably from wild and open spaces, we can mobilize the enormous symbolic and emotional impact of the property attribution by asserting that you are taking away some of our property”. The example provided by Wilde is the following: “In the US Supreme Court decision in *Friends of the Earth v. Laidlaw Environmental Services*, it is possible to detect elements of a notion of equitable property in the environment extending beyond the boundaries of any land in which one has a direct proprietary interest. The defendants had acquired a waste incinerator and waste-water treatment plant from which discharges of mercury contaminated a river. It fell to be determined whether *Friends of the Earth* (FOE) had standing to pursue the matter under the citizen suit provisions of the Clean Water Act 1972. In this respect they had to show that the organization comprised members who would enjoy standing in their own right under the Act. Thus, a number of residents, who were also members of FOE, attested as to the adverse effects that the pollution had had on their use and enjoyment of the river for recreational purposes. Of course, none of these persons had any direct proprietary interest in the river or its banks; nevertheless, Ginsberg J. was prepared to find that their use of the resource was worthy of protection under the Act:

[W]e see nothing ‘improbable’ about the proposition that a company’s continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms.

It is in this sense that K. Gray considers “*the environment as a form of ‘global commons’ in which everyone has an identifiable interest*”¹¹¹⁵.

However, in my opinion, the most adequate answer lies in a different kind of theoretical shift which would operate at the level of the second structural question above: if the rights-holder cannot start private-law judicial proceedings in respect of environmental damage *stricto sensu*, then who can? The answer actually lies in re-conceptualizing the stakes in terms of “entitlement”: it is somewhat irrelevant who the rights-holder actually is; what matters is having a legal subject who is entitled to act on behalf of the rights-holder, a sort of “proxy” for the purpose of private enforcement. In this sense, a solution to the mismatch could be attained by legally recognizing a form of entitlement (towards the private enforcement of environmental redress) to individual subjects: this would somewhat mean transferring upwards the practical virtues of representative actions – a form of collective redress discussed *supra* – towards the theoretical upstream level where this discussion lies. It means considering, from a theoretical standpoint, that any private subject is entitled to start proceedings seeking the redress of the *stricto sensu* environment. It amounts to a tacit incorporation of the representative-action logic to the upstream theoretical level of the debate.

It may be argued that, for this approach to work swiftly, some sort of geographical linking between the entitled private subject and the damaged *stricto sensu* environment should be required. After all, it is sometimes suggested that such kind of linking should be required from

By affording legal recognition to these recreational uses it is possible to argue that the Court elevated them to the status of collective beneficial or equitable rights in the resource. In this case, it is possible that the Supreme Court felt able to interpret standing requirements generously as the Act in question concerned environmental protection and made specific provision for citizen suit actions. Had the case been brought according to existing common-law principles, where the focus remains upon the protection of exclusive possession, it is doubtful whether the same conclusion would have been reached”. Further on in the article (p. 291), Wilde further refers to Gray’s ideas as a development of previous thoughts by C.B. MacPherson (“C.B. MacPherson, ‘Human Rights as Property Rights’, 24 *Dissent* (1977), 72”; no further info provided): “*Interpreting private law in a manner which is ‘rights compliant’ would certainly provide a practical means of framing human rights in terms of property rights in the manner advocated by writers such as Gray and MacPherson. Indeed, in their views, such is the dominance of property rights; any rights not enjoying this status are likely to be weaker. As MacPherson argues, ‘we have made property so central to our society that anything and any rights that are not property are very apt to take second place’*”.

¹¹¹⁵ *Vid.* M. WILDE, “Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence”, *op. cit.*, p. 292: “*This argument accords with the views expressed by MacPherson in which he explains that, historically, two forms of property were recognized. On the one hand, there was an individual right to exclude others from property and on the other hand there was an individual right not to be excluded from the use and enjoyment of ‘common’ resources, be they common lands, parks or other forms of public space. Gray takes this one step further to include the environment as a form of ‘global commons’ in which everyone has an identifiable interest*”. *Vid.* also p. 289: “*However, this is an issue that has been debated extensively, most notably in the dissenting judgment of Douglas J. in Sierra Club v. Morton. Although this was a judicial review case, the judge’s comments invoked these concepts and are instructive from that point of view. In this case, the issue was whether the Sierra Club, an organization that promotes environmental protection and outdoor pursuits, had standing to seek injunctive relief in order to enjoin environmentally harmful commercial development in part of the Sierra Nevada area of California. Douglas J. suggested that the time had come to recognize a public trust doctrine in ecological resources and that those who have a ‘meaningful’ or ‘intimate’ relationship with the resource, such as those who ‘hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment must be in a position to speak for its values*”.

NGOs wherever representative actions become available (downstream)¹¹¹⁶. And this is so notwithstanding the fact that NGOs – as opposed to the possible involvement of “public” representatives, such as administrations and public law entities – deserve a privileged status, for they play a privileged role as private channels for collective societal concerns.

Overall, with or without a geographical-linking requirement, the entitlement proposal is to be preferred, for it comes quite close to the “proprietary” conceptualization just described, but has bigger advantages: i) it can simultaneously cater to the needs of the environment *lato sensu* – no-one is the “owner” of his or her own life or health, however, one way or another, all humans are all holders of a right to life and / or health – and ii) it is fairly compatible with (it entails no significant departure from) the “diffuse interests” conceptualization (since it works at the level of the second structural question, and not the first one). This entitlement conceptualization is further inspired by two North-American cases described by Wilde within the description of his “property rights” approach, which precisely require departing from a traditional conception of rights *in rem*. These cases, *Mathias Colomb Indian Band v. Saskatchewan Power Corporation* in Canada and *in Re the Exxon Valdez* in the United States, focus on the standing of indigenous populations to bring actions in respect of the *stricto sensu* environment they live at. Despite the fact that claimants were unsuccessful, these cases are inspiring, in that

“[...] the claimants [could not] be said to ‘occupy’ or ‘possess’ the land in question according to any accepted legal definition of the terms. [In such cases] indigenous peoples sought remedies in respect of environmental damage on the grounds that their cultural and historic links with the landscape justified a broader view of standing and should not be contingent upon showing legal title to the natural resources affected.

In these cases, there was a clear public element to the dispute in that the activities affected the local population as a whole. In the first case to be considered, the plaintiffs sought to establish a cause of action in respect of special and individual losses they had incurred as a result of a failure to comply with regulatory requirements. In other words, they sought to establish a private cause of action in respect of a breach of a regulatory duty owed to the population as a whole. In the second case, an action was brought in respect of the public nuisance created by the pollution on the grounds that the plaintiffs’ losses exceeded those of the general population”¹¹¹⁷.

¹¹¹⁶ Vid. M. FALLON, “Le droit fondamental à l’environnement selon le droit communautaire”, *op.cit.*, pp. 124-128: “[...] Pourtant, cette appréciation donne à réfléchir à propos d’une association de défense de l’environnement qui, à la différence, par exemple, d’une association de défense des consommateurs, promeut les intérêts collectifs, non d’une «catégorie» de justiciables, mais de tous ceux, membres ou non, qui vivent dans l’aire géographique que les statuts lui ont assignée, permettant ainsi une substitution de l’action du ministère public, et de l’État [...]”. However, while it is sometimes contended that some sort of geographical linking between the geographical scope of an NGO’s organizational basis (or even its organizational purposes) and the environmental occurrence should be required for their involvement, *cfr.* developments in the Milieu Defensie case commented *supra*, Box 1 (Part I, Chapter 1).

¹¹¹⁷ Vid. M. WILDE, “Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence”, *op. cit.*, p. 288. The two cases are described in pp. 288-289, and are hereby reproduced for their very interesting and graphic character.

The first case concerns native Americans and even contains an intra-canadian conflict-of-laws element: “In the Canadian case of *Mathias Colomb Indian Band v. Saskatchewan Power Corporation* two Indian

A shift, in both cases, from an attempt of individualizing harm (“properatarizing” the situation) towards claiming entitlement would have possibly better accommodated all stakes and solidified the arguments of the respective sets of plaintiffs. However, as appealing as the entitlement approach may seem, it cannot fully resolve the mismatch-derived difficulties. The entitlement approach requires being accompanied by additional adjustments at the level of the third debate-structuring question identified above: which kind of remedy can be obtained by the entitled subject?

v. *First enhanced solution (II) – The practical adjustment that needs to follow: cy pres compensation*

Naturally, as both the “property-rights” and the “entitlement” conceptualizations are, actually, theoretical answers (not mere legal “adaptors” or “converters”) to a deeper theoretical problem (the above-referred mismatch) they intervene upstream in the environmental

bands sought injunctive relief and a declaration in respect of the flooding of lands allegedly caused by the damming of a lake for hydroelectric purposes. Although the dam and all other infrastructure was located in Saskatchewan, the lake and rivers affected straddled the provincial border with Manitoba where the bands resided. The defendants applied to strike out the action on the grounds, inter alia, that the plaintiffs lacked locus standi in the matter. The plaintiffs’ argument was that, although the defendant’s infrastructure was located in Saskatchewan, as water levels were affected in Manitoba, appropriate licences should have been obtained from the Manitoban authorities. The central issue was whether the legislation in question conferred a public right enforceable at the suit of private individuals. In other words, did the failure to obtain the licences amount to a form of actionable breach of statutory duty? After a careful analysis of the authorities, Jewers J. in the Manitoba Queen’s Bench considered that the legislation in question was capable of creating such a duty. The next issue was whether the bands had a sufficient interest in the flooded lands to seek the relief sought. Generally, where a statute has been found to create a public right, breach of the statute is only actionable at the suit of a private individual if that individual can show that he sustained ‘special damage’ as a result of the breach. Thus, the court had to determine whether the bands’ connection with the lands in question meant that the flooding could be regarded as special damage to their interests. Part of the land affected comprised some 660 acres of reserve lands; Jewers J. had no difficulty in finding that the bands residing on those lands had ‘a special interest beyond that of the public generally’. However, the bands also claimed that they had a special interest in all the land affected, irrespective of whether it was included in a reserve, by virtue of their cultural and historic links with the land and their use of it as a natural resource for hunting and fishing. Jewers J. was not persuaded that this use conferred upon them any additional interest over and above that enjoyed by the public generally”.

The second case is one of the controversies stemming out of the Exxon Valdez catastrophe: “A similar conclusion was reached by US Court of Appeals (Ninth Circuit) in *Re the Exxon Valdez* concerning the catastrophic environmental damage caused by the grounding of the eponymous supertanker in Prince William Sound, Alaska. One of the numerous classes seeking compensation comprised Alaskan natives. Economic claims in respect of lost fishing harvests were settled without difficulty. However, the Alaskan natives also sought damages in respect of non-economic damage caused to their cultural heritage and ‘subsistence way of life’ by the pollution. It was argued that this amounted to special damage warranting a private claim pursuant to the public nuisance caused by the contamination. It was held that, although the native Alaskans felt the impact of the disaster particularly acutely, the loss was no different in kind to that suffered by Alaskans as a whole: While the oil spill may have affected Alaska natives more severely than other members of the public, ‘the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings’ is shared by all Alaskans. Thus, there is a reluctance to elevate non-economic interests in the environment to anything akin to a proprietary status capable of protection in tort” (Emphasis added).

enforcement reasoning. Therefore, they would require, in order to avoid criticism and further controversy, a downstream adjustment, even if they were simply introduced, for instance, *via* case-law interpretation. The adjustment needed would have to come at the end of the path: in respect of remedies. As suggested *supra*, allowing private parties to obtain monetary compensation for damage to the *stricto sensu* environment goes against the fundamentals of private-law reasoning, as understood in western continental Europe, for diffuse interests match poorly the individual and individualized nature of civil proceedings, and of the redress that may be obtained therein. Funnily enough, this includes environmental associations: monetary compensations bestowed to NGOs are not necessarily welcomed either¹¹¹⁸. Therefore, a suitable solution in order to ensure coherence of the whole theoretical construction presented, and thus foster private enforcement is to enable so-called “Cy pres” compensation. Cy pres compensation is a form of non-direct compensation which has been successful in Canada and the United States, and which consists in the distribution of compensation arising from collective-redress schemes “to entities whose work and aims are related to the subject of the litigation”¹¹¹⁹. However, for the purpose of complementing the entitlement approach, and in order to countervail the referred private-law-based and NGO-focused-criticisms, this suggested compensation may not necessarily need to be distributed to NGOs, but could be given to public administrations, public funds or other similar publicly-controlled and monitorized entities. Therefore, by incorporating Cy pres compensation to the above-referred entitlement approach, the private enforcement of environmental policies could certainly be fostered and operationalized. Thus, *de lege ferenda* there is a creative margin of maneuver to explore interesting possibilities in respect of cy pres compensation¹¹²⁰.

In sum, the entitlement approach basically means transferring the virtues of representative actions – a form of collective redress – from the downstream level where they lie to the upstream theoretical level. And to be operational in practice, it would just require the introduction of cy-pres compenstion, in order to respect some of the sacrosanct principles of civil law as understood in several continental systems.

While I consider the construction in previous pages to be of great interest, I also acknowledge its complexity. Moreover, I equally acknowledge the fact that, overall, the construction points

¹¹¹⁸ Vid. F. LLODRÀ GRIMALT, *Lecciones de Derecho Ambiental Civil*, op. cit., p. 93: “[...] en relación con el daño ecológico, se plantea el tema de la legitimación de las asociaciones ecologistas para ejercitar acciones de defensa de bienes de titularidad común, pero las indemnizaciones por daños a bienes medioambientales corresponden a la Administración” (Emphasis added).

¹¹¹⁹ Vid. E. FALLA, “(EU) Collective Redress Proceedings: New Challenges for Judges”, op. cit., pp. 486-487.

¹¹²⁰ In this respect, I could not agree more with E. FALLA, (“(EU) Collective Redress Proceedings: New Challenges for Judges”, op. cit., pp. 486-487), who in respect of collective redress asserts that there are interesting possibilities to be explored in order to “transform cy pres awards into payment of a fine and class counsel into a true private attorney general”. Furthermore: “Sophisticated North- American opt-out class actions regimes have tried to [make] judges responsible for ascertaining the existence of at least some nexus between the cy pres recipients and the composition of the class. In this sense, judges have been required to be actively involved in vetting proposed cy pres recipients to ensure that group members receive benefits, even if indirectly. But, how? What criteria should be employed by judges to determine the best possible cy pres recipients? The difficulty is also that judges are put in a difficult position as interested groups will seek to lobby them in order to secure an award in their favour. Empowering judges to make cy pres damages awards may hence lead to difficulties and may tend to undermine the court’s perceived independence”.

to the fact that what would best solve the ensemble of the (upstream and downstream) problems referred, in the simplest possible way, would be the introduction of North-American-style citizen suit provisions.

vi. *Second enhanced solution - A European citizen suit provision?*

It is my contention that introducing a private right of action in the European legal order, akin to so-called “citizen suit” provisions in North-American environmental law, could amount to a “three birds, one stone” kind of solution to both the “procedural” and “substantive” problems, and the theoretical mismatch described above. Therefore, the objective of this section is to present the core characteristics of citizen suit provisions: the notion, its history and precedents (a), their most significant features (b), some restrictions on their operability (c), and their distinctive democratic character (d). This review, which intends to spark reflection on the potential of the incorporation of a citizen suit provision to the European legal order, will conclude with an appraisal thereof (e).

a. An introduction to the notion of citizen suits, its history and its precedents

In the United States, the involvement of citizens in the enforcement of environmental laws, achieved through the enactment of citizen suit provisions, has been qualified as “*the most pervasive, prominent, and continuing innovation in the modern environmental era*”¹¹²¹. The ratio than runs through the inclusion of this kind of provision in virtually all the major federal environmental laws passed in the 1970s and early 1980s¹¹²² is the idea that NGOs and individual citizens may “*supplement public enforcement of environmental laws by bringing their own prosecutorial actions*”¹¹²³. Citizen suit provisions are roughly sketched by B. H. Thompson as follows:

“Under the typical federal citizen suit provision, any individual or organization with constitutional standing can initiate a lawsuit in federal district court for an injunction against any person alleged to be in violation of one or more specified provisions of the statute. A growing number of provisions also authorize courts to impose monetary penalties, payable to the United States. Citizen prosecutors can settle their suits, even where settlement is not expressly authorized, on terms that include cessation of violations, supplemental environmental projects, and payment of monies to the

¹¹²¹ Vid. B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *U. Ill. L. Rev.*, 2000, pp. 185-236, at p. 185.

¹¹²² Vid. B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, pp. 185-186. Furthermore, the statutes that incorporate these provisions “*although far stricter and sweeping than earlier state and local environmental statutes, looked structurally similar to the earlier regimes- with one principal exception. Unlike their predecessors, almost all of the major laws provided for suits by private citizens to enjoin or penalize violations of their provisions. These citizen suit provisions became a defining theme of the modern environmental era*”.

¹¹²³ *Ibidem*, p. 186. And it has indeed been the case: “*Under federal and state citizen suit provisions, nonprofits and others have filed literally thousands of lawsuits over the past thirty years prosecuting alleged violations*”.

*plaintiff or other organizations. For largely political reasons, citizen suit provisions typically do not authorize private prosecution of every violation of the underlying statute*¹¹²⁴.

As pointed out by J. G. Miller, there is a significant level of resemblance among the different citizen suit provision due to the fact that they were all modelled out from § 304 of the Clean Air Act (CAA), which was introduced therein in 1970. The differences that may appear between this first citizen suit provision and others only reflect either differences in the structure or scheme of the underlying statutes or specific particularities of the time of their enactment. Interestingly, this aspect has led to a high level of potential for interpretative cross-pollination from one statute to another¹¹²⁵.

The origin of the citizen-suit policy movement can be found in the fact that the enforcement mechanisms of federal environmental statutes in the 1960s were considered to be both “*cumbersome and ineffective*”. Awareness of their lack of functionality happened in parallel with the flourishing of the interest in environmental protection, producing significant public dissatisfaction, which ultimately led to “*the significant enhancement of federal enforcement tools in the environmental legislation of the 1970s and to the creation of citizen suits*”¹¹²⁶. In adopting this position, Congress’ assumption was that, irrespective of whether lack of action was due to lack of funds or lack of political will, citizen suits would either trigger governmental enforcement of environmental laws or serve as a substitute thereto¹¹²⁷. However, citizen suits

¹¹²⁴ *Ibidem*, p. 192-193. *Vid.* also J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, *Environmental Law Reporter*, vol. 13, 1983, pp. 10309-10323, at pp. 10312-10313. As further indicated by this author: “*The sections authorize [...] confer jurisdiction on the district courts to entertain such suits without regard to diversity of citizenship or the amount in controversy. Jurisdiction is generally conferred on the courts to “enforce” the violated requirements although under § 505(a) of the Clean Water Act they may also assess penalties. Venue is usually in the district where the offense occurred, but venue in suits against the government is sometimes in the District of Columbia*”. As regards the fact that “*any person*” may initiate a citizen suit, *ibidem*, p. 10315: “*With one exception, the citizen suit sections authorize “any person” to commence suit. The exception is Clean Water Act § 505 which authorizes “any citizen” to commence suit. But § 505(g) then defines a “citizen” to be a “person” with an interest which is or may be adversely affected. “Person” is not defined in the citizen suit sections, but is addressed in the general definitional sections of all of the statutes except TSCA. These definitions are similar but not identical. Whether a particular entity can be a proper plaintiff depends both upon whether the entity is a “person” under the particular statute and, if so, whether the person has standing to sue. The definitions of “person” in the statutes are what would be expected. Little legislative history exists with regard to what “person” can sue and questions regarding proper plaintiffs therefore must be resolved with no obvious frame of reference*” (emphasis added).

¹¹²⁵ *Vid.* J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, at p. 10312: “*There are perhaps no sections of the environmental statutes where precedent under one statute so clearly applies to others [...] Ironically, subsequent amendments to § 304 reduce its similarity to equivalent sections in other statutes*”. Since CERCLA plays a pivotal role in American environmental law, an interesting particularity to point to is that its citizen suits are barred until after remedial action has been completed: “*[w]hile the language of this section merely bars “challenges” to removal and remediation orders, courts have found that citizen suits seeking civil penalties count as a “challenge”*” (*Vid.* R. L. REVESZ, *Environmental Law and Policy* (2nd ed.), New York, Foundation Press, 2012, p. 1175).

¹¹²⁶ *Vid.* J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, p. 10311.

¹¹²⁷ *Ibidem*.

cannot be considered to be a radical legal innovation; they are simply an “incremental improvement” on a preexisting notion, the *qui tam* actions¹¹²⁸:

*“Various statutes award informants a share of any penalties collected from prosecuting a violation based on information provided by the informant. Qui tam provisions authorize informants to bring their own suits against the alleged violator to collect those penalties if the government fails to act on the information”*¹¹²⁹.

Although there are significant differences, *qui tam* actions provide the most immediate historical precedent to citizen suits. From this precedent, and through the turmoil of a controversial political debate and several versions before enactment, the citizen suit was finally born, as mentioned, in § 304 of the Clean Air Act as amended in 1970¹¹³⁰. From thereon, notwithstanding the exception of the Federal Insecticide, Fungicide, and Rodenticide Act: “[e]very major environmental law passed since 1970 now includes a citizen suit provision”¹¹³¹.

b. Some significant features of citizen suits

Having summarily explored the notion, its history and origins, the following paragraphs provide a brief description of some of the most defining features of citizen suits:

¹¹²⁸ *Vid.* B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, p. 195.

¹¹²⁹ *Ibidem*, p. 196: “Given the history of private compensation actions and *qui tam* provisions, no one involved in the formulation of the 1970 Clean Air Act suggested that citizen enforcement suits were a radical break with the past. As the Nixon administration conceded, citizen suits were built upon the “trend of existing law”.

¹¹³⁰ *Vid.* J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, pp. 10311-10312: “The enactment of the section was contested; however, the political impossibility of opposing a “pro-environmental” measure at the outset of the environmental decade and the desire to keep environmental legislation bipartisan obscured the debate. Attempts to sidetrack the measure to the Senate Judiciary Committee were clothed with concern for “burdening the [already overcrowded] courts with a large number of law-suits.” Proponents of the idea quickly switched from espousing it as an antidote to an untrustworthy administration to championing it as the answer to the enforcement agencies’ inevitable lack of sufficient resources to address all statutory violations. Although the issues in the debate are obscure, there was a real debate, and tension between proponents and opponents shaped the provision”.

¹¹³¹ *Vid.* B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, p. 192. As further explained by J. G. MILLER (“Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, p. 10312): “Once firmly ensconced in the Clean Air Act, the citizen suit was included in all new federal environmental statutes or major statutory amendments to existing federal environmental statutes in the 1970s, except for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This almost ubiquitous inclusion and seemingly anomalous exclusion is explained by the fact that either or both the Senate Environment and Public Works Committee (formerly the Public Works Committee) and the House Commerce and Transportation Committee are the authorizing committees for all of this legislation except FIFRA. FIFRA is the exclusive domain of the more conservative Agriculture Committees in both houses of Congress. There has been a tendency to literally “lift” § 304 from the Clean Air Act and transpose it with only the most cursory conforming changes into other environmental statutes. The results are sometimes surprising. Lack of careful attention to statutory differences, for instance, has resulted in the ability of citizens to enforce more provisions of the Resource Conservation and Recovery Act (RCRA) than the Environmental Protection Agency (EPA) can enforce and allows them to enforce the Safe Drinking Water Act (SDWA) after notice to EPA that time is too short to allow EPA enforcement prior to the filing of a citizen suit”.

i) Notice period: before suing, citizens have to give notice of the alleged violation to the alleged violator, and to relevant agencies – EPA, the Environmental Protection Agency, and, where appropriate, state agencies – in order to give them the chance to sue first. Notwithstanding exceptions, the notice period is 60 days long. No citizen suit may be commenced if EPA or, where appropriate, the state: a) decides to act to require compliance – be it through civil or criminal action, and under some statutes, through an administrative enforcement proceeding¹¹³² – and, b) is “*diligently prosecuting*” an enforcement action. As it may be easily understood “[t]he necessarily subjective standard of “*diligent prosecution*” has led to litigation in the past and undoubtedly will in the future”¹¹³³. However, the notice provider has the possibility to intervene in any government enforcement action commenced before a federal court¹¹³⁴. It is not clear, nevertheless, what happens if a previously inactive government enters into a “*consent decree*” with the defendant while the citizen suit is pending: “*most courts have concluded that the consent decree bars the citizen suit if the decree reasonably ensures that the violation will not recur*”¹¹³⁵. The ratio behind this arrangement is simple: Congress wanted to avoid the complexities that would arise from overlapping private and public prosecution – as shown by prior experience in the fields of antitrust and securities – and thus, “*exclusive public prosecution was to be preferred over dual prosecution*”¹¹³⁶. Nevertheless, citizen suits have “*a savings clause to obviate any implication that they preclude other remedies provided by statute or at common law*”¹¹³⁷.

ii) Award of attorneys’ fees: as a means to incentivize environmental private enforcement, citizen suits provide, against the traditional “*American rule*” on expenses, for the award of costs, including reasonable attorneys and expert witness fees, to either party as appropriate. This arrangement is meant to both encourage private action and discourage “*frivolous and harassing*” one¹¹³⁸. However, this has caused a significant amount of litigation, especially during the 1970s, for there were important discrepancies in opinions as to what amounted to “*reasonable attorney fees*”¹¹³⁹. Without entering into unnecessary details it can be said that the conclusion of the controversy is that generally “*public interest attorneys should be compensated at the rate at which they would be billed in a private law firm*”¹¹⁴⁰.

iii) No award of damages to private parties: conversely to what happens with *qui tam* actions, citizen suit provisions contain an element that guarantees the disinterested character and the genuinely environmental motivation behind private involvement in environmental

¹¹³² Vid. B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, p. 192.

¹¹³³ Vid. J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, p. 10313. Notably, “*There are exceptions to the notice requirements, particularly where violations of hazardous pollutant or new source standards are alleged*”.

¹¹³⁴ Vid. J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, p. 10313.

¹¹³⁵ Vid. J. SALZMAN & B. H. THOMPSON, *Environmental Law and Policy* (4th ed.), St. Paul, Foundation Press, 2014, p. 101.

¹¹³⁶ Vid. B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, p. 192.

¹¹³⁷ Vid. J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, p. 10313.

¹¹³⁸ *Ibidem*, p. 10312. Furthermore: “*courts [may] require plaintiffs to post a bond or other surety where a temporary restraining order or preliminary injunction is sought*” (*ibidem*, p. 10313).

¹¹³⁹ *Ibidem*, p. 10313.

¹¹⁴⁰ Vid. B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, pp. 193-94: “*The federal government also supports citizen prosecutions through the federal tax code. The major source of funding for nonprofit environmental organizations is tax deductible contributions by private donors*”.

enforcement: private parties cannot obtain monetary damage redress from filing a citizen suit. As brilliantly summarized by J. Salzman & B. H. Thompson:

“In authorizing individual citizens and environmental groups to serve as private prosecutors, Congress has been cautious not to make citizen suits into profit-making opportunities. Most of the citizen suits provisions permit citizens and environmental groups to pursue only injunctive relief. A few statutes authorize courts to impose monetary penalties [...] but penalties are payable to the United States not to the private prosecutor. In practice however, plaintiffs often settle their citizen suits on terms that include not only the cessation of violations, but also (1) the payment of monies to the plaintiff or other organizations and (2) agreements to engage in supplemental projects to the benefit of the environment”¹¹⁴¹.

Attention needs to be drawn to supplemental enforcement projects – hereinafter SEPs – a truly creative development conceived by NGOs as a means to maximize environmental welfare out of the settlement of citizen suits: the alleged violator engages itself to undertake an environmentally-beneficial project as a part of the consideration for the private party to drop the citizen suit. As explained by B. H. Thompson:

“None of the federal environmental statutes adopted in the 1970s expressly contemplated SEPs. As the number of federal citizen suits began to grow in the early 1980s, however, environmental nonprofits began to use SEPs to an increasing degree in settlements of the suits.” In settling citizen suits, environmental nonprofits often were not only uninterested in direct monetary payments to themselves, both as a matter of public perception and for tax reasons, but also saw no environmental value to settlements providing non earmarked payments to the United States Treasury. SEPs benefited the environment more than payments to the Treasury and made powerful statements. By the mid-1980s, SEPs had been incorporated into consent decrees in over fifty federal citizen suits”¹¹⁴².

c. Restrictions on the operability of citizen suits

Against the liberality of allowing “any person” or “any citizen” to initiate a citizen suit, courts have taken a restrictive approach to the operability and scope of citizen suit provisions, possibly in order to contain the always-dreaded potential opening of the litigation floodgates. The said restrictive approach has manifested in case-law through two different channels: 1) by imposing standing requirements; 2) by requiring a “contemporary character” of the environmental violation to the suit (i.e. prohibition of redress of wholly past violations). As put by Thompson: “[a]lthough the impact of these decisions is hard to gauge, many supporters of citizen suits believe that the standing decisions in particular are rapidly and seriously eroding the opportunity for citizen prosecutions”¹¹⁴³. Let us deal with both restrictions in sequence.

¹¹⁴¹ Vid. J. SALZMAN & B. H. THOMPSON, *Environmental Law and Policy* (4th ed.), *op. cit.*, p. 100.

¹¹⁴² Vid. B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, p. 207.

¹¹⁴³ *Ibidem.*, p. 214.

1. Standing

As suggested *supra*, the notion of standing “requires the parties bringing the lawsuit to demonstrate that they are the appropriate parties to bring the case in front of a court”¹¹⁴⁴. Following the Supreme Court, there are three constitutionally-established requirements, plus a fourth prudential one, that an individual has to fulfill in order to demonstrate that she has standing¹¹⁴⁵:

i) The first requirement, on which most of the standing disputes focus¹¹⁴⁶, is that the plaintiff has to show that the challenged action has or will cause her an “injury in fact”. As explained by M. A. Martin:

*“The Supreme Court has noted that notwithstanding how many persons have been injured by the challenged action, the plaintiff bringing the lawsuit must demonstrate that the action injures him or her in a personal way [...] Economic harm has been the traditional means by which to show a plaintiff suffered an injury. However, many environmental harms [...] may not translate into an economic injury to the plaintiff. In the 1970s the Supreme Court held that non-economic injuries such as harm to recreational, conservational, and aesthetic interests can represent an “injury-in-fact” so long as the plaintiff is among the injured”*¹¹⁴⁷.

The referred 1970s decision is the infamous *Sierra Club v. Morton*¹¹⁴⁸, where the Court made clear that injury to the members could not be substituted by the “general or even particular interest of an organization in a pollution problem [...] This could include allegations that its members breathe polluted air within the zone of influence of an offending air pollution source, use waters polluted by a complained of water pollution source, or use wetlands to be filled without a properly issued permit”¹¹⁴⁹.

ii) The second requirement is that the plaintiff has to demonstrate that injury she has suffered is linked to the challenged action.

¹¹⁴⁴ *Vid.* M. A. MARTIN, “Standing”: who can sue to protect the environment?”, *op. cit.*, p. 113.

¹¹⁴⁵ *Vid.* J. SALZMAN & B. H. THOMPSON, *Environmental Law and Policy* (4th ed.), *op. cit.*, p. 102 (The first requirements are established by Article III of the United States Constitution).

¹¹⁴⁶ *Ibidem*, p. 102.

¹¹⁴⁷ *Vid.* M. A. MARTIN, “Standing”: who can sue to protect the environment?”, *op. cit.*, p. 113.

¹¹⁴⁸ *Vid.* *Sierra Club v. Morton*, 405 U.S. 727 (1972). As summarized by J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, (*op. cit.*, p. 10316): “[In this case] the Supreme Court held that the Sierra Club had no standing to challenge a recreational development adjacent to Sequoia National Park without compliance with the National Environmental Policy Act (NEPA) because it would sustain no injury”.

¹¹⁴⁹ *Vid.* J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, p. 10316. The same author further elaborates on the actual pertinence of this requirement (*ibidem*, p. 10317): “The resulting quagmire calls the question of whether injury is really relevant to standing under the citizen suit provisions, absent explicit congressional restrictions such as are found in Clean Water Act § 505 or SMCRA § 520. Congress has conferred enforcement powers on EPA in the first instance and there is no prerequisite of injury when EPA exercises those powers. In the absence of EPA action, Congress has conferred enforcement powers on citizens secondarily. Why should there be a prerequisite of injury when they act for EPA as private attorneys general?”.

iii) The third requirement is redressability: the injury needs to be redressable by the means of some form of available relief¹¹⁵⁰.

iv) The fourth and final requirement for standing, as announced is only prudential. This means that Congress could potentially modify it or suppress it. Furthermore, since it does not find its origin in the federal Constitution, courts have considered in certain instances that this requirement has been overridden by the very citizen suit provisions under specific acts. This requirement is that *“the injury must be within the “zone of interests” that the underlying substantive statute is designed to protect”*¹¹⁵¹.

On top of these considerations, if the plaintiff is an NGO, an additional element is added to the burden of demonstrating that at least one of its members individually fulfils the four requirements: the organization has to demonstrate that *“the goal in seeking judicial relief is “germane to the organization’s purposes”*¹¹⁵².

During a first period of almost twenty years after *Sierra Club v. Morton* – where the injury-in-fact element was dealt with – *“the Supreme Court showed no interest in constructing standing barriers to environmental litigation”*¹¹⁵³. The trend toward a more restrictive interpretation of standing can be considered to actually have begun in the 1990s with *Lujan v. Defenders of wildlife*. It was in this latter decision that the Supreme Court *“more fully elaborated Article III standing requirements as applied to an environmental case”*¹¹⁵⁴, and where it *“also rejected the argument that Congress waived Article III standing requirements in enacting the Endangered Species Act’s citizen-suit provision”*¹¹⁵⁵.

The trend however, can be considered to have been mitigated to some extent in the 2000 opinion in *Friends of the Earth v. Laidlaw environmental Services, Inc.*¹¹⁵⁶, where the Court states that *“injury to the environment was not necessary to show Article III standing so long as*

¹¹⁵⁰ Vid. J. SALZMAN & B. H. THOMPSON, *Environmental Law and Policy* (4th ed.), *op. cit.*, p. 102.

¹¹⁵¹ *Ibidem*. Interestingly, in the 1980s, J. G. MILLER (“Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, p. 10317) interpreted this fourth requirement as being a second prong of the first one: *“It should be noted that the injury requirement, liberally interpreted in Sierra Club v. Morton, is but one part of a two-pronged test for standing that has been developed under that case and its progeny: (1) the act complained of must cause injury to the plaintiff and (2) the injury must be within the zone of interest protected by the relevant statute”*.

¹¹⁵² Vid. J. SALZMAN & B. H. THOMPSON, *Environmental Law and Policy* (4th ed.), *op. cit.*, p. 102. It is interesting to highlight that standing requirements have been “codified” in certain citizen suit provisions. As commented by J. G. MILLER (“Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, pp. 10316-10317): *“Standing is explicitly recognized by Clean Water Act § 505(g), which defines a “citizen” as a “person or persons having an interest which is or may be adversely affected.” SMCRA § 520 and § 23 of the Outer Continental Shelf Lands Act (OCSLA) accomplish the same goal in authorizing suit by any person having an interest adversely affected or potentially affected. The language of § 505(g) is a conscious effort by Congress to restrict use of the citizen suit section to those who meet the standing test of Sierra Club v. Morton [...] By adopting the Sierra Club v. Morton conception of standing in Clean Water Act § 505 and SMCRA § 520, Congress has inadvertently raised troubling questions. Should standing be frozen under those two statutes as it was enunciated in Sierra Club v. Morton, or should it be allowed to develop as subsequent judicial interpretation develops?”*.

¹¹⁵³ *Ibidem*, p. 103. Vid. in the same sense M. A. MARTIN, *op. cit.*, p. 114 (pointing to a shift in the Court towards a stricter interpretation of standing in environmental and other areas).

¹¹⁵⁴ Vid. M. A. MARTIN, “Standing”: who can sue to protect the environment?”, *op. cit.*, p. 113.

¹¹⁵⁵ *Ibidem*, p. 114.

¹¹⁵⁶ Vid. *Friends of the Earth v. Laidlaw environmental Services, Inc.*, 528 U.S. 167 (2000).

Injury to the plaintiffs was shown". Justice Scalia dissented with this conclusion asserting that the majority made the "*injury-in-fact requirement a sham*"¹¹⁵⁷.

How should the requirement to demonstrate standing be assessed? While the US Supreme Court considers that "*existing standing rules are important for several reasons*", one of them being ensuring that the plaintiff has sufficient interest in the lawsuit to provide adequate representation of the public interest, academics have allowed themselves to be more critic¹¹⁵⁸. Specifically, some voices wonder whether the standing requirements are actually needed:

*"the question should be whether Congress has authorized individuals or organizations to seek judicial review or other relief in federal court. For example, where Congress has authorized "any person" to pursue environmental violators, as Congress has done in virtually every citizen suit provision, the courts should not erect roadblocks in the way of potential citizen prosecutors"*¹¹⁵⁹.

2. Contemporary character of the violation

The second major restriction on the operability of citizen suits is the prohibition of redress of wholly past environmental violations: the violation and the suit need to be contemporary to one another. As pointed by J. G. Miller this is due to the fact that most of the citizen suit provisions are "*forward looking*" for they establish that the violator needs "*to be in violation*" in the moment that the suit is filed; i.e. this wording blocks citizen suits where the alleged violation is totally in the past¹¹⁶⁰. This interpretation comes from the Supreme Courts' unanimous opinion in *Gwaltney of Smithfield, Ltd. V. Chesapeake Bay Foundation*¹¹⁶¹ which is understood as requiring that "*to prevail, a plaintiff must demonstrate a "state of either continuous or intermittent violation" –that is, "a reasonable likelihood that a past polluter will continue to pollute in the future"*¹¹⁶². The restriction on "past violations" has been related by Salzman and Thompson to the standing requirement of redressability. These authors understand *Friends of the Earth v. Laidlaw* as establishing that the said requirement of redressability is absent in cases of "past violation", "*because neither of the remedies*

¹¹⁵⁷ As summarized by M. A. MARTIN, "Standing": who can sue to protect the environment?", *op. cit.*, pp. 113-114. The evolution of the notion of standing was continued in 2007 in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007). However, this case escapes the scope of this section of the dissertation because the plaintiff is a public entity. Commentaries thereof can be found in M. A. MARTIN, "Standing": who can sue to protect the environment?", *op. cit.*, pp. 115-116 and in R. V. PERCIVAL, C. H. SCHROEDER, A. S. MILLER & J. P. LEAPE, *Environmental Regulation: Law, Science, and Policy* (7th ed.), New York, Aspen, 2013, pp. 117 and following. A second case would be *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), commented in PERCIVAL ET AL., *Environmental Regulation: Law, Science, and Policy* (7th ed.), *op. cit.*, pp. 1163 and following. These authors understand the opinion as Scalia, as resurrecting a narrow view of environmental standing. *Vid.* also R. L. REVESZ, *Environmental Law and Policy* (2nd ed.), *op. cit.*, pp. 1232-1233, who understands the decision as casting "*doubt on the ability to rely on probabilistic harms to establish standing*".

¹¹⁵⁸ *Vid.* J. SALZMAN & B. H. THOMPSON, *Environmental Law and Policy* (4th ed.), *op. cit.*, p. 102 for further reasons and discussion.

¹¹⁵⁹ *Ibidem*, p. 102.

¹¹⁶⁰ *Vid.* J. G. MILLER, "Private Enforcement of Federal Pollution Control Laws Part I", *op. cit.*, p. 10320.

¹¹⁶¹ *Vid.* *Gwaltney of Smithfield, Ltd. V. Chesapeake Bay Foundation*, 484 U.S. 49 (1987).

¹¹⁶² *Vid.* J. SALZMAN & B. H. THOMPSON, *Environmental Law and Policy* (4th ed.), *op. cit.*, p. 100.

*potentially available to the plaintiff (an injunction or a civil penalty payable to the government) could remedy an injury that the plaintiff has suffered as a result of the past violation”*¹¹⁶³. Congress reacted to *Gwaltney* by amending the citizen suit provision in the Clean Air Act in 1990. The new wording permits citizen suits against persons *“alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation”*. Such legislative reaction, however, fell short of what would actually be needed: the CAA is the only act which has been amended: *“[m]ost federal environmental statutes, however, retain the original wording interpreted in Gwaltney”*¹¹⁶⁴. Logically, the problem persists in most instances.

d. On the democratic character of citizen suits

Beyond their main features, and despite their restrictions, I personally believe it is important to highlight that a significant democratic element is introduced by citizen suits in North-American environmental law. The possibility for concerned subjects to start legal proceedings for environmental redress when they deem it necessary allows for a higher degree of direct citizen involvement in the management of environmental quality. In this sense, the democratic perks of having citizen suits are many, as explained by B. H. Thompson:

i) *“citizen suit provisions permit citizens to choose greater enforcement levels, to override leniency errors made by governmental officials, and to experiment with alternative-enforcement approaches. Several additional advantages, however, speak more directly to democratic participation in the making and implementation of environmental policy”*¹¹⁶⁵.

ii) *“citizen enforcement actions permit interested citizens to bring before the courts interpretations of environmental statutes that agency officials may be ignoring. [...They] play a critical role in permitting private citizens to influence how a law is interpreted. Many interpretative issues arise only at the enforcement stage of a statute's implementation”*¹¹⁶⁶.

iii) *“citizen enforcement actions provide individuals with the opportunity to provide guidance to governmental officials on the direction that enforcement policy should take”*¹¹⁶⁷.

iv) *“the mere provision of a right to file citizen enforcement actions strengthens democracy. Procedure is often as important to members of the public as outcomes, particularly where outcomes are unknown or ambiguous.” Members of the public, more particularly, place substantial value on the ability to tell their stories and express their views. The right to a voice in official proceedings confirms the importance of the individual and provides the individual with the status and dignity that is critical to the long-term functioning of a democracy”*¹¹⁶⁸.

¹¹⁶³ *Ibidem*, p. 105.

¹¹⁶⁴ *Ibidem*, p. 100.

¹¹⁶⁵ *Vid.* B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, p. 209.

¹¹⁶⁶ *Ibidem*.

¹¹⁶⁷ *Ibidem*.

¹¹⁶⁸ *Ibidem*, p. 210.

v) Finally, far beyond empowering NGOs as judicial activism players¹¹⁶⁹, citizen suits enabled NGOs as political actors: “[a]t a more concrete level, the right to file citizen suits has provided environmental nonprofits with a seat at the table they might not otherwise have had. In the 1960s, most environmental organizations were relatively marginal political players [...] Citizen suits, in short, are in part responsible for the acceptance and growth of a sizable environmental nonprofit community”¹¹⁷⁰.

e. Appraisal of citizen suit provisions

After considering the aspects presented in previous pages, what assessment can be made of citizen suit provisions? Their analysis can be summarized in the following four points:

i) As already highlighted *supra*, “[t]he purpose of citizen suits is not to provide compensation to the plaintiffs for injuries but to ensure more effective enforcement of environmental laws”¹¹⁷¹; “Plaintiffs would no longer be pursuing a private benefit but providing a public good”, “performing a public service”¹¹⁷². As explained by J. G. Miller, this a fundamental difference between citizen suits and the preceding forms of private enforcement priorly found in other fields: “[...] for the first time private citizens were specifically empowered and expected to act as real private attorneys general, vindicating the statutory rights of the community at large rather than the plaintiffs' own economic losses”¹¹⁷³. This first point is extremely important for it is the acknowledgement of the fact that citizen suits cater to the underlying problem that actually lies at the root of both of the aforementioned European problems: the structural unconventionality of environmental rights which makes them an inadequate match for private enforcement schemes.

ii) As put by Thompson, before the conception of citizen suits

“[the] law did not recognize that private citizens had an interest in protecting more intangible injuries. Citizens who had not suffered economic injury thus could not sue. Environmental citizen suit provisions, however, acknowledged that many of the most important environmental interests are not valued, at least directly, in the marketplace. People may value clean water and clean air even if pollution causes them no personal injury or damage in the traditional legal sense of those terms. People may even value the preservation of resources that they have never seen, perhaps because they

¹¹⁶⁹ Vid. J. SALZMAN & B. H. THOMPSON, *Environmental Law and Policy* (4th ed.), *op. cit.*, p. 99: “When governmental enforcement efforts declined at the beginning of the Reagan Administration in the early 1980s, groups such as the Natural Resources defense council organized enforcement campaigns”.

¹¹⁷⁰ Vid. B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, pp. 210-211.

¹¹⁷¹ Vid. J. SALZMAN & B. H. THOMPSON, *Environmental Law and Policy* (4th ed.), *op. cit.*, pp. 99-100.

¹¹⁷² Vid. B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, p. 198.

¹¹⁷³ Vid. J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, pp. 10310-10311: “[...] its emphasis is on use of citizens suits against pollution violations rather than against inappropriate or insufficient government implementation”. Footnote one further provides that: “The Committee realized that federal or state enforcement resources might be insufficient, and that federal agencies themselves might sometimes be polluters; the citizen suit provision created ‘private attorneys general’ to aid in enforcement.” *Natural Resources Defense Council, Inc., (NRDC) v. EPA*, 484 F.2d 1331, 1337, 3 ELR 20803, 20805 (1st Cir. 1973) [...].

someday hope to see them or hope their children can enjoy them or perhaps because they value the mere existence of pristine resources. By permitting any citizen to sue to enforce the environmental laws, Congress implicitly recognized that environmental benefits cannot be measured in mere market terms and that even those who do not suffer measurable economic injury can have a concrete interest in enforcement”¹¹⁷⁴.

iii) Significantly, citizen suits bring along enforcement competition and innovation to the realm of environmental protection:

“Citizen prosecutors have increased the available legal services; they have met the demands of those citizens wishing a higher level of enforcement than the government has chosen to provide; they have forced public officials to do a more effective job of enforcement, lest they be embarrassed by private enforcers; and they have devised new approaches to enforcement that, in some cases, have been adopted by public enforcers”¹¹⁷⁵.

This is valued in positive terms by Thompson who considers that

“Competition can be beneficial in the public arena much as it is beneficial in the private marketplace. Absent competition, public enforcement agencies may be prone to many of the pathologies of a natural monopoly-low production rates, low levels of innovation, and inefficiency. Competition from nonprofit organizations that are ready and able to file citizen suits can both prod public enforcement agencies to improve the agencies' enforcement performance and provide a separate source of enforcement and innovation. Competition in public enforcement, of course, is only loosely analogous to competition in private markets. Political oversight, for example, constrains agency behavior even absent competition, and public enforcement agencies need not respond to competition to survive. But thinking about citizen suits as a form of competition provides a useful framework for identifying some of the potential values of citizen suits”¹¹⁷⁶.

iv) At least until the beginning of the 1980s, a significant amount of the citizen suits filed had EPA as the targeted violator. Although this escapes from the scope of this section, it is important to highlight that these provisions have been used not only for pure private enforcement purposes – in the strictest of the meanings of the expression – but also to attack a public entity (EPA) *“for its failures to implement the environmental statutes in a timely and complete manner”¹¹⁷⁷.*

¹¹⁷⁴ Vid. B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, p. 197.

¹¹⁷⁵ Vid. B. H. THOMPSON, “The continuing innovation of citizen enforcement”, *op. cit.*, p. 198.

¹¹⁷⁶ *Ibidem*, p. 199. Furthermore, p. 206: “Competition can not only increase enforcement and reduce leniency error but also generate beneficial new enforcement approaches. In commercial settings, competition is a major driver of innovation.” In theory, enforcement competition also should produce a higher level of innovation. Environmental nonprofits may develop new approaches to developing proof, new theories of liability, new lawsuit efficiencies, or new forms of settlements that are preferable to traditional approaches. Such innovations may benefit both citizen suits and, if adopted by public officials, governmental enforcement actions”.

¹¹⁷⁷ Vid. J. G. MILLER, “Private Enforcement of Federal Pollution Control Laws Part I”, *op. cit.*, p. 10314.

In the light of this appraisal, and of the developments presented in previous pages, it may be easily understood why the introduction of a citizen suit provision would amount to a sort of miraculous solution to all the problems described *supra*. Having said so, let us wrap up the considerations on the specificities of the subjective dimension of the EPIL mechanism with some concluding thoughts on it.

C. Conclusions on the “subjective dimension” of the mechanism

If trees do not “*have standing*” in Europe, do public entities and / or European citizens have means to have standing for them?¹¹⁷⁸ It has been shown above that public bodies may face difficulties in obtaining redress for environmental damage *lato sensu* before civil courts throughout the EU. Therefore, previous pages have turned to the potential role of private subjects, and have thus assessed the involvement – or lack thereof – of private subjects in the redressability of environmental harms caused by private polluters. The following questions have been asked: Can private subjects obtain any kind of redress as “victims” (in a very loose sense) of damages to the environment itself by industrial actors? And if so, how? Put otherwise, are there true means of private enforcement of environmental law and policy in the European Union? It was observed that, despite significant efforts put forward in recent years, there is no procedural device akin to American class actions at the EU level, be it for environmental purposes, or for general purposes. Moreover, Member-State approaches to the stake tend to be scarce and uncomprehensive (they may, for instance, cover consumer redress, and not environmental issues). Thus, firstly, private enforcement of environmental law and policy faces a purely a procedural difficulty in the EU: the lack of environmental – or general – collective redress at the EU level, coupled with unsatisfactory developments at the Member State level. Secondly, it was also observed that a supplementary substantive difficulty was added to the procedural one: the fact that the ELD does not “*give private parties a right of compensation as a consequence of environmental damage*”. Thus, this section has established that the lack of either a procedural adaptation (the enactment of binding means of collective redress), or a substantive one (the amendment of the “ELD”) severely undermines the operability of environmental private enforcement in Europe.

In order to provide an adequate demonstration to the said points, this section has presented and analyzed the corresponding procedural and substantive problems, and has suggested two possible solutions, each one of them capable of simultaneously dealing with both problems: the enactment in Europe of an American-style environmental “citizen suits” provision, and a theoretical shift (a re-conceptualization of environmental legal goods in terms of entitlement, and some practical adjustments that would need to follow). All of this is suggested from the conviction that, in Europe, a much stronger stance for environmental private enforcement could be taken and would be indeed highly welcomed. Overall, when comparing the possibilities of legal involvement in environmental redress for citizens on both sides of the

¹¹⁷⁸ This is of course, a very unoriginal reference to Justice William Douglas’ dissenting opinion in the (already referred) infamous United States Supreme Court case *Sierra Club v. Morton*, 405 U.S. 727 (1972).

Atlantic, the differences seem to me to be striking: purely procedural mechanisms and private rights of action seem substantially more developed in the United States.

In the light of these differences, one cannot help but think that the fear of abusive litigation is freezing the EU's environmental private enforcement construct. Having true private enforcement of environmental law and policy in the European Union requires much more than a non-binding Recommendation on collective redress and an Environmental Liability Directive whose full potential can only be triggered by public entities. If the problem is really the risk of abusive litigation, it can be easily avoided by *cy pres* arrangements, and governmental recovery of awards in private proceedings. These simple measures will certainly ensure the purity of the intentions of environmental plaintiffs.

Beyond these considerations, while there may be a minimal risk of docket flood in the potential enactment of citizen suit provisions, potential disadvantages are outnumbered by the benefits that come along the democratic values enshrined in this judicial form of direct public participation in environmental management. Moreover, American dockets do not seem to have been flooded by American citizen suit provisions, so it could be questioned why it would be the case in Europe, if citizen suit provisions were introduced. In sum, in my opinion, it is unfortunate that this mechanism is blatantly lacking in European environmental law.

In any case, within the midst of the referred difficulties and suggestions for adaptations, a set of three questions which should structure any European debate on environmental collective redress and environmental private enforcement have been identified: If the *stricto sensu* environment is a collective legal good, who exactly holds the condition of collective right-holder over such a collective legal good? If the answer is that it is the ensemble of society, then who can act on its behalf? Finally, for which sort of redress will it qualify? As it has been seen, perhaps compensatory *cy-pres*-oriented redress could be fostered under the condition of channelizing monetary compensation to publicly managed and / or monitored schemes.

In the light of all the considerations in previous pages, it is possible to assert, however, that, *ad minima*, the following practical steps should be taken in order to foster the private enforcement of environmental rights through coherent collective redress:

- i) binding collective redress should be introduced *via* ensuring the standing of NGOs to introduce representative actions, starting private-law proceedings; and / or
- ii) binding collective redress should be introduced *via* a simple cumulative claim based on the aggregation of "diffuse interests" of *stricto sensu* environmental victims residing in a given suitably defined geographical area (for instance, all the citizens of a given village in the woods would introduce a common action – as if they were consumers – to claim their "individually insignificant claim" – and actually, indivisible – in respect of the forest in their region).

Without the introduction of these minimal proposals, it seems safe to say that, environmental private enforcement and the redress of damage to the *stricto sensu* environment will remain very seriously undermined in the European Union, for, at the very root, environmental legal goods are not naturally prone to being redressed through private-law means.

After these considerations, the exploration of so-called “procedural hurdles” (the use of separate legal personality to build shields of networks of subsidiaries, and *forum non conveniens*) follows. The practical significance of this duo of legal institutions in the frame of private international environmental litigation – as well as human-rights-related litigation – has been extensively commented in academia: it has been highlighted how, in the 1990s and the 2000s, a trend of multiple attempts at asserting the liability of multinational corporations in their – developed – home countries for events arising in developing host countries have been frustrated by these barriers to access to justice¹¹⁷⁹.

The assessment in the following pages will begin with an analysis of the impact of networks of separate legal persons being involved in global environmental harms, which seems to be a very politically sensitive point for it touches upon a core element of the global economy (III). It will be continued by an analysis of the common-law institution of *forum non conveniens* (IV). Despite the fact that such institution seems to have been mostly neutralized within the European Union, its subsistence outside of the EU and its potential impact in global environmental litigation justify addressing it and briefly displacing the focus of the relevant sections of this dissertation towards the United States¹¹⁸⁰.

¹¹⁷⁹ *Vid.*, on the idea of “barriers”, G. BETLEM “Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts”, *op. cit.*, p. 283: “In both the US and the UK, litigation is taking place by victims of alleged violations of human rights and/or environmental law by multinational corporations in developing countries. The harm involved is serious: severe personal injury and even death. The multinational is accused of either actually causing the harm or contributing to it significantly. There are a number of serious barriers to access to justice for these victims. For one thing, the complex nature of the structure of a multinational in numerous, related but legally separate, legal persons in various jurisdictions. For another the risks in terms of costs of taking on a powerful defendant. In practice, suing the local legal person in Africa is often not a viable option either because of the lack of funds of that legal person (if it still exists) or lack of legal infrastructure in the home State of the victims. For those reasons the suits have been brought in the “First world”, at the place of the head office or leading company of the activity in question”. *Vid.* also, on the idea of a “trend”, L. ENNEKING, “The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law”, *op. cit.*, p. 285: “These claims, and the dramatic series of events on which they are based, have strong associations with a current trend in which damage in developing host countries gives rise to civil liability claims before courts of the developed home countries of multinational corporations, based on the law of the latter countries.⁵ Well-known cases that fit this trend towards what are known as ‘foreign direct liability cases’ include the Cape plc and Thor cases in the UK, and several cases against multinational corporations that were instigated on the basis of the Alien Tort Claims Act in the US”.

¹¹⁸⁰ On the one hand, *forum non conveniens* subsists in the US, on the other hand, as put by D. M. BRANSON (D. M. BRANSON, “Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation”, *University of Pittsburgh - Legal Research Paper Series - Working Paper*, N. 2010-30, 2010, p. 2): “Of the 500 largest multinationals, a recent study characterizes 186 as having a United States domicile, 126 with homes in the European Union, and 108 with headquarters in Japan.⁶ All of those 500, nearly all, have a presence in the United States sufficient to support territorial jurisdiction over them”.

III. The problem of subsidiaries

As explained in the presentation of this chapter, the upstream problems can be divided into two different groups. Up to this point, “structural” problems have been dealt with. The following pages will deal with what may be called – in a very light sense – “procedural hurdles”. In a smoothly functioning system, defendants’ counsels can resort to two kinds of legal hindrance in order to short-circuit any attempt to assert the liability of their clients in the frame of a litigation. The first of them is the use of separate legal personality of overseas subsidiaries as a shield against liability in litigation.

It is conventional wisdom that the development of the industrial activities which lead to the production of environmental occurrences requires the gathering of certain economic power and technological capabilities which lie seldomly in the hands of physical persons. In general terms, independent individuals do not usually have the capacity to damage nature to a significant extent. Therefore, defendants in environmental tort cases are generally legal persons, most frequently so-called multinational or transnational corporations. These can be defined as sets of corporations which “*despite acting legally in an independent way, belong to the same economic group which [generally, has its] headquarters in a developed country*”¹¹⁸¹, and which “*tend[s] to establish businesses and industrial activities in one or more countries that are different from [its] State or origin*”¹¹⁸². This worldwide presence adds an additional dimension to the assertion that there is an “*inherently international character of industrial accidents bearing environmental consequences*”¹¹⁸³: internationality is thus not exclusively due to the repeatedly-referred fact that polluting substances know no borders and may travel from one country to another, but also to the frequently globalized / internationalized nature of the companies which are at the origin of these events¹¹⁸⁴. Interestingly, it is asserted that the creation of networks of subsidiaries by most western corporations may respond either to

¹¹⁸¹ Vid. C. OTERO GARCÍA-CASTRILLÓN, “International litigation trends in environmental liability: a European Union-United States comparative perspective”, *op. cit.*, pp. 554-555. As guidance, the following excerpt from D. M. BRANSON (“Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation”, *op. cit.*, pp. 18-19) clarifies corporate-group-related terminology in an excellent way: “*The link which makes a corporation a member of a corporate group is ownership of shares. A parent corporation owns the shares of subsidiary corporations, which may be direct or indirect subsidiaries, according to one terminology sometimes used. Share ownership permits the parent to elect directors who in turn appoint the officers of the subsidiary. There may be several tiers of subsidiaries, in which case the first tier corporations are direct subsidiaries and the remainder are indirect. The subsidiary may be wholly owned, that is, by the parent, or partly owned, which means that the parent has control, or a measure of control over the subsidiary (power to elect directors and to influence the affairs, policies, and direction of the subsidiary). Subsidiaries which have a common owner are brother or sister (sibling?) corporations. Transactions that flow from the parent to subsidiaries are often called “downstream” transactions. Transactions that flow upward, from subsidiary to parent, are “upstream” ones. Deals and transactions between or among sibling corporations are known as “cross stream.” The whole shebang, which might consist of a parent, 3 or 4 tiers of subsidiaries, and countless brother-sister patterns, is referred to as a corporate “group”.*”

¹¹⁸² Vid. F. MUNARI & L. SCHIANO DI PEPE “Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity”, *op. cit.*, pp. 174-175.

¹¹⁸³ *Ibidem*, pp. 174-175.

¹¹⁸⁴ Frequently but not always, *vid.* the MAL Hungary case (Box 5, Chapter 1).

geographically-strategic purposes or to functional – task division – purposes, or to both¹¹⁸⁵. Whichever the ratio, the protection of shareholders against personal liability for corporate debts through the separate legal personality of each corporation applies¹¹⁸⁶. Parent corporations generally enjoy the benefit of limited-liability protection just as physical-person-shareholders, even whenever the subsidiary is completely owned by the parent. Thus, “[f]ew multinationals are so ill-advised that they do business directly in far flung foreign places”¹¹⁸⁷. The full development of this strategy frequently leads to the establishment of multiple layers of subsidiaries between the specific legal person created in the place where the environmental tort occurs and the parent corporation, actually amounting to having “grandparent”, “great grandparent” corporations, and so on¹¹⁸⁸.

It has been submitted that the existence of the aforementioned benefit can be supported by certain policy arguments, among which the two following¹¹⁸⁹: First, it enhances the efficient operation of the securities markets; from a cost-benefit perspective, limited liability is generally assumed to reduce transaction costs and “*therefore is considered an acceptable social cost of securing efficient capital financing*”. Second, “*by allowing investors of moderate means to invest in business firms, limited liability protection keeps entry into business markets competitive and democratic and, thereby, allows economic progress*”. However, the said benefit and the subsequent practice of the multiplication of the layers of subsidiaries are problematic, from an environmental redress perspective, for several reasons:

¹¹⁸⁵ An example of the functional division of tasks may be found in the above-referred *Commune de Mesquer* case, where two different Total subsidiaries were involved: one producing the oil, and the other one chartering it. As explained by D. M. BRANSON (“Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation”, *op. cit.*, p. 31): “*corporations can and do segment their business precisely to prevent the assets of the parent from being at risk for claims of higher risk segment of the business. For example, an asset rich natural resource corporation may put its trucks and related assets into a separate transportation subsidiary. A petroleum exploration and production company may form a separate subsidiary for its drilling operations. Segmentation may also take place along geographical lines. The oil and gas company could have separate drilling companies for Central American, Venezuela, and the remainder of South America [...] Pursued in moderation, and when each subsidiary has a measure of functional independence and adequate capital, a segmentation strategy may be legitimate*”.

¹¹⁸⁶ For a generic introduction to these questions, *vid.* G. G. MORRIS, “Personal Liability For Corporate Participants Without Corporate Veil-Piercing: Louisiana Law”, *La. L. Rev.*, vol. 54, 1993-1994, pp. 207-209 (Notably, “*Shareholders, as such, are protected against personal liability for corporate debts by the separate legal personality of the corporation and by the related statutory rule that shareholders are not liable for corporate debts*”). Despite the fact that the article refers mainly to the Law of the North-American state of Louisiana, an important share of its introductive contentions are easily generalizable for, after all, all around the globe “*Limited liability is one of the fundamental principles of modern corporate law*” (L. BERGKAMP & W.-Q. PAK, “Piercing the Corporate Veil: Shareholder Liability for Corporate Torts”, *Maastricht J Eur. & Comp. L*, vol. 8-2, 2001, pp. 167-188, at p. 167).

¹¹⁸⁷ *Vid.* D. M. BRANSON, “Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation”, *op. cit.*, pp. 3-4.

¹¹⁸⁸ *Ibidem*, pp. 3-4

¹¹⁸⁹ For these “*theoretical bases*” and further developments, *vid.* J. W. CALLISON, “Rationalizing limited liability and veil piercing”, *The Business Lawyer*, vol. 58-3, 2003, pp. 1063-1072, at pp. 1064-1066.

i) *"The front line subsidiary may be a no assets corporation, or have only a few assets, [...] which could be attached to satisfy any judgment that the plaintiffs might obtain"*¹¹⁹⁰. In this sense, reaching a parent or grandparent corporation is not merely a question of trying to make polluters provide redress following developed-country liability standards, but equally a pragmatic question: assets lie generally with the head of the group, and subsidiaries are frequently undercapitalized. The above-referred *Boliden-Aznalcollar* case provides an interesting illustration of this phenomenon, for it demonstrates that this problem may even arise in *intra-European* environmental torts¹¹⁹¹.

ii) The fact that *"limited liability protections create incentives for excessive risk taking by permitting firm owners to avoid the full costs of their business activities while reaping the full economic reward of such activities"* gives rise to criticism¹¹⁹². This criticism arises from the fact that, in a global environment, the said scheme amounts to allowing multinational corporations to bring home profits *"while keeping liabilities bottled up in a distant subsidiary somewhere in a foreign land"*¹¹⁹³. In other words, the possibility to misuse the separate legal personality of subsidiaries, which acts as a shield against the internalization of the negative externalities created by the latter, runs against the deterrence that whichever other legal mechanisms may attempt to create.

Despite optimistic accounts – which focus on exceptional situations¹¹⁹⁴ – the truth is that it is not frequent that parent corporations amount to be liable for environmental torts committed by their subsidiaries. And while the creation of networks of subsidiaries may be backed by

¹¹⁹⁰ Vid. D. M. BRANSON, "Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation", *op. cit.*, pp. 3-4. However, the author acknowledges that: *"The same may be true of the parent and even grandparent corporations"*.

¹¹⁹¹ Vid. *supra* Box 3 (Chapter 1).

¹¹⁹² Vid. J. W. CALLISON, "Rationalizing limited liability and veil piercing", *op. cit.*, p. 1063.

¹¹⁹³ Vid. DOUGLAS M. BRANSON, "Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation", *op. cit.*, p. 36. In a similar sense *vid.* S. L. SCHWARCZ, "Collapsing Corporate Structures: Resolving the Tension Between Form and Substance", *The Business Lawyer*, vol. 60-1, 2004, pp. 109-145, at pp. 111-113: *"For example, courts will sometimes pierce the corporate veil of an undercapitalized subsidiary to reach the parent-firm's assets (though undercapitalization alone appears to be an insufficient basis for piercing the veil) based on the following rationale: If limited liability is absolute, a parent can form a subsidiary with minimal capitalization for the purpose of engaging in risky activities. If things go well, the parent captures the benefits. If things go poorly, the subsidiary declares bankruptcy, and the parent creates another with the same managers to engage in the same activities. This asymmetry between the benefits and costs, if limited liability were absolute, would create incentives to engage in a socially excessive amount of risky activities"*. In a less nuanced and more politicized way, *vid.* equally, U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *op. cit.*, p. 346: *"judicial ventures [...] are rarely accompanied by acts of judicial vigour in piercing the corporate veil in a globalizing world, where global corporations conveniently enact the smokescreen of networks and subsidiaries, affirming their sovereign prerogative to generate capital surplus by avoiding even threshold liability for the acts of corporate misgovernance and malfeasance"*.

¹¹⁹⁴ For instance, T. BALLARINO ("Questions de droit international privé et dommages catastrophiques", *op. cit.*, p. 357): *"Dans le cas de Seveso, le principe de la responsabilité des sociétés mères pour les accidents causés par leurs filiales fut ainsi reconnu d'une façon bien nette, même en l'absence de déclarations expresses ou de jugements"*. Similarly, the same author (*Ibidem*, pp. 365 and following), on the Amoco Cadiz case: *"Quant à la Standard Oil, la décision affirme qu'elle est responsable des actes dommageables (tortious acts) de ses filiales dont elle était propriétaire en tant que société multinationale engagée, par le biais d'un système de filiales, dans [...] la vente de produits pétroliers dans le monde entier [...]"*.

sound policy arguments and may respond to legitimate interests, the truth is that in the frame of the global economy it is not unheard of that the referred kind of structures be used for purposes which public opinion considers dubious. An example thereof which, despite being unrelated to environmental occurrences, may be found to be quite graphic is the multiple-subsidiary tax scheme that Apple has built in Europe: through certain manoeuvres, Apple's network of subsidiaries pays taxes only in Ireland, despite its significant turnover all through the EU¹¹⁹⁵. It is therefore in the midst of the tension between, on the one hand, the said policy arguments and legitimate interests, and, on the other hand, the perversion of those interests and the above-referred problems for adequately asserting liability, that the following question arises¹¹⁹⁶: under which circumstances is a corporate structure meant to be considered legitimate and when may it be legitimate to make it collapse?¹¹⁹⁷ Or in other terms: "*when should law respect, and when should it disrespect, form over substance and the manner in which firms purport to structure their legal relationships*"¹¹⁹⁸. Unfortunately, it is submitted that, despite attempts in isolated contexts, there is a lack of comprehensive and overarching academic constructions – or efforts to "*formulate rules of general application, much less an overall theory from which to derive such rules*" – which may respond to the referred questions¹¹⁹⁹. From this standpoint, three different legal theories will be presented: they serve as reactions to the inappropriate use of corporate structures, and embody three similar but different methods, through which law may deal with the liability of a parent corporation for the debts of its subsidiaries. They are, however, merely a selection, for, depending on the legal systems under consideration, options may multiply¹²⁰⁰. In the following pages the piercing of the corporate veil will be dealt with (A), before briefly presenting foreign direct liability and the

¹¹⁹⁵ In English: <http://www.forbes.com/sites/leesheppard/2013/05/28/how-does-apple-avoid-taxes/>; In Spanish: http://economia.elpais.com/economia/2012/05/20/actualidad/1337547016_498517.html. Both links were last consulted on July the 30th 2015. However, during summer 2016, a part of the tax scheme was found to contravene EU law on State aids: http://europa.eu/rapid/press-release_IP-16-2923_en.htm (Last consulted on November the 8th 2016).

¹¹⁹⁶ Not to mention the fact that there is also contestation as regards whether the policy arguments and legitimate interests are present. *Vid.*, for instance, K. A. STRASSER, "Piercing the Veil in Corporate Groups", *Conn. L. Rev.*, vol. 37, 2004-2005, pp. 637-665, at p. 664: "[...] *the reasons for limiting individual investors' liability are largely inapplicable to parent companies because their relationship to their subsidiaries is so different from an investor's relationship to a particular corporation. Thus, the conventional reasons for limiting shareholder liability do not apply*".

¹¹⁹⁷ *Vid.* S. L. SCHWARCZ, "Collapsing Corporate Structures: Resolving the Tension Between Form and Substance", *op. cit.*, p. 109.

¹¹⁹⁸ *Ibidem*, pp. 110-111.

¹¹⁹⁹ *Ibidem*, pp. 109-110. The excerpt goes on as follows: "*This failure leaves the law with unsettling ad hocery, which in turn creates uncertainty and inefficiency*".

¹²⁰⁰ Following L. BERGKAMP & W.-Q. PAK ("Piercing the Corporate Veil: Shareholder Liability for Corporate Torts", *op. cit.*, pp. 168-172) at least 8 different techniques may be distinguished from corporate veil-piercing but used for the same or similar purposes: director and officer liability; theories of custodian, possessor, or operator liability; liability of a successor company for the debts of a predecessor; "*parent corporation liability regimes. These regimes impose some form of vicarious liability, i.e. the parent, irrespective of any negligent behaviour on its part, is liable for damage caused by the subsidiary's tort*"; Direct shareholder liability (as "*a category that includes elements of veil piercing but is not limited to it*", and could be exemplified as arising from the adoption of a certain resolution by shareholders); contract-based liability theories (as for instance, when the parent corporation guarantees an obligation of the subsidiary); the so-called *actio pauliana* and its common law counterpart, the doctrine of fraudulent conveyance; and finally, "*liability on founders of corporations with respect to pre-incorporation transactions*".

theory of the agent (B) as alternatives thereto. Once this done, the discussion will conclude with a brief review of a polemic North-American *de lege ferenda* proposal (C).

A. First solution: "Piercing the corporate veil"

The term "piercing the corporate veil" is used to name a well-spread yet non-homogeneous legal doctrine, generally considered to have originated in the United States, where it has been most largely developed¹²⁰¹. It is defined by W. T. Allen, R. Kraakman and G. Subramanian in their emblematic treatise on North-American corporate law as being "[...] *the equitable power of the court to set aside the entity status of the corporation ("piercing the veil") to hold its shareholders liable directly on contract or tort obligations*"¹²⁰². Thus, the doctrine aims at collapsing "*walls that shield parent-firm assets from claims of a subsidiary's creditors*"¹²⁰³. This is so, generally, where it is understood that the parent corporation has committed wrongful acts "*in order to insulate itself from liability generated by a subsidiary [and] where fairness and equity suggest that the obligations of the subsidiary be satisfied by the parent*"¹²⁰⁴. Again, in the word of the referred North-American authors: "[Corporate-veil piercing] is an "*equitable*" device through which courts declare that they will not permit the attributes of the corporate form to be used to perpetrate fraud"¹²⁰⁵. To this end, courts may consider the corporate form as a "veil" that may be pierced or looked through¹²⁰⁶. By doing so, courts simultaneously make an exception to two fundamental notions of company law: on the one hand, the principle of the independent legal personality of the corporation in respect of its shareholders and, on the other, the principle that, notwithstanding exceptions, shareholders and directors cannot be held liable for the debts incurred by the corporation¹²⁰⁷: "[V]eil piercing, by definition, implies that both the corporation and the shareholder [-parent company] are liable"¹²⁰⁸. The ultimate purpose of this doctrine is "*to assign subsidiary liability to shareholders and parent-firms in*

¹²⁰¹ Vid. K. VANDEKERCKHOVE, "Piercing the corporate veil", *European Company Law*, 2007, vol. 4-5, pp. 191-200, at pp. 191-192. As further stated: "*In the United States, corporate veil piercing is the single most litigated area in corporate law*". In the same sense, vid. D. M. BRANSON, "Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation", *op. cit.*, p. 20, who comments that the doctrine "*has been termed "mangled and muzzy"*" and that it qualifies as "*a favorite corporate law doctrine of courts, with at least 15,188 reported cases by one count*".

¹²⁰² Vid. W. T. ALLEN, R. KRAAKMAN & G. SUBRAMANIAN, *Commentaries and Cases on the Law of Business Organization* (4th ed.), New York, Wolters Kluwer Law & Business, 2012, p. 134.

¹²⁰³ Vid. S. L. SCHWARCZ, "Collapsing Corporate Structures: Resolving the Tension Between Form and Substance", *op. cit.*, p. 119.

¹²⁰⁴ *Ibidem*, pp. 111-113. The excerpt goes on as follows: "*Unfortunately, this subjective focus leads to inconsistencies in the manner in which the veil-piercing doctrine is applied, and may explain why the doctrine is so conceptually confusing*".

¹²⁰⁵ W. T. ALLEN, R. KRAAKMAN & G. SUBRAMANIAN, *Commentaries and Cases on the Law of Business Organization* (4th ed.), *op. cit.*, p. 135.

¹²⁰⁶ Vid. S. L. SCHWARCZ, "Collapsing Corporate Structures: Resolving the Tension Between Form and Substance", *op. cit.*, pp. 111-113.

¹²⁰⁷ Vid. K. VANDEKERCKHOVE, "Piercing the corporate veil", *European Company Law*, 2007, vol. 4-5, pp. 191-200, at p. 191.

¹²⁰⁸ Vid. L. BERGKAMP & W.-Q. PAK, "Piercing the Corporate Veil: Shareholder Liability for Corporate Torts", *op. cit.*, p. 171.

certain circumstances”¹²⁰⁹, most notably, “where the subsidiary lacks real corporate independence and is misused by the parent-firm”¹²¹⁰.

In the following pages some of the core traits that may be identified in the doctrine (despite its geographical divergences) will be addressed (i), followed by a reflection on choice-of-law issues pertaining thereto (ii), before concluding with a review of the very scarce developments that European law presents in respect of veil-piercing and analogous notions (iii).

i. Core traces and geographical inconsistency of the doctrine

As it will be the case below in respect of the so-called *forum non conveniens* doctrine, corporate-veil piercing seems to be a non-homogeneous doctrine, varying widely from one jurisdiction to another, both within Europe and within the United States¹²¹¹. In this sense, since delivering a comprehensive study thereof is not the object of this dissertation, the following selected versions, traits, and significant divergences in approach from country to country, may be put forward: In Belgium, veil-piercing is mainly conceived as being a problem within the realm of insolvency (bankruptcy law), partially addressed *via* enacted legislation and with case-law completing the picture¹²¹². However, courts started progressively abandoning the application of the doctrine after the late 1980s. This is said to be due to significant legal reforms which have tackled some of the underlying problems which led to veil-piercing, and to the fact that the Supreme Court (*Cour de Cassation*) has imposed limits to the implementation of the doctrine¹²¹³. Beyond this, the legal foundations which allow holding shareholders of a company liable for acts of the latter are to be found in general tort and contract law¹²¹⁴. Notwithstanding these facts, sporadic and isolated decisions enforcing the doctrine still appear

¹²⁰⁹ *Vid.* S. L. SCHWARCZ, “Collapsing Corporate Structures: Resolving the Tension Between Form and Substance”, *op. cit.*, pp. 111-113.

¹²¹⁰ *Ibidem*, p. 119. Furthermore (pp. 111-113): “Courts limit the remedy of piercing the corporate veil to situations where parent-firms so control and dominate their subsidiaries that corporate independence is lacking and the parent and its subsidiary are effectively alter egos. Even then, veil piercing is only appropriate where the subsidiary is improperly used, causing damage or harm – such as preventing the subsidiary’s creditors from being repaid”.

¹²¹¹ This seems to be the conclusion of K. VANDEKERCKHOVE, *Piercing the corporate veil*, European Company Law series, vol. 2, Alphen aan den Rijn, Wolters Kluwer, 2007, pp. 705 and following. For a harsh and critical opinion on veil-piercing, conducted from a comparative-law perspective (which considers the legal systems of Germany, England, Belgium, the US, France, Italy, the Netherlands and Switzerland), *vid.* V. SIMONART, *La personnalité morale en droit privé comparé*, Bruxelles, Bruylant, 1995, pp. 527-540. This author furthermore contends that: “La plupart des solutions considérées par la doctrine et la jurisprudence comme des hypothèses de levée du voile social peuvent en réalité s’expliquer par d’autres institutions aux contours bien précis, dont l’application n’implique aucune dérogation à l’autonomie de la personnalité morale [...]” (p. 540). She therefore concludes (p. 560) that veil-piercing is a “superfluous” legal institution.

¹²¹² *Vid.* K. VANDEKERCKHOVE, “Piercing the corporate veil”, *European Company Law*, vol. 4-5, 2007, pp. 191-200, at p. 192.

¹²¹³ *Vid.* M. COIPEL, “La levée du voile de la personnalité morale”, *JDSC* (15th ed.), Book 2-5 to 7, 2013, p. 6.

¹²¹⁴ *Vid.* S. DEMEYERE, “Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law”, *European Review of Private Law*, vol. 3-2015, pp. 385–414, at p. 391.

from time to time¹²¹⁵. A similar panorama may be found in France where the weight of case-law is, nevertheless, significantly more substantial¹²¹⁶: France does not have enacted statutes dealing specifically with corporate groups or with veil-piercing. As Belgium, France relies largely on general tort and contract law, and resorts to grounds such as abuse of right, concealment, fraud, creation of false appearances, etc¹²¹⁷. English law is said to be one of the most veil-piercing-reticent legal system around the world: “*An exception is only accepted on the basis of statutory rules in case of unduly continuing loss-making activities*”¹²¹⁸. Beyond this, English law is said to remain faithful to the principle of separate legal personality, which was enshrined in the famous decision in *Salomon v. Salomon* in the late 19th century¹²¹⁹. Conversely, the Netherlands have taken a possibly more expansive approach to the issue of veil-piercing and similar constructions. On the one hand, it is said that there has been a gradual case-law development pointing towards a shareholder obligation to take into account the interests of the corporation's creditors, the breach of which may give rise to tort liability. Additionally, on the other hand, Dutch case-law has played an important role in developing, with the support of academia, a substantial theory on “identification”: “*when the recognition of the separate legal personality of affiliated corporations would lead to consequences which violate the principle of good faith, the court may ‘identify’ the corporations concerned*” and subsequently transfer rights and obligations from one to another¹²²⁰. As referred, equally within the United States approaches to the doctrine are not unitary, having spawned several branches through case-law developments in different states and through legal literature. These piercing doctrines – in plural – are said to bear a significant degree of metaphorical language, resulting in low legal certainty due to the scarcity of clear rules¹²²¹. They are, however, largely based on two cumulative elements: i) on the exercise of such a degree of control by the parent over the subsidiary that the latter cannot be regarded as an independent

¹²¹⁵ Vid. M. COIPEL, “La levée du voile de la personnalité morale”, *JDSC* (15th ed.), Book 2-5 to 7, 2013, p. 6.

¹²¹⁶ Vid. K. VANDEKERCKHOVE, “Piercing the corporate veil”, *op. cit.*, p. 192.

¹²¹⁷ Vid. S. DEMEYERE, “Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law”, *European Review of Private Law*, vol. 3-2015, 2015, pp. 385–414, at pp. 391, 398, and following. For a study which takes a Belgian stand-point but draws on other legal systems, and on some of the “Laws & Economics” research of the Chicago School, *vid. C. M. BRÜLS*, “Quelques réflexions juridiques et économiques sur la théorie de la levée du voile social”, *RCJB*, 2006, pp. 303-341 (The author considers that economic analysis of law allows to assert that “[...] *les projets tendant à introduire un régime de responsabilité illimitée ou un régime de responsabilité partielle doivent être écartés*”, p. 340).

¹²¹⁸ Vid. K. VANDEKERCKHOVE, “Piercing the corporate veil”, *op. cit.*, p. 192.

¹²¹⁹ Vid. *Salomon V A Salomon And Co Ltd* [1897] AC 22.

¹²²⁰ Vid. K. VANDEKERCKHOVE, “Piercing the corporate veil”, *op. cit.*, p. 192. This is so due to the fact that they amount to be considered a single legal person. Furthermore, at pp. 195-196: “*it is generally required that the parent corporation exercises excessive control over its subsidiary. Such a control can be deduced from shareholdership or from an active interference in management. It can concern either the entire management of the subsidiary or only the policy which is the subject of the dispute (e.g. financial policy). In addition, a far-reaching commingling of identity, activities and assets is generally required*”.

¹²²¹ Vid. J. W. CALLISON, “Rationalizing limited liability and veil piercing”, *op. cit.*, p. 1069: “*It is necessary to determine whether existing common law veil piercing principles work or, alternatively, whether they constitute an enigmatic doctrine ‘enveloped in the mists of metaphor,’ which fail to provide the certainty and predictability that should be goals of business entity law*”. In the same sense, *vid. D. M. BRANSON* (“Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation”, *op. cit.*, p. 20) who comments that “*courts have not even reached agreement on the proper law to apply, let alone parameters of the substantive doctrine*”. In a similar sense, *vid. K. VANDEKERCKHOVE*, “Piercing the corporate veil”, *op. cit.*, pp. 192-193.

legal person; ii) on the existence of a wrongful conduct by the parent company"¹²²². Beyond this assertion, only uncertainties lie: *"studies demonstrate that veil piercing cases are fact-specific and [...] it is difficult to discern any overarching doctrine that assists in determining when the limited liability veil will be pierced and when it will not"*¹²²³. W. T. Allen, R. Kraakman and G. Subramanian contend, however, that the fact that the doctrine's *"guidelines"* are *"vague"* is a consequence of its *"equitable"* nature, and that this happens with all doctrines sharing this feature¹²²⁴.

Despite uncertainties, it is interesting to highlight certain trends, either due to their recurring character, or for the inspiring prospects that their development may bring along:

i) Veil-piercing *"is often applied in situations where there is only one shareholder, a natural person or another corporation, or at least a controlling shareholder, although it is not conceptually limited to these situations"*¹²²⁵.

ii) *"Undercapitalization"* constitutes a highly relevant concept giving rise to a significant share of veil-piercing cases. It entails that *"[s]hareholders may be held personally liable for the debts*

¹²²² Vid. K. VANDEKERCKHOVE, "Piercing the corporate veil", *op. cit.*, pp. 192-193. She explains that the wrongful act requirement is a *"general rule (with, however, many exceptions in the case law)"*. Furthermore: *"Consideration is given to the extent to which the creditors concerned could or could not have taken into account the risk of insolvency of their debtor. Following this view, 'voluntary' creditors, such as contractual creditors, would deserve less protection than 'involuntary' creditors such as tort victims"*. Vid., under a similar, although not identical phrasing, D. H. BARBER, "Piercing the Corporate Veil", *Willamette L. Rev.*, vol. 17, 1980-1981, pp. 371-04, at p. 376 (*"[...] courts have required that the party seeking to pierce the corporate veil satisfy a two prong test: '(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual [shareholders] no longer exist; and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow'"*). As regards the element of parent control: it is equally highlighted by J. W. CALLISON, "Rationalizing limited liability and veil piercing", *op. cit.*, p. 1069.

¹²²³ Vid. J. W. CALLISON, "Rationalizing limited liability and veil piercing", *op. cit.*, p. 1069. Furthermore: *"Instead, the cases typically set forth vague standards, such as that limited liability should not 'sanction a fraud or promote injustice'"*. In the same sense, vid. D. M. BRANSON ("Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation", *op. cit.*, p. 20) who comments that *"[t]he whole of the veil piercing doctrine [...] by and large remains a subject for case-by-case development"*. There are, nevertheless, small certainties (vid. L. BERGKAMP & W.-Q PAK, "Piercing the Corporate Veil: Shareholder Liability for Corporate Torts", *op. cit.*, p. 173): *"A recent survey of the veil piercing in Belgium, England, Germany, and The Netherlands found that the doctrine is applied only in clear-cut cases of 'abuse of limited liability'"*.

¹²²⁴ Vid. W. T. ALLEN, R. KRAAKMAN & G. SUBRAMANIAN, *Commentaries and Cases on the Law of Business Organization* (4th ed.), *op. cit.*, p. 135.

¹²²⁵ Vid. L. BERGKAMP & W.-Q PAK, "Piercing the Corporate Veil: Shareholder Liability for Corporate Torts", *op. cit.*, p. 173. Furthermore: *"Veil piercing occurs far more often in closely held corporations (including subsidiaries) than in large publicly-held corporations, which may reflect an assumption that limited liability is intended to protect passive (rather than active, managing) investors. In a closely held corporation, the justification for limited liability may be deemed weaker because shareholders have greater ability to monitor and participate in management than passive investors in a publicly held corporation"*. Vid., in the same sense, D. H. BARBER, "Piercing the Corporate Veil", *op. cit.*, p. 372 (*"In theory, the piercing doctrine applies to publicly held and closely held or family corporations. A review of the decisional law, however, shows no case in which the shareholders of a corporation whose stock was publicly traded or widely held were found personally liable for the obligations of the corporation. Thus, the piercing doctrine applies primarily to closely held corporations"*).

of their subsidiary when the latter was provided with a capital which was manifestly insufficient for the performance of its activities"¹²²⁶.

iii) Identification, which as mentioned, has played a significant role, *inter alia*, in Dutch law, is considered by K. Vandekerckhove to be the "*core of the jurisprudential veil piercing*"¹²²⁷. She contends that, due to the heterogeneity of corporate veil doctrines, multiple theories and scenarios may come under the umbrella of this notion: situations of abuse of the legal personality, situations responding to the *fraus omnia corrumpit* principle, situations where "*an appearance of unity is created towards the outside world*", etc.¹²²⁸. A simple example of identification can be found in those situations where "*the parent sends its own employees to participate in the day-to-day or week-to-week operating decisions, or otherwise attempts to dictate or influence those decisions*", which means that, in order to avoid difficulties, "*parents may operate their subsidiaries but not the facilities of their subsidiaries*"¹²²⁹.

iv) It is said that, to a limited extent, veil-piercing has slowly and gradually evolved into a notion of "group liability" / "enterprise liability" in the case-law of certain United States courts¹²³⁰. This tendency has been identified, notably, on the basis of the *Amoco Cadiz* case, where it was explicitly held that the corporations involved were elements of "*an integrated international enterprise*"¹²³¹. As explained by Branson: "*advocates of [this] theory espouse as essential that courts move from an entity by entity approach (traditional veil piercing) to an*

¹²²⁶ Vid. K. VANDEKERCKHOVE, "Piercing the corporate veil", *op. cit.*, p. 193. D. M. BRANSON ("Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation", *op. cit.*, p. 22) highlights the "*sufficiency of undercapitalization to pierce the corporate veil*". Cfr., however, W. T. ALLEN, R. KRAAKMAN & G. SUBRAMANIAN, *Commentaries and Cases on the Law of Business Organization* (4th ed.), *op. cit.*, p. 144: "*Thin capitalization alone is insufficient ground for piercing the corporate veil*".

¹²²⁷ Vid. K. VANDEKERCKHOVE, "Piercing the corporate veil", *op. cit.*, pp. 195-196. Identification "*is defined by the idea that despite the traditional consideration of corporations as individual -legal- persons, the multiple members of a corporate group should be considered 'one single unit or entity, for purposes of a specific application of the law'*". Furthermore: "*When courts apply the identification theories, they are more concerned about the result to be achieved than about the legal motivation. They frequently refer to several of the piercing theories at the same time and they do not always carefully check whether the conditions for their application are fulfilled. The case law is characterized by an ad hoc approach from which it is not easy to deduce general principles. [...] Contradictory decisions are not exceptional*".

¹²²⁸ Vid. K. VANDEKERCKHOVE, "Piercing the corporate veil", *op. cit.*, pp. 195-196.

¹²²⁹ Vid. D. M. BRANSON, "Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation", *op. cit.*, pp. 30-31. D. H. BARBER ("Piercing the Corporate Veil", *op. cit.*, pp. 374-375) provides a list of 19 different circumstances and elements which, either isolated or in groups of several, may trigger veil-piercing in the United States.

¹²³⁰ Vid. D. M. BRANSON, "Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation", *op. cit.*, pp. 35-36, and K. VANDEKERCKHOVE, "Piercing the corporate veil", *op. cit.*, pp. 192-193: "*Besides the typical piercing theories, a gradual but so far limited rise of the idea of a group liability ('enterprise liability') may be noticed. [...] Group liability is principally withheld in situations where the courts favour a 'fair' interpretation of a statutory rule in order to ensure respect for the underlying policy objectives pursued by the statute concerned*".

¹²³¹ Vid. D. M. BRANSON, "Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation", *op. cit.*, p. 36. However, as reported by T. BALLARINO ("Questions de droit international privé et dommages catastrophiques", *op. cit.*, pp. 365 and following) a slightly different angle of approach to the problem was tried by the Indian government in the frame of the Bhopal litigation before United States courts (and rejected by the latter): the thesis of the "*monolithic multinational corporation*".

enterprise liability doctrine. [However, that] *time seems not yet to have arrived*¹²³². However, outside of the United States, certain other countries seem to have legislated along such lines, as it is the case, within the EU, of Germany. One of the purposes of German group law (*Konzernrecht*) is to regulate corporate groups *ex ante* in order to avoid – as much as possible and notwithstanding exceptions – veil-piercing complexities¹²³³. Other countries, as France and the United Kingdom, have chosen not to follow that path, and certain resembling initiatives at EU level have not been successful¹²³⁴. This last point raises the need to briefly consider developments at EU level, not only in respect veil-piercing, but equally in respect of analogous doctrines. Consequently, these issues will be dealt with *infra*¹²³⁵.

Overall, what stems from this summary description of core traits of the doctrine in selected jurisdictions? The arising picture shows a high variability of the doctrine across the globe, further complicated by the above-referred metaphorical language and lack of clarity on the precise boundaries of the doctrine. These complexities are enhanced by the fact that it is not always easy to distinguish the doctrine from analogous notions, and that academic accounts from different jurisdictions lack coherence and clarity in this respect¹²³⁶. This idea further reinforces the need to address developments at European level in a *lato sensu* manner, i.e. not restraining the description to veil piercing *per se*, but addressing the point as “veil-piercing and analogous notions”. However, before turning to this point, let us complete the veil-piercing picture by considering the choice-of-law-related aspects of the doctrine.

ii. Choice-of-law in veil piercing

Despite being a problem of substantive law, veil piercing is naturally prone to being intertwined with choice-of-law difficulties: since the economic dynamics of globalization frequently put veil piercing at stake in transnational situations, the question of determining which law governs it becomes crucial¹²³⁷. K. Vandekerckhove suggests a two-step approach in order perform such determination: firstly, if there is any statutory group law – as the German

¹²³² *Vid.* D. M. BRANSON, “Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation”, *op. cit.*, p. 36

¹²³³ *Vid.* K. VANDEKERCKHOVE, “Piercing the corporate veil”, *op. cit.*, p. 196. The author however acknowledges that: “the gradual extension of group law seems to be coming to an end and one can notice a certain return to ‘piercing’”. As further explained in p. 191: “In most legal systems, company law regulates the single corporation without taking into account, in a systematic manner, the corporate or contractual links with other corporations (‘entity law’) [...] In Germany, the legislator and the courts have developed a ‘group law’ which offers an overall regulation of corporate groups”. Equally, (p. 196): “In group law, shareholders accept liability for the organization of the group or at least it is considered that they should bear such a liability. While a tendency towards such a *Strukturhaftung* has been undeniably present, among others in the United States, and is still present in the German group law, the focus today seems to be more on an actual (wrongful) conduct of the parent corporation (*Verhaltenshaftung*)”.

¹²³⁴ *Vid.* K. VANDEKERCKHOVE, “Piercing the corporate veil”, *op. cit.*, p. 196.

¹²³⁵ *Vid. infra* “Developments at EU level”.

¹²³⁶ *Cfr.* L. BERGKAMP & W.-Q. PAK (“Piercing the Corporate Veil: Shareholder Liability for Corporate Torts”, *op. cit.*, pp. 168-172) who clearly distinguish vicarious liability from veil piercing with S. DEMEYERE who blurs the boundaries (“Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law”, *op. cit.*, pp. 394-397 and 407-408).

¹²³⁷ *Vid.* K. VANDEKERCKHOVE, “Piercing the corporate veil”, *op. cit.*, p. 191: It “raises many issues, both of a technical nature related to the conflict of laws rules and to the policy options to be followed”.

Konzernrecht – at stake, she contends that the territorial scope of application of the said group law should be determined. Secondly, where no group law is at stake, traditional conflict-of-laws methodology should be followed¹²³⁸. However, this immediately gives rise to a characterization problem, for veil piercing is conceived in diverging ways by different legal systems¹²³⁹. The characterization adopted in the six legal systems that Vandekerckhove selected for her analysis – Belgium, the Netherlands, France, Germany, the United Kingdom and the United States – is the same: corporate veil piercing is characterized as being an issue arising from the concepts of “state” and “capacity”, therefore, being related, “*at a transnational level, to the recognition of legal persons*”. The ratio behind this approach – ascertaining if an entity validly exists and bears legal personality or not – would be that veil piercing would amount to examining “*the degree or the extent*” to which the legal personality of the targeted corporation corresponds or not to that of similar legal persons in the State of the *forum*. These question are thus generally submitted to the *lex societatis*, notably, due to its practical character – both providing legal certainty and simultaneously catering to the interests of the corporation, the shareholders, and the creditors¹²⁴⁰.

Nevertheless, this characterization and the ensuing resort to the *lex societatis* connecting factor are not the only possible way in which the issue can be conceived. M. Bogdan approaches the issue as if it was exclusively a problem of “*liability for the acts of another person*”. In this sense, he resorts to the Rome II Regulation, and explains, in respect of environmental damage, that

*"Pursuant to Art. 15(g), "liability for the acts of another person" is governed by the law applicable to the non-contractual obligation in question, i.e., the law designated by Art. 7. Nevertheless, it appears that if the parent company is claimed to be liable solely in its capacity of shareholder, the question of its liability is excluded from the scope of the Regulation by Art. 1(2)(d) as being of company-law nature (liability of "members as such for the obligations of the company"). The law designated by Art. 7 may, however, apply to the extent it contains special rules on the liability of parent companies for environmental damage"*¹²⁴¹.

¹²³⁸ *Ibidem*, p. 197

¹²³⁹ *Ibidem*, p. 197

¹²⁴⁰ *Ibidem*, pp. 197-198. However, the said author recognizes that the referred reasoning needs not be absolute, and there may be questionings to it: “[...] *it may be questioned whether corporate veil piercing concerns the state and capacity of a legal person. Veil piercing does not affect the ‘degree’ or the ‘content’ of the legal personality. It only concerns an exception to the rule of limited liability of a (foreign) corporation which is recognized in the forum state. Piercing questions therefore need not necessarily, or at least not for the above-mentioned reason, be submitted to the lex societatis*”. Moreover, the same author acknowledges, however, that “[...] *the uniform connection to the lex societatis does not always lead to a uniform solution in practice and that it is not necessarily in the interest of all persons concerned*”.

¹²⁴¹ *Vid.* M. BOGDAN, “Some Reflections Regarding Environmental Damage and the Rome II Regulation”, *op. cit.*, p. 105. *Vid.* in a similar sense, C. OTERO GARCÍA-CASTRILLÓN, “International litigation trends in environmental liability: a European Union-United States comparative perspective”, *op. cit.*, p. 567. The ratio at the roots of Bogdan’s approach is explained by VANDEKERCKHOVE (“Piercing the corporate veil”, *op. cit.*, pp. 197-198): “*Despite the predominance of the lex societatis and the lex fori, it is recognized that these connections do not always offer the most appropriate solution. Various alternative theories have been developed in order to designate the laws governing veil piercing, taking into account the*

As European private international law stands nowadays, either position will ultimately lead to the application of domestic choice-of-law rules to the issue. On the one hand, state, capacity, and legal personality do not come within the scope of the Rome II Regulation. On the other hand, Article 1.2.d of Rome II enshrines a large exclusion of company-law-related matters from the scope of the Regulation¹²⁴². Additionally, within the European Union, the practicality of the *lex societatis* connecting factor is further complicated by the fact that some Member States resort to the so-called “incorporation doctrine”, while others resort to the so-called “real seat doctrine”¹²⁴³: According to the real seat theory, “the law of the country where the company has its ‘real’ seat (i.e. its management and control centre) is the law applicable to company relationships”. Conversely, following the incorporation theory, “the company is governed by the law according to which it is dully established. In other words, those in charge of the company’s management are free to choose which legal system applies to its company law relationships”¹²⁴⁴. However, beyond these considerations, case-law seems to point to the fact

various interests involved. These theories differentiate either on the basis of the area of the law in which the veil piercing issue arises (minimalist differentiation) or in function of the specific legal ground or theory for veil piercing in each separate case (maximalist differentiation). The minimalist differentiation theories remove from the scope of the *lex societatis* those questions which may be considered to engage a personal contractual or tort liability on the part of the parent corporation. These questions are submitted to the *lex contractus* and the *lex loci delicti* respectively. Although this solution is logical and justified, its application in practice is not self-evident. The maximalist theories show a great variety and several degrees in differentiation where they propose more or less exceptions to the *lex societatis* depending on the interests to be protected. The most far-reaching differentiation proposes to submit piercing questions to the *lex causae*, designated in function of the underlying relationship between the individual creditor and the subsidiary as original debtor (Bernstein). None of the differentiating theories examined is convincing in its entirety. They do offer, however, an interesting insight into the issues involved, which proves useful for the solution of the conflict of laws question”.

¹²⁴² Vid. C. OTERO GARCÍA-CASTRILLÓN, “International litigation trends in environmental liability: a European Union-United States comparative perspective”, *op. cit.*, p. 567: “Despite the inclusion of the “liability for the acts of another person” in the extend of the applicable law, if the parent company is claimed to be liable solely in its shareholder’s capacity, its liability is excluded from the scope of the Regulation (Article 1(2)(d)) as being of company-law nature, and hence it will be determined through the application of the forum’s conflict-of-laws rules)”.

¹²⁴³ As an example, Belgium follows the real seat theory. Vid. Article 110 of the Belgian Code of Private International Law. For a commentary, vid. P. WAUTELET, “Quelques réflexions sur la *lex societatis* dans le code de droit international privé”, *Revue Pratique des Sociétés Civiles et Commerciales*, 2006, pp. 5-56.

¹²⁴⁴ For an in-depth study of both of the doctrines and their significance across certain EU member States, vid. S. RAMMELOO, *Corporations in Private International Law – A European perspective*, Oxford monographies in Private International Law, Oxford, OUP, 2001, pp. 95-217. The definitions quoted are taken from pp. 11 and 16 (As it may be well understood “[...] the ‘incorporation theory’, at least in its purest form, stems from the principle of party autonomy”). For a comparative study of the specificities of both theories in different States, vid. P. PASCHALIDIS, *Freedom of Establishment and Private International Law for Corporations*, Oxford Private International Law Series, Oxford, OUP, 2012, pp. 3-7 (the theory of incorporation in England, the USA, and Switzerland); pp. 8-11 (the real seat theory in France, Germany and Italy); and pp. 11-13 (Comparison between both theories). K. VANDEKERCKHOVE (“Piercing the corporate veil”, *op. cit.*, p. 197) further warns about the complexity of certain situations that may arise: “[...] the question arises which company law should apply when several group members are submitted to the laws of different legal systems. The answers to those questions imply choices with regard to the interests one wishes to protect (‘foreign’ versus ‘local’ interests; shareholders versus creditors; creditors of the parent versus those of the subsidiary)”. The idea of the submission to the *lex incorporationis* seems to be well-enrooted and grounded in the US legal order; it is already mentioned in W. L. M. REESE & E. M. KAUFMAN, “The Law Governing Corporate Affairs: Choice of Law and the impact of Full Faith and Credit”, *Columbia Law Review*, vol. 58, 1958, pp. 1118-1144, at pp. 1143-1144: “Within the second

that, whenever veil piercing is not governed by the *lex societatis*, it is submitted to the *lex fori*, in order to avoid the performance of complex choice-of-law operations¹²⁴⁵.

The situation in the United States, although conceptualized under a different terminology, and submitted to different methodologies, is somewhat similar to the one depicted above, including the diverging possible characterizations of the issue and the relevant connecting factors. As explained by Branson:

*“Defendant corporations may seek to have the court apply the internal affairs choice of law doctrine under which the law of the corporation’s domicile (Delaware or Nevada, for example) would govern. Defendants would urge such a choice of law when the domicile state’s laws are less conducive to veil piercing than are those of the forum state or the place of the wrong, which may well be a foreign jurisdiction. Plaintiffs would respond that a suit for tort or breach of contract involves an external rather than internal affair, so that the law of the place of the wrong, or the law of the place designated the locus of contacts, should govern. Some commentators would split the baby in half, applying the internal affairs choice of law rule for voluntary creditors but traditional conflicts rules for involuntary ones, presumably which would include tort claimants. The better reasoned view seems to be that the court should apply the law of place where the wrong occurred, at least in cases of tort”*¹²⁴⁶.

Other than these possibilities, is it equally possible that courts may resort to the *lex fori*¹²⁴⁷. A structural difference, however, is that in the United States, besides the referred connecting factors, veil piercing may also be generally submitted to the *lex causae*. This is said to be due to the impossibility to designate a uniform connecting factor, caused by the above-referred lack of clarity and metaphorical language of case-law-based veil-piercing theories. This impossibility entails that the underlying legal relationship determines the relevant connecting factor¹²⁴⁸.

iii. Developments at EU level

The reference *supra* to the failure of European initiatives relating to “group liability” points to the need to briefly refer to the very scarce developments that exist at European level in respect of veil-piercing and analogous doctrines. Although there is a very limited EU legislative intervention in the field of company law – a limited number of harmonizing EU directives –

category [of corporate affairs] fall matters that are peculiar to corporations. They bear primarily upon the relationships inter sese of the corporation and its directors, officers, and stockholders, although they may also affect the interests of the corporation's creditors. At common law, matters of this sort are generally governed by the law of the state of incorporation”.

¹²⁴⁵ *Vid.* K. VANDEKERCKHOVE, “Piercing the corporate veil”, *op. cit.*, pp. 197-198.

¹²⁴⁶ *Vid.* D. M. BRANSON, “Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation”, *op. cit.*, pp. 20-21.

¹²⁴⁷ *Ibidem*, pp. 23-24.

¹²⁴⁸ *Vid.* K. VANDEKERCKHOVE, “Piercing the corporate veil”, *op. cit.*, pp. 197-198.

three ECJ rulings from the last decade may be mentioned in order to illustrate the current state of affairs¹²⁴⁹.

The first one is *Akzo Nobel*, a case which derives from an antitrust investigation by the European Commission into the global choline chloride industry during the 1990s. The Commission found that certain European companies had implemented a cartel at a European level, between March 1994 and October 1998. The case reached on appeal the Court of Justice, where the appellants (5 companies belonging to the Akzo Nobel group) claimed that “by rejecting the plea alleging that liability for the infringement had been wrongfully imputed to Akzo Nobel [the parent company of the group], the Court of First Instance incorrectly applied the definition of ‘undertaking’ within the meaning of Article 81 EC and Article 23(2) of Regulation No 1/2003”. In response, paragraph 58 of the appellate decision states that:

*“It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company [...], having regard in particular to the economic, organisational and legal links between those two legal entities [...]”*¹²⁵⁰ (Emphasis added).

The decision, which is the first in a constant line of case-law¹²⁵¹, enshrines, moreover, a rebuttable presumption that a wholly-owned subsidiary may be presumed to carry out the instructions of its parent. Despite the fact that the *Akzo Nobel* decision may be prone to an optimistic assessment¹²⁵², it may be wondered what the actual scope / extent of this ECJ’s

¹²⁴⁹ Putting aside the fact that it dates from 1996, the review of the state of the question made by D. S. BAKST (“Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive”, *B.C. Int’l & Comp. L. Rev.*, vol. 19, 1996, pp. 323-351) fails to adequately comprehend and describe the state of the question: it simply transposes developments from the field of competition law into the realm of environmental liability, without taking into account the existence of veil-piercing traditions at the Member-State level (pp. 323-325 and 338-347). On a different note, since the focus of this sub-section is the European Union, considerations on veil-piercing for shareholder-protection purposes (i.e. not for liability purposes) before the European Court of Human Rights will not be considered. *Vid.* in this sense, however, the interesting analysis made by M. EMBERLAND (“The Corporate Veil in the Case Law of the European Court of Human Rights”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 63-4, pp. 945-969) who considers that the apparent “formalism” of the European Court of Human Rights in this respect “builds on appearances more than reality” (p. 969), and that, therefore, when the principle of effectiveness so requires, the Court will be prone to veil-piercing.

¹²⁵⁰ *Vid.* ECJ, *Akzo Nobel NV and Others v. Commission of the European Communities*, judgment, case C-97/08, ECLI:EU:C:2009:536. For commentaries, *vid.*, *inter alia*, the references reprised in footnotes 1251 and 1252.

¹²⁵¹ *Vid.*, amongst others, ECJ, *Elf-Aquitaine SA v European Commission*, judgement, case C-521/09, ECLI:EU:C:2011:620. For a contextualization of *Akzo Nobel* within the frame of ECJ decisions on parent-subsidiary liability in EU competition law (notably, *Elf-Aquitaine*), *vid.* V. TERRIEN, “Droit de la concurrence : la présomption de responsabilité frappant les sociétés mères”, *Journal de droit européen*, vol. 20-185, 2012, pp. 1-7.

¹²⁵² C. OTERO GARCÍA-CASTRILLÓN (“International litigation trends in environmental liability: a European Union-United States comparative perspective”, *op. cit.*, p. 559) seems to have a very positive reading of the ruling, despite the fact that in the footnotes she nuances her position (“at least in the competition field, according to the ECJ”). For further commentaries, mainly from the standpoint of EU Competition Law, *vid.* R. GALANTE, “Arrêt Akzo Nobel NV c/ Commission (La jurisprudence de la Cour de justice et du

ruling is, and whether the quoted paragraph is not actually significantly or exclusively influenced by considerations pertaining to the wide notion of “undertaking” within the field of EU Competition Law¹²⁵³.

Both the second and third cases stem from the field of the law of the Internal Market, and thus present certain resemblances. The second one, *Idrima Tipou AE*, derives from a dispute between the Greek “Minister for the Press and the Mass Media” and a public limited company over an administrative fine arising from the personality-rights-related media activities of a third company, from which *Idrima Tipou AE* was a shareholder¹²⁵⁴. Greek law at the time established that, under certain conditions, shareholders holding 2.5% of shares or above could be made jointly and severally liable for the personality-rights-related fine (which derived from the infringement of “*the obligation to respect the character, honour, reputation, family life and presumption of innocence of various personalities*”). The said legislation was challenged as amounting to a violation of freedom of establishment and free movement of capitals within the EU. Despite being addressed from the standpoint of the law of the Internal Market, this case ultimately puts on the table the question whether the lack of liability of shareholders for a corporation’s debts can be regarded as a general principle of European law. When delivering its request for a preliminary ruling to the ECJ, the Greek “Council of State” was divided as regards this question. A majority of its members defended that the lack of liability of shareholders for a corporation’s debts cannot be considered to be a general principle of EU law since, in their opinion, many Member States have enshrined, mostly through case-law developments, the notion of veil-piercing under certain conditions. The ECJ agreed with this majority position – para. 42 of the decision – stating that the fact that the lack of shareholder liability for corporate debts is widely spread does not transform it into a “*a general principle of company law applicable in all circumstances and without exception*”. It nevertheless ended up

Tribunal de première instance. Chronique des arrêts)”, *Revue du droit de l’Union européenne*, n. 3, 2009, pp. 559-565; L. IDOT, “Groupe de sociétés et responsabilité personnelle”, *Europe*, n. 427, 2009, pp. 35-36; S. EINHAUS, “Parent Liability: Collective Responsibility Returns”, *European Law Reporter*, 2009, pp. 374-382.

¹²⁵³ The relevant definition of undertaking, as reproduced in para. 27 of the judgment is the following: “*the concept of undertaking within the meaning of Article [101 TFUE] includes economic entities which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision*” (This paragraph refers to paragraph 54 of *HFB [ECJ, HFB and Others v Commission]*, judgment, case T-9/99, ECLI:EU:T:2002:70)). Following W. FRENZ (*Handbook of EU Competition Law*, Heidelberg, Springer, 2016, p. 224) a broad interpretation of the notion of undertaking is said to be necessary in order to ensure the purpose of Article 101 TFUE: “*ensuring distortion-free competition as the basis for a functional internal Market*”. For a reflection on the notion of undertaking in EU Competition Law, *vid.* W. FRENZ, *op. cit.*, p. 203-204. It highlights the fact that, in order to construe the notion of undertaking, the ECJ places the emphasis on the existence of a “unit” which performs “economic activity”, and does not rely on the existence of an independent legal subject, and thus: “*the concept applies to any entity engaged in economic activity regardless its legal form or type of funding [...] Accordingly, an economic unit may even exist if, legally speaking, it comprises several natural or legal persons*”.

¹²⁵⁴ *Vid.* ECJ, *Idrima Tipou AE v Ipourgos Tipou kai Meson Mazikis Enimerosis*, judgment, case C-81/09, ECLI:EU:C:2010:622.

holding the relevant Greek legislation as infringing Internal Market law, from an aptitude / coherence assessment stand-point¹²⁵⁵.

The third and final decision to be commented is *Impacto Azul Lda v. BPSA* 9¹²⁵⁶. In a dispute concerning alleged contractual obligations between two Portuguese corporations, one of them tried to hold liable the sole-owner French grand-parent company of the other for the alleged damages. In the frame of the national proceedings it was established that although “Portuguese law provides for the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries”, this is only the case “in respect of parent companies having their seat in Portugal”. As a consequence, a request for a preliminary ruling reached the ECJ on whether the fact that “Portuguese legislation excludes the application of the principle of the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries to parent companies having their seat in the territory of another Member State” would amount to a violation of the freedom of establishment in the EU’s Internal Market. The ECJ’s answer is negative: “it is not contrary to Article 49 TFEU that a Member State may legitimately improve the treatment of claims of groups present on its territory”¹²⁵⁷.

Beyond these – scarce – developments, all considerations that can be put forward are *de lege ferenda* in their nature. Having completed the description of the core traits of veil-piercing, let us briefly address some alternatives thereto.

B. Alternatives: Agency in fact and foreign direct liability

Despite being frequently identified as variations of corporate-veil piercing¹²⁵⁸, there are two other closely-related legal techniques which may be attempted in order to make a parent

¹²⁵⁵ Vid. the commentary on this decision by Y. DE CORDT & L. CULOT (“Chronique droit européen des sociétés 2010”, *Journal de droit européen*, 2011, pp. 82-85, at pp. 84-85): “cette théorie [...] présente l’avantage de ne pas remettre fondamentalement en cause le principe de la responsabilité limitée; elle confirme simplement que ce privilège — susceptible d’abus — peut être écarté dans certaines circonstances. En l’état, le droit belge demeure attaché au principe de l’indépendance des personnalités juridiques et n’admet pas — hormis de rares exceptions au nom de la réalité économique — une mise à néant de l’être moral ou la perméabilité des sociétés d’un groupe. La théorie du piercing the corporate veil doit, en tout état de cause, être manipulée avec prudence”.

¹²⁵⁶ Vid. ECJ, *Impacto Azul Lda v BPSA* 9 - *Promoção e Desenvolvimento de Investimentos Imobiliários SA and Others*, judgment, case C-186/12, ECLI:EU:C:2013:412.

¹²⁵⁷ For a commentary of the decision that both addresses the private international law aspects of the case (as the existence of a “scope rule” in the relevant Portuguese legislation), and regrets the lack of evolution of EU law in respect of company groups, vid. S. RAMMELOO, “The Judgment in CJEU C-186/12 (*Impacto Azul*): Company Law, Parental Liability and Article 49 TFEU – A Plea for a “Soft Law” Oriented EU Law Approach on Company Groups”, *European Company Law*, vol. 11-1, 2014, pp. 20–29. This author ultimately concludes that the European legislator should start at least drafting some soft law standards or principles in order to make the situation progress.

¹²⁵⁸ As regards the theory of the agent, D. M. BRANSON (“Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation”, *op. cit.*, p. 37) acknowledges that principal-agent analogies can be either used to uphold veil piercing allegations, or as an “adjunct or extension” of corporate-veil piercing. Then he goes on to assert that: “There exists an entire other field of play for agency law other than for use in making analogies, what we might call agency in fact. According to veteran [Alien Tort Statue] litigators, actual agency has become the legal construct they use most frequently to argue that

corporation liable for the debts of one of its subsidiaries despite the rules on separate legal personality and limited liability. The first one of these two alternatives to veil piercing is the theory of the agent in fact: a subsidiary may be considered an agent of her parent company in order to try to attain the latter one. In this sense, an action / omission committed by the “representative” subsidiary would be attributed to the “principal” parent company as if it had been committed by the latter. Following Branson, it is possible to resort to this technique whenever “*a subsidiary corporation exists solely to carry out the owner’s agenda, having no independent reason for its own existence*”. For this to be the case, there are certain requirements, amongst which “*such domination of finances, policies, and practices that the controlled corporation has, so to speak, no separate mind, will, or existence of its own and is but a business conduit for its principal*”¹²⁵⁹. This is, quite obviously, an inversion of usual dynamics of corporate law, for it generally does not consider a given corporation to be the agent of its owners, thus shielding owners from being held vicariously liable for the acts of the corporation¹²⁶⁰. From this stand-point, it could be argued that the theory of the agent is merely a new theoretical packaging for classic vicarious liability¹²⁶¹.

In any case, Branson construes the theory of the agent in fact by drawing both positive and negative defining elements from case-law, more precisely from the infamous *Doe / Roe v. Unocal*¹²⁶² and from *Bauman v. Daimler Chrysler*¹²⁶³. He highlights that the first decision lists a series of indicia which may point to the fact that a subsidiary has actually become an agent in fact of her parent: In *Unocal*, the subsidiaries

“[...] had no employees of their own. Unocal engineers, still paid by Unocal paychecks, physically participated in every phase of pipeline construction: choosing a route, planning, safety, and operation. Unocal, not [its subsidiaries] had an office in Yangon which used Unocal stationery, invoices, and other paperwork, staffed with Unocal managers. Unocal financial personnel in Sugarland, Texas did the accounting for [the subsidiaries...]”¹²⁶⁴.

the grandparent or great grandparent has become answerable, as principal, for the acts of the subsidiary”.

¹²⁵⁹ *Ibidem*, p. 37.

¹²⁶⁰ *Vid.* J. W. CALLISON, “Rationalizing limited liability and veil piercing”, *op. cit.*, pp. 1069-1070.

¹²⁶¹ For further considerations on vicarious liability (under French, Belgian and English law) *vid.* S. DEMEYERE, “Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law”, *op. cit.*, pp. 394-397 and 407-408. *Vid.* also L. BERGKAMP & W.-Q. PAK (“Piercing the Corporate Veil: Shareholder Liability for Corporate Torts”, *op. cit.*, p. 168) who are against the possibility of extending any sort of vicarious-liability-resembling technique to the realm of parent-subsidiary relations: “*Theories of vicarious liability are not new to liability law; in many jurisdictions, employers, for instance, are fully liable for the torts committed by their employees. But a shareholder is not an employer, and the concept of shareholder liability is a relatively new phenomenon in the area of environmental liability. The Commission staffers’ proposal raises questions about the desirability of this approach, the rationale of limited liability, and the justifications of shareholder liability in general and for environmental liabilities in particular*”.

¹²⁶² *Vid.* *Doe/Roe v. Unocal*, 2002 WL 31063976 (9th Cir. 2002).

¹²⁶³ *Vid.* *Bauman v. Daimler Chrysler Corp*, 579 F.3d 1088 (9th Cir. 2009).

¹²⁶⁴ *Vid.* D. M. BRANSON, “Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation”, *op. cit.*, pp. 37-38

While *Unocal* delivers a negative list of conducts not to be entertained, *Daimler Chrysler AG* provides a list of conducts which are admissible, and may thus be considered “appropriate involvement”. These include “*monitoring the subsidiary’s performance; supervision of the subsidiary’s finances and capital budget decisions; and articulation of general policies and procedures*. [Also it] *is entirely appropriate for directors of a parent to select directors of a subsidiary*”¹²⁶⁵. Brandon completes his description of the theory by further highlighting from the case-law two cumulative conditions which need to be fulfilled for the theory of the agent in fact to work in practice: on the one hand, the kind of control exerted by the parent over the subsidiary must be so pervasive and continued that the latter appears to be an “instrumentality” of the former, “*notwithstanding the maintenance of corporate formalities*”. On the other hand, the “agent” needs to be so significant to the “principal” that if the latter “*did not have a representative, the parent corporation would have to undertake to perform substantially similar services*”¹²⁶⁶. Interestingly, the theory of the agent provides a graphic example of the blurriness and entanglement of various theories relating to parent-subsidiary liability: while the list of indicia that arises from *Unocal* resembles strongly the elements described above when dealing with “identification” within the realm of veil piercing, the first of the two conditions just mentioned parallels the first of the two general conditions of veil-piercing described above. Beyond these resemblances, it may be said that, overall, the theory of the agent in fact has a significant advantage over corporate-veil piercing since it “*bypasses the layers of intermediate corporations [making] the great grandparent household name corporation answer for acts done by the great grandchild subsidiary*”¹²⁶⁷.

The third solution that these pages will deal with is also sometimes conceived as being a mere variation of corporate-veil piercing¹²⁶⁸. However, so-called foreign direct liability may be considered a legal technique on its own right. Its point of departure is a rather simple premise: the fact that corporate shareholders bear no personal liability for the debts of their corporation in their capacity as shareholders does not mean that they are immune from liability on other generally applicable legal grounds¹²⁶⁹. In this sense, whenever a shareholder personally commits a tort “*that shareholder becomes personally liable for the resulting obligation, not because the corporation has incurred an obligation for which he is liable, but because he personally did the things necessary to be treated as a tortfeasor [...] in his own right*”¹²⁷⁰. Following this line of reasoning, L. Enneking sustains that, due to the knowledge and influence that parent companies have over the operations of their host-country subsidiaries,

¹²⁶⁵ *Vid.* Bauman v. Daimler Chrysler, judgment, *op. cit.*, at 1095.

¹²⁶⁶ *Ibidem*, at 1095. Furthermore, “Control must be over and above that to be expected as an incident of ownership”.

¹²⁶⁷ *Vid.* D. M. BRANSON, “Holding multinational corporations accountable? Achilles heels in Alien Torts Claims litigation”, *op. cit.*, p. 40. In pp. 24 -27 he addresses the *Unocal* case, describing that there were so many layers of subsidiaries that piercing one level would be meaningless, because there remained several others until reaching the grandparent corporation.

¹²⁶⁸ *Vid.* K. VANDEKERCKHOVE (“Piercing the corporate veil”, *op. cit.*, p. 192) is of this opinion. She considers as veil piercing those “[...] rare cases where foreign subsidiaries of English parent corporations cause physical harm to a large group of persons as a result of irresponsibly dangerous activities (e.g. the exposure of employees to asbestos). In such cases, liability of a parent company may be withheld on the basis of a violation of the duty of the parent to supervise the activities of the subsidiary”.

¹²⁶⁹ *Vid.* G. G. MORRIS, Personal Liability for Corporate Participants Without Corporate Veil-Piercing: Louisiana Law, *op. cit.*, pp. 207-208.

¹²⁷⁰ *Ibidem*, pp. 207-208.

they may, under certain conditions, “have a direct responsibility towards third parties in those host countries to keep them from being harmed as a result of those operations”¹²⁷¹. In other words, foreign direct liability is based on the idea that it is the actions and / or omissions of the home-country parent corporation that have resulted in damage in the host country. Thus, since their “superior resources, knowledge and influence, [entail] a duty of care to certain third parties in the host country, [they] can therefore be held liable for damage caused to these third parties by their subsidiaries [...]”¹²⁷². As it may be understood, this technique entails a significant reconceptualization of the kind of situation at stake: the tortfeasor is no longer the parent company due to an exception to limited liability and separate personality rules, or due to vicarious liability; the tortfeasor is the parent company by itself, independently of other considerations.

Although going any further than this explanation entails blurring the neat distinction amongst *forum non conveniens*, separate legal personality and choice-of-law as three distinct problems, some interesting reflections have been put forward as regards the consequences of this “foreign direct liability” conceptualization at the choice-of-law level:

i) L. Enneking conceives this conceptualization, as being a specific kind of delict / tort, totally distinct from environmental torts: “as the point of departure in these cases is that the parent company’s act or omission resulting in the breach of its duty of care has taken place in the home country, while the resulting damage to third parties arises in the host countries, it is to be expected that the Rome II Regulation’s choice for the applicability of the [lex loci damni] will have serious consequences for the feasibility of future foreign direct liability cases. On the basis of the Regulation’s general rule, it is the law of the host country and not that of the multinational corporation’s home country that will be applied to a claim brought before a home country court within the EU”¹²⁷³.

¹²⁷¹ Vid. L. ENNEKING, “The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law”, *op. cit.*, pp. 285-286. It is important to highlight that Enneking does not seem to conceive her conceptualization as a mere technique to overcome subsidiarity-related difficulties, but more as some kind of holistic approach.

¹²⁷² *Ibidem*, pp. 299-300. The same author delivered a comparative assessment of the status of foreign direct liability cases in the US and the EU in 2008, focusing on the profuse US experience in this respect, on the “awakening” of European Member-States to the possibilities offered by tort law in these cases, and on the potential for “cross-fertilization” (L. ENNEKING, “Crossing the Atlantic? The political and legal feasibility of European Foreign direct liability cases”, *Geo. Wash. Int’l L. Rev.*, vol. 40, 2008-2009, pp. 903-938). However, the assessment needs to be relativized in respect of the US for case-law developments after the publication of this article (notably the well-known US Supreme Court decision in *Kiobel v Royal Dutch Shell Petroleum Co.*) have undermined the potential of one of the core pieces of legislation referred to: the so-called “Alien Tort Statue”. The author has had the opportunity to update some of her considerations in a further 2014 article (L. ENNEKING, “The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case”, *Utrecht L. Rev.*, vol. 10, 2014, pp. 44-54).

¹²⁷³ Vid. L. ENNEKING, “The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law”, *op. cit.*, pp. 299-300 (The original text uses “law of the *Erfolgsort*” instead of *lex loci damni*).

ii) However, G. Betlem – who wrote on the issue almost a decade before the entry into application of the Rome II Regulation¹²⁷⁴ – does not seem to consider that this kind of construction impacts on the characterization of the kind of situations addressed as human-rights-related torts or environmental torts. His idea is that limitations arising from the rules of private international law in this context "*may be circumvented by constructing the whole case as one involving lack of supervision by the head office of a multinational corporation over its subsidiary based abroad where the actual harmful conduct and its effect took place*". Therefore, projecting his perspective to the Rome II Regulation, the applicability of the *lex loci damni* through the Regulation's general rule would be irrelevant, for environmental torts, following Article 7, allow choosing between *lex loci actus* and *lex loci damni*.

Notwithstanding these considerations, let us conclude the discussion of the difficulties caused by the existence of networks of subsidiary corporations by commenting a thought-provoking *de lege ferenda* proposal, before moving on to dissect the notion of *forum non conveniens*.

C. *De lege ferenda*: unlimited corporate liability in tort

It is necessary, in order to adequately conclude this analysis of the problems caused by the existence of multiple layers of subsidiaries, to briefly mention an interesting *de lege ferenda* proposal which rose in the 1990s within North-American academia: the possibility of withdrawing the benefit of the separate legal personality in cases of corporate tort. This proposal, generally attributed to H. Hansmann & R. Kraakman, basically consists on establishing that tortious liability will be borne by shareholders *pro rata* whenever it exceeds

¹²⁷⁴ *Vid.* G. BETLEM, "Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts", *op. cit.*, pp. 286 and 291. Betlem originally wrote on the topic as being a maneuver to circumvent difficulties related to the use of rules of international jurisdiction: "*A specific characteristic of the type of case presently under discussion reduces the availability of the forum delicti, namely the fact that the alleged violation of human rights has taken place outside the forum state (indeed outside the whole EU). The ECJ has ruled that this rule encompasses, in situations where the place where the damage arises differs from the place where the tortfeasor has acted, both these places: the place of harm as well as the place of acting. But neither of these places is in the Netherlands*")".

He first develops his reasoning at the level of international jurisdiction: "*If this head office is located in the Netherlands, a Dutch court would have jurisdiction under the rule of the forum delicti: the place where the harmful activity (i.e., lack of supervision) has occurred. This head of jurisdiction would of course be overlapping with the forum rei (jurisdiction of the court of the domicile of the defendant) where the seat of the whole multinational company must be regarded as being based in the Netherlands. But this need not necessarily be the case so that the forum delicti (place of harmful activity) can provide an additional head of jurisdiction*".

Then (p. 291) he suggests extending the same interpretation to the *locus delicti* as regards applicable law (in respect to Art. 6 of the 1999 Dutch Bill on Conflict of Laws in Tort [*Wet conflictenrecht onrechtmatige daad*], which preceded the Rome II Regulation). He admits that at the time of writing (1999/2000) there was no case-law from the Dutch Supreme Court (*Hoge Raad*) on the interpretation of the *lex loci delicti* rule, but he asserts that it is conceivable that "*if one were to stress the place of activity, the Netherlands can be characterized as the locus delicti [if it is argued that] the alleged wrongful act consists of lack of supervision which occurred at the head office of the multinational (or another office) situated in the Netherlands*". In his opinion, the outcome of this debate could not be predicted at the time of his writing. On the other hand, he also asserts that "*[h]owever, a denial of the fact that no unlawful activity has taken place in the Netherlands at all, would amount to a defence on the merits of the case and would thus not be available at this stage*".

the net assets of the relevant corporation¹²⁷⁵. Their analysis, and the ensuing proposal, are justified on the grounds that, despite the fact that limited liability is a well-spread rule of law, no comprehensive analysis of its effects, or of those of unlimited liability, had been performed before their work, and that, in their view, firms “*have an unusually strong incentive to engage in excessively risky behavior*”. As a consequence, “*Unlimited liability [in tort] would mitigate the current regime’s incentive to overinvest in hazardous industries and to underinvest in precaution*”¹²⁷⁶. These authors further contend that despite the popularity of the rule of limited liability, it is possible to conclude, using economic-analysis-of-law tools, that unlimited corporate liability as regards torts may be feasible and desirable¹²⁷⁷.

To my knowledge, no jurisdiction around the globe has decided to enact legislation along the lines suggested by H. Hansmann & R. Kraakman. Should this *de lege ferenda* proposal get to be enacted in relevant jurisdictions, its practical implementation may, however, still face choice-of-law difficulties: while, at a substantive level, it seemingly simultaneously neutralizes the hindrances introduced both by the existence of multiple layers of subsidiaries and by their possible undercapitalization, it remains to be seen whether this issue would be considered, for characterization purposes, an issue in tort or an issue arising from the “*law of companies*”¹²⁷⁸.

IV. Forum non conveniens

The doctrine of *forum non conveniens* is the second “procedural” hurdle – a properly procedural one – that environmental tort victims, just like many human-right-violations victims, may have to face in their path to seek justice. Mostly applied in Common-Law jurisdictions, it can be defined as a discretionary prerogative allowing a given court, at a defendant’s request, to stay or dismiss a case that it is entitled to hear, due to the fact that there is an allegedly more appropriate venue to hear the case elsewhere¹²⁷⁹. The ratio behind allowing a court to decline to exercise jurisdiction arises from the idea that, in cases connected to more than one jurisdiction, under certain circumstances, “*the interests of justice [may be] best served if the*

¹²⁷⁵ While the proposal is generally attributed to H. HANSMANN & R. KRAAKMAN (“Toward Unlimited Shareholder Liability for Corporate Torts”, *Yale L.J.*, vol. 100, 1991, pp. 1879-1934), M. R. PATTERSON (“Is Unlimited Liability Really Unattainable?: Of Long Arms and Short Sales”, *Ohio State Law Journal*, vol. 56-3, 1995, pp. 815-898) mentions other authors who, during the 1980s, had toyed with the idea. Patterson further sustains Hansmann & Kraakman’s proposal, notably addressing and dismissing the criticisms raised by J. A. GRUNDFEST (“The Limited Future of Unlimited Liability: A Capital Markets Perspective”, *Yale L.J.*, vol. 102, 1992, pp. 387-425) and J. C. ALEXANDER (“Unlimited Shareholder Liability Through a Procedural Lens”, *Harv. L. Rev.* vol. 106, 1992, pp. 387-445).

¹²⁷⁶ *Vid.* H. HANSMANN & R. KRAAKMAN, *op. cit.*, p. 1879.

¹²⁷⁷ *Vid. Ibidem*, pp. 1932-1934.

¹²⁷⁸ *Vid.* Article 1.2.d of the Rome II Regulation.

¹²⁷⁹ This definition has been elaborated drawing elements from the sources referred in the following footnotes, and notably from G. BETLEM, “Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts”, *op. cit.*, p. 283: “*the power of the courts, even where they are legally competent to adjudicate the case, to stay the proceedings because of the availability of an allegedly more appropriate forum elsewhere*”.

*trial takes place in another court*¹²⁸⁰. To this end, courts benefit from a wide range of substantial judicial discretion¹²⁸¹. Such discretion arises from the conception that “*whether a court can hear a case under subject matter jurisdiction, personal jurisdiction, and related doctrines is a different question than whether a court should hear a case as a normative or prudential matter*”¹²⁸². However, the said discretion is framed by certain guidelines provided by the very doctrine, which allegedly allow “*allocating adjudicative authority between countries*” whenever the courts of more than one country are available to adjudicate on a given matter¹²⁸³. Originally developed in Scotland¹²⁸⁴ and then spread widely throughout common law jurisdictions, *forum non conveniens* – hereinafter “*FNC*” – has developed diversely in different regions of the world, evolving into several different configurations¹²⁸⁵, and even lacking uniformity within the United States¹²⁸⁶.

¹²⁸⁰ Vid. R. A. BRAND, “Challenges to Forum non conveniens”, *University of Pittsburgh School of Law - Legal Studies Research Paper Series*, Working Paper No. 2013-21, 2013, p. 4.

¹²⁸¹ Vid. D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *Virginia Journal of International Law*, vol. 53-1, pp. 157-180, at pp. 167-168: “*a court is vested with wide discretion to dismiss a case with foreign elements, especially where a foreign plaintiff and foreign law is involved*”. Vid. in a similar sense R. A. BRAND, “Challenges to Forum non conveniens”, *op. cit.*, p. 4. Cfr. C. BURKE ROBERTSON, “Transnational Litigation and Institutional Choice”, *Boston College Law Review*, vol. 51, 2010, pp. 1081-1131, at p. 1086 (“[...] *judge-made court-access doctrines have expanded beyond their initial prudential focus, as they implicate substantive economic, regulatory, and foreign relations policy interests*”).

¹²⁸² Vid. D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 159.

¹²⁸³ Vid. C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *Columbia Law Review*, vol. 111, 2011, pp. 1444-1521, at p. 1453.

¹²⁸⁴ Although this aspect is briefly dealt with by most authors who deal with the notion *vid.*, for a more detailed development, A. NUYTS, *L’exception de Forum Non Conveniens – Étude de droit international privé compare*, Collection de la Faculté de Droit de l’Université Libre de Bruxelles, Bruxelles, Bruylant, 2003, pp. 79-106.

¹²⁸⁵ Vid. R. A. BRAND, “Challenges to Forum non conveniens”, *op. cit.*, pp. 4-5. Vid. for an introductory account to different configurations (the North-American, English, Australian, Quebecois, Japanese and Israeli models) A. NUYTS, *L’exception de Forum Non Conveniens – Étude de droit international privé compare*, *op. cit.*, pp. 161-201.

¹²⁸⁶ Vid. P. J. KALIS & T. M. REITER, “Forum non conveniens: a case management tool for comprehensive environmental insurance coverage actions?”, *W. Va. L. Rev.*, vol. 92, 1989-1990, pp. 391-425, at pp. 402-405: “*Gulf Oil* [i.e. the federal case-law understanding of the doctrine] is not binding on a state court’s determination of how, or whether, to apply forum non conveniens principles. In fact, a small number of states has declined to adopt the doctrine at all. As of this writing, West Virginia remains among this dwindling minority, although in *Gardner v. Norfolk & W. Ry.*, Justices Neely and Brotherton, in dissent, expressed their approval of the doctrine”. However, “[w]hile the contours of the forum non conveniens doctrine vary from state to state, the *Gulf Oil* public and private interest factors are almost universally adopted. In applying these factors, courts typically have been guided by several legal principles that for the most part are drawn from *Gulf Oil* itself”. Moreover, following R. A. BRAND (“Challenges to Forum non conveniens”, *op. cit.*, pp. 16-17): “[w]ithin the United States, there is further non-uniformity, with many states having their own versions of the doctrine. The Washington State Supreme Court has specifically rejected any claim that a foreign plaintiff’s choice of forum is presumptively inconvenient, and New York decisions have been read to eliminate the first prong of the federal analysis—proof of an alternative, appropriate forum. In *Radeljak v. DaimlerChrysler Corp.*, the Michigan Supreme Court provided a list of private and public interest factors that differs from that established by U.S. Supreme Court’s in *Gilbert*, and overruled earlier Michigan common law which required that the private and public interest factors be considered only if the defendant first proved that the local court is a “seriously inconvenient” forum. Thus, the law of the various states tends to both move away from, and back to, the federal standard”.

Although the introduction of this chapter stated that the core of its approach would be the European responses to legal stakes which are significant for the purposes of this dissertation – turning to other legal systems for purely comparative purposes – this section will shift its focus. Instead of presenting the English version of *forum non conveniens*, the following pages will provide a description of the main traits of the doctrine as developed by the US Supreme Court¹²⁸⁷. This choice is due to the fact that some of the most infamous practical examples of the operation of the doctrine in environmental and human-rights-related litigations have taken place before US Courts in past decades, and thus their practice may be more illustrative in terms of the global governance repercussions of private international litigation. Notably, in recent times, and especially the United States, *forum non conveniens* has been viewed as a natural reaction to the fact that certain jurisdictions attract significant amounts of transnational litigation. This is the so-called “magnet effect”: plaintiffs are said to forum-shop into US jurisdictions, often filing suits which involve “non-U.S. parties or activity that occurred outside U.S. territory”, due to “the conventional wisdom that the United States has a legal environment that is more favorable to plaintiffs than that of other countries”¹²⁸⁸. Conversely, through *forum non conveniens*, defendants try to forum-shop out of the United States and into

Vid. also A. NUYTS, *L’exception de Forum Non Conveniens – Étude de droit international privé compare*, *op. cit.*, pp. 117-134.

¹²⁸⁷ For a summary description of the elements under English law, *vid.* A. DICKINSON, “Legal Certainty and the Brussels Convention – Too much of a good thing?”, in P. DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Studies of the Oxford Institute of European and Comparative Law vol. 7, Oxford, Hart, 2008, pp. 115-136, at pp. 123-127. For more developed accounts, *vid.* A. NUYTS, *L’exception de Forum Non Conveniens – Étude de droit international privé compare*, *op. cit.*, pp. 107-116, and R. A. BRAND & S. C. JABLONSKI, *Forum non conveniens – History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements*, CILE studies vol. 3, Oxford, OUP, 2007, pp. 7-36 (which covers English law, Scottish law, and the Brussels system as impacted by the *Owusu* ruling). The same book provides accounts of the US, Canadian and Australian versions of the doctrine.

¹²⁸⁸ *Vid.* C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, p. 1446. *Vid.* furthermore, the explanation provided by D. E. CHILDRESS III (“Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 162-163). In his view, the US magnet forum phenomenon is a question of “*forum shopping for the most favorable law. To begin with, compensatory damage awards are believed to be higher in the United States than in the rest of the world. Similarly, cases may also be subject to punitive damage awards, which are not permitted in many foreign countries. In addition to increased damages awards, plaintiffs may avail themselves of procedural advantages when bringing suit, such as broad discovery to prove their claims, aggregation of claims, and contingency fee arrangements to support the litigation. U.S. substantive law may be more favorable than the law of another alternative forum. And, of course, in cases implicating foreign sovereigns, the prospect of a foreign court rendering justice may be so compromised that plaintiffs see a U.S. court as not only a convenient option, but the only option to vindicate their rights*”. A similar enumeration may be found in R. A. BRAND, “Challenges to Forum non conveniens”, *op. cit.*, p. 18: “*In many cases, it is not forum non conveniens itself that is found offensive so much as the fact that its operation denies plaintiffs access to U.S. courts and their liberal discovery rules; proximity to the assets of U.S. corporate defendants; perceived higher damage awards; punitive damages; jury trials; favorable products liability laws; the contingent fee system; and the lack of a loser-pays rule for attorney fees. Nonetheless, the doctrine of forum non conveniens serves as a gate-keeper to these benefits*”. For further discussion of the idea of the United States’ jurisdictional magnetism, including an analysis on how *FNC* decisions are affecting North-American international relations, and how the “*three branches of government*” need to join forces to deliver a new approach to access to courts in the US, *vid.* C. BURKE ROBERTSON, “Transnational Litigation and Institutional Choice”, *Boston College Law Review*, vol. 51, 2010, pp. 1081-1131.

*“a more defendant-friendly environment”*¹²⁸⁹. Interestingly, empirical research has established that this seems to be a relatively recent trend: the doctrine is said to have been scarcely used for addressing transnational litigation for most of its existence; it is only in recent decades that *forum non conveniens* has become a relevant issue in transnational litigation, and international relations. Furthermore, it has been empirically demonstrated, not only that the trend is recent, but that it is an increasing one: there seems to be a significant rise in the resort to *forum non conveniens*¹²⁹⁰.

In the following pages, the purpose and phases in the *forum non conveniens* reasoning (A), the criticisms and responses it faces around the globe (B), as well as some specific European considerations (C) will be presented. However, before that it may be worth to present one of the best-known examples of the use of the doctrine, which is precisely an illustration of its impact on an environmental tort case: the Bhopal catastrophe¹²⁹¹

BOX 18:

The Bhopal Castastrophe

“[...] on the night of 2-3 December 1984, 47 tons of methyl isocyanate gas (MIC), a highly toxic chemical gas, leaked out of the Union Carbide plant in Bhopal, Madhya Pradesh. Given the wind direction, the gas was driven into the most densely populated areas of the city. The results were catastrophic: more than 2,000 people (the actual estimate is closer to 10,000) died from this massive toxic exposure and at least 200,000 children, women and men suffered injuries. Livestock perished and crops were severely damaged. The mass disaster is unparalleled in recent human history and has, without hyperbole, been accurately described as an industrial Hiroshima. The Union Carbide Corporation (India) Ltd. (UCIL) managed the Bhopal plant and the Union Carbide Corporation, New York (UCC) held 50.99 per cent of its stock. The Union of India, in pursuit of the objectives of ushering in a Green Revolution, pursued a wide array of strategies, including the acceptance of offer of production of MIC-based pesticides (Sevin and Temik) at a plant designed, constructed, owned, controlled, operated and managed by the UCC, through its Indian subsidiary. The UCC trained Indian plant personnel at its production facility in West Virginia; it supervised the construction and maintenance of the plant. When a

¹²⁸⁹ Vid. C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, p. 1447

¹²⁹⁰ Vid. D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, pp. 161-162: “While the doctrine was little used in transnational cases for most of its existence, recent empirical evidence suggests that the doctrine’s use may be growing [...]”. Vid. similarly, *ibidem*, pp. 173 & 169. Furthermore, (pp. 168-169): “There has been a significant increase in forum non conveniens decisions in federal courts in recent years. Between 1990 through 2005, there were roughly 691 (about 43 per year) reported transnational forum non conveniens decisions by federal courts. Overall, the courts dismissed in favor of a foreign forum in about 50% of these cases. In cases where a foreign plaintiff was involved, the dismissal rate was higher, at 63%. Foreign plaintiffs are “twice as likely to have their suits dismissed” compared to domestic plaintiffs”. Vid., in the same sense, C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, pp. 1460-1462.

¹²⁹¹ Another environmental-tort illustration may be found in the Chevron - Lago Agrio case, presented *supra* in Box 2 (Part I, Chapter 1).

gas leakage occurred in 1982, killing two Indian workers, the UCC conducted a safety audit but declined to act on its recommendations, including the introduction of a state of the art safety system comparable to its own United States production facility. The UCC at all relevant times remained aware of all epidemiological and toxicological nature of MIC and its ultrahazardous character.

[...] Within four days of the event, contingency fee lawyers filed the first suit in the United States on behalf of thousands of victims, followed by as many as 144 additional suits in various federal courts. By 6 February 1984 [sic], the actions were joined and assigned [...] to the Southern District of New York, presided over by Judge John F. Keenan. Concerned with the scale of the disaster, the Union of India enacted the Bhopal Act under which it, inter alia, assumed parens patriae responsibility for legal redress of Bhopal victims. Given the fact that the victims were incapable of litigating their individual claims against a “monolithic multinational corporation” India brought action in the Keenan court for damages, present and future, against the UCC for an amount of \$3 billion, for death, personal injury, economic and environmental loss as well as punitive damages.

[...] It was common ground before Judge Keenan that the UCC was not amenable to the Indian jurisdiction. India even argued that its own legal system was incapable to cope with determination of rights and responsibilities in a sui generis situation of an archetypal mass disaster, rendering it an inappropriate forum. In any case, the limited forum discovery proceedings before Judge Keenan compelled the inference that his court was the most appropriate forum. [...] The response to all this was Judge Keenan’s reproduction of the federal doctrine of forum non conveniens”¹²⁹².

After the North-American FNC decision, litigation has been conducted in India on several fronts (amongst which, both civil and criminal proceedings). However, those various fronts do not seem to have provided successful redress to the victims; following the *Encyclopaedia Britannica*:

“In the early 21st century more than 400 tons of industrial waste were still present on the site. Neither the Dow Chemical Company, which bought out the Union Carbide Corporation in 2001, nor the Indian government had properly cleaned the site. Soil and water contamination in the

¹²⁹² *Vid.* U. BAXI, “Mass Torts, Multinational Enterprises Liability and Private International Law”, *op. cit.*, pp. 354-356. The following excerpts have not been included in the main text, but are very enlightening on the content of the Indian Government’s act: “India enunciated a daring principle of absolute multinational enterprise liability, a principle of responsibility commensurate with the global risk society and the attendant features of multinational “organized irresponsibility” and “organized impunity”. The principle, in effect, enunciated “a primary, absolute and non-delegable duty to any person or country in which it has in any manner caused to be undertaken any ultrahazardous or inherently injurious activity”. The scope of the duty included solicitude for the “highest standards of safety and to provide all necessary information and warnings regarding the activity involved”. Failure on both the counts to inform the Union of India and her peoples grounded the assertion of absolute multinational enterprise liability”. U. Baxi further praises the avant-garde character of the Indian Government’s intervention: “Never in the history of private international law did a sovereign nation so comprehensively present itself as a parens patriae plaintiff in a mass disaster situation. Never before Bhopal did a sovereign State seek to demonstrate, in detailed reason, why its courts were an inappropriate forum in a mass disaster/mass torts situation. Never did a Third World country innovate a principle of liability of multinational enterprises for mass torts as a principle of justice in a rapidly globalizing world”.

*area was blamed for chronic health problems and high instances of birth defects in the area's inhabitants. In 2004 the Indian Supreme Court ordered the state to supply clean drinking water to the residents of Bhopal because of groundwater contamination. In 2010 several former executives of Union Carbide's India subsidiary—all Indian citizens—were convicted by a Bhopal court of negligence in the disaster. Continued corporate and government mishandling of the disaster sparked decades of protests by victims and others*¹²⁹³.

Specifically, as regards civil liability, a settlement was reached in 1991. However, thereafter, "activist groups"¹²⁹⁴ have been unsuccessful in legally challenging the settlement in various occasions, in order to obtain further redress for the victims. A special petition filed in India's Supreme Court in 2010 has not been ruled on yet¹²⁹⁵.

A. Purpose and phases in the *forum non conveniens* reasoning

It is considered that, historically, the original ratio behind *forum non conveniens* was to avoid "vexatious and harassing litigation"¹²⁹⁶, i.e. "to prevent a plaintiff from "forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself" in order to "oppress' the defendant"¹²⁹⁷. This purpose is thought to date back to the doctrine's very first manifestations, which, despite the doctrine's latin name, are said to be found in English and Scottish case-law¹²⁹⁸, around the 19th century. Following U. Baxi, although the early formulations of the doctrine spoke of "*forum non competens*", there was a transition from "competence" to "convenience" which led the concern with "justice" to be replaced by a concern for convenience¹²⁹⁹. Nevertheless, it would seem that actually it is not necessary to

¹²⁹³ Vid. *Encyclopaedia Britannica*, "Bhopal disaster" entry (last consulted on June the 8th 2017); <https://www.britannica.com/event/Bhopal-disaster>

¹²⁹⁴ As labelled by Union Carbide in the www.bhopal.com website the company has established to manage the public-relations repercussions of the case (vid. specifically <http://www.bhopal.com/Bhopal-Litigation-in-India/Civil%20Litigation>).

¹²⁹⁵ Vid. <http://www.bhopal.com/Bhopal-Litigation-in-India/Civil%20Litigation>

¹²⁹⁶ Vid. P.J. KALIS & T.M. REITER, "Forum non conveniens: a case management tool for comprehensive environmental insurance coverage actions?", *op. cit.*, p. 392.

¹²⁹⁷ Vid. C. A. WHYTOCK & C. BURKE ROBERTSON, "Forum Conveniens and the enforcement of foreign judgments", *op. cit.*, pp. 1454-1455. Australia still conceives *forum non conveniens* in these terms nowadays (vid. R. A. BRAND & S. C. JABLONSKI, *Forum non conveniens – History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements*, *op. cit.* pp. 107-108, and 87-100).

¹²⁹⁸ Vid. D. E. CHILDRESS III, "Forum Conveniens: The Search for a Convenient Forum in Transnational Cases", *op. cit.*, pp. 164-165: "According to the Supreme Court, the doctrine of forum non conveniens has a long history". Furthermore, P.J. KALIS & T.M. REITER, "Forum non conveniens: a case management tool for comprehensive environmental insurance coverage actions?", *op. cit.*, pp. 402-403: "It is often assumed that forum non conveniens-with its Latin name-has an ancient lineage.37 Eminent legal figures such as Justice Robert Jackson and Paxton Blair have purported to trace the doctrine's antecedents back to English and Scottish case law".

¹²⁹⁹ Vid. U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *op. cit.*, p. 350. The same progression is accounted for by C. A. WHYTOCK & C. BURKE ROBERTSON, ("Forum Conveniens and the enforcement of foreign judgments", *op. cit.*, pp. 1454-1455): "[l]ater statements suggest that the doctrine's purpose is "to ensure that the trial is convenient". They furthermore refer other opinions which relate the doctrine to "avoiding 'undue burden'" on the litigants or the courts", or see it "as a device for giving judges "discretion to fine-tune and equilibrate jurisdiction in individual cases".

step back in time so radically in order to find the roots of its current formulation within the legal system of the United States: after having been rescued from oblivion by a law review article published in 1929 by an associate of a New York law firm, the doctrine was generally accepted for application before federal courts in 1948, expanding from there to state courts¹³⁰⁰. In this sense, as explained by R.A. Brand, the re-blossoming of the doctrine in the United States is largely due to the developments of the case-law of the Supreme Court, specifically through three core decisions (which not only were followed by both federal and state courts, but also inspired legislation in certain states)¹³⁰¹: *Gulf Oil Corp. v. Gilbert*¹³⁰², *Koster v. Lumbermens Mutual Casualty Co.*¹³⁰³, and *Piper Aircraft Co. v. Reyno*¹³⁰⁴. This case-law – especially *Gulf Oil* – has submitted the assertion of *forum non conveniens* to a two-step analysis: it first engages in determining whether there is an available and adequate alternative *forum*, and then considers a set of private and public interest factors in order to determine whether the relevant court should dismiss – or stay – the suit in favor of the said alternative *forum*¹³⁰⁵. Let us consider both phases of the reasoning in sequence.

i. 1ST Step: availability and adequateness of the alternative forum

As referred, the first step of the *forum non conveniens* reasoning is assessing if the defendant-suggested *forum* stands as an adequate and available alternative¹³⁰⁶. This requirement actually comprises two sub-requirements: on the one hand, availability and, on the other, adequateness¹³⁰⁷. The need to establish the availability of the alternative *forum* is never a significant hindrance to the success of a *forum non conveniens* motion: this requirement is merely understood as need to verify that the defendant is subject to jurisdiction before the alternative court, and is thus routinely satisfied by consenting to the jurisdiction thereof as part of the very *FNC* motion¹³⁰⁸. Once availability is verified, the alternative foreign forum needs to satisfy a certain threshold of judicial adequacy, which is assessed *ex ante*, from the plaintiff's perspective (considering “whether the plaintiff may obtain at least some remedy before the alternative court”)¹³⁰⁹. This assessment, despite divergences from court to court, is

¹³⁰⁰ *Vid.* P.J. KALIS & T.M. REITER, “Forum non conveniens: a case management tool for comprehensive environmental insurance coverage actions?”, *op. cit.*, pp. 402-403 & D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 164-165. As referenced by Childress, the 1929 article is: “P. BLAIR, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM L. REV. 1 (1929)”. Furthermore, both sources refer to a commentator, “Prof. Stein”, as playing a significant role in the doctrine’s resurfacing. The reference quoted by P. J. Kalis and T. M. Reiter is the following: “ALLAN R. STEIN, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 796 (1985)”.

¹³⁰¹ *Vid.* R. A. BRAND, “Challenges to Forum non conveniens”, *op. cit.*, p. 5.

¹³⁰² *Vid.* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

¹³⁰³ *Vid.* *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

¹³⁰⁴ *Vid.* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

¹³⁰⁵ *Vid.* C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, p. 1456.

¹³⁰⁶ *Vid.* R. A. BRAND “Challenges to Forum non conveniens”, *op. cit.*, p. 5.

¹³⁰⁷ *Vid.* C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, p. 1456.

¹³⁰⁸ *Ibidem*, pp. 1456-1457.

¹³⁰⁹ *Ibidem*, pp. 1459-1460.

said to be “uniformly lenient” since “[c]ourts typically disregard concerns about lack of fairness, impartiality, or due process in a foreign judiciary; when they do take these factors into account, the courts ordinarily consider them only on a case-specific basis”¹³¹⁰. Overall, these considerations lead to conclude that the alternative *forum* requirement can be very easily fulfilled¹³¹¹.

ii. 2nd step: balancing public and private interests

Once the existence of an alternative and adequate forum has been verified, the second phase of the *forum non conveniens* reasoning, the so-called “*Gulf Oil analysis*”, aims at providing guidance to the relevant court as to how to exercise its wide margin of discretion in choosing whether to stay / dismiss the claim or to allow it to proceed¹³¹². In a nutshell, this second step is a balancing exercise between a set of private and public interest factors which serve as “guidelines” in order to ascertain whether the *forum* suggested by the defendant is more appropriate than the one chosen by the plaintiff¹³¹³. Interestingly, this is a point of divergence between the United States and other Common-Law jurisdictions: while the former considers public interest factors as well as private ones, the latter restrict the operation to the private interest ensemble¹³¹⁴. The list of private and public interest items to be considered by US courts was delivered by the Supreme Court in the above-referred *Gulf Oil Corp. v. Gilbert* judgment and can be summarized as follows:

The private-interest factors set – which relates to the “*the convenience of the litigants*” – is composed of the following elements¹³¹⁵: i) the private interest of the litigant; ii) the relative

¹³¹⁰ *Ibidem*, *op. cit.*, pp. 1457-1458. Furthermore: “Under the basic adequacy standard, stated by the Supreme Court in *Piper Aircraft Co. v. Reyno*, the defendant’s proposed alternative forum is adequate unless the potential remedy it offers is “so clearly inadequate...that it is no remedy at all,” such as “where the alternative forum does not permit litigation of the subject matter of the dispute.” However, as the Court emphasized, this will be the case only “[i]n rare circumstances.” Thus, like the availability standard, the Supreme Court’s basic adequacy standard is easily satisfied”.

¹³¹¹ *Ibidem*, pp. 1457-1460.

¹³¹² *Vid.* C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, pp. 1460-1462; P.J. KALIS & T.M. REITER, “Forum non conveniens: a case management tool for comprehensive environmental insurance coverage actions?”, *op. cit.*, pp. 403-404.

¹³¹³ *Vid.* R. A. BRAND, Challenges to Forum non conveniens, *op. cit.*, p. 5. Following D. E. CHILDRESS III (“Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 167), it seems important to highlight that such elements are only “*guideposts*” and the United States Supreme Court “has declined to catalogue all of the circumstances where dismissal would be proper” or to “precisely identify a hierarchy of factors compelling dismissal”. Furthermore, despite the lack of hierarchy, it is contended that, nevertheless, “one of the leading rationales [leading to dismissal] is whether the transnational case requires complicated applications of foreign law. Indeed, many lower federal courts have given this factor substantial and decisive weight in the forum non conveniens analysis. While this factor is not conclusive, the [Supreme] Court has emphasized that the doctrine “is designed in part to help courts avoid conducting complex exercises in comparative law”.

¹³¹⁴ Further developed in R. A. BRAND & S. C. JABLONSKI, *Forum non conveniens – History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements*, *op. cit.*, pp. 111-113.

¹³¹⁵ This summary has been elaborated from the accounts made by C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, pp. 1460-1462, and R. A. BRAND, “Challenges to Forum non conveniens”, *op. cit.*, p. 5-6. Surprisingly, the description made by P.J. KALIS & T.M. REITER (“Forum non conveniens: a case management tool for comprehensive environmental

ease of access to sources of proof; iii) availability of compulsory process for attendance of unwilling witnesses; iv) the cost of obtaining attendance of willing witnesses; v) the possibility of viewing premises “if view would be appropriate to the action”; vi) all other practical problems that make trial of a case easy, expeditious and inexpensive; vi) questions relating to the enforceability of a judgment, should one be obtained.

The public interest considerations – those which relate to “the convenience of the forum” – are the following¹³¹⁶: i) “docket congestion” (“Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin”); ii) “the burden of jury duty on a community that has no relation to the lawsuit” (“Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation”); iii) “the benefit of having cases affecting a particular forum adjudicated in that forum” (“In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home”); iv) “the avoidance of choice-of-law issue” and “the benefit of having a court familiar with the substantive law adjudicate the suit” (“There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself”).

Once the interests at stake in the relevant dispute are identified, they are weighted against each other: those of the plaintiff versus those of the defendant, those of the *forum* State versus those borne by other States, “and the interest of U.S. courts in expending time and resources in litigating such cases”¹³¹⁷. Unfortunately, there is little guidance as to how courts evaluate the relevant interests exactly, which results in a lack of clarity and foreseeability when planning litigation¹³¹⁸.

insurance coverage actions?” *op. cit.*, pp. 403-404) does not include the first element (the set of private interest factors; the private interest of the litigant). The other authors refer that factors ii to vi are qualified as “important”, as opposed to the private interest of the litigant, described as “[a]n interest to be considered, and the one likely to be most pressed”.

¹³¹⁶ This paragraph combines the description made by P.J. KALIS & T.M. REITER (“Forum non conveniens: a case management tool for comprehensive environmental insurance coverage actions?”, *op. cit.*, pp. 403-404) with excerpts from the Supreme Court decision as quoted by C. A. WHYTECK & C. BURKE ROBERTSON (“Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, pp. 1460-1462) and R. A. BRAND (“Challenges to Forum non conveniens”, *op. cit.*, p. 6). Furthermore, following D. E. CHILDRESS III (“Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 166): “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” In the domestic forum non conveniens context as outlined in Gilbert, the plaintiff’s choice of forum should only be disturbed in limited circumstances. Such limited circumstances would appear to be those cases where the plaintiff’s choice of an inconvenient forum causes injustice to the defendant, by choosing a forum with little or no nexus to the case at bar which compromises the defendant’s ability to mount an appropriate defense.⁴³ This rule was later developed by the Court in *Piper Aircraft Company v. Reyno*, which applied the doctrine in the transnational context”.

¹³¹⁷ *Vid.* D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 164.

¹³¹⁸ *Ibidem*, p. 164.

B. Global criticism and global responses

From a global perspective, it is possible to formulate, at least, three significant criticisms to the way the North-American *forum non conveniens* doctrine operates, the first thereof being directed to its implementation whenever plaintiffs are not United-States citizens, and the second and the third deriving from its consequences on the global scene.

To begin with, the doctrine is said to be inclined towards a difference of treatment between foreign and domestic plaintiffs from the outset. Generally, it is considered that “*there is ordinarily a strong presumption in favor of the plaintiff’s choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum*”. However, the Supreme Court of the United States considers that the origin of the plaintiffs may play a relevant role in overturning the said presumption and, thus, that “*the presumption applies with less force when the plaintiff or real parties in interest are foreign*”. Comparatively, it is understood that “*a plaintiff’s choice of forum is entitled to greater deference when the plaintiff has chosen the home forum*”¹³¹⁹. Against this discriminatory appearance, R. A. Brand & S. C. Jablonski contend that the referred position is not meant to be considered as a bias against foreign plaintiffs in the implementation of the doctrine before US courts, “*but rather simple recognition that the presence of a foreign plaintiff will make a forum less convenient than will the presence of a local plaintiff*”¹³²⁰. In this sense, the referred authors conceive it as merely only one element of the balancing of private interest factors, not shared by other Common-Law jurisdictions – not the UK, nor Canada, nor Australia¹³²¹.

Once implemented, there are two sets of consequences that *forum non conveniens* is likely to lead to in private-international-litigation cases, which are far from fortunate. Each of them has been respectively identified as creating a different kind of access-to-justice gap: Firstly, D. Childress III warns that, conversely to what happens in intra-US cases, a *forum non conveniens* dismissal in international disputes may prevent plaintiffs from pursuing their claims altogether, for in certain instances *FNC* entails denying access to the only reasonable *forum* in the case in question. Childress asserts that empirical research conducted in respect of cases filed in the 1980s demonstrates that a successful *FNC* motion is likely to lead to the relevant case not be heard anywhere: “*plaintiffs generally did not refile their suits in foreign courts following forum non conveniens dismissals; instead, they tended to settle on terms favorable to the defendants or abandon their suits altogether*”¹³²².

¹³¹⁹ The preceding quotations are excerpts from the Supreme Court decision as quoted by R. A. BRAND, “Challenges to Forum non conveniens”, *op. cit.*, p. 6, and C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, pp. 1460-1462.

¹³²⁰ *Vid.* R. A. BRAND & S. C. JABLONSKI, *Forum non conveniens – History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements*, *op. cit.*, pp. 114-116, specially p. 116. *Cfr.*, however, with E. T. LEAR, “National Interests, Foreign Injuries, and Federal Forum Non Conveniens”, *U.C. Davis L. Rev.*, vol. 41, 2007, pp. 559-603, at p. 561: “*Foreign plaintiffs, whose forum choices receive “less deference,” find their claims almost uniformly dismissed*”.

¹³²¹ *Vid.* R. A. BRAND & S. C. JABLONSKI, *Forum non conveniens – History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements*, *op. cit.*, pp. 116.

¹³²² *Vid.* D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, pp. 161 & 168. *Cfr.* with C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, pp. 1454-1455, who consider that *FNC* is subordinated to

Additionally, C. Whytock and C. Burke Robertson identify a second kind of access-to-justice gap which may arise when a private international dispute mutates into so-called “*boomerang litigation*”¹³²³. This kind of disputes arises whenever, after a *forum non conveniens* dismissal, the action is refiled in the allegedly more convenient *forum* and a judgment on the merits is obtained against the defendant, giving rise to subsequent enforcement proceedings in the original *forum*. In these cases, which, allegedly, are on the rise, the further access-to-justice gap may crystallize from the interplay between the *FNC* doctrine and the North-American approach to the enforcement of foreign judicial decisions: these two doctrines, when applied in the same transnational dispute, may lead to a complete denial of justice if the relevant North-American court declines allowing the enforcement of the foreign judgment against the assets that the defendant may have in the United States¹³²⁴. These outcomes arise whenever, having obtained the dismissal they wanted, defendants successfully argue at the enforcement stage that either the foreign judgment, or the foreign legal system where it stems from, suffer “*from deficiencies that should preclude enforcement*”¹³²⁵. This phenomenon, which tends to occur whenever defendants face “*unexpectedly pro-plaintiff outcomes, including substantial judgments against them*”, has been labelled as “*Forum shopper’s remorse*”¹³²⁶. Notwithstanding the fact that the access-to-justice gap may materialize as the result of “common” exceptions to enforcement (such as fraud, public policy, reciprocity, etc.)¹³²⁷, the gap is, actually, more likely to arise from the divergences between the foreign-judicial-adequacy standards used in each of the referred doctrines. In boomerang litigation

“[...] a U.S. court will assess the adequacy of the same foreign judiciary twice in the same transnational dispute. First, at the *forum non conveniens* stage, there will be an *ex ante* foreign judicial adequacy assessment under the lenient, plaintiff-focused standard. Then, at the enforcement stage, there will be an *ex post* assessment under the stricter, defendant-focused standard. Because the standards are different, the same foreign judiciary may be adequate for *forum non conveniens* purposes but inadequate for enforcement purposes [...] Plaintiffs understand what is at stake when defendants first argue that a foreign judiciary is adequate in order to obtain a *forum*

an overall “*access-to-justice objective*”: “*To ensure that the plaintiff will have court access somewhere and that the dismissal will not entirely deny the plaintiff access to justice, a U.S. court may not dismiss a suit on forum non conveniens grounds unless there is an available and adequate alternative forum—even if the doctrine otherwise points toward dismissal. Thus, rather than a single-minded focus on convenience—which the doctrine’s Latin name may suggest—the doctrine’s overarching purpose is best understood as being to promote the ends of justice*”.

¹³²³ For a thorough presentation and discussion of the notion *vid.* R. A. BRAND, “Challenges to *Forum non conveniens*”, *op. cit.*, p. 22-27.

¹³²⁴ *Vid.* C. A. WHYTOCK & C. BURKE ROBERTSON, “*Forum Conveniens* and the enforcement of foreign judgments”, *op. cit.*, pp. 1472 & p. 1481. Furthermore: “*This gap violates the principle of ubi jus, ibi remedium—the idea that, for every violation of a right, there must be a remedy*”.

¹³²⁵ *Ibidem*, p. 1447.

¹³²⁶ *Vid.* MICHAEL D. GOLDBERGER, “*Forum Shopper’s Remorse*”, *Corp. Couns.*, Apr. 2010, as quoted by C. A. WHYTOCK & C. BURKE ROBERTSON, “*Forum Conveniens* and the enforcement of foreign judgments”, *op. cit.*, p. 1447. Also discussed by D. E. CHILDRESS III, “*Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*”, *op. cit.*, p. 175, and by C. BURKE ROBERTSON, “*Transnational Litigation and Institutional Choice*”, *op. cit.*, pp. 1081-1087.

¹³²⁷ *Vid.* C. A. WHYTOCK & C. BURKE ROBERTSON, “*Forum Conveniens* and the enforcement of foreign judgments”, *op. cit.*, p. 1473.

non conveniens dismissal, and then argue at the enforcement stage that the same foreign judiciary is inadequate. If defendants are “not estopped from taking these inconsistent positions, plaintiffs would have no forum or remedy [...]”¹³²⁸.

Allegedly, this change of pleading position is a successful technique for defendant’s purposes, which may also be on the rise¹³²⁹. However, its success is scholarly criticized, due to the fact that the resulting outcome is considered to undermine the goals of both the North-American *forum non conveniens* and judgment-enforcement doctrines¹³³⁰. Interestingly, it is contended that, since a *FNC* dismissal does not seem to end cases any longer, defendants may want to re-

¹³²⁸ Vid. C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, p. 1474. Furthermore (pp. 1474-1475): “Defendants also understand the implications of this doctrinal interaction. They are aware that with its lenient foreign judicial adequacy standard, “the doctrine of *forum non conveniens* enables US federal courts to dismiss cases in favour of a foreign forum they deem more convenient [...] even] when the plaintiffs have alleged that the foreign forum would not provide them, for one reason or another, with a fair hearing.” And they are further aware that “the ‘adequate alternative forum’ inquiry in *forum non conveniens* cases is governed by a different, less demanding standard than is used to determine whether a foreign judgment is enforceable in the United States.” They are aware that the *ex post* nature of the foreign judicial adequacy inquiry at the enforcement stage means that if the foreign judiciary’s adequacy deteriorates after a *forum non conveniens* dismissal, enforcement may be barred by *ex post* application of the judgment enforcement doctrine’s adequacy standard. The key element lies, therefore, not only in the divergence on the standards resorted to by each doctrine, but especially in each of their subjective focuses: while from a *forum non conveniens* perspective, the foreign court may be an adequate *forum* for the plaintiff, from an enforcement doctrine perspective, it may be inadequate for the defendant. However, *cfr.* with the opinion of D. E. CHILDRESS III (“Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 163): “the consideration of litigation convenience is not just focused on the plaintiff in U.S. decision making, but also on the demands that litigating the case in the United States places on the defendant (assessed through due process and *forum non conveniens*), and on U.S. courts (assessed explicitly through *forum non conveniens*). Unlike countries in the European Union where there is arguably a sense that plaintiffs must have access to at least one European forum to bring their case, U.S. courts appear less concerned solely with the plaintiff’s options. Indeed, U.S. courts seem to focus uniquely on the cost to defendants in litigating a case here, especially through concerns with due process [...] United States courts are also concerned with the cost to judicial economy and resources. The idea is that expending court resources by taking up court time and empaneling jurors is too costly in cases where there is only a limited U.S. contact with the case at bar. United States courts are thus concerned with normative questions concerning whether certain cases should be heard in the United States, and this concern significantly focuses on the defendant”. A real-life example is presented in pages 1476-1478 of C. A. WHYTOCK & C. BURKE ROBERTSON (“Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*): “[...] in the early 1990s, thousands of Latin American and Caribbean plaintiffs sued various U.S. defendants, including Shell Oil Co. and Dole Food Co., in Texas state courts for alleged injuries caused by exposure to the chemical dibromochloropropane (DBCP). Shell allegedly manufactured DBCP, and Dole allegedly used it in Nicaragua. The suits were removed and consolidated in the U.S. District Court for the Southern District of Texas. In *Delgado v. Shell Oil Co.*, the defendants successfully moved to dismiss the consolidated action on *forum non conveniens* grounds in favor of a variety of foreign countries, including Nicaragua, arguing that they provided adequate alternative forums and were more appropriate for adjudicating these suits. [...] Ultimately] Shell reconciled its two positions by drawing attention to the differences between the *forum non conveniens* doctrine’s foreign judicial adequacy standard and the judgment enforcement doctrine’s foreign judicial adequacy standard. [...] So] The court rejected the declaratory action defendants’ estoppel argument, and held that the Nicaraguan judgment was unenforceable. In another DBCP suit filed in Nicaragua, a \$97 million judgment was entered against Dole, Shell, and other defendants”.

¹³²⁹ Vid. C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, pp. 1448 & 1476.

¹³³⁰ *Ibidem*, pp. 1481-1482.

consider whether it is worth filing *FNC* motions to begin with, and risking enforcement proceedings later, instead of directly litigating the cases before North-American courts¹³³¹. Nevertheless, this contention does not seem to be strategically sound from a defendant's litigation-planning standpoint: the referred success of the "remorse" pleading at the enforcement stage means that defendants choosing a *FNC*-route when the action is filed before a United States court have two – or three – opportunities to avoid providing redress, instead of one¹³³².

Before turning to the European objections towards the notion of *forum non conveniens*, it must be briefly referred that these three criticisms have led to political contestation and legal responses from other countries around the world (notably in Latin-America), which strongly oppose the practical outcomes that the North-American *FNC* practice has delivered in past decades. Some Latin-American States have drafted so-called "blocking statutes", specifically designed to neutralize the *FNC* doctrine: these statutes render domestic courts unavailable for cases that have been rejected elsewhere on the basis of *FNC*, i.e. first filed and dismissed outside the country passing the statute. As it may be easily understood, the enactment of these laws aims directly at removing the alternative *forum* required in the first stage of the *forum non conveniens* analysis¹³³³. An interesting example of this tendency can be found, as reported by R. A. Brand, in the "*Model Law on International Jurisdiction and Applicable Law to Tort Liability*" created by a non-official organization known as the "Latin American Parliament" ("PARLATINO")¹³³⁴. However, this manoeuvre was not particularly successful and, subsequently,

¹³³¹ *Vid.* D. E. CHILDRESS III, "Forum Conveniens: The Search for a Convenient Forum in Transnational Cases", *op. cit.*, p. 178-179.

¹³³² For a detailed account of this kind of situation, *vid.* C. WESTON, "The enforcement loophole: judgment-recognition defenses as a loophole to corporate accountability for conduct abroad", *Emory International Law Review*, vol. 25, 2011, pp. 731-770. On the basis of the Chevron-Lago Agrio saga, this author explores in detail the maneuvers that may block the judgment enforcement phase when a boomerang litigation returns to the US (especially how the "loophole" is formed and which solutions can be suggested to deal with it, pp. 758-768). It pays special attention to the "*Uniform Foreign Money-Judgments Recognition Act, adopted by a majority of the states in the United States, and the defenses typically raised in judgment-enforcement proceedings*". It also explores case-law developments, the so-called "*international due process*" requirement (i.e. "*interpreting the requirement of due process to mean, in the international context, that the foreign procedures are 'fundamentally fair' and do not offend basic fairness*", pp. 743-744), and considerations on estoppel (pp. 747-749).

¹³³³ *Vid.* R. A. BRAND, "Challenges to Forum non conveniens", *op. cit.*, pp. 11, 17 & 20. *Vid.* also C. WESTON, "The enforcement loophole: judgment-recognition defenses as a loophole to corporate accountability for conduct abroad", *op. cit.*, pp. 754-756; and C. BURKE ROBERTSON, "Transnational Litigation and Institutional Choice", *op. cit.*, pp. 1081-1087.

¹³³⁴ *Vid.* R. A. BRAND, "Challenges to Forum non conveniens", *op. cit.*, pp. 20-21. The model law contains two articles:

"Art. 1. National and international jurisdiction. The petition that is validly filed, according to both legal systems, in the defendant's domiciliary court, extinguishes national jurisdiction. The latter is only reborn if the plaintiff desists of his foreign petition and files a new petition in the country, in a completely free and spontaneous way. Art. 2. International tort liability. Damages. In cases of international tort liability, the national court may, at the plaintiff's request, apply to damages and to the pecuniary sanctions related to such damages, the relevant standards and amounts of the pertinent foreign law". As explained by Brand: "Similar statutes favoring litigation in the court of the defendant's domicile (consistent with article 323 of the Bustamante Code), and preventing reference to another court, even if the court at the defendant's domicile considers that other court the more appropriate forum, were enacted in a number of Latin American countries. These statutes did not always have their intended effect".

the tendency has shifted towards “*responding*” by accepting the dismissed cases, conducting the trials, and awarding substantial judgments against the defendants (which has given rise to the above-referred boomerang litigations)¹³³⁵. In any case, the North-American resort to *forum non conveniens* has been found especially offensive in Latin America not only due to the direct practical impact of the doctrine on plaintiffs from the region, but also for more policy-related reasons which are shared with Europe¹³³⁶.

C. European criticism and European responses

Beyond the developments that have been presented in previous pages, there is an additional set of objections that may be put forward, which does not relate either to the (possibly) non-egalitarian manner in which the *FNC* doctrine has been implemented in the US, nor to the severe consequences described. This more idiosyncratic set of objections derives from the fact that the policy behind *forum non conveniens* may be hard to reconcile with the Continental-European understanding of international jurisdiction: in other words, the *FNC* doctrine constitutes a clear point of friction between the logics underpinning the construction of international jurisdiction in the Common-Law and in the Civil-Law worlds. As explained by R. A. Brand, the friction derives from the diverging sets of parameters used to construe international jurisdiction in each of the referred legal families. First, generally, Civil-Law jurisdictions give judges as little discretion as possible and, so *FNC* is inconsistent with their basic understanding of a judge’s role to begin with. Additionally, the possibility of exercising discretion to stay or dismiss a case in favor of a foreign court may be seen “*as inconsistent with every person’s (and every plaintiff’s) right of access to the courts*”¹³³⁷. However, an even more fundamental distinction is said to arise from the very philosophies which inspire each of the international jurisdiction systems: while the EU’s system of international jurisdiction is said to be based on the notion of “access to justice” (“*the plaintiff’s right to have his or her day in court*”), the North-American system is said to be based on the notion of “*due process rights of the defendant*”, the first allegedly being “*a clear plaintiff-protection approach*”, and the latter

¹³³⁵ Vid. R. A. BRAND, “Challenges to Forum non conveniens”, *op. cit.*, pp. 17 & 11.

¹³³⁶ As explained by R. A. BRAND (*Ibidem*, pp. 17-18) the “*distaste*” found in Latin America arises from the fact that the Latin American conception of international jurisdiction is very similar to the European one: “*Two basic rules of Latin American civil procedure, like those in the continental European systems from which they developed, provide the basis for this concern with the application of the forum non conveniens doctrine in the United States. First, it is a basic rule of jurisdiction in Latin America that a person (legal or natural) may be sued at his place of domicile or residence. Second, like the lis pendens rule in Europe, once a plaintiff has chosen a court that has jurisdiction on this ground, that court generally does not have discretion to refuse to hear the case, and all other courts are considered to have lost jurisdiction over the case*”.

¹³³⁷ Vid. R. A. BRAND, “Challenges to Forum non conveniens”, *op. cit.*, p. 8. For an interesting conception of *forum non conveniens* as a device to avoid parallel litigation and thus a confrontation between such notion and *lis alibi pendens*, vid. especially pp. 3 and 8-10: “*Neither approach to parallel litigation is wholly satisfactory. The lis pendens approach favors efficiency and predictability (values focused on societal interests) over equity and fairness (values focused on individual interests). The result is a race to the courthouse that can interrupt (and perhaps prevent) rational negotiated resolution of disputes before tensions are raised by formal legal proceedings. The common law approach (forum non conveniens) requires that courts be given discretion (something disfavored in civil law systems), and brings with it significant uncertainty*”.

being “a clear defendant-protection approach”¹³³⁸. From the North-American perspective, it is the notion of due process, jointly with judicial discretion, which should determine if a court “should” hear a case when it “can”¹³³⁹.

This latter point is not, however, completely accurate. While to the European conception, the notion of access to justice is fundamental, the Brussels I system is built upon the touchstone of the “*actor forum sequitur rei*” principle, which is a pro-defendant basis of jurisdiction. Moreover, departure therefrom is not simple and, following constant case-law from the ECJ, exceptions thereto – special *fora* – are meant to be construed narrowly. To that extent, it could be said that the philosophy underpinning the EU’s system of international jurisdiction in civil and commercial matters is constituted by an abstract balance between the notion of access to justice and the “*actor forum sequitur rei*” principle. Therefore, fully understanding the actual source of the friction, and the ensuing international-relations discontentment, requires a higher degree of conceptual refinement: the American approach to *FNC* actually entails a disruption in the aforementioned balance, the one underlying the European approach to international jurisdiction.

The starting point to reach this conclusion is, as explained by D. Childress III, that North-American federal courts have asserted that the United States cannot be required to be the “courthouse” of the world. This is said to be so, allegedly, because determining whether “foreign plaintiffs [should] be permitted to avail themselves of a U.S. forum to vindicate harms occurring primarily or completely abroad” is problematic to them, notably due to the fact that this kind of cases may be delicate in terms of foreign policy and international relations¹³⁴⁰. Two sets of remarks may be made in this respect:

i) First, while it is generally said that comity in international relations is one of the purported goals of *forum non conveniens*, and it is thus understandable that the United States may wish to avoid clashes with other countries, it is essential to make distinctions and not place all cases in the same basket. There is a difference between, on the hand, cases where the defendant is a foreign sovereign and, on the other hand, cases where the defendant is not. While the delicacy revolving around the former is understandable (hence why these cases may be addressed through general institutions of public international law – as immunities – and through international relations doctrines), one may question the delicacy of the latter. It is

¹³³⁸ Vid. R. A. BRAND, Challenges to Forum non conveniens, *op. cit.*, pp. 24-25.

¹³³⁹ Vid. D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 160. As further explained by R. A. BRAND (Challenges to Forum non conveniens, *op. cit.*, pp. 24-25): “In the United States, [...] Questions of jurisdiction are resolved by looking at the due process rights of the defendant, using an analysis which requires a three-way nexus among the court, the defendant, and the claim. In civil law countries, questions of jurisdiction are not so much questions of the defendant’s rights as they are questions of what court is “competent” to hear a case. Thus, for example, the rules of special jurisdiction found in the Brussels I Regulation of the European Union rely on a two-way nexus between the court and the claim. By omitting a separate analysis of the interests of the defendant in each case, the resulting bases of jurisdiction hypothetically (and in real cases) allow European courts to exercise jurisdiction in ways which United States courts would hold to violate the defendant’s right to due process. The contrast between conceptions of jurisdiction in the United States and the European Union illustrates the basic jurisdictional distinction between the United States and most of the rest of the world”.

¹³⁴⁰ Vid. D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, pp. 158-159.

asserted that jurisdiction over these cases may “offend ‘amicable working relationships’” with a foreign sovereign” and that “[i]n refusing to interfere with the foreign country’s jurisdictional sphere [in this way], courts [express] respect for foreign courts’ jurisdiction [...] in the expectation of [reciprocity and cooperation]”¹³⁴¹. However, these assertions do not seem to correspond with a modern (at least, European) understanding of the notions of comity, sovereignty and jurisdiction – of civil and commercial courts. This seems to be pointed out even by certain North-American authors. As put by E. T. Lear:

*“For comity to be relevant to a choice of forum analysis, one must assume that a foreign nation will take offense because an American court vested with subject matter jurisdiction adjudicates a claim against a defendant over whom it has personal jurisdiction. The decision to adjudicate under such circumstances is a very different exercise of power than the decision to apply domestic law to conduct abroad. Adjudicating a foreign claim implies no disrespect to “the legislative, executive or judicial acts” of another country. Routinely dismissing claims brought by foreign citizens against American corporations, on the other hand, invites foreign nations to accuse us of protectionism or xenophobia. Foreign governments, whose interests the federal courts so zealously protect, seldom complain when we open our doors to claims brought by their citizens. Most of the voices raising comity concerns belong to multinational corporate defendants who should lack standing to raise the interests of a sovereign nation”*¹³⁴².

Similar ideas may be found in the works of D. Childress III¹³⁴³, and of C. Whytock and C. Burke Robertson. The latter even support a contention made by other scholars before them: possibly, and conversely to general wisdom, comity may actually support asserting jurisdiction in tort cases “where the substantive law does not differ markedly between” countries. This would especially be so in cases where plaintiffs are foreign tort claimants and defendants are North-American corporations:

*“Foreign sovereigns are unlikely to be offended when the same law is to be applied, especially when the defendants are U.S. corporations. On the contrary, over the last decade a number of countries—especially those in Latin America—have expressed displeasure at the prevalence of discretionary dismissals from U.S. courts”*¹³⁴⁴.

¹³⁴¹ Vid. C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, pp. 1491-1492. Furthermore: “Some courts still reflexively list comity as a factor that favors dismissal for forum non conveniens, reasoning that by dismissing the case to be refiled in a foreign jurisdiction, they express respect for the latter forum”.

¹³⁴² Vid. E. T. LEAR, “National Interests, Foreign Injuries, and Federal Forum Non Conveniens”, *op. cit.*, pp. 600-601.

¹³⁴³ Vid. D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 174.

¹³⁴⁴ Vid. C. A. WHYTOCK & C. BURKE ROBERTSON, “Forum Conveniens and the enforcement of foreign judgments”, *op. cit.*, p. 1491-1492. Even more so, possibly, there may even be a case in contending that asserting jurisdiction and applying *lex fori* (irrespective of whether its content is similar or not to the *lex loci damni*) should not raise comity issues when the defendant is a citizen or corporation of the forum.

There seems to be, therefore, a strong case for contending that, actually, the weight of the alleged worry for comity and the well-being of international relations should not play the role that it has played up to now in the frame of the North-American *FNC* analysis.

ii) The second set of remarks to be made refers to the idea that these cases are about “*vindicat[ing] harms occurring primarily or completely abroad*”, and to the academic distinction between so-called “f-squared” and “f-cubed” cases. As regards the foreign location of the alleged harm, from a European perspective, giving such a preponderant weight to this factor when conceiving jurisdictional “convenience” entails disregarding the policy significance of other elements. Beyond the place of injury, the location of the plaintiff and the location of the defendant have both a very relevant value and very relevant policy implications. From a structural perspective, North-American academia distinguishes between “f-squared” and “f-cubed” cases. So-called f-squared cases are those cases where two out of the three referred elements are foreign (“f”). Conversely, f-cubed cases are those which are “*only [...] connected to the United States because this is the forum where the case is filed — namely, where a foreign plaintiff sues a foreign defendant for a foreign injury*”¹³⁴⁵. While the North-American tendency, over the last decades, to increasingly limit court-access in f-cubed cases may be understandable, the same cannot be predicated about f-squared cases. These cases, as clearly put by D. Childress III, may be conveniently filled and conducted before US courts, if the United States are the plaintiff’s or the defendant’s home *forum*¹³⁴⁶. Yet, as proved by *Bhopal* and *Chevron / Lago Agrio*, f-squared cases are equally subsumed into the same tendency. It is at this very point that the actual European - North-American friction becomes clear: it is not a matter of a plain general disregard of the European *actor sequitur forum rei* “culture”; the actual problem lies in that asserting jurisdiction in f-square cases would respect as much the due-process approach as it respects access to justice. Conversely, not asserting jurisdiction in f-square cases appears just as offensive from the standpoint of the European (balance of interests) approach to international jurisdiction, without necessarily advancing due process. For, in any case, if the North-American legal system is so concerned about due process, what better way may there be to provide due-process guarantees to a defendant than allowing her to be sued in her home *forum* in the United States? There is no ultimate guarantee as regards due-process guarantees when the action gets sent away.

Overall, these two branches of reasoning (i and ii above) help understand why it may be considered in certain instances that the doctrine is being used to foster economic protectionism in respect of North-American corporations¹³⁴⁷. In order to reach this conclusion one needs to ask whose convenience is actually preserved by the *forum non conveniens* doctrine. Following, D. Childress III victim / plaintiff convenience is, *de facto*, evicted from the doctrine’s content, since “[...] *the convenience courts are concerned with is the defendant’s convenience balanced against the United States’s interest in having domestic plaintiffs’ cases*

¹³⁴⁵ *Vid.* D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 163

¹³⁴⁶ *Ibidem.*

¹³⁴⁷ R. A. BRAND acknowledges the existence of this criticism (“Challenges to Forum non conveniens”, *op. cit.*, pp 19-20): the “*application of the forum non conveniens doctrine is used to protect U.S. corporations from liability for harm caused [outside the United States]*”. So does C. Burke Robertson (C. BURKE ROBERTSON, “Transnational Litigation and Institutional Choice”, *op. cit.*, p. 1083).

heard inside the country [which entails that] the *forum non conveniens* analysis is largely pro-defendant”¹³⁴⁸. U. Baxi contends, in his contribution to the *Recueil des Cours*, that there are very few voices within the United States which dare to raise this kind of point. He quotes, as being representative of a minority position, excerpts from a concurring opinion by Justice Lloyd Doggett in *Dow Chemical Company and Shell Oil Company v. Domingo Castro Afarao et al.*¹³⁴⁹ where: i) it is contended that *forum non conveniens* is “a fancy name to shield alleged wrongdoers”; and ii) where it is regretted that the refusal of “a Texas corporation to confront a Texas judge and jury is to be labeled ‘inconvenient’ when what is really involved is not corporate convenience but connivance to avoid corporate accountability”¹³⁵⁰. In any case, *ad minima*, it must be acknowledged that the doctrine is “operating in ways that either do not effectuate its arguable goals of finding a convenient forum, or that create externalities not readily apparent in the doctrine’s isolated application”¹³⁵¹. And that it is causing a detrimental “backlash” to North-American international relations¹³⁵², and possibly even to North-American interests¹³⁵³.

European disagreement with the *FNC* idiosyncrasy has not spurred EU institutions to create European equivalents of the blocking statutes mentioned above. It has, however, led to ECJ-

¹³⁴⁸ Vid. D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 175.

¹³⁴⁹ Vid. *Dow Chemical Company and Shell Oil Company v. Domingo Castro Afarao et al.*, 786 S.W.2d 674 (1990).

¹³⁵⁰ Vid. U. BAXI, “Mass Torts, Multinational Enterprises Liability and Private International Law”, *op. cit.*, pp. 334-335. Furthermore: “Nor is there much enthusiasm for the averment that in the ‘absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for human and environmental costs of their actions’”.

¹³⁵¹ Vid. D. E. CHILDRESS III, “Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, p. 175. However, it seems interesting to mention that criticisms regarding *FNC* within North-American academia are not restricted to current authors, nor to authors who focus on international-relations grounds. In a 1986 publication, M. G. Steward (M. G. STEWARD, “Forum Non Conveniens: A Doctrine in Search of a Role”, *California Law Review*, vol. 74, 1986, pp. 1259-1324) assessed the doctrine, largely reflecting on its implications in respect of both prescriptive and adjudicative jurisdiction (i.e. an analysis that resembles largely the typical North-American “interest-analysis”) and asserted that “When jurisdictional inquiries are conducted properly, it becomes apparent that the doctrine of *forum non conveniens* has outlived its usefulness” (p. 1263). Interestingly, when touching upon the issue of the law to be applied as a factor to consider in the *FNC* analysis, Steward contended that “Cases where personal jurisdiction is proper, but in which the law of another sovereign is to be applied, ought to be retained and decided in the original forum [...] the use of foreign law need not result in dismissal of the lawsuit” (p. 1264). This author thus concluded that “the doctrine should be abolished” (p. 1324). This author’s assessment is very significant, for it criticizes the doctrine without departing from the coordinates within which the doctrine was / is used by American Courts (As explained by E. T. LEAR, “National Interests, Foreign Injuries, and Federal Forum Non Conveniens”, *op. cit.*, p. 562: “[...] federal judges attempt to identify the forum with the greatest ‘connection’ to the dispute as if they are conducting a modern choice of law analysis”).

¹³⁵² Vid. C. BURKE ROBERTSON, “Transnational Litigation and Institutional Choice”, *op. cit.*, p. 1086.

¹³⁵³ Vid. E. T. LEAR, “National Interests, Foreign Injuries, and Federal Forum Non Conveniens”, *op. cit.*, pp. 568-579. The author contends in p. 562 that: “[...] foreign injury claims implicate critical American interests. [There is an] American interest in ensuring adequate compensation for the American resident plaintiff injured abroad and argues that an adequate alternative forum seldom exists in such cases. [Moreover,] deterrence in the context of globally marketed and distributed goods Global markets and the rise of the multinational corporation have rendered our deterrence interests in international torts more acute. Dismissing foreign injury claims from the federal courts, even those brought by foreign plaintiffs, may have a distinct negative impact on the safety of American consumers”.

case-law developments which have, on the one hand, maximized global access to courts of EU member States and, on the other hand, curtailed resort to *FNC* by those European jurisdictions who are keen on the doctrine. As regards the first aspect, at least since the 2000 ECJ's *Group Josi* ruling¹³⁵⁴, the jurisdiction of Member-State courts on the basis of *actor sequitur forum rei* has been opened worldwide. As regards the second aspect, by virtue of a 2005 judgment in the *Owusu* case, the ECJ has ruled out any possible resort to *FNC* within the realm of the Brussels I system of international jurisdiction in civil and commercial matters¹³⁵⁵. As explained by Otero, once the choice of the court is made, in accordance with the relevant rules on jurisdiction, there is no possibility for the said court to decline its competence, "*be it in intra-EU or extra-EU cases*" (i.e. irrespective of whether competence would be declined in favour of the courts of another Member State or in favour of the courts of a third country)¹³⁵⁶. The ECJ bases its decision on the mandatory nature of Article 2 of the 1968 Brussels Convention – Article 4 of the Brussels I BIS Regulation¹³⁵⁷.

¹³⁵⁴ Vid. ECJ, *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)*, *op. cit.*

¹³⁵⁵ Vid. ECJ, *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, judgment, case C-281/02, ECLI:EU:C:2005:120. This decision has been highly criticized. Vid, *inter alia*, T. C. HARTLEY, "The European Union and the systematic dismantling of the common law of the conflict of laws", *International and Comparative Law Quarterly*, vol. 54, 2005, pp. 813-828; G. CUNIBERTI & M. M. WINKLER, "La Cour de justice lit-elle les questions qui lui sont posées par les juges des Etats membres?", *Journal du droit international*, 2005, pp. 1183-1191; A. BRIGGS, "The death of Harrods: forum non conveniens and the European Court", *Law Quarterly Review*, vol. 121, 2005, pp. 525-540. For a nuanced approach, which combines the author's displeasure for *forum non conveniens*, with the author's displeasure with the European "suppression" of national legal notions, vid. P. MAYER, "Forum non conveniens et Application Uniforme des Règles de Competence", in P. DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Studies of the Oxford Institute of European and Comparative Law vol. 7, Oxford, Hart, 2008, pp. 137-144. Cfr. with H. GAUDEMET-TALLON, "Le « forum non conveniens », une menace por la Convention de Bruxelles?", *Rev.crit.dr.int.pr.*, 1991, pp. 491-592. H. Gaudemet-Tallon already warned in the 1990s about the problematic character of *forum non conveniens* for the European system of PIL.

¹³⁵⁶ Vid. C. OTERO GARCÍA-CASTRILLÓN, "International litigation trends in environmental liability: a European Union-United States comparative perspective", *op. cit.*, pp. 560-561. Vid. in similar terms, R. A. BRAND, "Challenges to Forum non conveniens", *op. cit.*, pp. 14-15 ("[The] limitations [imposed by the Brussels Regime] demonstrate the clear rejection of the doctrine of forum non conveniens in the courts of EU Member States, regardless of whether the Member State has a tradition of following the forum non conveniens doctrine over a lis alibi pendens analysis, and regardless of whether the court to which deference would be given under a forum non conveniens analysis is within or outside of the EU"). Cfr. with H. MUIR WATT ("Conclusion", in P. DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Studies of the Oxford Institute of European and Comparative Law vol. 7, Oxford, Hart, 2008, pp., pp. 145-154) who points to the fact that the controversy caused by *Owusu* derives precisely from the fact that there is a lack of precision on the kind of jurisdictional "conflict" covered by Brussels I (intra-EU only, or also third-country-versus-member-state ones).

¹³⁵⁷ P. DE VAREILLES-SOMMIÈRES ("The mandatory nature of Article 2 of the Brussels Convention and Derogation from the Rule It Lays Down", in P. DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Studies of the Oxford Institute of European and Comparative Law vol. 7, Oxford, Hart, 2008, pp. 101-114, at pp. 107-109, with the argument being further developed in following pages) highlights the recognition of the mandatory nature of Article 2 of the Brussels Convention. However, he criticizes that in maintaining this mandatory nature without distinguishing between conflicts of jurisdiction amongst Member States and Conflicts of jurisdiction between a Member State and a third country, the ECJ has neglected the double nature of the jurisdiction rule contained in Article 2. Its second function is, following the said author, to act as a "rule delineating the jurisdiction to adjudicate of the European Judicial Area" (in cases connected to the EU through a single Member State, the

It is submitted, nevertheless, that *Owusu* responds to different motivations: it is contended that this judgment – as well as other contemporary and prior ECJ case-law – shows that the ECJ perceives any national procedural concept which may potentially introduce legal uncertainty, by increasing judge’s discretion powers, as a real danger to the space of freedom security and justice¹³⁵⁸. Be it as it may, overall, the practical impact of *Owusu* is that it makes the whole European approach to international jurisdiction come full-circle from a global perspective: it perfectly joins the combination of *actor sequitur forum rei* – which is coherent with due process considerations – with the worldwide access to justice provided by the *Group Josi* case-law. Thus, nobody risks denial of justice when facing litigation with an EU-based defendant, while such defendant is simply and naturally submitted to the jurisdiction of the courts of the country where her domicile is located¹³⁵⁹.

If such is the state of the question, and the *forum non conveniens* doctrine has been significantly handicapped by the ECJ’s *Owusu* judgment, why devoting attention thereto in the frame of this dissertation?

First, as suggested in its introduction, the purpose of this chapter is to introduce worldwide stakes and present how they have been dealt with in the European Union. Despite the fact that the *Owusu* case-law and its impact on *FNC* in the the EU have been widely commented in recent years, it seems significant to point that if it was not for the *Owusu* case-law, access to justice in cases against European private offenders would not be fully guaranteed: it is the combination of the *Group Josi* and *Owusu* judgments that ensures that European and non-European-based plaintiffs alike will always have their day in court whenever a European-based defendant produces (environmental and human-rights-related) damage anywhere around the globe. This is a worldwide access-to-justice prerogative which, nevertheless, guarantees due-process rights to defendants.

remaining contacts being with a third country). Following the same author this fact should allow nuancing the assessment of the decision.

¹³⁵⁸ *Vid.* H. MUIR WATT, “Conclusion”, *op. cit.*, pp. 150-151. The same author further contends that it is possible to question whether the fear of uncertainty has not deformed the perception of the actual practice of *forum non conveniens*, which is highly codified by judges and leaves little room to the feared risk. Similarly, A. DICKINSON believes that the doctrine, as defined by English courts, is, in comparison with other developments of EU PIL, “a model of clarity”, and that “English courts have provided substantial guidance as to how the discretionary power to stay proceedings on the ground of *forum non conveniens* should be exercised” (“Legal Certainty and the Brussels Convention – Too much of a good thing?”, *op. cit.*, pp. 135 and 124, respectively. He further discusses legal certainty in respect of the Brussels I, Rome I, and Rome II Regulations in *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, pp. 126 and following). This position fails to understand, in my opinion, that what brings discomfort regarding the doctrine is not how clearly defined it is, but the fact that, as Dickinson acknowledges himself, its nature is discretionary. *Cfr.* Muir Watt’s and Dickinson’s opinion with the uncertainty reported as regards the North-American *FNC* doctrine by D. E. CHILDRESS III (“Forum Conveniens: The Search for a Convenient Forum in Transnational Cases”, *op. cit.*, pp. 158-159): “[...] there are circumstances in which a U.S. court should not adjudicate a transnational case filed by a foreign plaintiff, even though there is subject matter and personal jurisdiction. However, the types of transnational cases that should be entertained by U.S. courts is far from certain, as are the legal tools for making such determinations” (Emphasis added).

¹³⁵⁹ The relationship between *Owusu* and *Group Josi* is equally highlighted, although under different terms, by P. DE VAREILLES-SOMMIÈRES, “The mandatory nature of Article 2 of the Brussels Convention and Derogation from the Rule It Lays Down”, *op. cit.*, p. 105.

The second reason why *forum non conveniens* is dealt with is that it has not been completely eradicated within the European Union, and therefore, its potential intervention may still become a disruption in the effective use of the relevant choice-of-law provision downstream in the private-international-law process. The *Owusu* case-law can only block the *FNC* doctrine wherever the provisions on international jurisdiction at stake are those of the Brussels I BIS Regulation. Wherever the Regulation is not applicable and – residual – domestic heads of jurisdiction come into play, *forum non conveniens* can potentially operate¹³⁶⁰. As it is well-known, even if jurisdiction is asserted on the basis of such residual heads of jurisdiction, the law applicable will, nevertheless, still be determined following the Rome II Regulation, for it is universally applicable (i.e. notwithstanding exceptions, whenever the court of an EU Member State needs to determine the law applicable to non-contractual obligations, it will resort to Rome II). Therefore, a potential hindrance to the effectiveness of Art. 7 of the Rome II Regulation remains, and the analysis in previous pages should serve as a warning – to Member-State courts – about how not to implement the *forum non conveniens* doctrine¹³⁶¹.

Finally, it must be mentioned that there has been a resort to quasi *forum non conveniens* arguments in the frame of the *Milieu Defensie v. Shell* case before Dutch courts: within the frame of the said case¹³⁶², Shell's counsel has tried to block the proceedings in the Netherlands by resorting to quasi-*FNC* argumentations (notably arguing that there has been an abuse of procedural rights), despite the fact that the Brussels I Regulation proscribes *FNC*¹³⁶³.

All of this is, of course, independent, from a fact that justifies, all by itself, devoting attention to *FNC*: “[t]he doctrine, in so many of its forms, is, as is well known, contrary to a basic principle:

¹³⁶⁰ *Vid.*, in this sense, the English, Scottish and Irish reports on residual jurisdiction that were prepared in view of the Recast of the Brussels I Regulation (available online on March the 8th 2017):

C. WOODRUFF & K. REED, *Comparative study of “Residual Jurisdiction” in civil and commercial disputes in the EU – National report for England*, pp. 13-15

(http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_england_en.pdf);

S. REID & M. GUNTEON, *Comparative study of “Residual Jurisdiction” in civil and commercial disputes in the EU – National report for Scotland*, pp. 13-14

(http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_scotland_en.pdf);

D. O DONOHOE & J. MURRAY, *Comparative study of “Residual Jurisdiction” in civil and commercial disputes in the EU – National report for Ireland*, p. 17

(http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_ireland_en.pdf).

¹³⁶¹ It must be noted that the Belgian *Code de droit International privé* contains a quasi-*forum non conveniens* exception, whose scope is very limited. It is unlikely that it may have any impact on environmental litigation, except in those rare cases where polluters and victims reach an agreement as to submitting the litigation to a Belgian court. In those situations “*le juge peut toutefois décliner sa compétence lorsqu’il résulte de l’ensemble des circonstances que le litige ne présente aucun lien significatif avec la Belgique*” (Art. 6.2 of the Code).

¹³⁶² *Vid. supra*, Box 1 (Part I, Chapter 1).

¹³⁶³ *Vid. inter alia*, pp. 7 and 8, as well as the whole section 2.5 (“Efficiency of deciding the cases collectively on account of connection”) in Milieu Defensie’s Defense to Shell’s statement of appeal, dated December the 23rd 2014, available under the following link on March the 15th 2017: <https://milieudefensie.nl/publicaties/bezwaren-uitspraken/shell-courtcase-defense-to-shells-statement-of-appeal> (Further procedural documents have been made available by Milieu Defensie under the following link: <https://milieudefensie.nl/english/shell/courtcase/documents>).

*judex tenetur impertiri judicium suum (lit. a court with jurisdiction over a case is bound to decide it)*¹³⁶⁴.

V. Conclusion

Chapter 3 has initiated the specific assessment of the effectiveness of the EU's conflict-of-laws intervention in environmental torts. It has done so *via* the analysis of a series of "preliminary" difficulties which do not stem out directly from the core of the mechanism – its choice-of-law rule – but from surrounding aspects. The chapter began with an explanation on how the width and content of key definitions and key concepts may have a deep impact on the effectiveness of the said mechanism. In this context, several unresolved questions in respect of the notions of "*non-contractual obligations*" and "*environmental damage*" were identified.

The chapter then went on to extensively analyze some effectiveness-hindering aspects arising from the "subjective dimension" of the EU's mechanism. The potential involvement of the State and other public bodies, in respect of *stricto sensu* environmental damage caused by private parties, was dealt with first. The significant obstacle that the narrowness of the notion of "*civil and commercial matters*" entails, for *stricto sensu* environmental-redress purposes, was denounced: inasmuch as there is no prerogative or exorbitant power, the public authority should simply be considered as the aggregator of (potential) individual claims by private parties; in other words, the claim that the public authority introduces should be understood as the accumulation and solidification in a single hand of the diffuse interests on the environment that belong indivisibly to all individuals. In such a sense, it was contended that the notion needed to be interpreted in more environmental-friendly terms: if the content of the ELD is meant to be considered public law and / or the intervention of a public body in respect of environmental damage *stricto sensu* is automatically not a "*civil and commercial matter*" then the reference in Article 7 to "*environmental damage*" different from "*damage sustained by persons or property as a result of such damage*" (thus damage to the *stricto sensu* environment) is useless. In other words, claims introduced by public entities in respect of environmental damage *stricto sensu* need to be understood as being a "*civil and commercial matter*" in order to preserve the *effet utile* of Article 7.

After considering the potential involvement of the State in this kind of questions, it was the turn to assess the involvement of private subjects. In this sense, it was observed that, unless a given legal order specifically provides for a special legal tool, claims for environmental damage

¹³⁶⁴ *Vid.* U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *op. cit.*, p. 350 (the punctuation of the quote has been slightly altered: the original does not have comas before and after "as is well known"). Moreover, following G. BETLEM ("Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts", *op. cit.*, p. 283) *FNC* constitutes "*a major restriction on the ability of foreign plaintiffs to sue for acts outside the forum state*". The excerpt goes on as follows: "*For instance, foreign countries have objected to the doctrine's use, and some countries have implemented "blocking statutes" to prevent a U.S. court from by denying an adequate alternative forum as a means of dismissing a case. Forum non conveniens motions are, therefore, of concern not only to courts and litigants, but to the countries to which these cases will be dismissed for adjudication*".

per se cannot come from individuals, inasmuch as such kind of damage is inflicted to a collective legal good. In other words, it was established that, in order to seriously envisage the private enforcement of rights over the *stricto sensu* environment, an “adaptation” becomes truly and mandatorily required: within the framework of private-enforcement logic the collective / common dimension of the damaged legal good mandatorily needs to be somehow “translated” into private-law and / or civil-proceeding elements. In the absence of any such “converter” or “adaptation” rights cannot be enforced in practice and may actually become worthless. This imperative need for a “converter” or “adaptation” led to a thorough analysis of the state of collective redress in Europe. After observing that the lack of binding collective redress at the EU level, and the absence in the ELD of a “*right of compensation* [to private parties] *as a consequence of environmental damage*” severely undermined environmental private enforcement, a further, more theoretical analysis was conducted. In the frame of the said analysis, it was established that the key-question to deal with was not who the rights-holder was or how could diffuse interests over the environment be individualized: the key stake was to establish who should be entitled to act on behalf of the rights-holder(s) or the ensemble of diffuse-interest bearers¹³⁶⁵. This led to conclude that, in theoretical terms, the answer was not to individualize diffuse interests over the environment; they may remain as they are. The answer lies in “entitling” a given individual or set of individuals to introduce claims for redress over the *stricto sensu* environment. This theoretical analysis ultimately led to suggesting the adoption of North-American style “citizen suit provisions” – as inspired by the the American “private attorney” philosophy – accompanied by *cy pres* compensation. The introduction of this kind of compensation would help avoid the development of devious practices, for there would be no personal enrichment of any kind (as *cy pres* compensation entails channelizing the redress obtained to public administrations, public funds or other similar publicly-controlled and monitored entities). In other words, *cy pres* compensation would help not to distort Continental / Civil-Law approaches, nevertheless, fostering private enforcement: it would foster genuinely pro-environmental altruistic litigation.

However, it is important to insist on the idea that these are *de lege ferenda* considerations. *De lege lata* environmental private enforcement seems to be significantly underdeveloped and hindered in the European Union. Generally speaking, as examined *supra*, unless specific legal arrangements are provided for (such as those discussed thoroughly throughout the corresponding sections of this chapter), the collective legal good (*stricto sensu*) “environment” may only be “indirectly” protected within the realm of private law: as compensation thereof is not possible, the only hope for protection would be that the threat of private enforcement in respect of environmental damage *lato sensu* may discourage potential polluters, thus

¹³⁶⁵ Put otherwise, “*which parties should be in a position to take action in respect of environmental harm?* Within the “*debate regarding the role of civil liability as a means of environmental protection*” this is one of the central themes that has yet to be fully resolved. *Vid.*, in this sense, M. WILDE, “*Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence*”, *op. cit.*, p. 284: “*For example, members of the family home, other than the person enjoying title to the property, may be excluded from the protection afforded by the property torts, such as private and public nuisance, and trespass to land due to their lack of title. This theme links into a broader debate in that, beyond the family home, there is clearly limited capacity for individuals, or other interested parties, to seek remedies in respect of damage to the wider environment*”.

indirectly avoiding the production of environmental damage *per se*¹³⁶⁶. But, as seen in Chapter 1, deterrence seems an unlikely result whenever tort law is meant to protect the environment. Therefore, under current conditions, it is possible that private enforcement may hardly ever succeed in respect of environmental damage *per se*.

In any case, the first two problems referred were only those which touched simultaneously upon the scope and the operability of the mechanism. Other than these, two further “procedural” hurdles, which are actually classic “themes” in transnational corporate liability, were identified and assessed: the use of separate legal personality to build shields of networks of subsidiaries, and *forum non conveniens*, a doctrine which has become, in many instances, a significant obstacle to the goal of achieving effective access to justice. Since the latter notion has been partially neutralized in Europe, the analysis thereof focused mostly on the North-American experience, and concluded with a warning about the instances where *forum non conveniens* may still endanger the effectiveness of environmental private enforcement on this side of the Atlantic.

Thus, comparatively, the analysis of the use of the separate legal personality of overseas subsidiaries as a shield against liability in litigation may attract a higher level of interest. This is so, not only because this problem and its implications are far from being consistently overcome anywhere in the world, but due to the exploration of corporate-veil piercing, and alternative techniques, such as the theories of the agency in fact and of foreign direct liability. Amongst the reflections that emerge from the analysis of this latter procedural hurdle, one plays a pivotal role: despite the fact that many legal systems do not establish any kind of “corporate group liability”, and do not even contemplate corporate groups as a unity with legal significance *per se* (as opposed to what happens in other fields, as economics, where the notion of “enterprise” is relevant) certain data cannot be ignored: there is always a series of functional, structural, and economic linkings, a framework for the transmission of orders, etc. that bind corporations in a group together, and this should have legal significance, for their practical, real-life value is undeniable.

In any case, why are these two last legal institutions – the procedural hurdles – so significant? They may actually have a deep impact on the effectiveness of the choice-of-law rule. Effective and adequate liability requires the neutralization of *forum non conveniens*, the overcoming of the separate legal personality of subsidiaries, and the intervention of an adequate choice-of-law rule, leading to adequate pro-recovery substantive law. In order for polluters to adequately respond for the harms they cause, all of the three referred legal issues need to be

¹³⁶⁶ This idea just goes one step further in the reasoning presented by A. CABANILLAS SÁNCHEZ (*La reparación de los daños al medioambiente*, op. cit., pp. 46-47) when reflecting on the German Law of December the 10th 1990 (*Umwelthaftungsgesetz* [von 10. Dezember 1990, BGBl I 1990, 2634]): “*El objeto de protección directa de la Ley es especialmente el individuo. El medioambiente se protege sólo de forma mediata, a través de aquella protección que la responsabilidad liga a un influjo medioambiental. La responsabilidad civil por inmisiones nocivas para las propiedades y la salud debe ser también analizada desde la perspectiva ambiental. Aunque algunos autores afirmen que no se trata de una tutela directa del medio ambiente, es indiscutible que constituye uno de los instrumentos jurídicos más eficaces para protegerlo. Toda persona que defiende sus intereses en estos casos está defendiendo de una forma indirecta el interés de tipo ecológico de toda la comunidad y contribuye de esta forma indirecta a la protección del medioambiente*”.

configured in such a way as to lead to victim-favouring outcomes: they are narrowly and cumulatively connected; each of them is individually capable of blocking redress. If only one of these legal issues is unfavorable to victims, then the assertion of liability may be severely limited or even excluded. In other words, the assessment of the effectiveness of Article 7 is not only a function of the provision's own virtues and deficiencies, but the outcome of the overall valuation of – at least – the ensemble of these three elements (the rule itself and the two procedural hurdles), within the framework of which, the issue of the subsidiaries has a huge weight.

Having said this, notwithstanding the enormous significance of the two procedural hurdles (and the cumulative connection amongst the three issues that has been just mentioned), the upcoming Chapter will be built on the assumption that the two procedural hurdles have been “neutralized” upstream, and will focus on the choice-of-law element. Thus, let us, from herein onwards, address individually and independently the effectiveness of the very choice-of-law provision at the core of the EU's environmental PIL mechanism: Article 7 of the Rome II Regulation.

Chapter 4:

The foundational deficiencies of Article 7 of the Rome II Regulation

In the following pages, the effectiveness of the core provision of the EU's environmental PIL mechanism, Article 7 of the Rome II Regulation, will be assessed thoroughly. Previous chapters have paved the way thereto: Part I (Chapters 1 and 2) ascertained that multilateralist choice-of-law means may become default mechanisms in respect of the protection of the environment against international damage¹³⁶⁷. Part II, which focuses on the specific effectiveness of the EU's micro-regime, begun with Chapter 3, which explored several non-choice-of-law elements, which may restrain the effectiveness of the EU's choice-of-law provision (and any other similar rule). From this standpoint, the *prima facie* purpose of the analytical exercise that will be found in the next pages is to assess whether the environmental policy of the European Union can be adequately enforced through the means provided for by Article 7 of the Rome II Regulation. In this sense, the upcoming assessment will reveal that Article 7 suffers from, at least, two major disguised limitations, or "*congenital deficiencies*"¹³⁶⁸, which largely undermine the policies and objectives which are said to ground it. If Chapter 1 already hinted to the fact that tort-law constructions (understood in a broad sense, therefore including conflict-of-laws mechanisms dealing with international corporate torts) may not be the best means to cause deterrence in corporate tortfeasors, Chapter 4 will present certain difficulties that severely hinder compensation too.

It is hoped, however, that, beyond these *prima facie* considerations, this chapter will provide certain grounds of reflection on the adequacy – or possible lack thereof – of the methods being used in the development of private international law as a tool of global governance at the beginning of the 21st century. But before reaching such point – *inter alia* through the analysis of the two referred foundational deficiencies (II, III), and through the description of some possible solutions to, at least, one of them (IV) – this chapter will begin by presenting an enhanced analysis of Article 7 of the Rome II Regulation (I).

I. Analyzing Article 7 of Rome II

As explained *supra*, the EU's environmental PIL mechanism is mainly conformed by three provisions. As regards international jurisdiction, Articles 4 and 7.2 of the Brussels I BIS

¹³⁶⁷ This assertion is made notwithstanding the weaknesses that, in respect of deterrence, tort-law constructions generally suffer from (as mentioned in the ensuing paragraph).

¹³⁶⁸ The adjective is deliberately borrowed from Vincent Heuzé's famous article on the "congenital" deficiencies of Art. 5 of the Brussels Convention (V. HEUZÉ, "De quelques infirmités congénitales du droit uniforme : l'exemple de l'article 5, 1) de la Convention de Bruxelles du 27 septembre 1968", *Rev. Crit. Dr. Int. Pr.*, vol. 89, 2000, pp. 595-639). However, the adjective is used here in a slightly different nuance: Its use in this chapter fully corresponds with the meaning given to it by Cambridge's English language online dictionary: "*A congenital disease or condition exists at or from birth*" (<http://dictionary.cambridge.org/dictionary/english/congenital>) (Consulted on May the 18th 2017).

Regulation contain the most relevant heads of jurisdiction in respect of any kind of tort (be it environmentally-related or not). These articles allow asserting jurisdiction before the courts of the domicile of the tortfeasor or, alternatively, at the locations where either the tortious action or omission took place, or where the tortious result manifested. As regards applicable law, Article 7 of the Rome II Regulation specifically determines the law applicable to non-contractual obligations arising out of environmental damage.

Since the two articles on international jurisdiction have already been sufficiently dealt with *supra*¹³⁶⁹, the following pages will focus on analyzing Article 7 of the Rome II Regulation. The assessment process will separately address several different dimensions of the content-oriented rule contained therein. Amongst others, it will carefully assess the theory of ubiquity (C), and the *favor laesi* principle (D). In Article 7, *favor laesi* is achieved through a construction that embodies the theory of ubiquity. Both concepts are very closely related, and it must be acknowledged that, in certain occasions, their boundaries may be blurry – perhaps, this is the reason why certain authors tend to mix-up both notions, and even present as examples of either of them situations that actually relate to the other¹³⁷⁰. Nevertheless, ubiquity needs to be understood as the fact of considering that complex torts are located simultaneously in the *locus actus* and *locus damni* (independently of whether the judge or the victim performs the relevant choices as regards jurisdiction and / or applicable law). On the other hand, *favor laesi* refers to any sort of feature that may privilege the alleged victim over the alleged tortfeasor, such as alternative connecting factors, prerogative of choice, etc. Therefore, both concepts will be dealt with separately, presenting the precedents that, in both respects, have led to their inclusion in Article 7 as it stands nowadays. Then, after briefly reviewing the structure of the Article (E), the limited reference made therein to Article 4 of the Rome II Regulation will be discussed (F). Why does the former only refer to the latter's first paragraph? Are paragraphs 2 (common habitual residence of the tortfeasor and the victim) and 3 (escape clause) not suitable to cater to the policy needs of international environmental torts?¹³⁷¹.

All of these considerations will pave the way for the assessment of three more sophisticated aspects of the provision, namely, the equal treatment of victims as a justification to the current configuration of the Article (G), the impact of the provision's structure on the core value of predictability (H), and the dissection of the explanation on Article 7 provided in the explanatory memorandum to the Rome II proposal (I). But first, an individual assessment of the two connecting factors contained in the article, the two possible versions of *lex loci delicti commissi*, will be delivered. As it may be recalled, they reflect, respectively, the *stricto sensu* classical *lex loci delicti commissi*, also known as *lex loci actus* (B), and the modern alternative of the *lex loci damni* (A), sprung in more recent times as a reaction to the so-called

¹³⁶⁹ *Vid. supra* Part I, Chapter 1 (“Basic concepts of conflict of laws (I): international jurisdiction over environmental torts (Art.4 & 7.2 of the Brussels I BIS Regulation as illustrations)”).

¹³⁷⁰ *Vid. infra* note 1395.

¹³⁷¹ As it seems unlikely that an environmental victim may wish to give away her strategic advantage by agreeing on the choice of the applicable law (instead of making a unilateral choice) Art. 14 of the Rome II Regulation will not be considered. This is so notwithstanding the fact that, as pointed out in Chapter 1 (in the sub-section on the “Presentation of Article 7, on environmental torts”) there have been pre-Rome-II cases where an agreement has taken place.

"distantdeliktze", "délits complexes" or "complex torts"¹³⁷². The following pages briefly sketch some important traits of each of the two connecting factors, beginning with the last one mentioned.

A. The *lex loci damni* connection

It is a common place in private international law to assert that the *lex loci damni* connection is a reaction to the rise and proliferation of "complex torts" in the past century, due to the development of industry and technologies. In other words, the historical strict understanding of the *lex loci delicti commissi* as *lex loci actus* left unconsidered one of the two places where complex torts materialize – the place of the tortious result – and the *lex loci damni* connection aims at correcting this outcome. *Lex loci damni*'s rise is probably related to the objective of better addressing considerations of fairness towards tort victims: it may not be hard to understand that the referred connecting factor comes closer to the victim and, probably, reflects more her expectations – *inter alia*, being compensated for damage at least at the level and in the manners provided for by the law of the place where the damage manifested. This latter aspect is particularly relevant in the frame of environmental torts for, as already commented *supra*, it is not unlikely that environmental damage may simultaneously manifest in several countries, if the source of the damage spreads freely through air or water. As explained by A. Dickinson, in this cases "[...] *damage must be considered to have occurred in every country in which there is an adverse change to water or air quality*". Therefore, whenever a "*claim relates to environmental damage in more than one country, the laws of those countries need to be applied in a distributive basis*"¹³⁷³. Precisely, this later aspect, the distributive application of different tort laws to damages arising in different countries out of the same tortious event, has sparked an important share of reflection on the equal treatment of victims, as it will be seen *infra*¹³⁷⁴. Suffice it to say, for the time being and for the purposes of the current developments, that

"[t]he *locus damni* criterion provides a just and equitable solution. The high probability of regulatory fragmentation -especially in the damage is suffered in different states- and the lack of foreseeability for the defendant are less important than the other interests involved -such as the protection of the environment, the polluter-pays principle and the "preventive" function of liability rules"¹³⁷⁵.

¹³⁷² These notions have been introduced in previous chapters (notably in part I, Chapter 1, "*Presentation of Article 7, on environmental torts*", where Art. 7 of the Rome II Regulation was first assessed). However, it is now necessary to go beyond those first approximations and provide a more detailed assessment thereof.

¹³⁷³ *Vid.* A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, p. 439. "Pollution" actually reads "*the change*", which is a reference to the use of the word "*change*" in the frame of recital 24 of the Rome II Regulation.

¹³⁷⁴ *Vid. infra*, "*The equal treatment of victims as a justification to the current configuration of the Article*".

¹³⁷⁵ *Vid.* C. OTERO GARCÍA-CASTRILLÓN, "International litigation trends in environmental liability: a European Union-United States comparative perspective", *op. cit.*, p. 569. I have respected the quoted text, despite

Other than this, the limits of the notion of *lex loci damni* in the frame of the Rome II Regulation have been pre-shaped – and continue to be defined – by the ECJ’s case-law on the *locus damni* notion in the frame of the Brussels I Regulation – thus, for jurisdictional purposes. This is so by virtue of the above-referred principle of coherent interpretation of the Brussels I, Rome I and Rome II Regulations. In this regard, the influence of the *Dumez* ruling, which limits the notion of the *locus damni* to the place where the first, immediate and direct consequences of the tortious action / omission are felt, is of special significance¹³⁷⁶. In accordance with this, it has been asserted that “[e]conomic loss consequential upon damage to persons or property or, if within the scope of Art 7, environmental damage must be considered to be an indirect consequence of the environmental damage and left out of account in determining the law applicable under Art 4(1)”¹³⁷⁷. A rather graphic example of the huge impact of this development may be found in the well-known BP / Gulf-of-Mexico disaster. In this kind of cases, the tourism business in the affected regions is severely hit: cancelations and significant drops in reservations are suffered, thus causing substantial economic loss (even where the oil spill does not damage property or human health)¹³⁷⁸. In such hypotheses, economic loss suffered, for instance, by worldwide hotel chains is conceived as being placed exclusively in the country that the oil-spill reaches, and the concerned hotel is thus affected. It cannot be considered as arising, for instance, wherever the corporation’s seat is placed, or where most of the company’s assets are placed.

B. The *lex loci delicti commissi* / *lex loci actus* connection

As explained by P. Nygh, the *lex loci actus* connecting factor embodies, in the field of torts, the “classical multilateral approach of resolving conflict issues”. This means that, from a traditional standpoint, the law of the “*locus delicti* should determine whether the defendant was liable”, or put otherwise, that “[t]he law of the territory in which the act or event occurred should

the fact that, as shown in Chapter 1, solid doubts may arise as regards the “preventive” (detering) effect of tort law.

¹³⁷⁶ As already mentioned in Chapter 1, *vid.* *Dumez* (ECJ, *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*, judgment, case C-220/88, ECLI:EU:C:1990:8).

¹³⁷⁷ *Vid.*, A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, p. 439. *Cfr.* C. OTERO GARCÍA-CASTRILLÓN, “International litigation trends in environmental liability: a European Union-United States comparative perspective”, *op. cit.*, p. 569: “On the determination of the *locus damni*, the UK guide on the application of Rome II says that personal damages will be located where they were suffered (residence); that property damages will be located where the property was situated when damaged; and, finally, that the economic loss will be located where it was suffered”. The reference to the place where economic damage was suffered needs to be nuanced following the ECJ’s *Marinari* case-law (ECJ, *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*, judgment, case C-364/93, ECLI:EU:C:1995:289). For a thorough appraisal of the question of the location of economic loss in private international law *vid.* M. LEHMANN, “Where does economic loss occur?”, *Journal of Private International Law*, vol. 7-3, 2011, pp. 527-550.

¹³⁷⁸ For specific data (arising from empiric research), *vid.* OCEANA, “Oil Spills and Tourism: They Don’t Mix”. This is a case-study of the economic impact of the Deep Water Horizon disaster on the tourism business in the State of Florida (found under the following link on January the 9th 2017: http://usa.oceana.org/sites/default/files/tourism_impacts_fact_sheet_9-8-15.pdf).

determine its consequences", for that is "*where the alleged tort occurred*"¹³⁷⁹. This reading is in appearance almost intuitive: in "simple" torts, the event – action or omission – and its consequences arise in the same country and, thus, it may seem only natural to stress the element constituted by the action / omission and the social context where it takes place, as opposed to other "extraneous" connecting factors (such as nationalities, domiciles, and habitual residencies)¹³⁸⁰. However, as already suggested, the *lex loci actus* connecting factor disregards a significant share of relevant elements in the frame of so-called complex torts.

As it has been referred *supra*, the Rome II Regulation took as its main and general rule the *lex loci damni*. Then, what is actually the value of reintroducing *lex loci actus* in Article 7? This connecting factor, all by itself, would conform to considerations on fairness towards defendants, for, from their standpoint, it embodies territoriality, and, more importantly, predictability, in the application of law. However, what actually produces the victim-protective effect that Article 7 (allegedly) entails is the placement of the connecting factor in an alternative / elective structure (which will be addressed *infra*). T. Kadner-Graziano considers its introduction in Article 7 to be the consolidation of certain national preexisting rules, and more specifically, a reflection of certain court practices in environmental tort matters: following his account, wherever the rule of ubiquity was available, courts tended to apply more frequently the *lex loci damni*, except in environmental tort cases. In the latter, "*courts repeatedly applied the law of a country in which the event giving rise to the damage occurred (i.e. the law of the place where the tortfeasor had acted) which was more beneficial for the person seeking compensation*"¹³⁸¹.

Thus, in conclusion, paradoxically, the move of reintroducing the classical reading of the *lex loci delicti commissi* (*lex loci actus*), which is said to correspond with considerations on fairness towards the defendants, actually finds its justification on victim-protection aspirations. This is probably why, as already referred, K. Fach considers the overall result of Article 7 to be well

¹³⁷⁹ Vid. P. E. NYGH, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort", *op. cit.*, p. 282 (emphasis added). When discussing these issues, Nygh further stresses (p. 283) the "fortuitous" character that the *lex loci actus* may have in many cases, notably as regards road accidents, for instance (which is the case-law example that the author resorts to in order to illustrate the "classical method" in Australian conflict of laws): "*Applying the classical choice of law method, the judges [...] would have applied the law of New South Wales as the sole determinant of the rights of the plaintiff including the extend of damages recoverable, because the strip of earth on which she was hit happened to be within that state*".

¹³⁸⁰ It may be argued, from a very classical stand-point, that it is intuitive at another level: the allegedly "faulty" behavior constitutes the nucleus of the possible tort, and, therefore, whether that behaviour is "unlawful" or not should be determined following the law of the country where it takes place.

¹³⁸¹ Vid. T. KADNER-GRAZIANO, "The Law Applicable to Cross-Border Damage to the Environment – A Commentary on Article 7 of the Rome II Regulation", *op. cit.*, p. 75. Moreover: "*For example, in Germany, the courts have repeatedly decided claims for environmental damage caused in Germany but originating from sources in France, not under German law but under French law which was more favourable to the victim*".

balanced¹³⁸². However, the developments in upcoming sections will demonstrate that such statement is not very accurate¹³⁸³.

C. Origins and developments of the theory of ubiquity

Despite the fact that the theory or rule of ubiquity is well-known throughout the EU, at the jurisdictional level – due to *Mines de Potasse* – it is not the case within the realm of the applicable law: its use for choice-of-law purposes is a novelty for many European States¹³⁸⁴. The theory is said to have been first introduced by German courts in the late 19th century, before being later adopted by the German legislator (Art. 40, Sec. I of the EGBGB)¹³⁸⁵. Subsequently, it was codified, *inter alia*, in Switzerland for environmental matters, and in the following countries for torts in general: Italy, Czech Republic, Slovakia, Hungary, Estonia, Slovenia, and Russia¹³⁸⁶. It mainly consists in a "*splitting of the locus delicti*" – which, thus, simultaneously comprises the *locus damni* and the *locus actus* – the logic behind it being that, otherwise, exclusive resort to either of the locations would "*ignore the fact that the case is closely connected with at least two States*"¹³⁸⁷. In other words, the theory of ubiquity is simply the conflict-of-laws doctrine which, in complex torts, establishes that the place of tort is simultaneously the place of the causal event and the place of harm. Whether the choice amongst both possible locations belongs to the judge or to any of the parties, whether the theory is used for jurisdictional or choice-of-law purposes, and what values or policies that choice is performed upon – *favor laesi*, neutrality, etc. – are different – and contingent – matters.

It must be noted, though, that the theory of ubiquity is nothing but one option amongst several solutions developed throughout history and space in order to solve a core issue in respect of transboundary torts, the dilemma of the determination of the *locus delicti*. In this respect, other options exist in comparative private international law. For instance, for choice-

¹³⁸² *Vid.* K. FACH, "The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II", *op. cit.*, p. 317. This opinion was mentioned in Part I, Chapter 1 of this dissertation ("*Presentation of Article 7, on environmental torts*").

¹³⁸³ Notably, *infra* "*The first congenital deficiency of Article 7 of Rome II*".

¹³⁸⁴ *Vid.* T. KADNER-GRAZIANO, "The Law Applicable to Cross-Border Damage to the Environment – A Commentary on Article 7 of the Rome II Regulation", *op. cit.*, p. 74.

¹³⁸⁵ *Ibidem*, p. 74. Interestingly, K. Fach (K. FACH, "The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II", *op. cit.*, p. 297) contends that this theory, actually finds its origins in the realm of criminal law. However, she does not provide further references.

¹³⁸⁶ *Ibidem*. Following T. Kadner-Graziano, the relevant provisions are the following: Art. 62, sect. 1 of the Italian PIL Act; Paragraph 15 of the respective PIL acts of the Czech Republic and Slovakia; Paragraph 32, sect. 1 and 2 of the Hungarian Law-Decree on PIL; Paragraph 164, sect. 3 of the Estonian Law on the Principles of the Civil Code; Art. 30, sect. I of the Slovenian PIL Act; Art. 1219 sect. I of Part III of the Russian Civil Code. Furthermore, *vid.* F. GRISEL, "Analyse critique de l'article 7 du règlement du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles ("*Rome II*")", *op. cit.*, p. 157 (quoting Bernasconi): the theory of ubiquity has also been codified, *inter alia*, in Tunisia and Venezuela, and enshrined in China by a ruling of its Supreme Court. For further comments on the different solutions embodied in the different Members States, *vid.* the explanatory memorandum to the Rome II proposal, pp. 19-20.

¹³⁸⁷ *Vid.* K. FACH, "The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II", *op. cit.*, p. 297.

of-law purposes, instead of choosing between the *lex loci damni* and the *lex loci delicti commissi* certain legal systems have opted to resort to "both laws on a distributive basis by applying each of them to particular aspects of the tort"¹³⁸⁸. Conversely, a somewhat opposite solution has longtime been embodied in Common-Law systems: it is the so-called *double actionability rule*, which resorts to the "cumulative application of *lex fori* and the foreign *lex loci delicti* when determining the unlawfulness of the act giving rise to the damage"¹³⁸⁹ (or, in other words, the requirement that the event be blameworthy under both laws). Notwithstanding the existence of these other conceptions, it is "widely held that only one of the laws territorially connected with the tort should be applied" and that – following Article 2 of the resolution on tort obligations proposed by the *Institut de Droit International*¹³⁹⁰ – whatever the solution chosen, the principle of proximity should lead to the application of the law most closely connected with the case¹³⁹¹.

As pointed out above, the theory of ubiquity can be used both in respect of jurisdictional and choice-of-law issues. It may be recalled that, within the EU's system of private international law, it is contended that a distinction needs to be drawn between the use of the theory in each of those fields: it is said that, while in the field of international jurisdiction the theory of ubiquity is essentially inspired by considerations on legal efficiency – and not by considerations on victim protection – the ratio of the insertion of the theory of ubiquity in the field of choice of law is, quite precisely, favoring environmental-tort victims¹³⁹². As previously explained, the

¹³⁸⁸ K. FACH (*Ibidem*, pp. 297-298) provides the following example: "Articles 107 and 108 of the Rumanian PIL Act provide that the capacity of the tortfeasor is governed by the *lex loci actus*, while the *lex loci damni* applies to the remaining aspects of a transboundary tort". But does this example of "distributive application" not amount to a hypothesis of *dépeçage*? The author goes on to explain that "However, such approach may give rise to uncertainties (for example, a party may be held liable for an unlawful act under the *lex loci damni* that is lawful under the *lex loci actus*)". Nevertheless, it seems to me that this problem does not stem from the cumulative application of different laws, but that it is inherent to the *lex loci damni* connecting factor. In any case, the same author (*Ibidem*, pp. 298-299) further comments a somewhat similar possibility that has found no support in legislation or in case law: following Rabel and Ehrenzweig, it would be possible to make a distinction "in the conflict of laws between fault-based and no-fault liability, with the law applicable to each type of liability being determined either by the *lex loci actus* or the *lex loci damni* respectively". As it may be understood, the lack of support for this latter idea comes from the "difficulties that would arise in qualifying the nature of the liability".

¹³⁸⁹ Note, however, that, following K. FACH ("The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II", *op. cit.*, pp. 297-298), even before the enactment of the Rome II Regulation, "[prior] developments in the United Kingdom, [had] shifted away from this approach, as it [was] deemed incompatible with the tendency in substantive law to give priority to the party harmed by the pollution".

¹³⁹⁰ *Vid.* INSTITUT DE DROIT INTERNATIONAL (RAPPEUR: O. KAHN-FREUND), "Résolution : Les obligations délictuelles en droit international privé", *Annuaire de l'Institut de Droit International*, Edinburg session 1969, Part II, Basel, 1969, pp. 370-374.

¹³⁹¹ *Vid.* K. FACH, "The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II", *op. cit.*, pp. 298-299. As regards the intervention of the principle of proximity, this author explains that "Its application on a regular basis, however, would require overcoming the fear of legal uncertainty".

¹³⁹² *Vid.* the interpretation of Art. 7.2 of the Brussels I BIS Regulation provided *supra*, Chapter 1 ("Special heads of International Jurisdiction in the Brussels I Regulation"). *Vid.*, furthermore, F. GRISEL, "Analyse critique de l'article 7 du règlement du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles ("Rome II")", *op. cit.*, p. 159 (who focuses specifically on considerations as regards obtaining evidence). *Cfr.*, however, with F. K. JUENGER, "Jurisdiction, Choice of Law and the Elusive Goal of Decisional Harmony", in M. SUMAMPOUW ET AL. (ed.), *Law and Reality. Essays on National and*

justification for allowing the plaintiff to choose the applicable law is that, allegedly (*via* a maximization of the amount of compensation), it is supposed to ensure an optimal protection of the environment, since the interests of the plaintiff and environmental interests are supposed to be aligned¹³⁹³. In order to better understand these ideas, let us now deal with the notion of *favor laesi*, and its relevance as a principle in choice of law in torts in general.

D. *Favor laesi* as a distinctive concept

Favor laesi may be defined as the principle enshrined in choice-of-law rules that allow the victim – or some other subject on her behalf – to opt for a given legal system, or more generally, the principle enshrined in conflict-of-law rules that quite simply favor the alleged victim of a tort over the alleged tortfeasor¹³⁹⁴. As a principle in private international law, *favor laesi* is so intrinsically linked to the theory of ubiquity that, in many cases, examples provided for each of these notions are interchangeable, and the boundaries between both of them are not always neatly drawn¹³⁹⁵. But, as already suggested, both concepts are to be distinguished. Several reasons plead in this sense:

International Procedural Law in Honour of Cornelis Carel Albert Voskuil, Dordrecht, M. Nijhoff, 1992, pp. 137-147, at pp. 145-146 (Juenger reads *Mines de Potasse* as “implicitly” recognizing “the substantive policy of protecting the weak party”).

¹³⁹³ Vid. F. GRISEL, “Analyse critique de l’article 7 du règlement du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (“Rome II”)”, *op. cit.*, pp. 157, 159, 160, 161. This author, although not totally convinced as regards the alignment, seems to agree with the explanatory memorandum of the Rome II proposal (pp. 19-20) on the idea that the natural or legal person performing a potentially polluting activity will be forced to respect *ex ante* the prescriptions in force in the States where the effects of her activities may be felt, on top of those in force in the place of its activities. He further agrees with the idea that allowing the victim to choose the applicable law has a discouraging nature (“*caractère désincitatif de ce choix*”). Moreover, he contends that the possibility for the plaintiff to ensure the maximization of the compensation will encourage (“*inciterait*”) the industry operator to respect the most environmentally protective law.

Interestingly, despite concluding in the same sense as previously quoted authors (that the ratio of the theory of ubiquity in both fields is different) Grisel, insists on the idea that Article 7 is inspired by the interpretation of Art. 5.3 of the Brussels I Regulation. This reinforces the impression that, despite the explanations provided by the ECJ as regards Article 5.3 of the Brussels I Regulation (notably, the reference to the “*point of view of the evidence and the conduct of the proceedings*”; *vid. Mines de Potasse*, judgment, *op. cit.*, notably para. 17), it is implicitly considered that the practical result of the rule of ubiquity in international jurisdiction is victim protection.

¹³⁹⁴ The first half of the definition is inspired by Nygh’s conception of choice of law by the plaintiff (P. E. NYGH, “The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort”, *op. cit.*, p. 365) – but not his definition of *favor laesi*.

¹³⁹⁵ Vid., for instance, P. E. NYGH, “The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort”, *op. cit.*, p. 366: “*For over a 100 years German Law has, in relation to cross-border torts where the place of conduct and the place of harm lie in different States, applied the law which is most favourable to the victim (Ubiquitätsregel)*” [Emphasis added]. Other authors, despite not blurring the boundaries of both concepts, do provide narrower definitions of *favor laesi*, which tie them to the theory of ubiquity. Vid. *inter alia*, K. FACH (“The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II”, *op. cit.*, pp. 299-300), who considers that the principle means that “*the choice between the *lex loci actus* and the *lex loci damni* can be made on each individual case on the basis of the principle of the most favourable law [...]. In the environmental sector this criterion is codified in Article 138 of the Swiss Private International Law Act. The *lex favorabilior* has also been used in the German case law to settle some cross-border environmental cases*”.

i) The theory of ubiquity was enshrined in *Mines de Potasse* merely in order to foster the sound administration of justice, therefore, not in order to provide privileges to victims, nor in order to create a *forum actoris*. This may be specifically remarked in the fact that, in *Mines de Potasse*, the choice between both potential *fora* is left to whoever initiates the litigation – the claimant – irrespectively of whether it is the victim, or the alleged tortfeasor¹³⁹⁶ (of course, this is no obstacle for equally acknowledging that, quite frequently, the real *de facto* effect of the theory of ubiquity in *Mines de Potasse* scenarios is *favor laesi*¹³⁹⁷).

ii) *Favor laesi* may manifest itself in connecting-factor structures which are not alternative / elective. This may be better illustrated through an example: Article 45 of the Portuguese Civil Code – as amended by Law 59/99, of June the 30th – establishes that

*"Extracontractual liability [...] is regulated by the law of the State where the main activity causing the prejudice took place [...] If the law of the State where the damaging effect occurred considers the subject to be liable, but such is not the case of the law of the State where his activity took place, the former law is to be applied, if the subject should have foreseen the production of harm in that country [...]"*¹³⁹⁸.

¹³⁹⁶ It must be recalled that, as regards the referred procedural objectives, both *fora* have equal standing. Interestingly, leaving this choice in the hands of the claimant and not in the hands of the judges may be justified, *inter alia*, as a time-saving and money-saving decision, but additionally as a means of avoiding the introduction of a pseudo-*forum non conveniens* in the system of the Brussels I Regulation.

¹³⁹⁷ Despite the fact that the assertion made refers to the *de facto* result of the *Mines de Potasse* case before the ECJ, certain authors seem to believe that such result is also its *de iure* theoretical underpinning. *Vid.* for instance, T. BALLARINO, "Questions de droit international privé et dommages catastrophiques", *op. cit.*, pp. 374-375 (quoting Juenger) who seems to consider that *Mines de Potasse* actually reflects *favor laesi*. Therefore, taking into account the fact that Article 2 of the Brussels I Regulation is a general jurisdictional principle, and that exceptions thereto need to be narrowly construed – following recurrent ECJ case-law – it may be wondered whether a narrower construction could have been introduced, since efficiency and procedural proximity are meant to be the only inspiring ratios. The possibility of leaving the choice to the relevant judges cannot be seriously considered, for it would amount to a quasi-*forum non conveniens* exception, which is not acceptable in the system of the Brussels (I) Convention / Regulations. But, the ECJ could have chosen to enshrine just one of the two available options: *locus damni*, in order to maximize the *effet utile* of the provision, or *locus delicti commissi* – had they wanted to follow a truly narrow approach. Thus, may the alternative *fora* be seen as a subtle sign of a possible jurisdictional embodiment of the *favor laesi* principle?

¹³⁹⁸ This translation has been kindly provided by María del Mar Val. The official text of Article 45 of the Portuguese Civil Code (Código Civil Português; actualizado até à Lei 59/99, de 30/06) is the following:

"1. A responsabilidade extracontratual fundada, quer em acto ilícito, quer no risco ou em qualquer conduta lícita, é regulada pela lei do Estado onde decorreu a principal actividade causadora do prejuízo; em caso de responsabilidade por omissão, é aplicável a lei do lugar onde o responsável deveria ter agido. 2. Se a lei do Estado onde se produziu o efeito lesivo considerar responsável o agente, mas não o considerar como tal a lei do país onde decorreu a sua actividade, é aplicável a primeira lei, desde que o agente devesse prever a produção de um dano, naquele país, como consequência do seu acto ou omissão [...]" (Found at <http://www.confap.pt/docs/codcivil.PDF> on July the 11th 2013). *Vid.*, moreover, C. G. J. MORSE, "Choice of Law in Tort: A Comparative Review", *The American Journal of Comparative Law*, vol. 32-1, 1984, pp. 51-97, at p. 95: "A vestige of Cavers' first principle of preference may be seen in Art. 45(2) of the Portuguese Code, according to which if the law of the state of injury holds the actor liable but the law of the state where he acts does not, the law of the place of injury shall apply, providing the actor could foresee that damage would occur in that country. Similarly, those systems that, in a

As it may be easily seen, the provision aims at favoring the weaker party, despite the fact that the connecting factors in the provision are not presented in an elective structure, and the choice of law is not given to the victim¹³⁹⁹. Thus, this provision embodies a comparatively lighter manifestation of the *favor laesi* principle, but *favor laesi* still.

Despite the possibility of finding different – stronger or softer – manifestations of the principle throughout different legal systems, P. Nygh points out that the philosophical foundations of the *favor laesi* principle seem to find their roots in the principle of party autonomy:

"[t]he *favor laesi* in relation to delict [...] flows from the principle of autonomy, albeit not [...] directly. It is based on the concept of responsibility for one's actions and the consequent obligation to compensate for damage done [...] The expectation of compensation is therefore reasonable and fundamental, as is the converse expectation that the liability be foreseeable and the compensation not be excessive or punitive"¹⁴⁰⁰.

As paradoxical and surprising as this assertion may seem, it is nothing but a reminder of the fact that freedom of action and responsibility are two sides to the same coin. In general, these two interconnected elements are present both on the side of the alleged tortfeasor and on the side of the alleged victim¹⁴⁰¹. And the lesser the extent of one of the party's freedom is, the bigger the extent of the other party's responsibility is. Interestingly, the referred excerpt draws a correlation between predictability / foreseeability – which, as it may be remembered, is considered to be one of the core values in private international law – and *favor laesi*. But the excerpt does not contemplate what happens when both values come into conflict, as it is frequently the case in environmental torts. Notwithstanding the fact that predictability will be dealt with thoroughly *infra*, it may be good to highlight already that these considerations – on the interplay of autonomy, responsibility, foreseeability and *favor laesi* as regards torts in general – may need to be nuanced in respect of environmental torts. Taking into account the fact that in most environmental torts, the victim's degree of freedom of action (as regards, *inter alia*, avoiding the production of the tortious result) comes closer to zero, correlatively, the amounts of expected responsibility – thus, liability – and *favor laesi* should significantly increase. If such increase runs against the tortfeasor's predictability, this latter value simply needs to (substantially) give way to *favor laesi* considerations: while the environmental tort may be unforeseeable for the tortfeasor, it is certainly even more so for the victim.

multi-state case give the plaintiff a power to choose from among the stipulated laws, the law most favorable to him, might be thought to be paying some attention to a "better law" theory".

¹³⁹⁹ The fact that the *favor laesi* principle and the theory of ubiquity are not fully equivalent concepts may be further demonstrated through a more general consideration: overall, substantive objectives, in general, may be reached through rules that do not have an alternative / elective structure. As pointed out by P. LAGARDE ("Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé", *op. cit.*, p. 57) : "[p]arfois, la règle de conflit peut prendre la forme d'une règle «en cascade», désignant une loi à titre principal et une autre à titre subsidiaire, mais seulement dans le cas où la première ne permettrait pas d'obtenir le résultat souhaité".

¹⁴⁰⁰ *Vid.*, P. E. NYGH, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort", *op. cit.* p. 296. The original excerpt further clarifies that: "Autonomy may operate directly where the parties either modify that obligation by agreement or agree as to the law which should govern the liability".

¹⁴⁰¹ It should not be forgotten that in certain kinds of tort, the victim's behaviour may contribute to the production of the tort or to the increase in the extend of damages.

In any case, previous paragraphs have helped draw a somewhat more precise line of distinction between the theory of ubiquity and the *favor laesi* principle or, at least, have demonstrated that both notions, even if partially resembling, are different: the combination of the theory of ubiquity with the conferral of the choice of legal system to the victim (or else the conferral of the choice to the court, but obliging her to perform it in the view of the interests of the weaker party) is merely one possible manifestation of a larger notion, known as the *favor laesi* principle.

Let us now briefly consider Article 7's structure before moving on to more complex questions.

E. The structure of the article

As already explained, Article 7's connecting factors are not exactly placed in an alternative positioning, but, more accurately, in an "elective" structure: while there is a choice to be made between both connecting factors, if the only subject possibly entitled to make it (the victim), does not do it in due course (in accordance with the procedural law of the forum) the *lex loci damni* takes precedence¹⁴⁰². In the same sense that *favor laesi* and the theory of ubiquity needed to be distinguished from each other, the use of alternative or elective structures in choice of law needs to be distinguished from both:

i) The *favor laesi* principle may not be identified with the use of alternative structures, since victim-favoring outcomes may be achieved through the use of other kinds of structure, as waterfall structures, for instance. Thus, the referred principle aims at obtaining an outcome which favors the interests of the victims of a tort, irrespectively of how such outcome is achieved. Also, in the frame of an alternative structure, *favor laesi* is independent from whom – the victim or the court – performs the choice amongst the available possibilities.

ii) Naturally, the use of alternative structures in private international law may be distinguished from the theory of ubiquity, for such structures are used in other fields different from the realm of torts. In other words, the theory of ubiquity is merely the theoretical construction which considers that, in situations of "complex torts", the tort is simultaneously located in the *locus actus* and the *locus damni*, and this is so, irrespectively of the fact that, as regards choice of court and / or choice of law, the said theory usually leads to alternative structures. Moreover, the notion of ubiquity is also independent from the identification of the subject who chooses between the *locus actus* and the *locus damni*, and from the – naturally-borne or imposed upon – values which are used by the choice-maker in order to perform such choice.

These remarks bring to an end the ensemble of sub-sections dealing with the "basic" elements of Article 7. Having briefly characterized the *lex loci damni* and *lex loci delicti* connecting factors, the core theoretical notions that Article 7 rests upon (the theory of ubiquity and the *favor laesi* principle), and the provision's structure, let us consider why Article 7 blocks access to the second and third paragraphs of Article 4 of the Rome II Regulation.

¹⁴⁰² *Vid.* Recital 25 of the Rome II Regulation.

F. The reference in Article 7 of the Rome II Regulation to Article 4.1

The *lex loci damni* connecting factor is not directly included in Article 7 of the Rome II Regulation: it is incorporated through a reference to Article 4.1, the Regulation's general rule. Since the reference is restricted to the first paragraph of article 4 it is logical to consider that the European legislator intended to exclude the recourse to the common habitual residence connection – Article 4.2 – and the “escape clause” – Article 4.3 – in cases of international environmental tort¹⁴⁰³. What is the sense and purpose of such exclusion? Is it “neutral” from a policy stand-point? What would be the results of allowing the operation of the common habitual residence connection and / or the escape clause in the frame of international environmental torts? Both paragraphs will be dealt with in sequence, beginning with paragraph 4.3.

i. Article 4.3: the escape clause

In his seminal contribution to the *Recueil des cours*, P. Lagarde offers an explanation on why escape clauses do not combine well with tortious issues (or, in other words, on why tortious matters are significantly less prone to the operation of escape clauses than contractual ones): since escape clauses increase uncertainty, they may only operate to their fullest extent in those fields where unpredictability may be discarded beforehand, i.e. where parties may choose the applicable law. Hence, naturally in the realm of contracts. By the way of contrast, in tortious matters, party autonomy – despite being conceivable and often times functional – will frequently intervene only after the accident occurs and therefore, in Lagarde's opinion, it may only play a very limited role¹⁴⁰⁴. This concern is addressed by the Rome II Regulation: under certain conditions, Article 14 of Rome II allows for party autonomy as regards most of the material scope of the Regulation, including environmental torts. However, even if it was not

¹⁴⁰³ *Vid.*, *inter alia*, A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, p. 438 (who mentions the exclusion without elaborating any further) and A. CRESPO, “Daños al medio ambiente y regla de la ubicación en el art. 8 del futuro Reglamento de Roma II”, *op. cit.*, pp. 18-19: “Además, la no aplicación de los arts. 5.2 y 5.3 a los daños al medio ambiente, probablemente sea la solución más adecuada en el contexto del art. 8 del Reglamento. Las razones son diversas en relación con cada una de las dos normas generales” (N.B. this is the numbering in the Regulation proposal).

¹⁴⁰⁴ *Vid.* P. LAGARDE, “Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé”, *op. cit.*, pp. 103-104 : “[...] la matière des délits oppose à la clause [d'exception] une résistance plus forte que celle des contrats. [...] Nous avons déjà constaté que le danger principal (mais non rédhibitoire) du principe de proximité est de faire naître une certaine incertitude. Et cela est vrai, que le principe s'exerce dans sa fonction d'élaboration ou dans sa fonction de correction de la règle de conflit. Il ne peut donc s'épanouir pleinement que là où il est possible de dissiper d'avance toute incertitude, c'est-à-dire là où les parties peuvent choisir la loi applicable. Et, de fait, en matière contractuelle, la clause d'exception est toujours écartée lorsque les parties ont fait usage de leur faculté de choisir la loi applicable. [...] Il existe ainsi un double rapport d'attraction et d'exclusion entre les principes de proximité et d'autonomie de la volonté. D'une part, l'autonomie de la volonté chasse la clause d'exception, car elle est l'outil par lequel les parties conjurent le risque d'incertitude attaché au principe de proximité. D'autre part, la clause d'exception appelle l'autonomie de la volonté, comme son contrepoids nécessaire. En matière délictuelle, les choses se présentent autrement. [...] l'autonomie de la volonté, si elle est concevable et parfois même constatée, ne peut normalement intervenir qu'après l'accident et ne peut donc jouer qu'un rôle très limité dans la détermination de la loi applicable”.

the case, following the above-referred idea that *favor laesi* in torts indirectly derives from party autonomy, *via* the notion of responsibility for one's actions¹⁴⁰⁵, it could be considered that Article 7 fulfills Lagarde's requirement. In other words, the fact that victims are able to choose the applicable law between two options is, to a certain extent, the reflection of a unilateral / limited understanding of (a single) party autonomy. In the light of these considerations, it is worth considering why the escape clause is non-operative in the frame of environmental torts.

It could be argued that there may be an implicit wish to avoid judicial manipulations away from or towards the *lex fori*. In his contribution to the *Recueil des Cours*, P. Nygh warned that, despite the "increasing popularity of the "non-rule" of flexibility, whether called "closest connection" [...] or whatever else", the said rule is prone to being used as an interference for substantive purposes (and not for conflictual justice ends): "Although the flexible exception can also be manipulated away from the forum, if it denies relief, the more common tendency is to favour the law of the forum"¹⁴⁰⁶. In a similar vein, K. Fach highlights the fact that the risk that the law of the closest connection may be used to *de facto* apply the *lex fori* is a concern by itself, beyond the risk of undermining legal certainty in environmental matters¹⁴⁰⁷.

Nevertheless, the main reason behind the exclusion is possibly somewhat more straightforward. As A. Crespo points out, the objective of the exclusion may be to avoid imposing a given national law despite the victim's express will to resort to another one: considerations as to the search for the legal order that is most closely connected to the tortious relationship need to give way to the victim's right to choose the applicable law, since the opposite approach would be contrary to the spirit of Article 7¹⁴⁰⁸. In other words, the ratio of the exclusion would thus be the preservation of the content-oriented construction built in the article, and its policy substance. This precisely points to a different comment, equally made by Lagarde in the above-referred publication: beyond not combining well with tortious issues,

¹⁴⁰⁵ *Vid. supra* "Favor laesi as a distinctive concept" in this same chapter.

¹⁴⁰⁶ *Vid.* P. E. NYGH, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort", *op. cit.*, p. 364. For him, this is mainly an example of the "strong homeward tendency behind formal rules".

¹⁴⁰⁷ *Vid.* K. FACH, "The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II", *op. cit.*, pp. 302-303. This is so irrespective of whether the closest connection is used "as a generic type of declaration that is later defined by a series of presumptions or as a saving clause that would take effect if a closer connection with a legal system is detected other than the one determined by the main conflict rule [...]".

¹⁴⁰⁸ *Vid.* A. CRESPO, "Daños al medio ambiente y regla de la ubicación en el art. 8 del futuro Reglamento de Roma II", *op. cit.*, pp. 18-19: "[...] el objetivo de la cláusula de excepción del art. 5.3 de la Propuesta es introducir una cierta flexibilidad que permita al Juez aplicar la ley que corresponda al centro de gravedad de la situación. En los daños al medio ambiente, aunque dicha flexibilidad no deje de ser conveniente, la aplicación de la cláusula de excepción es probablemente incompatible con el derecho de opción entre la ley del acto causal y la del daño que concede el art. 8. Sería contrario al espíritu del mismo que dejara de aplicarse la ley escogida por la víctima, aún cuando ésta no fuera la más vinculada con el supuesto. La ley elegida deberá aplicarse, presente o no la situación vínculos más estrechos con otro Estado, ya que está claro que las cláusulas de excepción no actúan en supuestos en que de una u otra manera se permite a las partes elegir (aunque sea de forma limitada) la ley aplicable. De esta manera, se reputa que debe limitarse la actuación de la cláusula de excepción – y de la dosis de imprevisibilidad que ésta introduce – en los casos en que se estima necesaria la protección de la parte débil y muy en particular, si se propone una norma materialmente orientada, como sucede en el marco del art. 8 de la propuesta".

escape clauses do not combine well with content-oriented rules either. Lagarde's point is that allowing the operation of an escape clause would go against the policy goal embodied in the content-oriented rule¹⁴⁰⁹: whenever the legislator envisages the application of a legal system which may not bear the closest connection with the situation at stake its choice is deliberate. Despite such tenuous linking, it enshrines the substantive solution that the legislator, as the author of the relevant content-oriented rule, wished for¹⁴¹⁰. Interestingly, this position taken by Lagarde may be a first indication of the fact that, when in conflict, substantive justice considerations should take precedence over conflictual justice considerations. This idea will be further elaborated *infra*¹⁴¹¹.

ii. Article 4.2, the "common habitual residence" connection

K. Fach contends that

*"the view is generally held that the reference to the lex communis habitationis is not effective in typical cases of transboundary pollution because the parties do not habitually reside in the same State. Moreover, it does not necessarily lead to more reasonable results than would be achieved by the application of the lex loci delicti. Therefore [it] should be viewed with caution"*¹⁴¹²

Notwithstanding the fact that reasonableness is a vague notion (which depends on the set of parameters and criteria chosen for its assessment), whenever both parties to a tortious dispute have their common habitual residence in a State different from the *locus damni* state, their common familiarity with their common legal system is a very significant element in choice-of-law terms. While it may be agreed that the common-habitual-residence hypothesis

¹⁴⁰⁹ While discarding this connecting factor in order to protect the policy objective behind the rule may make sense, it must be acknowledged that it equally weakens the judge's position, should she realize that the choice-of-law rule does not fulfill its policy objectives in all possible situations. This is an interesting thought to keep in mind, in the view of further developments *infra*. Additionally, the full extent of Crespo's position may be questioned: if the only means to defend the relevant policy objective was to protect the victim's choice between the two enounced connecting factors, then why is it possible that party autonomy may potentially come into play *via* Article 14? By way of contrast, Article 6 of Rome II – competition – and Article 8 – intellectual property – explicitly bar resort to Article 14. Is this an indication that *favor laesi* (hence victim protection) more than a vehicle for environmental protection is not only a full-fledged objective by itself but, moreover, a more important goal than the former?

¹⁴¹⁰ *Vid.*, P. LAGARDE, "Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé", *op. cit.*, p. 116: "Ainsi [...] nous constatons que la clause d'exception a vocation à s'appliquer à la quasi-totalité des règles de conflit de lois. La seule exception paraît être constituée par les règles de conflit alternatives, édictées en vue de l'obtention d'un certain résultat matériel : établissement d'une filiation, validité d'un testament, etc. Dans ces situations, c'est à dessein que le législateur envisage l'application d'une loi qui peut n'avoir que très peu de liens avec la situation, mais qui a au moins le mérite de consacrer la solution matérielle voulue par l'auteur de la règle de conflit. Ecarter cette loi en raison de son manque de liens avec la situation irait évidemment contre le but de la règle de conflit. Mais, comme on l'avait déjà relevé, s'agit-il encore ici de véritables règles de conflit de lois ?".

¹⁴¹¹ *Vid. infra* "Second Criticism: The suggested solution is not in accordance with the principle of proximity - Lack of proximity of the applicable law to the harmful result".

¹⁴¹² *Vid.* K. FACH, "The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II", *op. cit.*, p. 301.

may be rare, it is not easy to understand why the uncommon character of the hypothesis would be a sufficiently significant justification for discarding the pertinence of the connecting factor altogether. The exclusion may be related to a conservative reading of the policy meaning of the different connecting factors at stake: A. Crespo considers that the ratio behind excluding the operation of Article 4.2 in the frame of environmental torts lies in the fact that the common-habitual-residence connecting factor does not necessarily designate the most closely connected law. She considers that the intense territorial character of the damages arising from environmental torts would entail a correlative loss in significance for potentially relevant personal connecting factors¹⁴¹³. This opinion is, however, not coherent: it does not seem appropriate to discard a connecting factor simply due to its lack of proximity, when the provision – Article 7 – does not primarily seek proximity, but a substantive result. In principle, conversely to what happened in respect of Article 4.3, there does not seem to be, at least at first, a clear policy justification for this exclusion.

BOX 19:

Hypothetical scenarios on the common habitual residence connection in merely international environmental torts

K. Fach's reasoning only deals with hypotheses of transboundary environmental damage (for instance, *Mines de Potasse*), at least explicitly. However, it must be recalled that there are also situations of "merely international environmental damage", as *Milieu Defensie v. Shell*¹⁴¹⁴. The common-habitual-residence connecting factor may bring along a different set of difficulties in these cases, which may be illustrated by two different hypothetical scenarios:

i) Let us take the *Milieu Defensie v. Shell* facts and modify them slightly: let us think that instead of oil-related pollution, the case deals with a toxic leaking which causes immediate health damage to the four Nigerian farmers, and to an Amsterdam-based Dutch scientist who was conducting on-site research in the area. Depending on how the tortious event is framed and conceived strategically by the scientist's counsel it may be possible to sue Shell's core parent company in the Netherlands, with whom the scientist has a common habitual residence. Had resort to Article 4.2 not been barred, the scientist could have had access to Dutch law in respect of her personal injuries. While this kind of scenario may be rare in practice, again, the rarity of a situation does not justify discarding a connecting factor.

¹⁴¹³ Vid. A. CRESPO, "Daños al medio ambiente y regla de la ubicuidad en el art. 8 del futuro Reglamento de Roma II", *op. cit.*, pp. 18-19: "La norma establecida por el art. 5.2, pese a responder a motivos justificados, probablemente no deba operar como solución incondicional, ya que entendida de un modo rígido puede resultar tan inconveniente como la *lex loci delicti commissi*. En el caso concreto de los daños al medio ambiente, la ley de la residencia habitual de las partes no designa necesariamente la ley más vinculada. La fuerte territorialidad que presentan estos daños supone que pierdan relevancia en ellos los puntos de contacto personales, como la residencia habitual de las partes. En un supuesto típico de daños por contaminación, ésta es un elemento puramente fortuito que sólo cobra importancia real en caso de que coincida con el lugar del acto causal o del daño".

¹⁴¹⁴ Vid. *supra* Box 1 (Chapter 1).

ii) Let us go back to the original set of facts of *Milieu Defensie v. Shell*, but let us suppose that access to Article 4.2 was not excluded in the realm of environmental torts. Despite Shell's efforts, Milieu Defensie has been acknowledged as having standing in the case. Milieu Defensie's standing derives from its stated foundational goal as a non-profit legal person under Dutch law: the protection of the environment. Their involvement in the case possibly mainly relates to the environmental damage *stricto sensu* (ecological damage) caused in Nigeria. Would it have been conceivable that the law of the common habitual residence of Milieu Defensie and the Shell core parent company be applied to the said ecological damage? As unlikely and far-fetched as this kind of outcome may seem, it would not have been a totally impossible result, had resort to Article 4.2 not been excluded. Moreover, it must be recalled that Dutch courts have a track-record of being very open-minded to out-of-the-box environmentally-protective legal arguments, as witnessed by the *Urgenda vs. the Netherlands* case¹⁴¹⁵.

Although it seems unlikely that hypotheses like the latter one may have been foreseen at the time of Rome II's enactment, it may not be the case of the former. This puts on the table the question whether the exclusion of Article 4.2 was actually motivated for protectionist purposes, in the fear that it may be resorted to in those scarce (merely international) cases where it would have led to a developed-country legal system. It must be acknowledged, though, that this use of Article 4.2 would have raised questions as regards the equal treatment of victims, for, in the hypothetical, Nigerian farmers would not have had access to Dutch law in respect of their own injuries¹⁴¹⁶. This latter point is possibly the actual reason behind the exclusion.

As a means of concluding the discussion in respect of the common-habitual-residence connection, it may be helpful to refer to a final criticism put forward by A. Crespo, which actually joins the final remark in Box 19, and may serve as a transition towards the following sub-section: wherever a given tort attains multiple victims – which is a frequent outcome in environmental torts scenarios – a choice-of-law solution based on the possible common habitual residence of parties may potentially lead to the application of different laws to different victims, which may be arbitrary and discriminatory as an outcome¹⁴¹⁷. Irrespectively of whether this criticism suffices to justify the exclusion, the intricacies of the issue of the

¹⁴¹⁵ The Urgenda foundation successfully conducted litigation in 2015 against the Government of the Netherlands for its lack of efforts to combat climate change (the so-called Urgenda climate-change litigation). An English version of the judgment, rendered by the district court of The Hague (The Netherlands), dated June the 24th 2015, can be found under the following permanent link: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196>.

¹⁴¹⁶ Equal treatment is a theme that will be dealt with in the next sub-section. Interestingly, the same kind of difficulty arises in product-liability-related actions within the frame of air-carriage accidents. *Vid.* in this sense, M. BOGDAN, "Aircraft Accidents in the Conflict of Laws", *op. cit.*

¹⁴¹⁷ *Vid.* A. CRESPO, "Daños al medio ambiente y regla de la ubicuidad en el art. 8 del futuro Reglamento de Roma II", *op. cit.*, pp. 18-19: "si son varias las víctimas – algo frecuente en este tipo de daños – una solución basada en la residencia habitual puede conducir a la aplicación de leyes diferentes a cada una de ellas, lo que podría resultar arbitrario y discriminatorio".

equal treatment of victims (*inter alia*, those affected by a same tort in different locations) will be briefly explored in the next pages.

G. The equal treatment of victims as a justification to the current configuration of the Article

As previously explained, the possibility of applying Article 4.2 of the Rome II Regulation (law of the common habitual residence of the victim and the tortfeasor) to environmental torts has been criticized: it may introduce disruptions into choice-of-law reasoning as regards the equal treatment of victims, especially, although not exclusively, those located in different countries. Authors seem to pay great importance to this complicated and delicate subject, which runs through several aspects of the whole conflict-of-laws process¹⁴¹⁸. Other than the referred choice-of-law dimension of the problem, stakes may arise at the jurisdictional level, from different access-to-justice-related questions. These may range from the possibility for victims to undergo an accumulation of claims at an inconvenient forum¹⁴¹⁹, to the impact of opt-in or opt-out formulas, should a fully operational scheme of collective redress be introduced at the EU level in years to come¹⁴²⁰. However, let us focus here exclusively on the first problem mentioned, and only inasmuch as needed in order to complete the reasoning developed in previous pages, and to make a point: if ensuring the equal-treatment of victims is a core value to protect, then the current state of Article 7 possibly provides the most homogenous possible treatment for all victims.

On this subject, the self-evident point of departure is the acknowledgement of the fact that absolute equal treatment is impossible – at least in the frame of the hypotheses that are being discussed – and that the only possible way to achieve it would be the unification of substantive law on environmental torts (for instance, through the means of an international treaty). Nevertheless, it is obvious that, due to the sensitivity of the topic, in the current state of international relations and global environmental policy, the creation of substantive uniform law on environmentally-related issues seems difficult, to say the least¹⁴²¹. Beyond these preliminary indications, it is important to specify that, within the theme of equal treatment in choice of law in environmental torts, only two scenarios will be assessed. They will be

¹⁴¹⁸ Notwithstanding the fact that they may deal with this issue at varying degrees of explicitness, *vid.*, *inter alia*, P. BOUREL, “Un nouveau champ d’exploration pour le droit international privé conventionnel: les dommages causés à l’environnement”, *op. cit.*, p. 369 and following; A. CRESPO “Daños al medio ambiente y regla de la ubicación en el art. 8 del futuro Reglamento de Roma II”, *op. cit.*, pp. 18-19; and M. BOGDAN, “Some Reflections Regarding Environmental Damage and The Rome II Regulation”, *op. cit.*, pp. 102-103.

¹⁴¹⁹ *Vid.* Art. 30 of the Brussels I BIS Regulation (former Art. 28 of the Brussels I Regulation). Moreover, it must be recalled that domestic heads of jurisdiction may apply to environmental torts if the relevant polluter is not domiciled in an EU Member State. For a thorough commentary on former Art. 28, *vid.* R. FENTIMAN, “Section 9 – Lis pendens-related actions - Article 28” in U. MAGNUS and P. MANKOWSKI (eds.), *Brussels I Regulation. European commentaries on Private International Law*, Munich, Sellier - European Law Publishers, 2007, pp. 475-522, at pp. 507-518. *Vid.* also selected aspects of B. HESS, T. PFEIFFER, & P. SCHLOSSER, *The Brussels I Regulation 44/2001 – Application and Enforcement in the EU*, Munich, C. B. Beck, 2008, pp. 100-126.

¹⁴²⁰ *Vid.* “Opt in – Opt out schemes and their implications as regards fundamental rights” as a part of the discussion on collective redress presented *supra* (Part II, Chapter 3).

¹⁴²¹ A rather graphic example of this point may be found in the realm of climate change action, taking into account the political mishaps that have taken place since the elaboration of the Kyoto Protocol.

commented simultaneously for the difficulties they present are similar, and the argumentations to be made around them are intertwined. These scenarios are the equal treatment of victims of an environmental tort harmed in the same country, and the equal treatment of victims of a transboundary environmental tort harmed in different countries (a Chernobyl kind of situation, for instance)¹⁴²².

It was commented *supra* that A. Crespo considers that the operation of the common-habitual-residence connecting factor, as regards environmental torts, would potentially lead to situations of un-equal treatment amongst different victims of a same tort within a given country (and an illustration of how the said outcome could possibly materialize was provided)¹⁴²³. However, that argument is not solid enough for rejecting the possible pertinence of the common-habitual-residence connecting factor for, as the law stands in May 2017, the elective structure of Article 7 already potentially jeopardizes the homogeneity of treatment of all victims, by the very will of the victims themselves through their choice of law¹⁴²⁴. It is true that such potential distortion in the homogeneous treatment of victims is, in principle, only an abstract one, for *in concreto* it will be only in very few hypotheses, if in any at all, that two victims harmed by the same tort in the same country will choose two different applicable laws. But, it would be reasonable to understand that, had the equal treatment of all victims been such a fundamental value to the European Legislator, the choice would have been given to the judges and courts (accompanied with instructions and / or restrictions on how to perform it). Overall, that would seem to be the only possible way to ensure a truly homogeneous choice-of-law treatment of all victims¹⁴²⁵.

¹⁴²² A comprehensive study of the equal treatment of victims of merely international environmental torts, however, is a much more complex topic. It is indeed so complex that it would require a dissertation all by itself, for it entails calling into question core foundations of the very field of private international law. Discrimination in these contexts is a theme that runs right through U. Baxi's contribution to the *Recueil des Cours* (U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *op. cit.*, pp. 307 and following). Despite the fact that he only uses the word "discrimination" once, the idea is implicitly present throughout the ensemble of his contribution. Some textual examples of the presence of the idea may be found in p. 315 (in respect of Bhopal: "*Would much the same result have occurred if in Bhopal thousands of American UCC management and workers setting up or operating the plant were exposed to massive runaway reaction causing devastating MIC exposure? Would Judge Keenan have then conflated choice of law with the issues of forum conveniens? Must constructions of "public interest" for ever [sic] remain exercises in parochial, even xenophobic, jurisprudence?*"), and in p. 388 ("*jobs and prosperity, [...] will be gone if these forum-shoppers (Denning's multitudinous moths) can dictate choice of law influencing considerations pointing to higher liability* [Regarding the term "*moth*", *vid.* the explanation in p. 316: "*The metaphor is profoundly racist*"]).

¹⁴²³ *Vid.* in this sense the first hypothesis in Box 19 *supra* (despite the fact that it is not a transboundary environmental tort, but a merely international one, the illustration is useful within the current discussion without requiring further elaboration on the complexities of the equal treatment of victims of merely international environmental torts).

¹⁴²⁴ As it has been rightly pointed out, the very structure of Article 7 potentially allows for divergences in the legal regime to be applied to different victims within a specific country. *Vid.* M. BOGDAN, "Some Reflections Regarding Environmental Damage and The Rome II Regulation", *op. cit.*, p.103: "*In fact, even damage occurring in the same country may be subjected to different laws depending on the different choices made by individual claimants*".

¹⁴²⁵ This reinforces the above-referred impression that victim protection is at least as important (and thus an aim by itself, and not merely a means to and environmentally protective end) in Article 7.

Nevertheless, even in those hypotheses, a fully egalitarian treatment may be impossible: should elective / alternative structures be considered to disrupt equal treatment amongst victims within the same country, then the same should be contended about the *lex loci damni* connection by itself: it has the “*disadvantage of the parallel application of several legal systems to the damage caused by the same harmful event if such damage occurs in more than one country*”¹⁴²⁶. Hence, different victims in different countries may receive “*varying legal protection, unless [they] opt for the law of the country of the [event giving rise to the tortious result]*”¹⁴²⁷. In other words, in the frame of transboundary environmental torts attaining several countries this whole unequal treatment phenomenon arises from the very content of the *lex loci damni* connecting factor, *per* its very nature. And the only way to correct it – without compromising all the features discussed in previous pages – is through the incorporation of the *lex loci actus* connection within an alternative / elective structure as it has been done in Article 7.

In sum, all victims are treated as equally as possible if each of them is given the opportunity to choose between a common possibility – *lex loci actus* – and her own *lex loci damni*. *Lex loci actus* would, therefore, have an egalitarian and homogenizing value: it is a solution which is accessible to all victims alike, and which is added to the previously available *lex loci damni* (Art. 4.1). The fact that other victims in other countries may have access to different – higher or lower – standards of protection is, in principle, unavoidable, as the law stands nowadays, and may become less relevant, in hypotheses of transboundary tort attaining several countries, if every victim has free access to the common solution.

Paradoxically, a structural configuration that may be said to contribute to distorting equal treatment amongst victims located in the same country is the only tool allowing for a – relative – enhancement of egalitarian treatment in hypotheses where victims are harmed by the environmental tort in different countries. Therefore, the “egalitarian” argument needs to be added to the list of justifications for the existence of the double connecting factor and the victim’s freedom of choice in Art. 7.

H. The impact of the structure on predictability

Taking into account the fact that ensuring predictability is said to be one of the core functions of private international law, does this elective structure lead to a decrease in the predictability of conflict-of-laws outcomes in international environmental torts? In principle, neither elective nor alternative structures necessarily entail a decrease in predictability. A decrease in predictability may happen when no choice-orienting policy is prescribed and the choice is left in the hands of the court. If the choice is left in the hands of one of the parties, or if the choice-orienting policy is perfectly determined, an alternative structure does not necessarily lead to unpredictable conflict-of-laws outcomes, irrespective of how many connecting factors the structure contains.

¹⁴²⁶ *Vid.* M. BOGDAN, “Some Reflections Regarding Environmental Damage and The Rome II Regulation”, *op. cit.*, p. 102.

¹⁴²⁷ *Ibidem*, p. 102.

This is the case of Article 7: the alternative / elective structure that the theory of ubiquity leads to contains two well-defined connecting factors, a well-defined result-selective policy orientation – *favor laesi* – and lies on the hands of the victim. Actually, the drafters of the Rome II Regulation counted on this fact: the alleged rise to be expected in the overall level of environmental protection comes from the fact that the *favor laesi* policy-orientation in choice-of-law in environmental torts will force potential tortfeasors to adjust to the strictest potentially applicable national law¹⁴²⁸. If all the possible *loci damni* are known in advance, there should be no uncertainty as regards what the outcome will be. Precisely, this last observation points to the only eventual source of unpredictability in Article 7 as it stands nowadays: depending on the relevant type of polluting industry, the potential *loci damni* may not be known in advance. But as it may be easily understood, this is a very different matter. This potential share of unpredictability does not come from the elective structure, but from the combination of two elements: the nature of the tortious activity and the very content of one of the connecting factors displayed in the provision¹⁴²⁹.

This last commentary closes the *stricto sensu* assessment of Article 7 and works as a perfect transition towards the analysis of the commentary on Article 7 provided by the EU Commission in the explanatory memorandum to the Rome II proposal.

I. Assessing the explanation on Article 7 in the explanatory memorandum to the Rome II proposal

The final piece in the analysis of the Article 7 puzzle has already been partially dealt with *supra*: the policy explanations provided in the memorandum that accompanies the Rome II proposal have already been resorted to, wherever needed in previous chapters, without, however, being fully critically analyzed. Thus, in order to complete the appraisal of Article 7, a critical assessment of the policy reasoning put forward by the Commission, as a justification for the inclusion of the provision in the Rome II Regulation, needs to be delivered¹⁴³⁰. The said critical assessment will refrain from being exhaustive, for a number of reasons. Firstly, a comprehensive approach would entail repeating some points already put forward in previous chapters (for instance, as concluded in Chapter 3, while Article 7, recital 24 and the first paragraph of the explanation in the explanatory memorandum clearly state that Article 7 needs to allow redress to “*damage to the ecology itself*”, as the law stands nowadays, such redress seems short of impossible in many instances)¹⁴³¹. Secondly, there are multiple minor

¹⁴²⁸ *Vid.* the explanatory memorandum to the Rome II proposal, pp. 19-20.

¹⁴²⁹ Furthermore, it must be pointed out that the Commission seems to consider the amount of unpredictability arising from the *lex loci damni* connection to be negligible (“[...] *The solution in Article [4.1] meets the concern for certainty in the law [...]*”), and that *lex loci damni* is a satisfying compromise between the *lex loci actus* and victim-choice options (*vid.* explanatory memorandum to the Rome II proposal, pp. 11-12).

¹⁴³⁰ It must be noted, from the offset, that R. PLENDER AND M. WILDERSPIN (*The European Private International Law of Obligations* (3rd ed.), *op. cit.*, pp. 635-636) qualify the justifications provided in the explanatory memorandum to the Rome II proposal in respect of Art. 7 as “*improbable*” and “*not convincing*”.

¹⁴³¹ Other than this, there are multiple small details which do not fully make sense: it is not completely clear how may the “*major differences*” in “*the right of associations to bring actions*” justify the existence

inconsistencies in the explanation (for instance, it is not completely clear how may the “*major differences*” in “*the right of associations to bring actions*” justify the existence of Article 7); dealing with such small details would excessively deviate the discussion from theme of the effectiveness of Article 7. The following pages will thus focus on the most problematic aspects of the policy explanations since, in reality, they point to some hidden limitations, both in the Commission’s overall reasoning, and in the very effectiveness of the EU’s environmental PIL construction.

BOX 20:

Relevant excerpts of the policy explanations in the explanatory memorandum to the Rome II proposal

The problematic aspects of the explanations arise from the following five excerpts:

i) first prong: “*The basic connection to the law of the place where the damage was sustained is in conformity with recent objectives of environmental protection policy, which tends to support strict liability*”.

ii) second prong: “*The solution is also conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries, which removes the incentive for an operator to opt for low-protection countries. The rule thus contributes to raising the general level of environmental protection.*”

iii) third prong: “*But 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. Considering the Union’s more general objectives in environmental matters, the point 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*”.

iv) fourth prong: “*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*”.

v) fifth prong: “*A further difficulty regarding civil liability for violations of the environment lies in the close link with the public-law rules governing the operator’s conduct and the safety rules with which he is required to comply. One of the most frequently asked questions concerns the consequences of an activity that is authorised and legitimate in State A (where, for example, a certain level of toxic emissions is tolerated) but causes damage to be sustained in State B,*

of Article 7. This kind of detail will not be addressed, in order to focus on the core arguments that need to be put forward.

where it is not authorised (and where the emissions exceed the tolerated level). Under Article 13, the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which he is in business”.

[Emphasis added]

i. The spatial reasoning in the explanation

The first major problematic point in the memorandum’s explanation for Article 7 arises from one of its underlying arguments: the reasoning on the spatial / geographical structures of international environmental torts that is used to justify Article 7’s configuration (both the elective structure and the resort to the *lex loci actus* and *lex loci damni* connecting factors). Let us progressively deal with this point, assessing the memorandum’s explanation step by step:

i) The spatial / geographical reasoning used to justify the *lex loci damni* connection in the second prong of the policy explanations is fallacious: a potential tortfeasor may only consider abiding “*by the higher levels of protection in neighbouring countries*” insofar as the type of pollution, industry or activity makes it foreseeable that the source of damage may cross the frontier, and that damage may be caused in the said “*neighbouring countries*”. Thus, “*the incentive for an operator to opt for low-protection countries*” will only disappear where the materialization of transboundary damage in a country with a higher level of protection is to be expected. In principle, if the potential tortfeasor envisages that any possible damage will only potentially materialize within the boundaries of a given country, there is no incentive not to opt for a low-protection country, be it in an intra-European or in a global context. In other words, wherever the type of pollution, industry or activity is such that its geographical reach may be under control a rogue operator will still see the *lex loci damni* connecting factor as an incentive to relocate¹⁴³².

ii) Moreover, the second and the fourth prongs are, at least at first sight, at odds with each other: a rogue tortfeasor who is smart enough to establish herself at the frontier in order “*to discharge toxic substances into a river and enjoy the benefit of the neighbouring country’s laxer rules*” might as well move to the neighbouring country altogether¹⁴³³. It is, therefore, not possible to assert that the *lex loci damni* “*removes the incentive for an operator to opt for low-protection countries*” as if it was an absolute truth, as it is done in the second prong. Even more so, it would seem that prong number 2 focuses on accidental or non-deliberate damage while prong number 4 focuses on deliberate / rogue damage: this distinction is extremely important and, in my opinion, not only it should have been acknowledged, but it also impedes using both scenarios to make any overarching / common categorical assertion.

¹⁴³² As it will be repeatedly mentioned in the following footnotes, this is just one incentive, thus it may or may not be decisive in deciding to relocate (for the decision to relocate depends on a number of elements).

¹⁴³³ This assertion is nuanced because it will be contended *infra* that actually relocation decisions are not based only in a single legal aspect, but on the overall advantages provided by the relevant legal order. Therefore, after comprehensively comparing the legal orders of the relevant countries, dumping from the border into the next State may still be more interesting than relocating. However, whether the Commission shares this view is not sufficiently explained in the argumentation.

iii) The third prong asserts that victims in a low-protection country would not enjoy the “*higher degree of protection available in neighbouring countries*” if the only available connecting factor was the *lex loci damni*, as means to justify the *lex loci actus* connection. While this is a well-intentioned effort, the sole availability of the *lex loci actus* is not, by itself, a guarantee of the enjoyment of the “*higher degree of protection available in neighbouring countries*”. Putting aside the fact that adding the place-of-acting connection amounts to nothing in merely international torts (due to the coincidence of the place of acting and place of result) the Commission’s reasoning may only work partially in transboundary torts: it may only work for certain in those cases where the *lex loci actus* is a strict-liability system. It may or may not work (depending on the availability of evidence and similar factors) in those cases where both the *lex loci damni* and the *lex loci actus* are fault-based legal systems, and this uncertainty will even be more radical in those cases where the *lex loci damni* is a strict-liability system and the *lex loci actus* is fault-based¹⁴³⁴.

Notwithstanding these thoughts, what is fundamentally problematic is the overarching spatial / geographical reasoning that runs through them, more precisely the constant references to “*neighbouring countries*” in the second, third and fourth prongs, and the constraint of the explanation to transboundary torts that is implicit in the first prong¹⁴³⁵: these elements indicate that the whole policy explanation is built having in mind transboundary environmental torts only, and possibly only in an intra-European context¹⁴³⁶. However, the rule applies also to merely international torts and, moreover, taking into account the universal scope of application of the Regulation, the rule is meant to operate at a global scale. It seems therefore incoherent to build a choice-of-law rule on considerations of spatial proximity / neighbouring legal orders, and transboundary situations when the rule is to be applied irrespectively of where in the world the facts take place, as long as the dispute comes before an EU court (universal application of the Rome II Regulation)¹⁴³⁷. In other words, it seems incoherent to

¹⁴³⁴ This idea refers exclusively to the substance and nature of the “protection”. If, additionally, the element of the quantification of damages is brought into consideration, uncertainty increases in all scenarios.

¹⁴³⁵ Although it is not explicit, the only way to fully make sense of the first prong is to consider that it refers to transboundary environmental torts: when one asserts that the “*basic connection*” to the *lex loci damni* reflects the value of “*strict liability*”, one is acknowledging the potential vocation of a possible *lex loci actus* to apply to the facts (thus, one is placing the relevant reasoning in a transboundary context) and is thus considering that what “matters” is what happens in the place of result. In other words, the referred assertion entails that its author considers that even when the facts are not tortious under the *lex loci actus* there should be the possibility to litigate upon them if they are tortious under the *lex loci damni*. As it will be mentioned *infra*, this means that the first and the fifth prongs are at odds with each other.

¹⁴³⁶ Since the rule is only binding upon the courts of the Member States of the European Union it is not to be excluded that the “neighbouring” references were intended to point, in the mind of the European Commission, to situations involving only European Member States, or at the most, situations involving a Member State and a third country in its vicinity. While this would entail a regrettable confusion in the Commission’s mindset between the notions of “applicability” and “binding effect” of a legal instrument (especially in the light of the text of Article 3 of the Regulation) it is not to be excluded.

¹⁴³⁷ Perhaps the Commission did not want to discuss these issues in terms of “place of acting”, but in terms of “neighbouring” places in order to curtail possible expansive interpretations of the place of action as those which will be suggested *infra*? (Vid. *infra* “Corrective interpretation”).

build a rule by adjusting it to match a single set of situations, when the rule is meant to be resorted to in several diverse kinds of scenarios¹⁴³⁸.

This is, thus, the first major problem that may be identified in Article 7 of the Rome II Regulation: the disruption that the discordances just described cause, notably when the rule is put to the test of global situations. However, before addressing it, a second major deficiency needs to be presented.

ii. *The meaning of the term “higher levels of protection” (and similar expressions)*

The second, third and fourth prongs contain references to terms such as “*higher levels of protection*”, and “*raising the general level of environmental protection*” which articulate the policy objective of achieving an improvement in the levels of protection of the environment¹⁴³⁹. The reasoning of the Commission seems, therefore, to aim at taking advantage of the existence of diverging levels of protection in different places to the benefit of the environment: through its structure, connecting factors, and victim-choice nature, the provision is said to aim at provoking – what could be called – a “push to the top” in terms of protection (as the opposite to a “race to the bottom”). But if the aim of the provision is to force potential polluters to abide by “*higher levels of protection*”, it may be useful to reflect on what those “*higher levels of protection*” are, how they are defined and established, and how they get to be abided by.

The expression possibly refers to whichever rules of private law may amount to increase the monetary compensation to be provided to the victim in case of damage. This would range from simple rules establishing a more significant valuation and quantification of damages, to more generous rules on “*limitation periods*”¹⁴⁴⁰. It could equally aim at the very basic – yet essential – question of the strict liability / fault-based liability dichotomy. In these cases, “*protection*” should be understood as compensation for, as explained *supra*, there may hardly ever be deterrence in environmental corporate torts due to the relative value of tort law following cost-benefit analysis¹⁴⁴¹.

¹⁴³⁸ As a clarification, this assertion on the “differences” of the situations is not contrary to the reasoning on their “similarities” to be found in “*Third argument: the law of the domicile of the polluter as a global adaptation of the Commission’s “neighbouring countries” reasoning*” *infra*. *Vid.* also footnote 1686.

¹⁴³⁹ The term “*policy of prevention*” is equally used but it is not reflected in the main text in order not to render the explanation excessively complicated: as repeatedly explained it seems very difficult to attain deterrence through tort means in the realm of environmental issues.

¹⁴⁴⁰ This is one of the examples provided by the very explanatory memorandum to the Rome II proposal (*op. cit.*, p. 19) of aspects upon which different legal systems tend to diverge (therefore justifying the need for choice-of-law rules in environmental matters).

¹⁴⁴¹ To be sure, whatever contributes to a higher level of compensation, and thus to a more significant fulfilment of compensation goals, is to be welcomed. However, as regards deterrence (as a variety of prevention) it is not possible to make any clear assertion. Certainly, a higher level of compensation will bring the cost-benefit analysis closer to a “do not pollute” outcome, but since the analysis is relative and not absolute, there are no means to guarantee that this will be the case. *Vid. supra* Part I, Chapter 1 (“*The alleged effectiveness of intervening in environmental matters through the means of content-oriented multilateral choice-of-law rules*”).

Notwithstanding these considerations, a fundamental question to be asked is whether the referred expression aims exclusively at more stringent private-law provisions. Rules of public law may have an important role to play in cases of international environmental tort. For instance, pollution is often legally defined by rules of administrative law¹⁴⁴² which establish so-called environmental “standards”. Standards are a form of regulatory intervention that allows activities “to take place without any *ex ante* control but the supplier who fails to meet certain standards of quality commits an offence”¹⁴⁴³. In terms of degree of public-authority intervention, standards are placed in a middle position within the range of regulatory instruments which may hinder, for environmentally-protective purposes, the development of freedom of activity¹⁴⁴⁴. They lie between, on the one hand, economic and information measures – low intervention – and prior approval (authorization), which represents the highest possible degree of public control¹⁴⁴⁵. Furthermore, standards can take several forms: i) target standards, which define the level of environmental ambient quality (for instance, in the atmosphere or water) which is regarded as desirable; ii) performance (or output) standards, which entail the control of the emissions from individual firms, and are expressed in the terms of the maximum concentration of particular pollutants; iii) specification (or input) standards, which either prohibit the use of certain production methods or materials, or either prescribe, for individual firms, the measures or processes which must or must not be adopted (for instance the use of a certain fuel)¹⁴⁴⁶.

Taking this into account, it is legitimate to wonder whether the European Commission had in mind the possible application of foreign higher environmental quality standards, as embodied in public law provisions, when it designed Article 7 of the Rome II Regulation. This would seem to be the case, if one reads between the lines of the explanatory proposal¹⁴⁴⁷. If it was indeed the case, the Commission’s approach would pose fundamental difficulties in terms of the spatial application of legal provisions, at least from two different perspectives:

i) From a very conservative and traditional standpoint, public law has historically been considered to apply only within the territory over which the enacting entity can exercise its powers. Put otherwise, traditionally, it has been contended that the function of choice-of-law rules is to point the legal order to be applied to a certain legal controversy, and that, when doing so, they point exclusively to the ensemble of private-law rules contained therein, and

¹⁴⁴² *Vid.* N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution - Essai sur la genèse et la portée juridique de quelques principes du Droit de l’Environnement*, *op. cit.*, p. 71.

¹⁴⁴³ *Vid.* A. OGUS, “Standard setting for an environmental protection”, in M. FAURE, J. VERVAELE, A. WEALE (eds.), *Environmental standards in the European Union in an interdisciplinary framework*, Antwerp, Maklu, 1999, pp. 25-30, at pp. 26-27.

¹⁴⁴⁴ *Ibidem*, pp. 26-27.

¹⁴⁴⁵ *Ibidem*, pp. 26-27: “Economic measures do not impede any legal constraints on a supplier’s behavior; rather they function as incentives, conferring financial advantages or disadvantages on desired and undesired activities, respectively”. As examples of negative and positive economic instruments respectively the author mentions taxes or charges and subsidies. On their turn, “Information measures require suppliers to disclose certain facts but do not otherwise impose behavioral controls”. The example provided thereof is ecolabeling.

¹⁴⁴⁶ This whole paragraph is a synthesis of A. OGUS, “Standard setting for an environmental protection”, *op. cit.*, pp. 26-27.

¹⁴⁴⁷ *Vid.* in prong number 5 the reference to public law and to Article 17 (back then Article 13 of the proposal).

not those labelled as public-law rules. This is due to the fact that, typically, rules of public law have been conceived as having a highly "political" nature and, thus, as not being suitable for enforcement beyond the frame of the territory over which the enacting political entity can exercise its jurisdiction¹⁴⁴⁸. As it may be easily understood, this position clashes with the one that stems from the explanatory memorandum, and leads to an applicability conundrum.

ii) However, the conundrum does not disappear, but merely mutates, if the traditional and conservative position on the restricted applicability of public law is replaced by a more modern approach¹⁴⁴⁹: modern unilateralism in private international law contends that EU secondary law instruments can autonomously determine their own scopes of application in space¹⁴⁵⁰. Due to the breadth of EU environmental law, it is to be expected that many environmental standards be established by European Regulations and European Directives (through their national transpositions). It is, therefore, also to be expected that the spatial applicability of those standards be determined by – explicit or implicit – scope rules and applicability criteria. This, again, is at odds with the assumption that underlies the explanatory memorandum, that Article 7 may allow and / or command the application of “foreign” environmental quality standards.

While the Rome II Regulation contains a general provision, Article 17 (on “*rules of safety and conduct*”) which, allegedly, could help deal with these issues (at least partially), it is uncertain whether this provision may actually fulfill a satisfying role in respect of the specificities of international environmental torts, in the light of Article 7’s *favor laesi* requirements. Taking into account these considerations, the challenges to the effectiveness of Article 7 which arise from its interplay with environmental standards, and with Article 17, are the second major difficulty to be dealt with¹⁴⁵¹.

¹⁴⁴⁸ *Vid.* O. BOSKOVIC, "Droit international privé et environnement. - Conflit de juridictions - Conflit de lois", *JurisClasseur Environnement et Développement durable*, 2030, 2013-2014, pp. 1-16, at p. 3 (where the traditional position is said to be "*l'inapplicabilité absolue du droit public étranger*"). For further explanations on this idea and more references *vid. infra* "Challenges from the standpoint of the traditional doctrine on the spatial applicability of public law".

¹⁴⁴⁹ The word modern is used between inverted commas for, as it may be well understood, unilateralism as a stream of thought and methodology in private international law is certainly not “modern”. *Vid.* the discussion and all the references provided in Part I, Chapter 1 (“*Typology of choice-of-law rules (II): scope rules (règles d’applicabilité)*”).

¹⁴⁵⁰ *Vid.* S. FRANCO, *L’applicabilité du droit communautaire au regard des méthodes de droit international privé*, Bibliothèque de la Faculté de droit de l’Université catholique de Louvain, Bruxelles / Paris, Bruylant, L.G.D.J., 2005, notably pp. 641-652.

¹⁴⁵¹ The focus of the corresponding sub-section *infra* is “standards” and not “authorizations” or “permits”, but its conclusions should be, in principle, transposable, *mutatis mutandis*, to permits / authorizations (there should be no significant difference in terms of practical outcome for, as referred, both of them are forms of public-authority intervention). For introductory considerations on both standards and administrative authorizations, *vid.* S. FRANCO, "Le règlement Rome II sur la loi applicable aux obligations non contractuelles", *op. cit.*, pp. 131-132, and 132-133, respectively. Bernasconi and Betlem devoted an article to the theme of authorizations (C. BERNASCONI & G. BETLEM, "Cross-border pollution: private international law analysis of administrative authorisations as regulatory compliance defence (A view from Europe)", *International Law – Revista Colombiana de Derecho Internacional*, vol. 2003-2, 2003, pp. 301-317) but it is of limited interest nowadays, for it pre-dates the Rome II Regulation and, therefore, the relevant reasoning does not take place within a legal context where *favor laesi* and environmental protection are meant to play a significant role. *Vid.* also – albeit with similar caution – G.

Since both the first and the second congenital deficiencies have been presented, let us deal with them in sequence.

II. The first foundational deficiency of Article 7 of Rome II

It was announced *supra* that Article 7's first congenital deficiency derives from the fact that it is built having in mind a single kind of scenario only (transboundary environmental torts in a neighbouring intra-European context), while it actually applies to other scenarios (the rule actually applies at a global scale and to merely international torts too)¹⁴⁵². However, beyond a lack of consistency, this mismatch creates a significant disruption in the practical implementation of Article 7: the way it has been conceived, the provision does not actually fulfil its ambitious environmental objectives in a significant amount of cases coming within its scope. In precise terms, the first congenital deficiency that Article 7 suffers from is that the narrow structural reasoning it was built upon renders it unfit to fully achieve its victim-compensation and environmentally-protective policy objectives at least in "merely international" situations arising in an extra-European / global context.

In order to justify this assertion, a practical demonstration of the existence of the failure will be provided (B), after a brief recapitulation on the objectives and territorial scope of the EU's environmental policy and law (A).

A. Review of the objectives and territorial scope of the EU's environmental policy and law

In order to further bring into the light the first hidden failure in Article 7, certain aspects of the EU's environmental law and policy – amongst which their objectives and territorial scopes –

PALAO MORENO, *La responsabilidad civil por daños al medioambiente*, *op. cit.*, pp. 133-141 (and, the bibliography therein cited, especially footnote 299); C. ZILIOI, "Choice of Law", in C. VON BAR (ed.), *Internationales Umwelthaftungsrecht I. Auf dem Wege zu einer Konvention über Fragen des Umwelthaftungsrecht*, 1994, Köln, C. Heymanns, pp. 177-194, at pp. 190 (a one-page summary of the issue); M. VINAIXA, *La responsabilidad civil por contaminación transfronteriza derivada de residuos*, *op. cit.*, pp. 411-425, and K. FACH, *La contaminación transfronteriza en Derecho internacional privado*, *op. cit.*, pp. 386-411. *Cfr.* these opinions with J.C. FERNÁNDEZ ROZAS & S. SÁNCHEZ LORENZO, *Curso de Derecho Internacional Privado* (3rd ed.), Madrid, Civitas, pp. 392-393: these authors consider that the issue of foreign authorizations and permits is to be distinguished from the issue of application of foreign public law, and needs to be understood as resembling the issue of the recognition and enforcement of foreign public acts and documents. Should this be the case, then arguments pertaining to the *ordre public* exception (on the grounds that permits and authorizations would entail an assertion of authority by a foreign sovereign entity) would become relevant. It would also be the case of arguments pertaining to the "*Sic utere tuo ut alienum non laedas*" principle, despite the difficulties which may derive from its lack of self-executing character.

¹⁴⁵² As it was already pointed out, it seems incoherent to build a choice-of-law rule on considerations of spatial proximity, neighbouring legal orders, and transboundary character when the rule is to be applied irrespectively of where in the world the facts take place (as long as the dispute comes before an EU court).

need to be either recalled or else rendered explicit (whenever they were only suggested in previous chapters). The point of departure of these considerations is the very text of Article 191.3 TFUE, which establishes as one of the objectives of the Union's environmental policy: "[...] *promoting measures at international level to deal with regional or worldwide environmental problems* [...]". Very interestingly, much before the Lisbon Treaty inserted an explicit consecration of an "external environmental policy" into art. 191 TFUE, relevant authors had already asserted that the scope of the environmental protection contained in the EU Treaties was not limited to a – reductive – understanding of the references to the environment as meaning exclusively the EU's environment¹⁴⁵³. Historically, this has not always been the case: during the times of the European Single Act the scope of the environmental objectives of the – then – European Community were the object of discussion, specifically regarding whether they were territorially limited¹⁴⁵⁴. Despite these precedents, nowadays there seems to be a certain consensus on the idea that the conception of environmental protection enshrined in the Treaties goes beyond the boundaries of the EU. This assertion seems to go well beyond the typical "common place" argument of environmental problems being global in nature because "pollution knows no frontiers"; strong indications of the accuracy of this approach may be found both at the political discourse / policy practice and strictly legal levels:

i) As regards the discursive and policy-implementation levels, it is contended that the EU has tried to project its internal environmental policy to the field of its international relations as a means to shape its international political image. This idea is supported, notably, by some detailed academic assessments of the EU's external environmental action specifically as regards its attempt to become an environmental "leader" in the frame of climate-change and Kyoto-protocol-related negotiations¹⁴⁵⁵.

¹⁴⁵³ Vid. L. KRÄMER, *EC Environmental Law* (6th ed.), *op. cit.*, p. 3. In the same sense, J. H. JANS, *European Environmental Law* (2nd ed.), Groeningen, Europa Law Publishing, 2000, pp. 29-31.

¹⁴⁵⁴ Vid. J. H. JANS, *European Environmental Law* (2nd ed.), *op. cit.*, p. 29. A different question, subject to discussion, is ascertaining whether the transcribed extract of Art. 191.1 TFUE covers unilateral action or not (*Ibidem*, p. 30). In this sense, it must be mentioned that after this first "open" reference, it is only in Art. 191.4 that the Treaty refers to international cooperation and agreements as regards environmental affairs. J. H. Jans (*Ibidem*, p. 29) contends that, at least at the end of the 20th century, a significant share of the EU's extraterritorial environmental policy has been articulated through unilateral measures. In p. 29 of the 2nd ed. (2000) he provides a list of EU environmental law instruments which affect either the "global" or the "regional" environment beyond the frontiers of the EU. However, since almost all the instruments in that list have been repealed it was important to perform the analysis that will be found *infra* (Vid. *infra* "Empirical research: Spatial references in EU secondary environmental law").

¹⁴⁵⁵ Vid., *inter alia*, the following articles or chapters in collective works by O. COSTA: "Los dos debates sobre seguridad y medio ambiente", *Ecología política*, N. 23, 2002, pp. 27-48; "Puestos a liderar. Unidad e influencia de la UE en la política internacional del clima", in M. E. BARBÉ IZUEL (coord.), *Cambio mundial y gobernanza global: la interacción entre la unión europea y las instituciones internacionales*, 2012, pp. 124-141; "La política exterior de la UE en materia ambiental. Interacciones, normas y preferencias", in F. J. QUEL LÓPEZ, J. J. ÁLVAREZ RUBIO, J. L. DE CASTRO RUANO (coords.) *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2012: Vitoria-Gasteizko Nazioarteko Zuzenbidearen eta Nacioarteko Harremanen Ikastaroak 2012*, Madrid, Tecnos, 2013, pp. 377 and following. Vid. Along the same lines (agreeing on the "defining" character of climate change issues for the EU's international profile), but with a more skeptical view, J. DE CENDRA DE LARRAGÁN, "EU climate change law: a credible example?" in W. SCHOLTZ & J. VERSCHUUREN (eds.), *Regional Environmental Law – Transregional Comparative Lessons in Pursuit of Sustainable Development*, New horizons in environmental law and energy series, Cheltenham, Edward Elgar Publishing, 2015, pp. 338-363.

ii) As regards the EU's specific environmental legal action, it has been suggested *supra* that the EU's secondary environmental legislation may be capable of establishing, whether directly or indirectly, its extraterritorial application (beyond the EU's frontiers). It must be acknowledged, however, that extraterritorial environmental protection may face contestation, for it may clash with third state's expectations: other countries may consider that the EU's environmental legislation interferes with their internal affairs and sovereignty, thus giving rise to diplomatic tensions¹⁴⁵⁶. This may be the case even when the relevant objective of the environmental measure is "global" and not "regional" in its scope. An excellent illustration thereof (which already hints to the conclusions that will be provided by a detailed analysis of these questions *infra*¹⁴⁵⁷), is the *Air Transport Association of America and others* ECJ-case, which deals with the allegedly expansive spatial applicability of the European emission-trading scheme in respect of air carriage¹⁴⁵⁸. In its decision, the ECJ ruled as admissible (i.e., as not contravening or breaching international law) the fact that the European emission-trading scheme is applicable to any air carrier – thus, also non-European-based ones – whose flights depart or land in EU airports¹⁴⁵⁹. However, despite the ruling, the practical outcome of the case has been that the

¹⁴⁵⁶ *Vid.*, in this sense, J. H. JANS, *European Environmental Law* (2nd ed.), *op. cit.*, p. 30. Pages 89 to 98 of the same book contain an introductory reflection on the kind of problem that so-called extraterritorial environmental legislation may give rise to within the frame of the law of the World Trade Organization, as well as other environmentally relevant WTO-related issues. As further explained by F. FRANCONI ("Extraterritorial application of environmental law", in K.M. MEESSEN (ed.), *Extraterritorial jurisdiction in theory and practice*, London, Kluwer Law International, 1996, pp. 122-146, at p. 122): "*Environmental regulation has become a serious source of barriers to the free movement of goods and technologies across national boundaries. The increasing stringency of environmental regulation in advanced industrial countries has stimulated the territorial relocation of polluting industries. This phenomenon, which has been called "pollution tourism", necessarily involves jurisdictional consequences. The increasing concern for the protection of the domestic environment has stimulated states to adopt legislation restricting the import of environmentally noxious substances. When such legislation extends to production processes and technologies abroad, an issue of extraterritorial jurisdiction arises. Naturally, the best way to address these issues is with the development of common environmental standards at a global level or at a regional level*".

¹⁴⁵⁷ *Vid. infra* "Empirical research: Spatial references in EU secondary environmental law".

¹⁴⁵⁸ *Vid. ECJ, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, judgment, *op. cit.* The core piece of legislation of the ETS is Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, O.J. L 275, 25.10.2003, p. 32. For a contextualization of this "unilateral" climate change decision in the frame of the EU's climate change policy, *vid. K. KULOVIĆ, "Climate change in EU external relations: please follow my example, or I might force you to", in E. MORGERA (ed.), The External Environmental policy of the European Union – EU and International Law perspectives*, Cambridge, CUP, 2012, pp. 115-148 (especially 139-146). For further accounts of the role of the EU in environmental and climate-change-related global governance, *vid. M. BOURBLANC, "The European Union and global environmental governance", in J.-U. WUNDERLICH & D. J. BAILEY (eds.), The European Union and Global Governance – A Handbook*, London, Routledge, 2011, pp. 131-139; S. OBERTHÜR, "The role of the EU in global environmental and climate governance", in M. TELÒ (ed.), *The European Union and Global Governance*, Gernet Series: Europe in the World, London, Routledge, 2009, pp. 192-210.

¹⁴⁵⁹ *Per* the amendment made by Directive 2008/101, paragraph 2 of the introduction preceding the table set out in Annex I to Directive 2003/87 ("*Categories of activities to which this Directive applies*") had the following subparagraph added to it: "*From 1 January 2012 all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies shall be included*". Furthermore, *vid., inter alia*, para. 125 of the decision: "*In laying down a criterion for Directive 2008/101 to be applicable to operators of aircraft registered in a Member State or in a third State that is founded on the fact that those aircraft perform a flight which departs from or arrives at an aerodrome*

EU has been forced to temper its position and enter into negotiations within the frame of the International Civil Aviation Organization, due to international pressure¹⁴⁶⁰.

Nevertheless, potential diplomatic or WTO-related contestation is not relevant for the purpose of this sub-section. What matters is the fact that the spatial application of EU environmentally relevant legal instruments (as provided by direct or indirect means) may, potentially, in some cases, be extraterritorial. Therefore, there is a coincidence between the said spatial scope of application, the spatial scope of the EU's political discourse and environmental policy, and the will of worldwide environmental protection as provided by the EU Treaties.

Taking into account these observations, it would be coherent for the EU to equally project outside, for environmental purposes, the – relatively high – civil liability standards provided for by the law of its member States. In this vein, moreover, all of the above considerations are, *prima facie*, coincident with the global reach provided to the EU environmental PIL mechanism by the rules on the territorial scopes of the Rome II and Brussels I BIS Regulations. Nevertheless, as it has been announced, the actual outcomes that Article 7 leads to in practice are not fully coincident with these features: *inter alia*, the rule is ill-prepared to cope with environmental torts caused by European tortfeasors outside the EU. Let us turn now to a brief demonstration of how this failure materializes.

B. Demonstration of existence of the failure: case screening

Let us recall that recital 25 of the Rome II Regulation establishes that:

“Regarding environmental damage, Article [191] of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage [...]”.

Similarly, let us also recall the fact that the commentary to Article 7 in the explanatory memorandum to the Rome II proposal repeatedly refers to a will to ensure “*higher levels of protection*”, the objective of “*raising the general level of environmental protection*”, and similar notions. While the current formulation of Article 7 may possibly contribute to the

situated in the territory of one of the Member States, Directive 2008/101, inasmuch as it extends application of the scheme laid down by Directive 2003/87 to aviation, does not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union”.

¹⁴⁶⁰ The European Commission has referred to the outcome of these negotiations in the following terms: “*In October 2016, the International Civil Aviation Organization (ICAO) agreed on a Resolution for a global market-based measure to address CO2 emissions from international aviation as of 2021. The agreed Resolution sets out the objective and key design elements of the global scheme, as well as a roadmap for the completion of the work on implementing modalities*”.

Vid. http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm (Last consulted on Feb the 6th 2017).

crystallization of the referred principles, values, and objectives in situations of transboundary environmental damage, especially in an intra-European context, the same cannot be asserted in merely international environmental torts, especially where they arise outside of the EU. In other words, it is very likely that Article 7's choice-of-law content – specifically its structure and connecting factors – may not be sufficient to ensure, in all possible situations coming within its scope, i) that there is “*discriminatio[n] in favour of the person sustaining the damage*”; ii) that the polluter actually gets to adequately compensate for the environmental damage caused; iii) and that the rule thus contributes to raising the general level of environmental protection. The content-oriented nature of Article 7 most directly manifests in the possibility of choosing the applicable law in situations of transboundary environmental tort. In merely international (environmental) torts victims do not have any choice at their disposal¹⁴⁶¹: the *lex loci actus* and the *lex loci damni* are coincident; there is only one possible applicable law. What if the only applicable law lacks civil-liability rules on environmental damage, or has a polluter-friendly civil-liability system? Since Article 7 may come to be applied to environmental torts arising anywhere in the world¹⁴⁶², it is not unlikely that the only law to be applied ends up being the law of a State whose legal system is simply not prepared to cope with environmental torts. This kind of situation is far from being rare, and has led to criticism. C. Otero, for instance, considers that this kind of scenarios “*offers pseudo-impunity for European companies acting in countries whose legal rules on civil liability for environmental damage are deficient*”¹⁴⁶³. The universal *ratione loci* application of the Rome II Regulation, therefore, places Article 7 in a global context, and provides it with a significant role as regards environmental global governance: Article 7 governs the environmentally-relevant behavior of European-based corporations. Let us examine a few hypotheses in this sense.

BOX 21:

Model 1: *Milieu Defensie v. Shell*

¹⁴⁶¹ As repeatedly suggested since Chapter 1, so-called merely international (environmental) torts are tortious situations where the manifestation of environmental damage and the event that causes it are located in the same country, and the international character of the tort arises from the fact that the polluter is a foreigner.

¹⁴⁶² It also needs to be recalled that the Rome II Regulation is binding on all the Member States of the EU – with the exception of Denmark – and following Article 3, its application is universal: the Regulation's application is not submitted to any *ratione loci* condition. This means that whenever a court throughout the EU – excepting Denmark – asserts jurisdiction over a given dispute Rome II is applied irrespectively of the spatial circumstances of the litigation: it does not matter where in the world the tortious facts took place. In other words, this also means that the choice-of-law rules in the Regulation may point to the law of any State in the world (not necessarily a Member State of the European Union). In short, within the material scope of the Regulation (as defined in Article 1), every single judicial authority within the EU mandatorily follows its choice-of-law rules in order to determine the law to be applied to non-contractual obligations, and no space is left to national choice-of-law rules.

¹⁴⁶³ *Vid.* C. OTERO GARCÍA-CASTRILLÓN, “International litigation trends in environmental liability: a European Union-United States comparative perspective”, *op. cit.*, p. 569. The full sentence refers to the operation of the *lex loci damni* connecting factor specifically. However, due to the coincidence of the *lex loci damni* and the *lex loci actus*, the quote can be used as it is done here without distorting its sense.

(Merely international environmental tort committed by a western corporation and one of its subsidiaries)

NATURE: Real-life case.

ALLEGED TORTFEASOR(S): the European parent-company, and its Nigerian subsidiary.

ALLEGED VICTIM(S): Nigerian population in Ogoniland.

LOCATION OF THE TORTIOUS RESULT(S): Ogoniland, Nigeria.

OTHER PHYSICAL OR LEGAL PERSONS INVOLVED: None (the local subsidiary is considered to be a co-tortfeasor).

DESCRIPTION: Box 1 above sufficiently described the *Milieu Defensie v. Shell* case, which has been chosen here as a paradigmatic an example of merely international environmental torts committed by European and North-American corporations together with their subsidiaries. Other well-known cases which present a very similar structure and fact-pattern are the above-referred Chevron / Lago Agrio dispute (Box 2, here only in reference to the Ecuadorian victims), the Lubbe case (Box 16) and the Bhopal catastrophe (Box 18). Notwithstanding the fact that victims have asserted that, due to socio-political circumstances, it is unlikely that Nigerian courts may be able to provide a fair trial, it has already been referred that Nigerian civil law does not seem capable of adequately dealing with this kind of tort and providing fair and just compensation¹⁴⁶⁴.

BOX 22:**Model 2: Secondary establishment of a European company in a non-European country**

NATURE: Fictive model.

ALLEGED TORTFEASOR(S): Eurochemistry = European-based corporation.

ALLEGED VICTIM(S): Ruritania citizens = injuries and economic loss; undetermined victims = purely environmental damage.

LOCATION OF THE TORTIOUS RESULT(S): Ruritania = developing country.

OTHER PHYSICAL OR LEGAL PERSONS INVOLVED: None.

DESCRIPTION: Eurochemistry is a European-based chemicals company, domiciled in Oz (an EU Member State), where it also has its principal place of business, and central administration. It develops business activity through all of the EU and several third States. A part of its chemical production is, nevertheless, produced in *Ruritania*, a developing country whose legal standards on working-environment safety and environmental protection are significantly lower than

¹⁴⁶⁴ *Vid. supra* Box 6, “The Nigerian case” (Chapter 1).

those in force in *Oz*. This entails lower production costs and a remarkable simplicity in terms of disposal of hazardous waste. After several months operating in perfect accordance to *Ruritania's* legislation, *Eurochemistry's* plant is informed that (i) locals living within a 3 km distance have developed severe breathing illnesses; (ii) crops have been lost in neighboring agricultural fields; (iii) the fish in the neighboring rivers and lakes (on which the local food supply depends) have disappeared. Despite the fact that all of the factory's activity is in perfect compliance with the administrative law in force in *Ruritania*, it is certainly not the case as regards *OZ's* standards. Additionally, the civil liability rules on environmental damage in *Ruritania* are, to a large extent, "polluter-friendly".

SPECIFICITY: No subsidiary involved; Deliberate / Non-accidental nature of the events. Choice of location: while in the previous box the location of the relevant natural resource (oil) necessarily determined the location of the operations, in this case the determining factor is the weakness of the local regulatory framework.

BOX 23:

Model 3: The Trafigura case¹⁴⁶⁵

NATURE: Real-life case.

ALLEGED TORTFEASOR(S): Trafigura Ltd. = UK-based corporation; Trafigura = Dutch-based parent corporation.

ALLEGED VICTIM(S): Ivorian citizens = injuries and death; no record of purely environmental damage¹⁴⁶⁶.

LOCATION OF THE TORTIOUS RESULT(S): Abidjan, Ivory Coast.

OTHER PHYSICAL OR LEGAL PERSONS INVOLVED: Société Tommy = Ivorian-based corporation (local contractor).

¹⁴⁶⁵ The summary of the facts is extracted from L. ENNEKING, "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, pp. 284-285, and C. OTERO GARCÍA-CASTRILLÓN, "International litigation trends in environmental liability: a European Union-United States comparative perspective", *op. cit.*, p. 551. As currently explained by the website of the British law firm Leigh Day: "*Leigh Day issued proceedings in the High Court in London at the end of 2006 and after a long legal battle involving around 20 experts, the claims were successfully settled out of court in September 2009, resulting in compensation for the claimants*" (<https://www.leighday.co.uk/International-and-group-claims/Ivory-Coast>; Last consulted on February the 2nd 2017). An interesting analysis (even if possibly excessively partisan) has been made, where the possibility of criminal prosecution under international criminal law is explored: *vid.* A. M. MANIRABONA, "L'affaire Trafigura : vers la répression de graves atteintes environnementales en tant que crimes contre l'humanité ?", *Revue de droit international et de droit comparé*, vol. 2011-4, 2011, pp. 535-576.

¹⁴⁶⁶ However, A. M. Manirabona refers to decontamination work being undertaken (A. M. MANIRABONA "L'affaire Trafigura : vers la répression de graves atteintes environnementales en tant que crimes contre l'humanité ?", *op. cit.*, p. 538): "*En 2007, en échange de l'abandon des poursuites pénales en Côte d'Ivoire, Trafigura a conclu un accord avec l'État ivoirien afin d'indemniser les victimes et financer les opérations de dépollution pour un montant de 152 millions d'euros*".

DESCRIPTION: In August 2006, the MV Probo Koala, a vessel sailing under a Panamanian flag and chartered by Trafigura Ltd., a UK-based shipping company, transported circa 580 tonnes of toxic petrochemical waste. They were offloaded in the Ivory Coast, after permission had been denied in several countries. *Inter alia*, a discharge had been attempted at the port of Amsterdam, The Netherlands (the country where the parent company of the Trafigura group has its seat), but the port service did not authorize the operation because of the alleged toxicity of the waste. The cargo was finally unloaded in Abidjan (capital of the Ivory Coast) into tanker trucks operated by an Ivorian company, Société Tommy, which had been contracted by Trafigura for its disposal. The local company dumped the toxic waste at several open sites around the city. Exposure to toxic fumes emanating from that waste subsequently led to the death of seventeen people and physical harm to up to 100,000 others.

SPECIFICITY: Deliberate / Non-accidental nature¹⁴⁶⁷; deliberate disposal of hazardous substances in a developing country after a developed country would not accept them; resort to a local cooperator.

BOX 24:

Model 4: Black tide in a non-CLC country by a European-based tortfeasor

NATURE: Fictive model

ALLEGED TORTFEASOR(S): Eurovessel = European-based owner of ship.

ALLEGED VICTIM(S): Undetermined victims = environmental damage *stricto sensu* (to the marine ecosystems and landscapes of Ruritania); Ruritanian citizens = economic loss arising from a decline of tourism in the zone + damage to touristic coastal properties.

LOCATION OF THE TORTIOUS RESULT(S): Coasts of Ruritania, a developing country that is not Member State of the EU and is not a party to the *International Convention on civil liability for oil pollution damage* (CLC).

OTHER PHYSICAL OR LEGAL PERSONS INVOLVED: Euro-chemistry = charterer, European-based corporation.

DESCRIPTION: An oil-loaded vessel wrecks in the territorial waters of *Ruritania*, spilling its cargo along that country's shores. The black tide causes severe damage to the *Ruritanian* coastal ecosystems, some touristic coastal properties, and to the overall touristic industry of the country, which is highly dependent on its natural environment. The accident is due to the deterioration of the vessel, that has not undergone appropriate maintenance as prescribed by the law in force in *Oz*, where *Eurochemistry* (the charterer) and *Eurovessel* (the owner of the

¹⁴⁶⁷ Allegedly, Trafigura tampered with documents, which excludes that the events may be the result of an involuntary negligence (A. M. MANIRABONA, "L'affaire Trafigura : vers la répression de graves atteintes environnementales en tant que crimes contre l'humanité ?", *op. cit.*, p. 538 : "Trafigura a également été accusée de faux en écriture pour avoir manipulé les documents de transport en vue de dissimuler la véritable nature de la cargaison transportée par ce navire").

ship) are domiciled. *Ruritania* is not a party to the CLC¹⁴⁶⁸, nor has any specific tort rules on environmental damage. The general regime of tort law in force therein is unable to adequately address this type of situations.

SPECIFY: Practical application of Article 7 of Rome II in a scenario that is not covered by a uniform law convention due to a lack of ratification.

BOX 25:

Model 5: Chemical transport traffic accident

NATURE: Fictive model

ALLEGED TORTFEASOR(S): *Eurochemistry* = European-based corporation.

ALLEGED VICTIM(S): Ruritanian citizens = injuries; undetermined victims = purely environmental damage.

LOCATION OF THE TORTIOUS RESULT(S): Ruritania

OTHER PHYSICAL OR LEGAL PERSONS INVOLVED: *EUChem*, a European-based subsidiary

DESCRIPTION: *Eurochemistry* loads a special van of its property with a very dangerous chemical substance, in order to transport it from *Oz* to the venues of *EUChem*, a subsidiary in *Avalon*. While the van is being driven by an *Eurochemistry* employee through *Ruritania* it suffers an accident in which no other vehicle is involved, on an isolated road in the middle of a forest. The accident and the subsequent chemical spill occur because the rules in force in *Oz* as regards vehicle maintenance and safety in the transport of hazardous liquids have been disregarded. As a consequence of the chemical spill, both ecological damage and severe health problems to the inhabitants of some neighboring farms arise. *Oz* and *Ruritania* are not parties to the Hague Convention on traffic accidents¹⁴⁶⁹. Once again, the civil liability rules on environmental damage in force in *Ruritania* are polluter-friendly.

SPECIFY: Deliberate disregard of the rules of safety and conduct in force in the place where the parent corporation is established.

¹⁴⁶⁸ As it may be recalled, the CLC is a Convention that establishes a substantive civil liability regime, applicable to damage occurring in the territorial waters, exclusive economic zone or the territory of its ratifying countries. As of February the 2nd 2017, 26 out of the 28 Member States of the European Union have ratified the CLC (Only Austria and the Czech Republic have not ratified it). *Vid.*, for a summary description, D. STEFANIUK, "La prévention des marées noires et leur indemnisation. Aspects de droit international et européen", *Journal du Droit International*, vol. 130-4, 2003, pp. 1013-1058, at pp. 1030-1034.

¹⁴⁶⁹ *Vid.* Convention on the law applicable to traffic accidents, concluded on May the 4th 1971, entered into force on June the 3rd 1975, available in the web page of the Hague Conference on Private International Law, on February the 8th 2017 (http://www.hcch.net/index_en.php?act=conventions.text&cid=81).

The current answer that the EU's private international law provides to the situations depicted in models 1 to 5 above is that *Eurochemistry* and *Eurovessel* can be sued in *Oz*, and *Shell* and *Trafigura* can be sued either in The Netherlands or in England. Then, most commentators would assert that the only possible applicable law, following Article 7 of Rome II, would be *Ruritanian*, Ivorian and Nigerian legislation, respectively, for the place of the harmful event and the harmful result – as the mainstream characterization goes – are to be found in the same location. This result seems, *prima facie*, coherent, because, at least in appearance, there is a structural difference with "transboundary" environmental tort cases, which justifies that there be only one legal system available for the victims. Nevertheless, since the rule's content-oriented character is based on an alternative, a lack of alternative means no eventual rise in the level of compensation / protection. In the referred models, victims will be "trapped" in unsatisfactory legal systems, as there will be no other applicable law to choose. In other words, if the relevant public-law standards of environmental protection are low, and / or the relevant private-law rules do not provide an adequate and fair solution to the situation, there is nothing wrong with this outcome from a "classic" private-international-law perspective. Some would even contend that the coincidence of the *lex loci damni* and *lex loci actus* makes the situation pretty simple in terms of conflicts justice, since the only applicable law is closely and very intensely connected to the facts¹⁴⁷⁰. This would be, however, a clear disregard of substantive justice: this practical outcome does not correspond with the substantive objectives of Article 7 of Rome II, notably with the goal of "*raising the general level of environmental protection*". Furthermore, in a global context, the operation of Article 7 makes void and meaningless – and even contravenes – the legal principles which inspire it, for it allows European-based companies to take advantage of the insufficiencies of the local law, derived from the above-referred global phenomenon of the legislative race to the bottom.

Two sets of arguments could be put forward to contest the ideas that have just been presented:

First, it could be contended that this alleged congenital deficiency actually implies that the spatial scope of application of Article 7 is not universal: the fact that the rule fails to fulfil its substantive-oriented objectives in extra-European merely international torts – due to the fact that it is built on a "neighbouring", transboundary, and possibly intra-European logic – may be an indication that its spatial scope of application diverges from what is established by the text of Article 3 of the Regulation. Similar theories have been presented as regards Article 6.3 of Rome II (non-contractual liability arising from violations of antitrust law)¹⁴⁷¹. However, there is a difference between building a rule having a given set of scenarios in mind and intending the rule to be applied exclusively and limitedly to that given set of scenarios. Moreover, certain

¹⁴⁷⁰ In a sublime article that provides an excellent introduction to the challenges that transnational corporations create in terms of environmental global governance, M. ANDERSON ("Transnational Corporations and Environmental Damage: Is Tort Law the Answer?", *Washburn L.J.*, vol. 41, 2001-2002, pp. 399-425) denounces the "*Tyranny of the Place of Injury*" in respect of choice of law in environmental torts (p. 415).

¹⁴⁷¹ *Vid.* S. FRANCO & W. WURMNEST, "International Antitrust Claims under the Rome II Regulation", *op. cit.*, p. 102. For a broad discussion on the spatial scope of application of the Regulation, and the difficulties it raises in connection with the Treaty basis used to enact it, *vid.* A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, pp. 80- 82 and 100-105.

arguments may be put forward to contend that there is no restriction in the application of Article 7, and that, actually, the first foundational deficiency exists:

i) As mentioned *supra*, the scope of the EU's environmental policy is "global" (in the sense of not being restrained to the protection of the environment of the EU)¹⁴⁷². There is, therefore, an alignment between its spatial scope of application and the spatial scope of application established by Article 3 of Rome II for the ensemble of the Regulation, which is universal (in the sense of covering tortious situations coming within its material scope, irrespective of their location in the globe, as long as they are litigated before the courts of a Member State);

ii) Had the polluter been European-based in the Chevron / Lago Agrio case described in Chapter 1 (Box 2), Peruvian victims would have been in an extra-European transboundary kind of scenario. Had Rome II been applicable time-wise, these victims could have potentially obtained an enhancement of protection, for they would have potentially benefited from a choice between two potentially applicable laws¹⁴⁷³. Since there is no explicit reference to any sort of territorial restraint in Article 7 or Recitals 24 or 25 of the Rome II Regulation, the fact that the rule may possibly fulfill its protection-enhancing objectives when applied in extra-European transboundary environmental torts (as the Peruvian branch of the Chevron / Lago Agrio saga) points towards the existence of the congenital deficiency in respect of extra-European merely international torts.

As a second ground of contestation to the ideas presented in previous pages, it may be contended that, if this first foundational deficiency exists, it may actually not be related to global governance considerations, but to the very structural configuration of all "merely international" environmental torts. Thus, it may be argued that the deficiency may manifest irrespectively of the geographical space where the environmental tort arises at, even within the European Union, as long as it is a merely international tort. In other words, it may be contended that Article 7 is unable to adequately deal with merely international torts, be it in a global or in an intra-European context. This would be sustained by the fact that, in all merely international environmental torts, the "unification" of the connecting factors – coincidence of the *lex loci actus* and *lex loci damni* – entails no possible rise in levels of compensation. It may even be argued that Article 7 could possibly contribute to a sort of intra-European environmental race to the bottom. However, an intra-European setting presupposes certain features which limit and minimize (if not, eliminate) the problem. In the European internal market: i) private-law systems are allegedly supposed to be able to cope with these sophisticated torts; ii) environmental standards are supposed to be, to an important extent, similar, due to directive-articulated harmonization (and supposedly fairly decent)¹⁴⁷⁴.

¹⁴⁷² This point will be further reinforced *infra* ("*Empirical research: Spatial references in EU secondary environmental law*"), for it will be demonstrated that the scope of given currently-in-force instruments of EU environmental law is extraterritorial.

¹⁴⁷³ *Vid.* Box 2 (Part, I, Chapter 1). They could have chosen between the Peruvian and the Ecuadorian legal systems.

¹⁴⁷⁴ While the harmonization operated is, in many cases, an *ad minima* harmonization, the point about fairly decent standards remains. Thus, the difference in degree of gravity between intra-EU and extra-EU cases exists, by virtue of the existence of environmental standards in EU directives. Moreover, as regards private law, *vid.* Box 6 (Part I, Chapter 1).

Thus, in sum, as models 1 to 5 depict, a strong deficiency lies at the core of Article 7 of the Rome II Regulation, as regards merely international environmental tort scenarios, especially in extra-European contexts. Taking into account the significant amount of cases in which it may come into play, this "black hole" is far from being a residual problem. A truly content-oriented rule should lead to outcomes in accordance with the principles that inspired it in all hypotheses falling within its material and spatial scopes, and not only in part of them. Since the rule ensures a certain material outcome in some situations, but not always, alternative options need to be considered, in order to bring in line the rule, its sustaining principles, their relevant material and spatial scopes, and the ensuing outcomes. Taking into account the very delicate political considerations that lie behind global environmental matters, filling the referred "black hole" is far from being a simple task. Some possible solutions may be considered excessive from the standpoint of certain political sectors. But if a truly operational tool for the private enforcement of the EU's environmental policy at the international level is wanted – one which may fully address all possible stakes, and which may protect the environment truly globally – then filling the black hole is mandatory. Thus, proposals for solutions to this problem are required, and will be, therefore, examined *infra*. Before reaching that stage, let us turn now to Article 7's second congenital deficiency.

III. Second foundational deficiency of Article 7 of the Rome II Regulation: challenges pertaining to environmental standards / tensions with Article 17 of the Rome II Regulation

As explained *supra*, the series of complexities that revolve around environmental security standards and environmental technical norms constitute the second foundational deficiency that Article 7 of the Rome II Regulation suffers from. As equally mentioned before, these difficulties manifest irrespectively of the doctrinal approach chosen: whether environmental standards are dealt with from the standpoint of the conservative position on the strict territoriality of public law (C), or from the standpoint of modern unilateralism's stance on the autonomous determination of the spatial applicability of EU Regulations and Directives (D), issues arise.

Before addressing and analyzing the said issues, the following pages will deliver a presentation of Article 17 of the Rome II Regulation (A), including its historical origins (B).

A. Article 17 of the Rome II Regulation: handling "Rules of safety and conduct"

Article 17, entitled "*Rules of safety and conduct*", establishes that

*“In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability”*¹⁴⁷⁵.

This Article is presented by Recital 34 of the Rome II Regulation in the following terms:

“In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The 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”.

Article 17 is one of the Regulation’s general provisions and, consequently, is meant to intervene in any situation concerning non-contractual obligations (not only environmental torts) where “rules of safety and conduct” happen to be involved. Road accidents and product liability are classic examples thereof¹⁴⁷⁶. Since, as explained by recital 34 of the Regulation, the term “rules of safety and conduct” refers to “all regulations having any relation to safety and conduct”, it is not confined to the realm of administrative-law provisions. The term, therefore, includes rules belonging to other legal sectors, thus aiming, for instance, in the frame of road accidents, to labour law provisions dealing with working hours for bus drivers¹⁴⁷⁷, or else to

¹⁴⁷⁵ In their draft Rome II Convention, the GEDIP included an Article 10 on “Règles de sécurité et comportement” which reads as follows: “Quelle que soit la loi applicable, il doit, dans la détermination de l’obligation, être tenu compte des règles de sécurité et de comportement en vigueur au lieu et au moment du fait dommageable ou du fait dont dérive l’obligation”. In the commentary to the project the term “lieu et moment du fait dommageable” is interpreted as follows: “Le terme « fait dommageable » peut être entendu comme une référence, soit au fait générateur, soit à la survenance du dommage. Le choix des termes de l’alternative dépend de la volonté d’application de la règle en cause. Par exemple, il se peut qu’une règle concernant la concurrence veuille s’appliquer en fonction du lieu de survenance du dommage (ou de prise d’effet du fait générateur)”. It must be noted, however, that while the GEDIP’s drafting is ubiquity-inspired, Art. 17 of the Rome II Regulation only refers to the rules “in force at the place and time of the event giving rise to the liability”. *Vid.* M. FALLON & P. LAGARDE, *Commentaire de la proposition pour une convention européenne sur la loi applicable aux obligations non contractuelles*, Comment to article 10 (“Règles de sécurité et comportement”), Document from the GEDIP’s 1998 session, Luxembourg (The final version of the proposal was delivered in the same session, a previous « draft » version having been issued after the 1997 The Hague meeting).

¹⁴⁷⁶ *Vid.* K. FACH, *La contaminación transfronteriza en Derecho internacional privado: estudio de derecho aplicable*, *op. cit.*, p. 373. This autor provides a more extensive list of examples: “Este conjunto normativo amplio, heterogéneo y de rápida mutabilidad afecta a múltiples sectores de la realidad social. Así, se considera que son normas de conducta y seguridad en el sentido aludido de las reglas de circulación (Tasa de alcoholemia, velocidad, cinturón de seguridad, carril a utilizar, etc.), las denominadas good manufacturing practices en materia de productos (alimentación, medicamentos, electrodomésticos, etc.), las medidas de seguridad de los edificios o instalaciones eléctricas, las normas de custodia de cosas u animales, las referidas a protección en el trabajo, la normativa de apertura y cierre de comercios, las relativas a funcionamiento de industrias peligrosas, etc.”.

¹⁴⁷⁷ Example taken from E. W. ESSÉN, Explanatory report to the Convention on the law applicable to traffic accidents, The Hague, Hague Conference of Private International Law, 1970, Art.7, point.6.4 (p.212 [20] of the French language version). Neither the French nor the English language version provide better citation information than that reproduced here. The English-language version is available on May the 29th 2015 under the following link: <http://www.hcch.net/upload/conventions/txt19en.pdf>.

"non-legally binding conventional standards of behaviour" (as for instance, deontological or professional ethics standards)¹⁴⁷⁸.

Following the European Commission, at the root of Article 17 lies the understanding that a tortfeasor needs to respect the rules of safety and conduct in force in the country where she deploys her activities "*irrespective of the law applicable to the civil consequences of [her] action*", and, therefore, "*these rules must also be taken into consideration when ascertaining liability*". Thus, judges may solely apply the legal order designated by the choice-of-law rule, but "*must*" take into account the other law as an element of fact¹⁴⁷⁹. In other words, following the European Commission, within the frame of international disputes on non-contractual obligations, rules on safety and conduct do not intervene as legal elements; they are not applied as legal rules, but they are taken into account as factual elements, as data. As explained by Dickinson,

*"They provide part of the context within which the conduct of the person liable must be judged, and their significance will vary according to the nature of that conduct and the other surrounding circumstances, as well as the content of legal rules underlying the non-contractual obligation in question. If liability under the applicable law is strict, the conduct of the person liable may not fall to be assessed at all"*¹⁴⁸⁰.

In the light of these considerations it has been contended by Kozyris that Article 17 does not contain a choice-of-law rule, and that the point of fact that rules of safety and conduct constitute is to be addressed from the standpoint of the legal order that is anyhow meant to be applied following the Regulation's choice-of-law rules¹⁴⁸¹. This has entailed that the provision has been labelled as "*minor and subordinate*", for its only purpose would allegedly

¹⁴⁷⁸ Vid. A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, op. cit., p. 640. Notwithstanding this position, it must be acknowledged that the bulk of this kind of provision is composed by administrative law rules. In this sense, M. VINAIXA, *La responsabilidad civil por contaminación transfronteriza derivada de residuos*, op. cit., p. 427 ("*Las normas de comportamiento y seguridad son normas de derecho público, esencialmente administrativas, el incumplimiento de las cuales se sanciona penalmente y administrativamente. No son normas que regulen el régimen de responsabilidad civil por los daños causados por los residuos, pero [...] son normas que inciden en la determinación de la existencia o inexistencia de ilicitud en la conducta del eventual responsable*").

¹⁴⁷⁹ Vid. explanatory memorandum to the Rome II proposal, op. cit., p. 25. Following the proposal's numbering, the content of Article 13 coincides with that of current Article 17: "*Where the law that is designated is not the law of the country in which the event giving rise to the damage occurred, Article 13 of the proposed Regulation requires the court to take account of the rules of safety and conduct which were in force at the place and time of the relevant event. [...] The rule in Article 13 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. Taking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author's good or bad faith for the purposes of the measure of damages*".

¹⁴⁸⁰ Vid. A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, op. cit., p. 641. Thus, at least in principle, there should be a clear distinction between taking into account foreign law and applying it. However, cfr. S. C. SYMEONIDES, "Rome II and Tort Conflicts: A Missed Opportunity", op. cit., pp. 212-215.

¹⁴⁸¹ Vid. P. J. KOZYRIS, "Rome II: tort conflicts on the right track! A postscript to Symeon Simeonides' «Missed opportunity»", *The American journal of comparative law*, vol. 56-2, 2008, op. cit., p. 483. Cfr. Symeonides, p. 212, who expresses some skepticism.

be to allow “on a discretionary basis and in an evidentiary sense” that account be taken of the referred rules as a narrative element in the ensemble of the controversy¹⁴⁸². However, against this position it has been asserted that ““taking account of” local law is a misnomer [...] “taking account of” local data means actually enforcing policies other than those underlying the *lex causae*. Consequently, the current dogma of nonapplication is a doctrinal and technical workaround designed to conceal what courts are actually doing when considering local rules of safety and conduct”¹⁴⁸³.

In the line of Kozyris’ opinion, Dickinson also contends that “courts enjoy a wide margin of appreciation in deciding whether and, if so, for what purpose and to what extent to take account of any rule identified by Art 17”¹⁴⁸⁴. This discretionary character is contended despite the explicit reference in the explanatory memorandum to the Regulation’s proposal to the mandatory nature of the taking-into-account operation¹⁴⁸⁵. This understanding is allegedly meant to be supported by “the legislative history and the phrase “in so far as appropriate” in art. 17, although that phrase also has a quantitative element”¹⁴⁸⁶. An alternative position, which would be more in line with the memorandum’s text (and the connotation of a “requirement”), is that these rules could be overriding mandatory provisions (“*lois de police*”), but this idea has been criticized, *inter alia*, on the basis that the Rome II Regulation devotes two different articles to these questions¹⁴⁸⁷.

In the midst of these diverging opinions on the nature and content of Article 17, the one thing that is clear is that the main challenges in respect of its practical application will come from the domain of environmental torts, “[i]n the view of the extensive regulation under national law of industrial and other processes liable to cause environmental damage”¹⁴⁸⁸. Before performing a more thorough assessment those environmentally-related challenges let us recall Article 17’s historical origins.

B. Precedents to Article 17 of the Rome II Regulation

¹⁴⁸² *Vid.* P. J. KOZYRIS, “Rome II: tort conflicts on the right track! A postscript to Symeon Simeonides’ «Missed opportunity»”, *op. cit.*, p. 483.

¹⁴⁸³ *Vid.* T. W. DORNIS, ““Local Data” in European Choice of Law: A Trojan Horse from across the Atlantic?”, *Ga. J. Int’l & Comp. L.*, vol. 44-1, 2015, pp. 1-33, at pp. 15-16.

¹⁴⁸⁴ *Vid.* A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, pp. 640-641.

¹⁴⁸⁵ *Vid.* S. C. SYMEONIDES, “Rome II and Tort Conflicts: A Missed Opportunity”, *op. cit.*, p. 212 (further developments in pp. 212-215).

¹⁴⁸⁶ *Ibidem*, p. 212 and footnote 173.

¹⁴⁸⁷ *Vid.* equally M. VINAIXA, *La responsabilidad civil por contaminación transfronteriza derivada de residuos*, *op. cit.*, pp. 428-429 (who quotes K. FACH, *La contaminación transfronteriza en Derecho internacional privado: estudio de derecho aplicable*, *op. cit.*, p. 375 and following). Moreover, K. FACH (*Ibidem*, p. 345) equally refers to the opposite hypothesis, namely that overriding mandatory rules of countries other than the *forum* could be “taken into account” through the datum-theory, just the way that rules of safety and conduct are taken into account. For further developments on the possibility of considering non-*forum* overriding mandatory rules as local data, *vid.* pp. 360 and following. *Vid.* Especially pp. 364-369 where an assessment is made of the “role” to be played by overriding mandatory rules from the place of the *actus* when the *lex causae* is the *lex loci damni*.

¹⁴⁸⁸ *Vid.* A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, p. 441.

Article 17 of the Rome II Regulation is by no means a novelty in private international law. The origins of the theoretical construction embodied therein can possibly be traced back to Ehrenzweig's "*local and moral data*" theory, developed under the acknowledged inspiration of Currie's notion of "*datum*" and other influences coming from Europe¹⁴⁸⁹. The notion of moral data is meant to be understood as referring to "*instances of legal value judgments*"¹⁴⁹⁰, or put otherwise, to situations "*in which choice of law does in effect not occur because the issue is one affected by moral standards*"¹⁴⁹¹. In turn, local data are "*questions which typically can or must be subjected to foreign rules without resort to a 'choice of law'*"¹⁴⁹². As regards the first category, Ehrenzweig traces a very delicate distinction within tort law, between, on the one hand, "*moral data of behavioural standards*" and, on the other hand, "*rules of decision such as the requirements of willful or gross negligence as against mere ordinary negligence, or the application of presumptions of fault*". While he asserts in respect of the first that each *forum* is meant to apply its own, the latter would be submitted to the *lex causae*¹⁴⁹³. As regards local data, he illustrates his point through an example from the realm of the law of admiralty: "*such foreign rules as fixed speed limits or pilotage and manning requirements [apply], without recourse to choice of law, as local data under the local law of the defendant's conduct*"¹⁴⁹⁴.

Despite these roots, the explicit and most immediate inspiration for Article 17 is to be found in analog provisions contained in two international conventions drafted within the frame of the Hague Conference on Private International Law¹⁴⁹⁵: Article 7 of the *Convention on the law applicable to traffic accidents*, concluded 4 May 1971 (hereinafter CTA¹⁴⁹⁶), and Article 9 of the *Convention on the law applicable to products liability*, concluded 2 October 1973 (hereinafter CPL¹⁴⁹⁷). Accordingly, the following pages will be devoted to analyzing these precedents. Attention will be focused on the explanatory reports on both Conventions for, reportedly, at

¹⁴⁸⁹ Vid. A. A. EHRENZWEIG, "Local and moral data in the conflict of laws: terra incognita", *Buff. L. Rev.*, vol. 16, 1966-1967, pp. 55-60. Similar examples but further explanation can be found in one of this author's core pieces of work, *Private international law: a comparative treatise on American international conflicts law, including the law of admiralty*, vol. I, Leyden, Sijthoff, 1967, in pp. 77-85, notably in pp. 83 & 84.

¹⁴⁹⁰ Vid. A. A. EHRENZWEIG, *Private International Law*, *op. cit.*, p. 77.

¹⁴⁹¹ Vid. A. A. EHRENZWEIG, *Conflicts in a nutshell* (3rd ed.), St. Paul, West Pub. Co., 1974, p. 95.

¹⁴⁹² Vid. A. A. EHRENZWEIG, *Private International Law*, *op. cit.*, p. 83.

¹⁴⁹³ *Ibidem*, p. 80.

¹⁴⁹⁴ *Ibidem*, p. 84. In this whole paragraph the use of verbs by the author has been respected: Ehrenzweig uses the verb "*to apply*" (no neat distinction is traced between "applying" and "taking into account"). In the last quotation of the paragraph only the tense of the verb in between brackets has been changed.

¹⁴⁹⁵ Vid. explanatory memorandum to the Rome II proposal, *op. cit.*, p. 25: "*This article is based on the corresponding articles of the Hague Conventions on traffic accidents (Article 7) and product liability (Article 9). There are equivalent principles in the conflict systems of virtually all the Member States, either in express statutory provisions or in the decided cases*".

¹⁴⁹⁶ Article 7: "*Whatever may be the applicable law, in determining liability account shall be taken of rules relating to the control and safety of traffic which were in force at the place and time of the accident*". This Convention entered into force on June the 3rd 1975, and is binding, on March the 18th 2017, on 21 States across the European continent.

¹⁴⁹⁷ Article 9: "*The application of Articles 4, 5 and 6 shall not preclude consideration being given to the rules of conduct and safety prevailing in the State where the product was introduced into the market*". This Convention entered into force on October the 1st 1977, and is binding, on March the 18th 2017, on 11 States across the European continent.

least until 1996, national courts from the ratifying States had not produced case-law on the said provisions¹⁴⁹⁸.

i. *E. W. Essén's explanatory report on the 1971 Hague Convention*

Article 7 of the CTA reads as follows:

"Whatever may be the applicable law, in determining liability account shall be taken of rules relating to the control and safety of traffic which were in force at the place and time of the accident".

The Essén report presents Article 7 of the CTA as ensuring that, when assessing liability, account is taken of the rules on control and safety of traffic in force in the place and at the time of the accident, irrespective of the applicable law. This provision is, therefore, of interest when, following the operation of the choice-of-law rules in the Convention, the applicable law is the law of a place which differs from the location of the accident¹⁴⁹⁹. From the outset, this aspect means that a transposition of whichever content towards the realm of environmental torts is extremely difficult. As the law stands nowadays, Article 7 of the Rome II Regulation will never lead to the application of the law of a place which differs from the location of the harmful event: in transboundary environmental torts, the two possible applicable laws (*lex loci damni* and *lex loci actus*) are connected with both of the locations of the complex tort. In merely international environmental torts the only possible applicable law is the law of the place of the environmental tort. This is not the case with road accidents, which are generally simple (non-complex) torts: therefore, any other possible applicable law will, generally, not be connected with the *locus* of the accident.

This warning having been made, it is also necessary to highlight that the report establishes that the terms "*rule*" and "*rules relating to control and safety of traffic*" are to be understood in the largest possible sense: the first one as including "*law, regulations and even municipal ordinances*", and the second one as a flexible formula "*conferring on judges wide discretionary powers of evaluation*" in respect of the precise identification of the concepts coming within its scope. Moreover, the report stresses the idea that even if these rules are "*only [local] data*", judges "*will all the same have to take [them] into account*"¹⁵⁰⁰.

Without prejudice to the relevance of these explanations, it is actually at paragraphs 6.3 to 6.5 of the commentary of Article 7 that the most essential information for this dissertation's purposes is to be found. Those three paragraphs introduce examples of the functioning of Article 7 CTA that, despite not being properly transposable to the specificities of environmental torts, may be helpful in order to interpret the functioning of Article 17 of Rome II. Let us examine the referred paragraphs following their order in the report.

¹⁴⁹⁸ *Vid.* M. SUMAMPOUW, *Les nouvelles conventions de La Haye - Leur application par les juges nationaux*, vol. V, The Hague, Nijhoff, 1996.

¹⁴⁹⁹ *Vid.* E. W. ESSÉN, *op. cit.*, Article 7, points 1, 2 and 3.

¹⁵⁰⁰ *Ibidem*, Article 7, points 4 to 6.

Paragraph 6.3 deals with situations where "*there is no speed limit fixed by the local law*" – in this context, the law in force in the country where the accident takes place. In these cases, "*a judge may nevertheless consider that the driver was at fault in driving too fast taking into account all the circumstances*". Up to this point, nothing revolutionary: transposing this reasoning to environmental torts would entail that a judge could take into account the circumstances at stake (for instance, the availability of scientific evidence on the environmental impact of a product, the location of the factory next to a border, the fact that the product was dumped into a river that crosses through other countries, etc.) to consider that the polluter has acted in fault. However, the key element in paragraph 6.3, for the purposes of this dissertation, is the very clear assertion it contains at its ending: "[...] *in such a case local law may not be invoked to excuse the driver for an act which is negligent in the eyes of the applicable law*". In the environmental context this would mean the following: if the victim chooses the application of the *lex loci damni* and its rules of safety and conduct impose a maximum threshold of "Z", which *in casu* was breached by the polluter, the lack of norms limiting the maximal release of "Z" within the rules of safety and conduct of the place of acting would not lead to exonerating the polluter from liability¹⁵⁰¹.

Paragraph 6.4 deals with cases where "*the law applicable to questions of liability is more exacting than the law of the place of the accident*". It gives as an example a situation where fog-lamps are not required by the law of the place of the accident but are required by the "*law applicable to questions of liability*". It is not possible to transpose the content of this paragraph to the realm of environmental torts for several reasons:

i) As already mentioned, as the law stands nowadays, there cannot be a law applicable to liability for environmental torts that is not one of the laws of the place of the accident (the *lex loci actus* or the *lex loci damni*)¹⁵⁰².

ii) Attempting at transposing this example would require more drastic adaptations than in the case of paragraph 6.3, in order to extract any useful lesson: notably, it would require understanding "*place of the accident*" as place of the event giving rise to damage. Accordingly, within the context of a transboundary environmental tort, a bigger degree of stringency may be found, for instance, in situations where both legal orders at stake have rules on the level of emissions of chemical "Z", but those in force in the country where the damage arises (when such law is the law chosen by the victim) are more restrictive than those in the law of the country where the event giving rise to damage took place. Consequently, this adaptation would transform paragraph 6.4 into a replica of paragraph 6.3, therefore possibly leading to similar conclusions.

iii) The overall sense of paragraph 6.4 is that, in situations of diverging levels of stringency between the legal orders at stake, the judge may "*consider*" as "*negligent*" the lack of conformity with the (more stringent) *lex causae*. This would be the case because the tortfeasor

¹⁵⁰¹ From the outset, this is in direct opposition (*mutatis mutandis*) with a pro-polluter use of Art. 17 in transboundary cases in the sense suggested by the explanatory memorandum to the Rome II proposal.

¹⁵⁰² This is so, notwithstanding the possibility for both parties to agree on an applicable law following Article 14. However, as repeatedly mentioned *supra*, an agreement on the applicable law seems difficult within the realm of environmental torts, since it is unlikely that the victim may want to give away her choice-of-law prerogative.

had the choice between either abiding by the *lex causae*'s provisions, or else maximizing precaution, security measures, etc. in order to avoid the manifestation of the tortious result. The paragraph ends with the following assertion: “[a]lthough the local law does not contain any such restriction, a judge may take into account the [lex causae] in determining liability”¹⁵⁰³. With all due respect, paragraph 6.4 does not seem to present a correct kind of reasoning: first, the examples given therein are examples of application of – not of “considering” or “taking into account” – legal rules¹⁵⁰⁴; second, per definition, whatever elements come within the *lex causae* are to be applied to the dispute.

As a consequence of these difficulties, if there is anything that may be extracted from paragraph 6.4 that may be useful for the purposes of this dissertation is that, just as in paragraph 6.3, the approach chosen therein is not very favorable to the subject liable for the damages.

Finally, paragraph 6.5 intends to summarize the overall sense of Article 7 CTA and makes reference to the “evaluation of the tortious nature of the act committed by the author of the accident”. It establishes that the evaluation will be dependent on the “combined effect” of the local law and the law following which liability is determined”¹⁵⁰⁵:

“[t]his evaluation is carried out according to the applicable law, but on the basis of factual elements drawn *inter alia* from the local law. This law is therefore only of relevance in providing certain factual elements to the judge and so to enable him to apply the law governing liability”.

As it may be seen, amongst the three paragraphs that have been commented, this closing paragraph is the only one that contains an interpretative proposal which may be qualified as neutral, and not directly detrimental, to the – alleged – tortfeasor. The apparent neutrality of the statement actually points to the need to ascertain what to do in radical scenarios. A scenario of this kind within the environmental context could be, again, a situation where the release of “Z” to the environment was illegal following the rules of safety and conduct of the (elected) *lex causae* (*lex loci damni*) but it was, nevertheless, legal following the rules of safety and conduct of the law in force in the place of the event giving rise to damage. In this kind of situation, stating that the relevant rules of safety and conduct remain those of the chosen applicable law, but that the other set of rules of safety and conduct constitutes an additional factual element within the case submitted to litigation is not very helpful. While it may be

¹⁵⁰³ The original final sentence in paragraph 6.4 may be found in footnote 1504.

¹⁵⁰⁴ The full text of the paragraph reads as follows: “Then again, there is the case where the law applicable to questions of liability is more exacting than the law of the place of the accident. If for example foglamps are not required by the latter law, but are required by the law applicable to questions of liability, it was considered that a judge may consider the lack of these lamps to be negligent, for example if he is of the opinion that the driver should have reduced his speed as his car was not equipped with foglamps. The following example of a coach travelling in a foreign country where an accident occurs illustrates the same situation: according to local law, there is no need to change the driver at regular intervals. On the other hand, according to the law deemed applicable to liability, the driver of the coach must be replaced every six hours. Although the local law does not contain any such restriction, a judge may take into account the requirements of the law of the State of registration in determining liability”.

¹⁵⁰⁵ The excerpt goes on: “The rules of the local highway code are data which play a part in the evaluation of the whole situation”.

contended that providing further indications as to how to react in these situations would possibly mean sliding into substantive law considerations, it is not any less true that indications on the appropriate legal consequences would have been welcomed.

Notwithstanding the referred apparent neutrality of paragraph 6.5, as a matter of a conclusion on the exam of commentary of Article 7 CTA, it seems appropriate to consider that the approach of the Essén report to the said article seems to be mostly pro-victim, or at least not necessarily beneficial to the tortfeasor. Therefore, as it will be discussed *infra*, it is not unlikely that the same pro-victim approach may find its way into the implementation of Article 17 of Rome II in the environmental context¹⁵⁰⁶. Let us turn now to the commentary of Article 9 of the CPL.

ii. *W. L. M. Reese's explanatory report on the 1973 Convention*

Article 9 of the CPL reads as follows:

*"The application of Articles 4, 5 and 6 shall not preclude consideration being given to the rules of conduct and safety prevailing in the State where the product was introduced into the market"*¹⁵⁰⁷.

The Reese report describes Article 9 of the CPL – both in the *"general discussion of the convention"*¹⁵⁰⁸ and the *"discussion of each article"*¹⁵⁰⁹ – as being relevant in situations where the law applicable to the case would be different from the law in force in the country where the product was introduced into the market. In those cases, the relevant court *"is authorized but not required, to give 'consideration...to the rules of conduct and safety'"* of the latter¹⁵¹⁰. Interestingly, the report goes on to indicate that *"[t]he court may also, of course, give consideration, and indeed may give exclusive consideration, to the rules of conduct and safety"*

¹⁵⁰⁶ It seems important to highlight, from this very point, that trying to strike a balance between polluter and victim does not seem compatible with the idea of favouring the victim.

¹⁵⁰⁷ For a commentary of Article 9 of the CPL, conceived as a part of a *"système de 'freins et contrepoids'"* to the general connecting factor of the 1973 Convention, *vid.* M. FALLON, *Les accidents de la consommation et le droit – La responsabilité du fait des produits en question : droit comparé, droit des conflits de lois avec l'aide de la méthode expérimentale*, Bruxelles, Bruylant, 1982, pp. 248-262.

¹⁵⁰⁸ *Vid.* W. L. M. REESE, "Explanatory report to the Convention on the law applicable to products liability" in BUREAU OF HAGUE CONFERENCE OF PRIVATE INTERNATIONAL LAW (ed.), *Convention on the law applicable to products liability – Draft adopted by the Twelfth Session and Explanatory report by W. L. M. Reese – Tirage à part des Actes et documents de la Douzième session (1972)*, Tome III - Responsabilité du fait des produits, The Hague, Imprimerie Nationale, pp. 252 [8] and following. Bilingual document, available online on May the 25th 2015 under the following link: <http://www.hcch.net/upload/expl22.pdf>.

¹⁵⁰⁹ *Ibidem*, pp. 268 [24] and 269 [25].

¹⁵¹⁰ *Ibidem*, p. 255 [11]. The French text of the bilingual report uses the following terms: *"peut, sans y être tenu"*. In the *"consideration of each article"* (p. 268 [24], art.9, 1st paragraph) the idea is expressed as follows: *"[...] this article empowers, but does not require, the court to give consideration [...]"*. The French equivalent reads as follows: *"[...] l'article 9 permet au tribunal, mais ne lui en fait pas l'obligation [...]"*.

*prevailing in the State whose internal law is made applicable by [the Convention's choice-of-law rules]"*¹⁵¹¹.

If the terms employed to refer to the rules of safety and conduct of the *lex causae* is that “consideration” may be “given” thereto, this excerpt raises the question of knowing how to make the distinction between what is meant to be understood as applying rules of safety and conduct, and taking into account rules of safety and conduct. In such a sense, the practical example contained in the detailed analysis of Article 9, found in the section on the “discussion of each article” of the Reese report, is all the more confusing:

“A hypothetical situation may make clearer the reach of this article. Suppose that an automobile, which was manufactured in State X by a manufacturer whose principal place of business is in X, is first introduced into the market in State Y and is then taken to State Z, where it is purchased by one A, whose habitual residence is in Z.

*Suppose further that A is injured in an accident in State Z and that this injury would not have occurred if the brakes of the car had met the safety standards on power or construction of Z. The automobile, however, was not equipped with such powerful brakes as this was not required by the Y rules of conduct and safety. The contrary is true, however, of the rules of Z which is the State whose internal law is made applicable by the Convention. By virtue of this article, the court would be free to apply either the rules of conduct and safety of Y or the similar rules of Z. The court would be free, in other words, to find for the manufacturer by application of the Y rules or to find for A by application of the rules of Z”*¹⁵¹².

As it may be seen, there is a strong divergence between, on the one hand, the terms of the explanatory memorandum to the Rome II proposal, and, on the other hand, the terms of the explanatory report to the CPL, especially the conclusions that may derived from the above-referred example. The Reese report completely merges the concepts of applying / enforcing and taking into account rules, and seems to conceive the stakes only in terms of application. Since the distinction between both notions seems to be essential to the reasoning developed in the explanatory memorandum to the Rome II proposal, any effort put into using the text of the Reese report in order to reflect on Article 17 of Rome II may be counterproductive, to say the least¹⁵¹³. For the European Commission, the operation of taking into account of rules is clearly different – or at least it should be – from their application¹⁵¹⁴.

¹⁵¹¹ *Ibidem*, pp. 255 [11] and 256 [12].

¹⁵¹² *Ibidem*, p. 268 [24].

¹⁵¹³ It is important to highlight that, placing aside certain considerations and practical examples, in general, the commentary of Article 7 CTA in the Essén report is globally in consonance with the presentation of Article 17 of Rome II found in the explanatory memorandum to the Rome II proposal.

¹⁵¹⁴ As suggested above, SYMEONIDES (“Rome II and Tort Conflicts: A Missed Opportunity”, *op. cit.*, p. 212) expresses some skepticism in this respect. However, *vid.* explanatory memorandum to the Rome II proposal, *op. cit.*, p. 25: in the case of Art. 17 Rome II, the European Commission went as far as to explicitly establish that: “[...] the court will apply only the law that is applicable under the conflict rule [...]”. This idea is all the more logic within the domain of environmental stakes, as it will be examined later.

However, beyond this terminological and conceptual divergence, there is a more essential cleavage between both documents which renders the Reese report totally unfit for any attempt at transposing content: its underlying philosophy is incompatible with the spirit of Article 7 of Rome II. One of the core questionings presented *supra*, when the second congenital deficiency was first presented¹⁵¹⁵, referred to the need to know what exactly was comprised in an environmental-tort victim's choice of law: whether her choice of applicable law comprises the entirety of the relevant legal order (thus, equally including the rules of administrative law in force therein), or whether it comprises exclusively its private-law rules. This question will be assessed in detail *infra*¹⁵¹⁶; for the time being it is sufficient to address the point in hypothetical terms. Let us suppose that the said question was to be answered positively (i.e. the victim's choice of law comprises the relevant rules of administrative law). If this was the case, it would be necessary to consider that the relevant court's freedom of choice between taking into account, or not, the rules of safety and conduct of one legal system or another – as put forward by the Reese report – clashes with the philosophy underlying Article 7 of Rome II¹⁵¹⁷. Following Article 7, the choice of the applicable law belongs exclusively to the victim, and should such choice not intervene, the law to be applied will be (following the core provision of the Regulation) the *lex loci damni*¹⁵¹⁸. Reese's position would, thus, run against the victim's own freedom of choice¹⁵¹⁹. This would be the case even if the said victim's choice referred to the ensemble of the applicable law and the court's choice determined solely the relevant set of rules of safety and conduct: transposing the ratio of the Reese report to the field of environmental torts would possibly amount to voiding Article 7 of sense.

These considerations close the analysis of the precedents to Article 17 of the Rome II Regulation. Let us turn to consecutive assessments of the intricacies of the second congenital deficiency: first, from the standpoint of the conservative position on the spatial applicability of public law and, second, from the standpoint of the more modern doctrine of the autonomous determination of the spatial applicability of European secondary law.

C. Challenges from the standpoint of the traditional doctrine on the spatial applicability of public law

As mentioned *supra*, under conservative positions, environmental standards, wherever legally enacted (therefore excluding those instances where they arise from soft law, as crafted, for instance, by a professional association) are labelled as "public" law. As equally mentioned *supra*, this is problematic because, from the perspective of those traditional approaches,

¹⁵¹⁵ *Vid. supra* "The meaning of the term "higher levels of protection" (and similar expressions)".

¹⁵¹⁶ *Vid. infra* the second situation in the practical model proposed.

¹⁵¹⁷ This would be so even if the fundamental difference (the confusion of notions) mentioned in the previous point was to be ignored.

¹⁵¹⁸ *Vid.* Articles 7 and 4.1 of the Rome II Regulation.

¹⁵¹⁹ In other words, if, supposedly, the judge had the prerogative to make a decision in the light of Art. 17 of Rome II (which is far from certain), this decision would entail a disrespect towards the victim's choice of law. Notwithstanding the said uncertainty as regards the judge's powers, it is, moreover, unlikely that in the realm of environmental torts, she may be allowed to try to strike a balance (or aim at any other policy goal), for that would run against *favor laesi*.

public law may only be applied within the territory covered by the jurisdiction of the entity which enacted it¹⁵²⁰. Different explanations have been put forward in respect of the ratio behind this conservative position. In French legal academia, it is considered that it is the very attitude of French national courts which is to blame in respect of this phenomenon; French judges themselves are reticent towards the idea of applying foreign public law provisions:

"[...] Afin de justifier le refus, les tribunaux [...] invoquent un prétendu caractère politique de la loi [mais,] l'explication véritable est toujours la même: elle réside dans la répugnance du juge français à collaborer à la réalisation des buts que s'est fixés l'état étranger, alors qu'il a été institué pour servir ceux de la France"¹⁵²¹.

In British academia, the take on this issue is somewhat different: the applicability of provisions of foreign public law is thought to be narrowly related to the *ordre public* doctrine (or, more precisely, following Fawcett & Carruthers, to the English theory analogous to the "civil law" notion of *ordre public*). The English *ordre public* bars the recognition of any foreign legal provision or foreign judicial decision which would be "*repugnant to the distinctive policy of English law*", thus impeding the application of any legal provision of criminal nature, tax-related nature, or any other nature deriving from the realm of public law¹⁵²². It has been contended that the common thread running right through the exclusion of these three categories is that provisions stemming therefrom will not be applied inasmuch as they entail an assertion of sovereign authority by one State over the territory of another¹⁵²³. Consequently, doubts have been cast regarding whether such exclusion is absolute (therefore affecting any law or legal provision which may be labelled as belonging to any of the above-referred categories), or limited, therefore referring exclusively to foreign public-law provisions which would specifically clash with the *forum's ordre public*¹⁵²⁴. In any case, following Fawcett & Carruthers, this threefold categorization of un-applicable foreign legal provisions is now firmly established in the case-laws of England and other Common-Law jurisdictions¹⁵²⁵.

¹⁵²⁰ For a thorough discussion on the relationships between public law and private international law *vid.*, *inter alia*, F. RIGAUX, *Droit public et droit Privé dans les relations internationales*, Publications de la Revue Générale de Droit International Public – Nouvelle série n°26, Paris, Editions A. Pedone, 1977; for an extensive and detailed assessment, *vid.* F. A. MANN, *Conflict of laws and public law*, *Recueil des Cours de l'Académie de Droit International*, vol. 132, Leiden, Martinus Nijhoff, 1971.

¹⁵²¹ *Vid.* P. MAYER & V. HEUZE, *Droit International Privé* (8th ed.), Paris, Montchrestien, 2004, p.77: "[...] Afin de justifier le refus, les tribunaux [...] invoquent un prétendu caractère politique de la loi [mais,] l'explication véritable est toujours la même: elle réside dans la répugnance du juge français à collaborer à la réalisation des buts que s'est fixés l'état étranger, alors qu'il a été institué pour servir ceux de la France". A similar explanation is provided by A. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol. I, *op. cit.*, p. 337: "En relación con este aspecto, la regla general derivada del art. 8 CC es que los tribunales y autoridades españolas no aplican en ningún caso, un Derecho Público extranjero (SAN CA 9 diciembre 2010 [...])." However, the same authors subsequently admit that there are some exceptions to these ideas.

¹⁵²² *Vid.* J. FAWCETT & J. M. CARRUTHERS, *Cheshire, North & Fawcett Private International Law* (14th ed.), Oxford, OUP, 2008, p. 121.

¹⁵²³ *Ibidem*, p. 122.

¹⁵²⁴ *Vid.* J. FAWCETT & J. M. CARRUTHERS, *Cheshire, North & Fawcett Private International Law*, *op. cit.*, p. 132.

¹⁵²⁵ *Ibidem*, pp. 130-131. These authors further explain that in the 1984 English judgement in "*A-G of New Zealand v Ortiz*" it is asserted that the common thread running through the three above-referred categories comes from international law. However, as it will be analyzed *infra* (when commenting on the

If embraced, this conservative approach, would be significant for the purposes of this dissertation, at least in respect of two different situations:

First, in the frame of merely international environmental cases, what if the victims of a *stricto sensu* environmental tort needed to start proceedings before the courts of a different country – for instance, the country of the domicile of the tortfeasor – whose rules of administrative law did not consider the relevant situation as environmental damage? In this type of situation, victims would need to choose and obtain the application of both the private and the public law (administrative standards) of the country where the situation is considered to be environmentally harmful¹⁵²⁶. In other words, if the victims of a *stricto sensu* environmental tort choose as the applicable law the legal order of a State other than the State where the relevant court is located, may such choice comprise rules of administrative law, thus entailing the application of foreign public law by the relevant court?

Second, in the frame of cases of transboundary environmental tort, both the polluter and the victim find themselves facing a situation where two different sets of administrative rules are at stake: the ensemble in force in the country where the event giving rise to the damage occurred and the ensemble in force in the country where the harmful result occurred. Usually, only one of these two ensembles of administrative rules will be applied by the relevant court to make a decision on the merits. What function, if any, may the other ensemble be able to play?

These reflections hint to the fact that the interaction between PIL and administrative law provisions in the realm of environmental torts may be problematic in several senses, and may give rise to several questions, amongst which the following:

- i) May public-law environmental standards be applied by a court outside the State that enacted them? In other words, may public-law environmental standards be “dragged” (as the European Commission seems to imply) together with private-law rules, whenever a choice-of-law rule establishes or allows the application of the law of the enacting state? (i.e., if, following Article 7 of the Rome II Regulation, an environmental victim choses the law of country “A” will that choice cover public-law environmental standards?)
- ii) In the frame of transboundary environmental torts, may the un-applied environmental standards have any impact in the outcome of disputes?

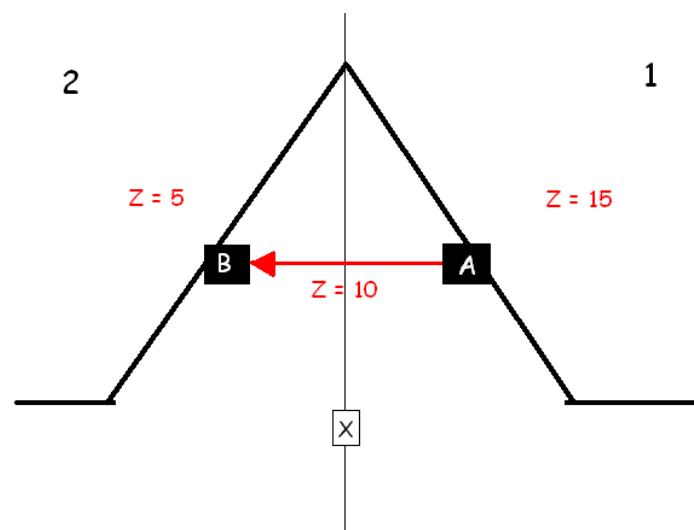
These questions point to the need to assess the interaction amongst the EU’s PIL mechanism, the environmental standards prescribed by domestic rules of administrative law, and Article 17 of the Rome II Regulation, from the standpoint of the above-mentioned “conservative” position. This will be accomplished through the development of a hypothetical model / practical simulation (i), from which a set of conclusions will be extracted (ii), before turning to re-assess the second congenital deficiency from the standpoint of more modern doctrines (D).

1975 resolution of the *Institut de Droit International*, adopted in its Wiesbaden session), this latter point is unlikely to hold further scrutiny.

¹⁵²⁶ This question presupposes the existence of adequate collective redress tools available to the victims. As it was seen in Part II, Chapter 3 (“*The role of private claimants: collective redress*”), this is not currently the case at EU-level.

- i. *Hypothetical model: Practical effects of the interplay amongst Article 17 Rome II, the EU environmental PIL mechanism, and domestic environmental standards (from the standpoint of the traditional doctrine on the spatial applicability of public law)*

The following pages, possibly the most complex in this section of the dissertation, aim at presenting Article 17's implications in practice from the standpoint of the traditional doctrine on the spatial applicability of public law: they intend to assess Article 17's interplay with the EU environmental PIL mechanism – both in respect of jurisdiction and choice-of-law – and domestic environmental standards. This task will be accomplished through the development of a hypothetical model which will: i) explore all the possibilities offered to environmental victims in respect of the configuration of international jurisdiction and choice-of-law when facing a transboundary environmental tort; ii) explore the consequences that their choices will have in respect of the reach of Article 17 of the Rome II Regulation, and the role to be played by administrative standards. In working through the model, the European Commission's implicit will to allow Article 7 of the Rome II Regulation to “drag” environmental standards will be respected as much as possible.



Graphic 0

Let us assume that “A” is a chemical corporation established in “1” (a Member State of the European Union), and “B” is a water-bottling corporation established in “2” (a Member State of the European Union too). Both corporations have factories in Mountain “X”, run through by the frontier between both States. A’s factory produces a chemical product “Z” in the side of the mountain that belongs to State 1. B’s factory bottles water on the side of the mountain that belongs to State 2 (*vid.* graphic 0). The everyday operations of A’s factory entails the release to nature of a certain quantity of Z. This emission does not cause any problem to the said corporation, since in State 1 administrative-law standards are very permissive, and the maximum admissible amount of Z that may be found in water for human consumption (before considering it as being “polluted”) is of 15 units per microgram. Scientific analyses conducted in the area do not report the presence of more than 10 units of Z in any resource or element in the zone surrounding the factory. However, administrative standards in force in State 2 are far

more protective, and following such rules water is “polluted” and, therefore, not suitable for human consumption, if it contains more than 5 units per microgram. If the emissions of Z reach the water spring on the other side of the mountain, and the amount of Z that may be found in B’s bottled water is of 10 units per microgram, may it be considered that an environmental damage has arisen, taking into account the difference in environmental standards between both countries?

Following the provisions on international jurisdiction in force in the European Union (Articles 4 and 7.2 of the Brussels I BIS Regulation), corporation B will have the choice between starting proceedings before the courts of State 2 (courts of the place where the damage [tortious result] arises), or else the courts of State 1 (courts of the place where the event giving rise to damage takes place, and domicile of the defendant). Following Article 7 of the Rome II Regulation, the victim will equally be able to choose the law to be applied to the controversy between the law of the place where the damage [tortious results] arises, and the law of the place where the event giving rise to damage takes place. Consequently, victims will be able to choose among four different configurations for the litigation, following their choices in respect of international jurisdiction and applicable law. In the following pages each of those four situations will be examined. Without prejudice to other aspects, each of the assessments will be built around the same two core questions: i) What happens with the administrative definition of the environmental damage? ii) How will Article 17 of the Rome II Regulation intervene?

Two warnings must be made before immersing into these questions. First, the upcoming reflections are primarily relevant whenever the applicable law is fault-based, and much less so if it enshrines strict liability¹⁵²⁷. Accordingly, the following developments will presuppose that the law to be applied is fault-based, in order to ensure that the blameworthiness of the polluter’s conduct is fully called into question¹⁵²⁸. Second, administrative authorizations, as mentioned before, are simply a higher form of public-authority intervention and, thus, bear no significant specificity for the purposes of this model¹⁵²⁹. Therefore, the upcoming conclusions on administrative standards may be transposed, *mutatis mutandis*, to authorizations. Other than this, the four situations in the model will be dealt with following a simple progression: the assessment will begin with the simplest and most beneficial situation from the point of view of the victim and will finish with the most complex one.

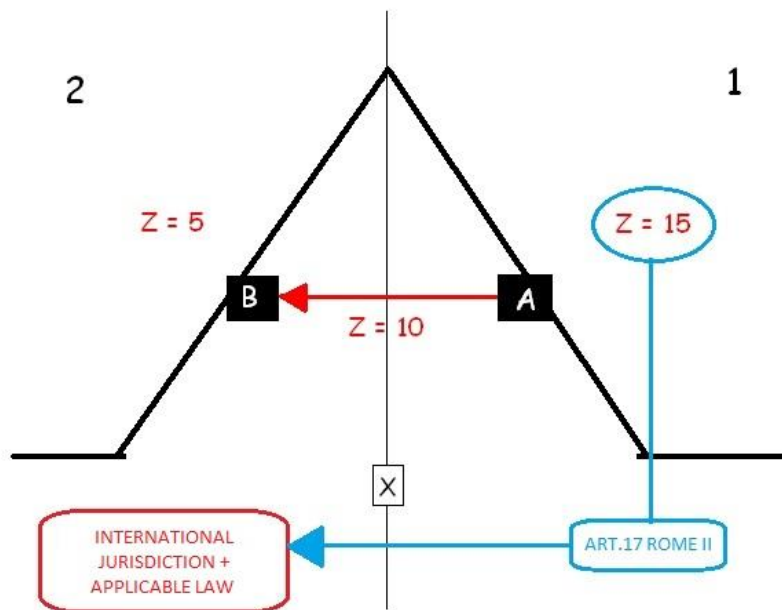
- a. First situation: International jurisdiction and applicable law “placed” in country 2

¹⁵²⁷ This is the case due to the reasons already presented *supra* in footnote 1434, and in the corresponding main text.

¹⁵²⁸ *Vid.* A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, p. 641. Following Dickinson, if liability within the applicable law is strict-liability-based, the behavior of the alleged tortfeasor will not be evaluated at all, and under such circumstances Article 17 will hardly have any effect or no effect at all.

¹⁵²⁹ *Vid. supra* “The meaning of the term “higher levels of protection” (and similar expressions)”, and, especially, footnote 1451.

In the first possible configuration, the victim decides to start proceedings before the court of the place where damage arises, and chooses to have applied the law of the same country (*vid. graphic 1*). In terms of international jurisdiction, situations like this one entail that the victim starts proceedings “at home”. While the strategic advantages that arise from this configuration for the victim cannot be denied, it must be recalled that the ratio behind the relevant rule on international jurisdiction, following the ECJ, is not the *favor laesi* principle; it relates to the physical proximity to the tortious result which is meant to facilitate obtaining evidence. Furthermore, the coincidence between *forum* and *lex* – the relevant court applies its own national law – entails the significant advantage of discarding the procedural issues pertaining to the intervention of foreign law.



Graphic 1

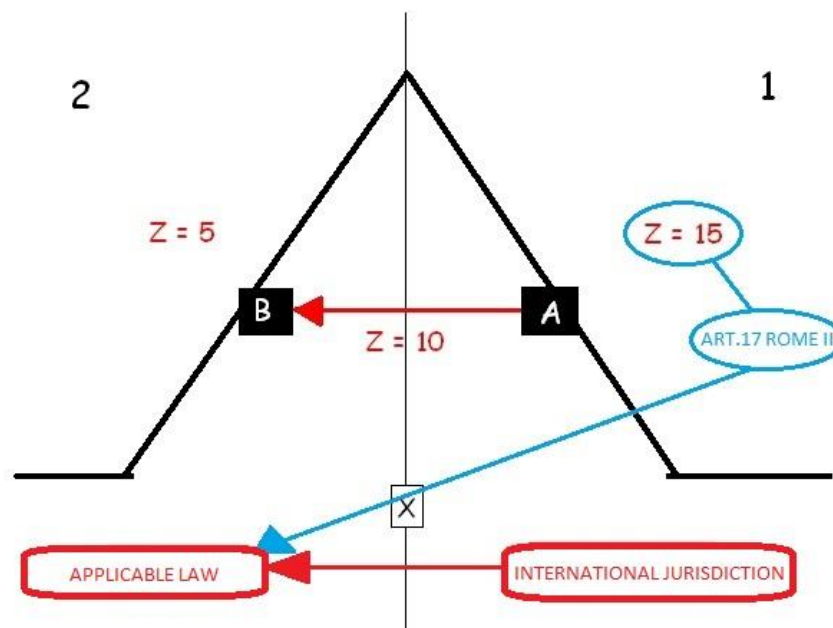
Regarding the first of the two questions suggested above (What happens with the administrative definition of the environmental damage?): This kind of configuration presents no difficulty in respect of the administrative definition of environmental damage. Following the European Commission’s assumption on the ability of Article 7 to “drag” environmental standards, the standards in force in country 2 are the ones that will be applied, for they belong in the *lex causae*, which is furthermore the law of the relevant court. Therefore, from the victim’s perspective, this configuration should give rise to no discussion regarding the potential applicability, or lack thereof, of foreign rules of public law.

Regarding the second question (How will Article 17 of the Rome II Regulation intervene?): Symeonides considers that, within the context of environmental occurrences, Article 17 does not necessarily operate to the benefit of the victim¹⁵³⁰; it is preconized that polluters may attempt to use the provision to try to avoid liability, or at least to try to reduce the extent of their obligations to compensate. In this sense, it is precisely the potential intervention of Article 17 in scenarios like this first situation that may cause the biggest difficulties in terms of

¹⁵³⁰ *Vid.* S. C. SYMEONIDES, “Rome II and Tort Conflicts: A Missed Opportunity”, *op. cit.*, pp. 211-215.

environmental protection: whenever the law chosen by the victim is not the *lex loci actus*, Article 17 would require – following a strict textual interpretation of the explanatory memorandum – the relevant court to take into account the rules of safety and conduct in force at the place and time where the event giving rise to damage took place. However, it is legitimate to ask whether such application / implementation would be compatible with the goals and principles of the environmental law of the European Union, amongst which the “*high level of [environmental] protection*” enshrined in Article 191 TFUE (to which recital 25 of the Rome II Regulation refers explicitly¹⁵³¹). If the polluter was allowed to take advantage of Article 17 in order to reduce the amount of reparation, or even to exclude liability altogether, would the “polluter pays” principle not be hindered? Would it not hurt the whole ratio behind the EU’s intervention in environmental matters through PIL? Would it not, at least, be counterproductive from a “deterrence” perspective? As repeatedly suggested *supra*, reducing the potential for compensation necessarily diminishes the – already doubtful – potential for deterrence in respect of corporate torts. These questions will be further dealt with *infra*, once the four configurations are presented.

- b. Second situation: International jurisdiction “placed” in country 1 and applicable law “placed” in country 2



Graphic 2

In the second possible scenario (*vid.* graphic 2) the victim chooses to start proceedings in country 1, but elects as the applicable law the legal order of country 2. In respect of international jurisdiction, several possible facts may justify opting for this configuration, almost all of them related to attaining a higher degree of convenience in strategic terms. Amongst

¹⁵³¹ As the justification for resorting to “the principle of discriminating in favour of the person sustaining the damage” in the frame of Article 7.

these facts: i) simplicity in terms of enforcement of a possible judgment against the polluter; ii) the possibly beneficial nature of the procedural law in force in country 1; iii) simplicity in obtaining certain evidence; or iv) whichever other reasons may derive from the *in casu* specificities. However, in this second scenario, both of the transversal questions become problematic:

Firstly, despite the difference in respect of the assertion of international jurisdiction, the role to be played by Article 17, and the ensuing difficulties, are exactly the same as in the first situation depicted above. Therefore, the comments delivered above should be considered as reproduced in here.

Secondly, regarding the administrative definition of environmental damage: if B decides to start proceedings before the courts of country 1 and chooses the law of country 2 as the applicable law, the relevant court will be faced with having to apply foreign rules of administrative law. The victim's counsel (following the European Commission's implicit position in the explanatory memorandum to the Rome II proposal) will contend that the said rules are comprised in its choice of law. As a consequence, it is likely that the opposing counsel will raise the traditional position on the impossibility to apply foreign public law (as described above), as a defense. Should the polluter's legal counsel opt for this strategy, the victim's counsel may introduce three sets of counter-arguments:

i) First, she may raise the conclusions of a 1975 resolution of the *Institut de Droit International*, adopted in its Wiesbaden session, on "*The Application of Foreign Public Law*" ("*l'application du droit public étranger*") which states that:

*"Le caractère public attribué à une disposition du droit étranger désigné par la règle de conflit de lois ne fait pas obstacle à l'application de cette disposition, sous la réserve fondamentale de l'ordre public [...] Le prétendu principe de l'inapplicabilité a priori du droit public étranger, comme celui de son absolue territorialité, principe invoqué, sinon appliqué, par la jurisprudence et la doctrine de certains pays : a) n'est fondé sur aucune raison théorique ou pratique valable, b) fait souvent double emploi avec les principes de l'ordre public, c) est susceptible d'entraîner des résultats peu souhaitables et peu conformes aux exigences actuelles de la collaboration internationale [...] La portée de la règle et des déclarations qui précèdent n'est en rien affectée par le fait que le droit étranger considéré comme public demeure moins fréquemment appliqué pour diverses raisons [...]"*¹⁵³².

(Reproduced in French because the French text is authoritative)

¹⁵³² *Vid.* INSTITUT DE DROIT INTERNATIONAL (RAPPORTEUR: P. LALIVE), "Résolution : L'application du droit public étranger", *Annuaire de l'Institut de Droit International*, Wiesbaden session 1975, Geneva, 1975, pp. 274-278 (Draft text). The final French-language text of the resolution (the French text is authoritative), which is the one used in this dissertation, is available, on November the 28th 2016, under the following link: http://www.justitiaetpace.org/idiF/resolutionsF/1975_wies_04_fr.pdf. The English text can be found under the following link: http://www.justitiaetpace.org/idiE/resolutionsE/1975_wies_04_en.pdf. M. BOGDAN ("Private International Law as a Component of the Law of the Forum. General Course on Private International Law", *Recueil des Cours de l'Académie de Droit International*, vol. 348, Leiden, Martinus Nijhoff, 2010, pp. 245-246) mentions a 1988 resolution of the International Law Association along the same lines.

Unfortunately, as it is well-known, the Institute's resolutions, despite their immense academic value, are no source of mandatory legal obligations. Consequently, the admissibility and weight of this argument will be highly dependent on the relevant court's position on the issue, and on the majoritarian opinion amongst academics in the *forum's* state.

ii) The second counter-argument that the victim's counsel may try to raise is a slight variation on some of the British considerations referred above: in principle, as long as there is no assertion of sovereign authority involved, there is no need to radically exclude each and every foreign provision of public law, for most them would be harmless for the *forum's* State. Even more so, it must be recalled that, on the one hand, the notion of overriding mandatory rules exists to enhance the *forum's* fundamental values, even before the determination of the relevant applicable law by a classic choice-of-law rule is made. And, on the other hand, the purpose of the *ordre public* exception is "*évincer la loi étrangère lorsque la politique du législateur étranger ne [permettrait pas de] recevoir le soutien du législateur du for*"¹⁵³³. The strongest point in this argument is that, in principle, State 1's courts would face significant difficulties in order to establish that the *forum's* "permissive" administrative standards are overriding mandatory rules (whose application by priority is allowed by Article 16 of the Rome II Regulation¹⁵³⁴) and / or in order to establish that State 2's administrative standards are incompatible with the *forum's* *ordre public* (*ordre public* exception – allowed by Article 26 of the Rome II Regulation¹⁵³⁵).

iii) The third and final counter-argument that may be put forward is the notion of "full reference" to a given legal order: whenever a choice-of-law rule points towards the law of a given state, that reference is to be understood as made to the full ensemble of the relevant legal order, irrespective of whether given provisions are labelled as "private" or "public" law. In other words, the choice-of-law provision makes applicable any rule within the relevant legal order inasmuch as it is necessary to solve the relevant dispute¹⁵³⁶.

¹⁵³³ Vid. F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), *op. cit.*, p. 141.

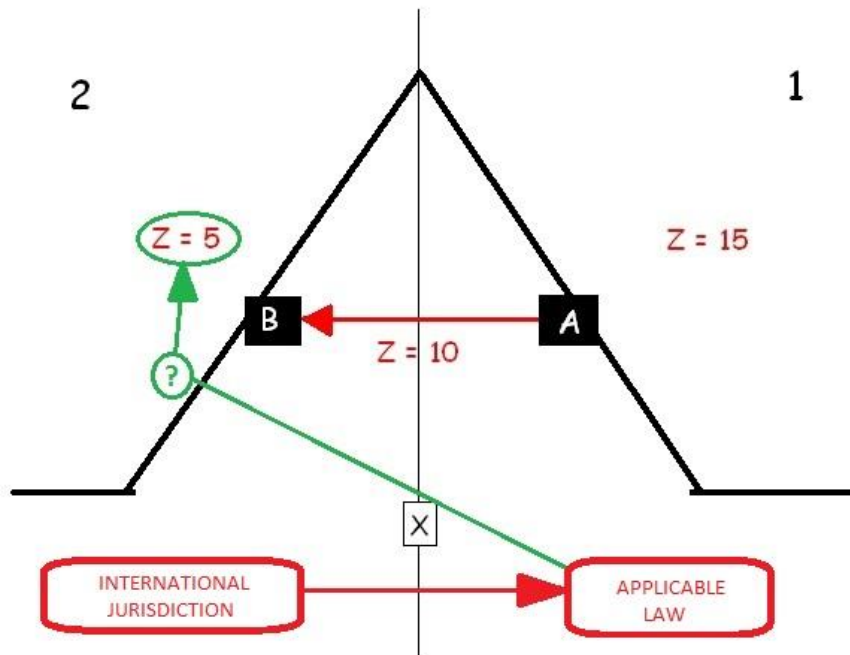
¹⁵³⁴ Article 16 ("overriding mandatory provisions") reads as follows: "Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation".

¹⁵³⁵ Article 26 ("Public policy of the forum") reads as follows: "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum".

¹⁵³⁶ Vid., *inter alia*, T. W. DORNIS, "'Local Data' in European Choice of Law: A Trojan Horse from across the Atlantic?", *op. cit.*, p. 8: "As is commonly explained, the *lex causae* should cover the whole case and apply to all of its issues". Vid. also K. FACH, *La contaminación transfronteriza en Derecho internacional privado: estudio de derecho aplicable*, *op. cit.*, p. 355: "[...] Se interpreta que la remisión conflictual engloba todas las normas aplicables al supuesto de hecho, con independencia de que éstas sean dispositivas o imperativas, públicas o privadas [...]". M. BOGDAN ("Private International Law as a Component of the Law of the Forum. General Course on Private International Law", *op. cit.*, pp. 242-243) describes, despite his personal disagreement, a certain tendency towards considering that "[...] foreign public law [...] should [...] be subjected to the same conflict rules as private rules". P. PICONE ("La méthode de la référence à l'ordre juridique compétent en droit international privé", *Recueil des Cours de l'Académie de Droit International*, vol. 197, Leiden, Martinus Nijhoff, 1986, pp. 264 and following, notably p. 265) refers to a "*nécessité que l'ordre juridique, ainsi désigné, pris en bloc, voit respectée sa propre position de « primauté » [...]*" (Emphasis added). Vid. also J.C. FERNÁNDEZ ROZAS & S. SÁNCHEZ LORENZO, *Curso de Derecho Internacional Privado* (3rd ed.), *op. cit.*, pp. 390-393.

c. Third situation: International jurisdiction “placed” in country 2 and applicable law “placed” in country 1

In the third possible configuration (*vid.* graphic 3), the victim chooses to start proceedings before the courts of the country where the damage arises, but elects as applicable the law of the country where the event giving rise to the damage took place. Under this configuration, the model varies widely from the two previous scenarios.



Graphic 3

Concerning the role of Article 17, a literal interpretation thereof would entail that it is not meant to intervene at all in this kind of situation, for the rules of safety and conduct "*in force at the place and time of the event giving rise to the liability*" are already comprised in the *lex causae*: no need to take them into account for they are going to be applied anyhow. Precisely, this point entails a major difficulty: the administrative standards which define the relevant environmental damage are not part of the applicable law and, therefore, remain – at least apparently – outside the framework of the dispute. As a consequence, the victim's counsel must act in two fronts. On the one hand, she needs to manage to block the administrative standards in force in State 1 ($Z = 15$), and, on the other hand, she needs to manage to introduce within the framework of the dispute the administrative standards in force in State 2 ($Z = 5$). Since one of the assumptions in this model is that the law applicable to liability is fault-based, this latter point is significant: the victim's counsel needs to obtain the introduction of the standards in State 2 into the dispute, for under the standards in force in State 1 the tortfeasor has committed no fault.

In these respects, three different arguments may be raised: while the two first of them will be simultaneously relevant in both fronts, the last one will only serve to attempt to introduce the administrative standards in force in country 2:

i) The victim's counsel may try to raise the traditional position on the exclusion of foreign provisions of public law, and all the ensuing arguments (political nature, exclusively territorial application, etc.). In this sense, all the developments in respect of the second configuration of the model become relevant here, *mutatis mutandis*, for there is an inversion in the roles of the subjects involved: what was relevant before for the polluter is now relevant for the victim and vice-versa (thus including the counter-arguments that the polluter may raise).

ii) A converse logic to the one depicted in the second configuration of the model may be further resorted to in order to attempt to ensure the application of country 2's administrative standards. Despite possible technical difficulties, the victim's counsel could try to contend that country 2's administrative standards are overriding mandatory rules, or else that country 1's environmental standards clash frontally with the *forum's* fundamental values (*ordre public* exception). Notwithstanding the fact that, as mentioned in previous pages, these two options have been enshrined in the Rome II Regulation (Arts. 16 and 26), it remains to be seen whether they may be effective in practice. As regards the first option, it is to be ascertained whether the environmental standards of the *forum* "require their application in a mandatory fashion" in order to achieve the overriding-mandatory-rule status¹⁵³⁷. As regards the second option (*ordre public* exception), it may have some chances to succeed when pleaded, for environmentally-protective purposes, before the courts of certain pro-green-reputed European countries (possibly the Scandinavian countries, the Netherlands, etc.).

iii) The third line of argumentation (which only aims at introducing country 2's environmental administrative standards, and not to exclude country 1's standards) is probably the least aggressive one amongst the three presented, in respect of the whole legal framework: the analogic application of Article 17. This possibility, which is frontally opposed to the literality of the provision (the rule refers to "[...] the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability"), would be coherent, however, with the *favor laesi* and polluter-pays principles, which allegedly inspires Article 7 of Rome II¹⁵³⁸. This possibility would face, nevertheless, certain obstacles.

First, there is a controversy surrounding the provision's alleged purpose. It may be recalled that Symeonides considers that the drafters of the Rome II proposal seemed to only envisage a unilateral and narrow role for Article 17, as a "tool for helping the tortfeasor, but not necessarily the victim"¹⁵³⁹. He quotes, in order to sustain his understanding that Art. 17 may possibly only be resorted to by the tortfeasor, the reference to a need to "strike a reasonable balance between the parties" in recital 34 of the Rome II Regulation. Against this position it is possible to quote Dickinson and Kozyris. Following Dickinson, the fact that Article 17 only makes reference to the "rules of safety and conduct which were in force at the place and time

¹⁵³⁷ Vid. S. FRANCO & W. WURMNEST, "International Antitrust Claims under the Rome II Regulation", in J. BASEDOW, S. FRANCO & L. IDOT (eds.), *International Antitrust Litigation - Conflict of Laws and Coordination*, Oxford, Hart, 2012, pp. 108-109.

¹⁵³⁸ Vid. recital 25 of Rome II.

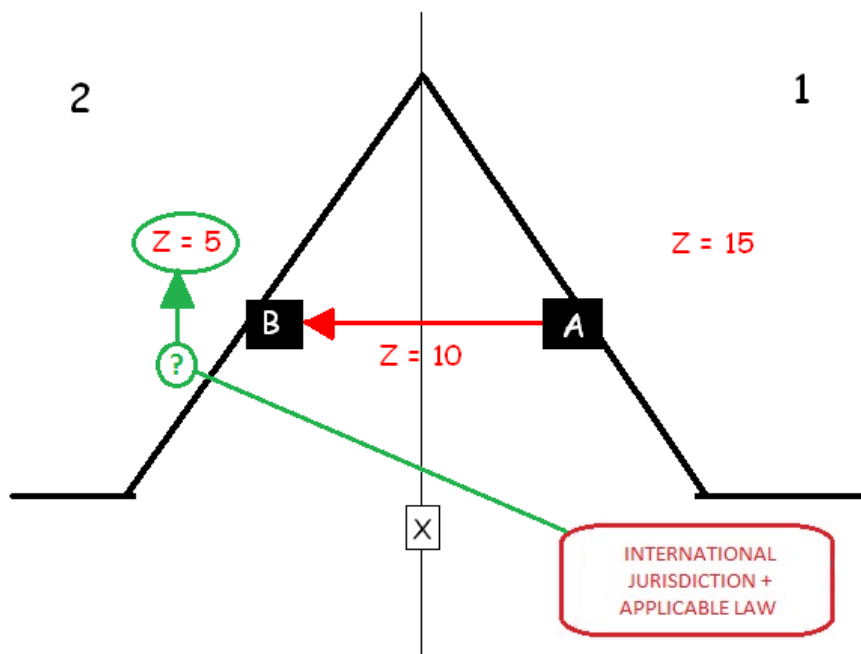
¹⁵³⁹ Vid. S. C. SYMEONIDES, "Rome II and Tort Conflicts: A Missed Opportunity", *op. cit.*, p. 213.

of the event giving rise to the liability” should not preclude the possibility that, due to their relevance, the rules in force in other places and moments be also taken into account¹⁵⁴⁰. Along the same lines Kozyris asserts that, despite the fact that the text of preparatory documents may indicate otherwise, and despite the “*delphic language*” employed, this provision should not be exclusively available to the benefit of the tortfeasor, but also to the benefit of the victim, whenever this seems appropriate¹⁵⁴¹.

A second obstacle to the success of this line of argumentation would come from the “application *versus* taking into account” conceptual dichotomy: if it is supposed, as the European Commission does, that “application” and “taking into account” are two different notions, then “taking into account” the administrative standards in force in country 2 would not suffice for the victim’s purposes. It seems, thus, that this third argument may be a cumulative support to the two preceding ones, but may possibly lack enough strength to stand alone.

Overall, it seems that, in principle, choosing this third litigation configuration may lead to highly complex, possibly detrimental, outcomes for the victim. Therefore, in the view of these significant difficulties and related considerations, it does not seem recommendable for the victim to choose this third scenario for the configuration of her litigation.

d. Fourth situation: International jurisdiction and applicable law “placed” in country 1



¹⁵⁴⁰ Vid. A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, op. cit., p. 641.

¹⁵⁴¹ Vid. P. J. KOZYRIS, "Rome II: tort conflicts on the right track! A postscript to Symeon Simeonides' «Missed opportunity»", op. cit., p. 483.

Graphic 4

The last configuration of the model (*vid. graphic 4*) will only be dealt with very briefly, since its core elements have already been commented. Here Article 17 becomes useless once again, if literally interpreted, since the rules of safety and conduct in force in country 1 are the rules of safety and conduct of the legal order chosen as applicable law. But this configuration entails a further disadvantage for the victim: since jurisdiction is being asserted in country 1 (place where the event giving rise to damage took place), the victim's counsel will not be able to raise the two first lines of argumentation presented above in respect of the third situation (exclusion of foreign provisions of public law, standards as overriding mandatory rules, and *ordre public*) in order to discard the standards of country 1 and introduce those of country 2. Therefore, the victim's counsel only chance of introducing the "Z = 5" standard within the framework of the litigation is to resort to the third above-referred argument (analogic application of Article 17), which was said to be a weak one.

As a consequence, this fourth configuration of the model is significantly disadvantageous for the victim and, therefore, seems a situation to be avoided, at least *a priori*. It is thus likely that it will be rarely resorted to.

Since the model's four possible configurations have been developed and analyzed, it is time to extract some conclusions in respect of the problems that have been presented.

ii. *Conclusions extracted from the hypothetical model*

Previous pages have depicted how Article 17 of the Rome II Regulation will intervene – or not – in all possible configurations for transboundary environmental torts; what will subsequently happen with the administrative definition of the environmental damage; and other significant and complex points. The aim of the following pages is to integrate the reflections and commentaries delivered in the hypothetical model, so as to render explicit and develop the guidance it provides. This will be done by structuring further developments around two questions: (a) Is the ordinary use (textual interpretation + mandatory application) of Article 17 of the Rome II Regulation (which seems to be “pro-polluter”) compatible with the polluter-pays and *favor laesi* principles? And (b) What happens when the environmental standards “*in force at the place and time of the*” tortious result are not comprised in the *lex causae* (i.e. are not covered by the victim's choice of law as performed by virtue of Article 7)? These two questions will be followed by a synthesis (c).

a. First question: Assessment of the compatibility between the ordinary use of Article 17 of Rome II and the polluter-pays and *favor laesi* principles

The first and second situations in the model demonstrate that a literal interpretation and mandatory application of Article 17 of Rome II undermines the victim's freedom of choice of the applicable law, and the prospects of compensation maximization. Therefore, a literal interpretation and a mandatory application of Article 17 of Rome II are incompatible with the

favor laesi principle and the principles of EU environmental law. Following recital 34 of the Rome II Regulation, and the relevant paragraph of the explanatory memorandum to the Rome II proposal, Article 17's purpose would be "[...] *to strike a reasonable balance between the parties [...]*", "[...] *when ascertaining liability [...]*". These words point to the idea that the Commission sought a nuancing / softening of the obligation of reparation (a reduction in the amount of compensation) whenever rules of safety and conduct were implicated under the circumstances described in the Article itself. This idea, which may possibly be convenient and adequate in other contexts (Article 17 is a general provision), seems hard to conciliate with the specificities that characterize the phenomenon of environmental liability, for a number of reasons: i) Notwithstanding the fact that, as shown in Chapter 1, deterrence is hard to achieve through tort-law means in respect of corporate torts, the European Commission designed Article 7 of Rome II on the basis of the expectation of causing deterrence¹⁵⁴². Nuancing / Softening the obligation to compensate runs frontally against this ratio: the least the potential tortfeasor may pay, the least likely it is that deterrence may be achieved. ii) As explained in Chapter 2, the polluter-pays principle – one of the explicit ratios behind Article 7 of Rome II – tends to impose full reparation¹⁵⁴³. Thus, if within the context of environmental damage, the polluter-pays principle demands that reparation be full, there is no room for considering nuancing / softening the obligation to compensate. iii) Furthermore, it was equally established *supra* that, following De Sadeleer, the polluter pays principle would consecrate a strict-liability-based conception of liability. This idea, coupled with the fact that the explanatory memorandum's commentary of Article 7 establishes that "*recent [...] environmental protection policy*", which inspires Article 7, "*[...] tends to support strict liability*" would further close the door to a pro-polluter use of Article 17¹⁵⁴⁴. iv) Ultimately, it may even be wondered whether a pro-polluter use of Article 17 of the Rome II Regulation would not run against the underlying ratio of the public-international-law "*Sic utere tuo ut alienum non laedas*" principle.

Overall, all of these ideas converge towards the assertion, repeatedly presented *supra*, that concessions to the polluter in order "*to strike a balance*" are incompatible with the *favor laesi* principle, and thus, with environmental protection. Therefore, it seems clear, in the light of the developments above, that question number 1 needs to be answered negatively: a pro-polluter use of Article 17 would go against *favor laesi* and the polluter pays principle, and thus against the ratio of Article 7. Therefore, in order to preserve the *effet utile* of Article 7, resort to Article

¹⁵⁴² *Vid.* the commentary to Art. 7 in the explanatory memorandum to the Rome II proposal, pp. 19-20; L. ENNEKING, "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, pp. 289-291.

¹⁵⁴³ *Vid.* Box 12 (*supra* Chapter 2). Further support for this idea may be directly drawn from the realm of comparative tort law, where the principle of full reparation / compensation bears a strong relevance. *Vid.*, in this sense, for instance, J. SPIER (ed.), *The limits of liability: keeping the floodgates shut*, The Hague, Kluwer law international, 1996, p. 1 and following; C. VON BAR, *The common European law of torts (Vol. 2, Damage and damages, liability for and without personal misconduct, causality, and defences)*, *op. cit.*, p. 106.

¹⁵⁴⁴ The French and Spanish linguistic versions confirm that it is the "*policy*" what "*tends to support*" ("*Le rattachement de principe à la loi du lieu du dommage est conforme aux récents objectifs de la politique législative en matière de protection de l'environnement qui favorise la responsabilité objective, stricte*" ; "*La fijación de principio a la ley del lugar donde se produce el hecho dañoso se ajusta a los recientes objetivos de la política legislativa en cuanto a protección del medio ambiente que favorece la responsabilidad objetiva, estricta*").

17 must be discarded in situations of transboundary environmental damage¹⁵⁴⁵. In other words, the pro-polluter use of Article 17 in environmental cases needs to be blocked, either through a legislative amendment, or through the coherent interpretation of Article 17.

- b. Second question: Assessment of the status of environmental standards “*in force at the place and time of the*” tortious result, whenever they are not comprised in the *lex causae*

As it may be recalled, in the third and fourth situations the victim needs to block the application of the “*rules of safety and conduct*” comprised in the *lex causae* (environmental standards of country 1; the country of the event giving rise to damage) and succeed in inserting into the dispute the “*rules of safety and conduct in force at the place and time of the*” tortious result. As it was seen, strategic options put forward along these lines face significant difficulties, and the *a priori* most adequate argument amongst them would be the pro-victim interpretation and application of Article 17, which, as mentioned, is sustained by Dickinson and Kozyris. This would mean that the relevant court would have, at least, to take into account “*as a point of fact*” the rules of safety and conduct of the place where the tortious result materializes, whenever the victim needs this to be the case. This position would be sustained by the idea that environmental standards of the country where the tortious result takes place have such an essential character for the very framing and existence of the dispute (at least in those instances where they “define” damage, as they do in the hypothetical model above) that it is impossible to ignore the factual reality that they constitute. Beyond these ideas, two coherence-driven arguments would further sustain a possible pro-victim interpretation and application of Article 17:

- i) If the content of the precited 1975 resolution of the *Institut de Droit International* was to be accepted (i.e., if it is considered that whenever a choice-of-law rule points to a certain legal system as the applicable law such designation comprises that State’s public law provisions too) the lack of pro-victim interpretation and application of Article 17 would *de facto* undermine the effectiveness of Article 7 of Rome II: under these circumstances, the victim would never be able to choose the law of the place where the event giving rise to damage took place (country 1), because not choosing the law of the place where the tortious result arose (country 2) would mean that the definition of the environmental damage would be completely “foreign” to the framework of the dispute.

¹⁵⁴⁵ A similar conclusion is reached by M. A. AMORES CONRADI & E. TORRALBA MENDIOLA (“XI Tesis sobre el estatuto delictual”, *Revista Electrónica de Estudios Internacionales*, vol. 8, 2004, pp. 1-34, at pp. 25-26), albeit via a very short and detail-less explanation which states, in reference to Article 7, that: “[...] Así las cosas, las dificultades señaladas pueden justificar una regla de favor, aunque sea tan limitada como la que permite la opción entre el ordenamiento del lugar de la acción y el del resultado. Nótese, por añadir algo, que en este entendimiento la referencia del art. 13 a las reglas de seguridad y conducta del lugar de la acción está más bien fuera de lugar: la licitud del actuar conforme a determinado ordenamiento no tiene por qué significar irresponsabilidad conforme a otro, cuando lo que se está buscando es, precisamente, qué ordenamiento es más eficaz en la prevención de tal actuar. A la misma conclusión se llega si se tiene en cuenta que la responsabilidad por daño medioambiental suele estar materialmente configurada como objetiva o por riesgo”.

ii) If the 1975 resolution was discarded (i.e. if the traditional position was accepted, and foreign provisions of public law were to be excluded), the lack of pro-victim interpretation and application of Article 17 would equally put in danger the victim's freedom of choice, for the victim would hardly ever be able to choose the courts of the place where the event giving rise to damage took place (country 1).

However, the pro-victim interpretation and application of Article 17 is hindered by a difficulty that is much more significant than its mere clash with the literal reading of the text of the provision, or the imperfections of the two coherence-driven arguments that have just been referred. From the standpoint of the conceptual distinction between "application" and "taking into account", simply taking into account country 2's environmental standards as "*circonstances factuelles à l'étranger*"¹⁵⁴⁶ (or factual elements occurred within the *forum* State, as appropriate) will not be sufficient for the victim's purposes: the environmental standards "*in force at the place and time of the*" tortious result necessarily need to be applied. It is precisely on the basis of hypotheticals like the third and the fourth situations in the model that the "application-taking into account" distinction is contested, for in scenarios like these the distinction clearly does not work¹⁵⁴⁷. Notwithstanding these considerations, the distinction cannot be discarded, for it does make sense in scenarios like the first and second situations above, and because the European Court of Justice has enshrined it (even though the case where it did so is yet again a scenario where the distinction does not work)¹⁵⁴⁸.

¹⁵⁴⁶ The literal expression is borrowed from a contribution which is otherwise very enlightening in respect of this theme: G. KEGEL, "The Role of Public Law in Private International Law: German report", in F.-E. KLEIN (ed.), *Colloque de Bâle sur le rôle du droit public en droit international privé (20 et 21 mars 1986) – Rapports et procès-verbaux des débats*, Bâle, Francfort-sur-le-Main, Helbing & Lichtenhahn, 1991, pp. 29-62, at p. 57.

¹⁵⁴⁷ *Vid.*, for instance, T. W. DORNIS, "'Local Data' in European Choice of Law: A Trojan Horse from across the Atlantic?", *op. cit.*, pp. 3-4 and 15-16. Notably: "*While the French lex domicilii communis may be applied with respect to the liability of the tortfeasor, the English rule of driving on the left side of the street—hence, 'local data'—provides for the standard of conduct. The rationale is as simple as it is convincing: consideration of this rule is mandatory when assessing the tortfeasor's negligence at the time and place of accident causation. The tortfeasor cannot claim that he was acting in accordance with French traffic laws while driving his car in England*". Despite contestation, however, it is possible to find endorsement of the distinction: *vid.*, for instance, M. BOGDAN, "Private International Law as a Component of the Law of the Forum. General Course on Private International Law", *op. cit.*, pp. 242-244.

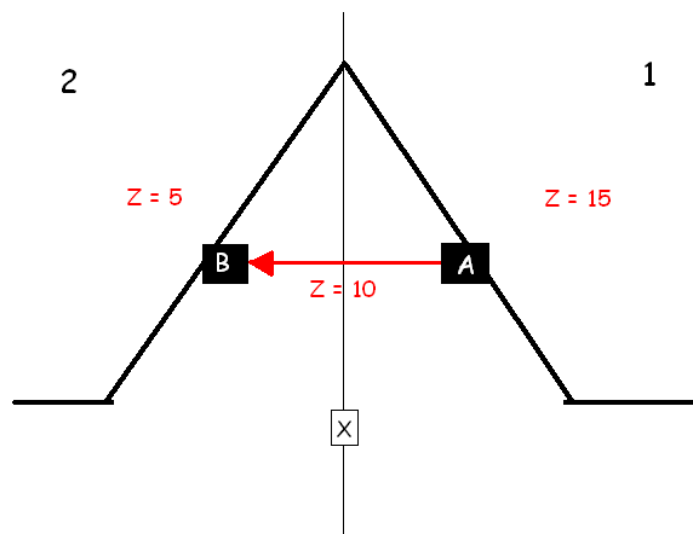
¹⁵⁴⁸ *Vid.* ECJ, *Republik Griechenland v Grigorios Nikiforidis*, judgment, case C-135/15, ECLI:EU:C:2016:774, notably para. 55: "*In the light of all the foregoing considerations, the answer to the second and third questions is that Article 9(3) of the Rome I Regulation must be interpreted as precluding overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed from being applied, as legal rules, by the court of the forum, but as not precluding it from taking such other overriding mandatory provisions into account as matters of fact in so far as this is provided for by the national law that is applicable to the contract pursuant to the regulation*". For a critical assessment of this decision *vid.* G. VAN CALSTER, "Which strap on which boot? CJEU rejects von Munchausen in Nikiforidis, without suggesting an alternative. And it leaves effet utile stranded in the mud", published on October the 18th 2016, consulted on May the 24th 2017 (<https://gavclaw.com/2016/10/28/which-strap-on-which-boot-cjeu-rejects-von-munchausen-in-nikiforidis-without-suggesting-alternative-and-it-leaves-effet-utile-stranded-in-the-mud/>).

The distinction is strongly defended by B. REMY in his PhD dissertation: *Exception d'ordre public et mécanisme des lois de police en droit international privé*, Nouvelle bibliothèque de thèses, Dalloz, 2008, pp. 352 and following).

As a consequence, the second question presented above (what happens when the environmental standards “*in force at the place and time of the*” tortious result are not comprised in the *lex causae*?) needs to be answered as follows: simply put, the standards “*in force at the place and time of the*” tortious result need to be mandatorily applied, in all circumstances, irrespective of other considerations¹⁵⁴⁹.

c. Synthesis

Taking into account all the developments in previous pages, specifically the first and second situations in the hypothetical model, it is possible to assert that, in environmental damage cases, if literally interpreted, the current configuration of Article 17 of the Rome II Regulation is incompatible with the *favor laesi* principle, the polluter-pays principle and, possibly, other principles of EU environmental law. In other words, irrespective of the chosen forum, if literally interpreted, Article 17 severely undermines the *effet utile* of Article 7. Therefore, either through interpretation, or through amendment, access to the benefits of Article 17 needs to be blocked for potential polluters. From this point onwards, it will be assumed that a mere “coherent interpretation” allows blocking the pro-polluter use of Art. 17, in order to preserve the *effet utile* of Article 7.



Graphic 0 (Repeated)

However, significant difficulties persist. Blocking the pro-polluter use of Art. 17 only frees the first situation in the hypothetical model above from difficulties. All three remaining possible litigation configurations face relevant hindrances. This entails that the victim’s freedom of choice is actually far from being absolute; the victim would be largely forced to choose the first configuration: in the second and fourth configurations the conservative position on the

¹⁵⁴⁹ It is important to highlight at this stage that: i) the place of the tortious result is likely to be foreseeable for the potential tortfeasor, if it is foreseeable at all for anyone; ii) that Article 7 (unlike Art. 5) of the Rome II Regulation does not contain any foreseeability restriction; and iii) that, in environmental torts, if a lack of foreseeability should run against any of the parties involved, it should be against the tortfeasor and not the victim.

applicability of public law could be a substantial obstacle to a successful litigation, and in situation number 3, in principle, the fault-defining environmental standards are out of the frame of the dispute, and need to be introduced therein. These limitations entail that both the maximization of victim's compensation and environmental protection are undermined: the only law left to "choose" would be exactly the same one that was consecrated in the basic general rule of the Rome II Regulation.

Thus, the second and fourth litigation configurations in the model actually demonstrate that, in order to maximize the freedom of choice of the relevant court and of the applicable law, the conservative position on the applicability of public law cannot be accepted¹⁵⁵⁰. Otherwise the victim would be forced to always choose the courts of the country where the tortious result materialized. In this sense, the stance taken by the 1975 resolution of the *Institut de Droit International* is to be welcomed: the *ordre public* exception largely suffices to neutralize whichever unacceptable provision may come from the *lex causae*, be it private-law or public-law labelled¹⁵⁵¹.

Discarding the conservative position on the applicability of public law betters the victim's range of choice for, consequently, both the first and the second configuration in the model become unhindered options. Problems persist, nevertheless, in respect of the third and fourth scenarios¹⁵⁵². Precisely, the third and fourth situations demonstrate that the European

¹⁵⁵⁰ As a matter of a clarification, this author does not support the conservative approach to the scope of application of public law. It is simply taken in previous pages as a hypothesis to work with.

¹⁵⁵¹ Notwithstanding the persistence in academia of the "conservative" position, it must be acknowledged that the exclusion of foreign public-law provisions seems to be contested nowadays. Nuanced positions may be found amongst European authors. *Vid.* for instance, M. BOGDAN ("Private International Law as a Component of the Law of the Forum. General Course on Private International Law", *op. cit.*, pp. 236-246): "[...] courts are naturally bound by the public-law rules of the *lex fori* and have to apply them in accordance with the intention of the forum country's legislator, irrespective of the law governing the private-law aspects of the relationship pursuant to the conflict rules of the forum" (although he recognizes that "[t]he matter is somewhat more complicated as far as foreign public-law rules are concerned"; p. 237). Thus, Bogdan distinguishes the "Non-enforcement of Claims based of Foreign Public Law" from the role of "Foreign Public Law in Private Disputes". The former "do not normally deserve to be enforced by courts" (p. 238). As regards the latter, he contends that "[...] the forum should not normally make itself an instrument for enforcing foreign public-law prohibitions and other similar rules, irrespective of whether they are part of the applicable *lex causae* or not". He further contends (without providing any complementary explanation) that the treatment of public-law rules "should in essence depend on the power, in the individual case, of the foreign State to enforce its own rules" (p. 242). *Vid.* also F. -E. KLEIN (ed.), *Colloque de Bâle sur le rôle du droit public en droit international privé (20 et 21 mars 1986) – Rapports et procès-verbaux des débats*, Bâle, Francfort-sur-le-Main, Helbing & Lichtenhahn, 1991 (All four contributions in this work are rather enlightening in respect of these questions, illustrating how, since the 1970s, some European authors seem to adopt the referred "nuanced" positions).

Some elements of "contestation" to the conservative approach can be found, already, in the work of F. A. MANN (*Conflict of laws and public law*, *op. cit.*, pp. 182-196). Overall, it must be acknowledged that the fact that the application of foreign public law remains, generally, exceptional "*est moins fonction de l'impossibilité théorique d'envisager une telle application que du faible degré d'intégration de la communauté internationale*" (*vid.* F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), *op. cit.*, p. 35).

¹⁵⁵² Discarding the conservative position on the applicability of public law entails that the third situation in the model gets even more complicated, because that theory cannot be used for blocking country 1's environmental standards. The victim will need to assess the chances of successfully invoking the *ordre public* exception.

Commission's implicit stance on Art. 7 dragging / comprising public-law rules cannot be blindly followed either, for, in these situations, it would render the choice of law senseless: the "applicable" environmental standard (country 1) would make the polluter non-liable. The third and fourth situations also demonstrate that the fact that the environmental standards which would render the polluter liable (those in country 2) are, in principle, out of the applicable law is equally problematic.

As it was established *supra*, in order to avoid voiding Article 7 from its content, courts need to be allowed to (and probably even need to be obliged to) accept the "intervention", under all circumstances, of "*the rules of safety and conduct which were in force at the place and time*" of crystallization of the tortious result. Be it, at least, (as Dickinson and Kozyris contend) as factual elements to be taken into account (pro-victim interpretation and application of Article 17), or else through their pure and simple application (as it is contended above in this very dissertation) the said standards need to be allowed to perform their significant role. This is so because without real freedom of choice of the litigation's configuration there can be no *favor laesi*. Without *favor laesi* there cannot be an adequate implementation of the polluter pays principle, and without both of them the policy ratio of Article 7 of Rome II would be frustrated.

Trying to obtain the application of the fault-defining environmental standards raises, however, fundamental questionings. As previously mentioned, the European Commission's implicit stance on Art. 7 dragging / comprising public-law-labelled rules cannot be considered an absolute principle, due to the detrimental results that it would lead to in the third and fourth situations in the model. However, the principle cannot be fully discarded either, for environmental standards need to be comprised in the victim's choice of law in order for the first and second configuration in the model to work. This paradox (and the impossibility to find a rule beyond the intuition that standards would need to be applied whenever the victim needs them to) points to the idea that, in order for freedom of choice to be maximized (and thus *favor laesi*, and therefore environmental protection) *dépeçage* would need to be allowed. This, nevertheless, as seen in Chapter 1, is considered unacceptable by academic commentators of Article 7¹⁵⁵³, as a reflection of the general European approach to *dépeçage*, which is a choice-of-law concept only restrictively allowed in Europe¹⁵⁵⁴.

However, beyond raising the need to seriously consider allowing victim-choice *dépeçage* (in order to maximize the *effet utile* of the EU's environmental PIL micro-regime), these pages bring along a need to switch perspectives: Article 7's shortcomings in dealing with the spatial applicability of environmental standards highlight the appropriateness of assessing whether, and to what extent, those standards may contain their own applicability criteria. As it was announced *supra*, the second congenital deficiency of Art. 7 needs to be analyzed from the stand-point of modern unilateralism's approach to the autonomous determination of the spatial applicability of EU Regulations and Directives.

¹⁵⁵³ Vid. Part I, Chapter 1, "*Presentation of Article 7, on environmental torts*".

¹⁵⁵⁴ Vid. T. W. DORNIS, "'Local Data' in European Choice of Law: A Trojan Horse from across the Atlantic?", *op. cit.*, pp. 5, 8, 9 and 13, *inter alia*.

D. Challenges from the standpoint of the doctrine on the autonomous determination of the spatial applicability of EU secondary law and related theoretical constructs

As it was explained *supra*, modern unilateralism in private international law contends that EU secondary law can autonomously determine its own scope of application in space¹⁵⁵⁵. This autonomous determination, which is partially “based on the legislative nature of those acts” and “partially based on the specificities of European Law”¹⁵⁵⁶, can be either explicit – through the insertion of explicit scope rules in the text of any given EU Regulation or Directive – or implicit – thus, the result of statutory interpretation¹⁵⁵⁷. Following this approach, “[t]he conditions of application derive directly from both the content of the rules and their purpose”¹⁵⁵⁸.

Per Article 4 TFUE, law-making on environmental issues is a shared competence between the EU and its Member States. As a consequence, as mentioned *supra*, it is to be expected that many environmental standards be established by European Regulations and European Directives (through their national transpositions). Therefore, following modern unilateralism, it is also to be expected that the spatial applicability of those standards be determined – explicitly or implicitly – by their own scope rules and applicability criteria. These scope rules would autonomously establish the spatial scope of application of the EU secondary-law environmental standards, taking precedence, due to the *lex specialis* principle, over common choice-of-law rules which would act as *lex generalis*¹⁵⁵⁹.

This position, as announced, is difficult to conciliate with the assumption that underlies the explanatory memorandum to the Rome II proposal, that Article 7 may allow and / or command the application of “foreign” environmental-quality standards (i.e., the assumption that standards will be comprised in the victim’s choice of law). In order to reflect on this point, and its impact on the effectiveness of Art. 7 of the Rome II Regulation, the following analytical path will be taken: first, this construction needs to be distinguished from the one developed in the realm of competition law (in order to foster its *private enforcement*) upon the notion of *lois de police* (i), and from the theoretical framework that could be built upon the notion of self-limited rules (ii). Once this done, a brief empirical study will be performed on a small sample of EU environmental law instruments (iii). This will be done in order to ascertain whether the EU’s body of environmental law contains spatial references on the basis of which it could establish

¹⁵⁵⁵ Vid. S. FRANCO, *L’applicabilité du droit communautaire au regard des méthodes de droit international privé*, *op. cit.*, notably pp. 641-652. For an English-language summary of this monograph, *vid.* S. FRANCO, “The scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the other way around?”, *Yearbook of Private International Law*, vol. VIII, 2006, pp. 333-374. However, *cfr.* with P. KINSCH, “L’autolimitation implicite des normes de droit privé matériel”, *op. cit.*, which uses a different frame of reasoning (multilateralism) to deal with a similar theme.

¹⁵⁵⁶ Vid. S. FRANCO, “The scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the other way around?”, *op. cit.*, p. 374.

¹⁵⁵⁷ Vid. S. FRANCO, *L’applicabilité du droit communautaire au regard des méthodes de droit international privé*, *op. cit.*, pp. 651-652. This book undertakes assessments in different thematic fields within EU law. *Vid.*, for instance, the following assessments: analysis of EU competition law Regulations which explicitly establish their own spatial applicability in pp. 100-120; analysis of EU competition law Regulations which establish their own spatial applicability implicitly in pp. 121-176.

¹⁵⁵⁸ Vid. S. FRANCO, “The scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the other way around?”, *op. cit.*, p. 353.

¹⁵⁵⁹ *Ibidem*, pp. 355-354.

its own scope of spatial application, and if so, whether the said scope could even be, occasionally, extraterritorial. These developments will culminate in a synthesis (iv), followed by considerations on the interplay of standards with Articles 7 and 17 of the Rome II Regulation (v), and some conclusions (vi).

Before beginning the path, however, it is important to insist that the analysis will only hold true for standards in EU Regulations, and in the national transpositions of EU Directives, notably, due to the intervention of Article 27 of the Rome II Regulation¹⁵⁶⁰. Scope rules in purely domestic environmental standards (i.e. standards not deriving from EU Directives) will be trumped by Rome II's provisions, via the principle of supremacy of EU law.

i. EU secondary law as lois de police: the example of the spatial scope of application of competition law

The increasing interest demonstrated by the European Commission during past decades in enhancing the private enforcement of European competition law has fostered the detailed assessment of so-called *Private antitrust damages actions*¹⁵⁶¹. As a consequence of the almost-necessarily international character of these actions, academic attention has been devoted to the interplay between EU competition law and private international law¹⁵⁶². In this context, the assessment of the interplay between, on the one hand, Article 6.3 of Rome II (*"The law applicable to a non-contractual obligation arising out of a restriction of competition"*) and, on the other hand, either the provisions on competition law contained in the TFUE – Articles 101 and 102, mainly – or analogous provisions in domestic Member-State legislations has been a crucial point¹⁵⁶³.

¹⁵⁶⁰ Article 27 reads as follows: *"Relationship with other provisions of Community law This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations"*.

¹⁵⁶¹ *Vid.* the documents made publicly available by the European Commission under the following link: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html (last consulted on March the 24th 2017). Amongst them, other than the EU Directive on Antitrust Damages Actions (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, O.J. L 349, 5.12.2014, p. 1), may be highlighted the proposal for the Directive (Proposal for a Directive of the European Parliament and of the Council *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, COM(2013) 404), as well as the corresponding White and Green Papers.

¹⁵⁶² *Vid.* the diverse contributions included in J. BASEDOW, S. FRANCO & L. IDOT (eds.), *International Antitrust Litigation - Conflict of Laws and Coordination*, Oxford, Hart, 2012. This collective work gathers the conclusions of a research project financed by European Commission. As an introduction to these topics *vid.*, E. RODRIGUEZ PINEAU, "Conflict of Laws Comes to the Rescue of Competition Law: The New Rome II Regulation", *Journal of Private International Law*, 2009, pp. 311 & following.

¹⁵⁶³ The study of the theme of the spatial application of antitrust law and its possible "extraterritoriality" is by no means recent. As a token of a very extensive literature *vid.* the detailed and thorough analysis provided by J. BASEDOW, "Souveraineté territoriale et globalisation des marchés: le domaine d'applications des lois contre les restrictions de la concurrence", *Recueil des Cours de l'Académie de Droit International*, vol. 264, Leiden, Martinus Nijhoff, 1997. For a brief account of the theme (which goes beyond, exploring the possible approximation of antitrust legislations around the world) *vid.* J.

As regards the interplay of Article 6.3 and Articles 101 and 102 TFUE, Francq & Wurmnest assert that the objective of the former is “to designate the ‘law applicable to a non-contractual obligation’ and not necessarily the law applicable to an infringement of competition law” and that, consequently, both problems can be distinguished¹⁵⁶⁴. The said authors further explain that it is well-known that competition law is capable of establishing its own scope of application in a unilateral way: the field benefits from the “existence of autonomous criteria of applicability established” by its own provisions, both at EU and domestic levels¹⁵⁶⁵. As regards the competition-law provisions in the EU Treaties, the above-mentioned authors comment that, since the spatial conditions of application of Articles 101 and 102 TFUE are rather straightforward, and primary EU law takes precedence over EU secondary law, Article 6.3 does not intervene in determining the applicability of the said treaty provisions¹⁵⁶⁶. This just leaves the more delicate question of analyzing the spatial scope of application of domestic competition-law provisions in order to ascertain whether they actually are, and act as, overriding mandatory rules. The referred authors consider in their contribution two other theoretical approaches to the issue, but end up opting for and ascertaining the rightness of the “overriding mandatory rule” approach¹⁵⁶⁷. In their assessment, they verify the fact that domestic provisions of competition law bear the usual features of overriding mandatory rules: “they defend the public interest, fix their own scope of application and require their application in a mandatory way”. This ultimately entails that the relevant competition-law provisions unilaterally establish their own spatial applicability, and the law applicable to civil remedies is established by Article 6.3¹⁵⁶⁸.

This theoretical framework, developed in the field of competition law, is likely to be transposable to the field of environmental law.

ii. EU secondary law as self-limited rules

Other than distinguishing the notion of *lois de police* (and the overriding-mandatory-rules approach) from the notion of *lex specialis* (and the application-by-priority approach contended by modern unilateralism¹⁵⁶⁹) there is a second conceptual construct that the unilateralist

BASEDOW, “International Antitrust: From Extraterritorial Application to Harmonization”, *La. L. Rev.*, vol. 60, 1999-2000, pp. 1037-1052. For another summary account of the theme, which is articulated *via* the analysis of the Spanish domestic legislation of the early 1990s, *vid.* F. ESTEBAN DE LA ROSA, “Aplicación del Derecho Antitrust y técnicas de Derecho Internacional Privado”, *Revista de Derecho Privado*, num. 80-11, 1996, pp. 817-848.

¹⁵⁶⁴ *Vid.* S. FRANCO & W. WURMNEST, “International Antitrust Claims under the Rome II Regulation”, *op. cit.*, pp. 108-109.

¹⁵⁶⁵ *Ibidem*, p. 109.

¹⁵⁶⁶ *Ibidem*, p. 110.

¹⁵⁶⁷ *Ibidem*, pp. 111-117.

¹⁵⁶⁸ *Ibidem*, pp. 114-115: “Competition law provisions have up to now primarily been considered as overriding mandatory rules. [...] Considering market rules as overriding mandatory rules leaves the application of competition law provisions to their own criteria of applicability. In a first step, the unilateral will of application of competition law provisions is taken into account and, in a second step, the law applicable to the civil remedies is determined according to the bilateral conflict rules [...]”.

¹⁵⁶⁹ For developments on why the *lois de police* phenomenon does not provide a full explanation, *vid.* S. FRANCO, “The scope of Secondary Community Law in the Light of the Methods of Private International

position needs to be distinguished from: self-limited rules. Self-limited rules “*delineate their own scope of application, but this [...] limitation is only taken into consideration after the intervention of the conflict rule*”¹⁵⁷⁰. In other words, “[c]ette autodélimitation serait neutre du point de vue du droit international privé”¹⁵⁷¹. The consequence of their intervention – which needs not be explicit; the phenomenon of self-limitation can also work implicitly¹⁵⁷² – is that a different rule from the same legal order becomes applicable¹⁵⁷³. In other words, whenever a self-limited rule is not applied, the solution to the dispute remains within the *lex causae* where the said rule belongs. As explained by Francq: “*Cette catégorie de règles s’explique donc en raison du caractère universel des règles de droit privé et de la distinction qui en découle entre droit matériel et droit international privé. Elle suppose l’existence d’une auto-délimitation des normes matérielles qui n’influence pas la désignation de l’ordre juridique compétent*”¹⁵⁷⁴.

As it was the case with the overriding-mandatory-provisions approach, it is equally likely that the phenomenon of self-limited rules may also be present within the realm of EU secondary environmental law.

iii. Empirical research: Spatial references in EU secondary environmental law

From the stand-point of the distinctions traced, as announced *supra*, a brief empirical study will be conducted, on the basis of a small sample of EU-environmental-law instruments. Its purpose will be to ascertain whether these instruments contain explicit spatial references, if so, what value may be given thereto, and should they establish their own scope of spatial application, whether the said application may be extraterritorial. The term “extraterritorial” in the following pages will aim at the two following scenarios: i) whenever the said instruments may be applied to European-based subjects beyond the territory of the European Union; and / or ii) whenever the said instruments may be applied to non-European-based subjects whose activities have an impact on the EU’s territory¹⁵⁷⁵. While implicit spatial references are

Law – Or the other way around?”, *op. cit.*, pp. 358-362; and S. FRANCO, *L’applicabilité du droit communautaire au regard des méthodes de droit international privé*, *op. cit.*, pp. 555-576.

¹⁵⁷⁰ *Vid.* S. FRANCO, “The scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the other way around?”, *op. cit.*, pp. 350-352 (notably, p. 350). *Vid.* also P. KINSCH, “L’autolimitation implicite des normes de droit privé matériel”, *op. cit.*, pp. 404-405. Kinsch considers that this is a “*limitation du champ d’application internationale des normes de droit matériel, qui ne se substitue pas au jeu des mécanismes [...] des règles de conflit [...]*”.

¹⁵⁷¹ *Vid.* S. FRANCO, *L’applicabilité du droit communautaire au regard des méthodes de droit international privé*, *op. cit.*, p. 622.

¹⁵⁷² *Vid.* P. KINSCH, “L’autolimitation implicite des normes de droit privé matériel”, *op. cit.*, pp. 409-410.

¹⁵⁷³ *Vid.* S. FRANCO, *L’applicabilité du droit communautaire au regard des méthodes de droit international privé*, *op. cit.*, p. 622 ; P. KINSCH, “L’autolimitation implicite des normes de droit privé matériel”, *op. cit.*, p. 405.

¹⁵⁷⁴ *Vid.* S. FRANCO, *L’applicabilité du droit communautaire au regard des méthodes de droit international privé*, *op. cit.*, p. 624.

¹⁵⁷⁵ *Vid.*, for a slightly different categorization, J. SCOTT, “Extraterritoriality and Territorial Extension in EU Law”, *The American Journal of Comparative Law*, vol. 62, 2014, pp. 87-126. This author uses a restrictive notion of “extraterritoriality” and considers that there will be “territorial extension” when the application of a “measure” “depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances

considered relevant both within the *lois de police* and the *lex specialis* theories (and possibly within the self-limited rules theory too), the focus of the following empirical assessment will be placed on explicit spatial references purely as a matter of simplicity.

As indicated, the analysis will focus on a small sample of legal instruments, mainly composed of EU directives, but which also comprises two regulations and a decision. The said instruments have been chosen, within the immense body of EU environmental law, due to the specific aspects of environmental protection that they deal with and, additionally, due to the cross-references to each other that they contain. The 10 legal instruments that have been selected are the following: 1) Directive 87/217/EEC on the prevention and reduction of environmental pollution by asbestos¹⁵⁷⁶; 2) Directive 2008/105/EC on environmental quality standards in the field of water policy,¹⁵⁷⁷; 3) Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market¹⁵⁷⁸; 4) Directive 1999/31/CE, on the landfill of waste¹⁵⁷⁹; 5) Directive 2006/11/CE on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community¹⁵⁸⁰; 6) Directive 2008/98/CE on waste¹⁵⁸¹; 7) Directive 2010/75/UE on industrial emissions¹⁵⁸²; 8) Decision 2000/532/CE (establishing a list of wastes and hazardous waste)¹⁵⁸³; 9) Regulation 1013/2006 on shipments of waste¹⁵⁸⁴; 10) the aforementioned Directive 2004/35/CE, on environmental liability.

Taking into account the assumptions made in previous pages, the aim of the analysis is double: on the one hand, the analysis will attempt to ascertain whether they may establish sufficiently clear technical and “environmental behavior” standards to be directly followed by private subjects (i.e., standards which will not require further clarification or development by Member

abroad” (p. 90). *Vid.*, along the same lines, J. SCOTT, “The new EU “extraterritoriality””, *Common Market Law Review*, vol. 51, 2014, pp. 1343–1380.

¹⁵⁷⁶ Council Directive 87/217/EEC of 19 March 1987 on the prevention and reduction of environmental pollution by asbestos, O.J. L 85, 28.3.1987, p. 40.

¹⁵⁷⁷ Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council, O.J. L 348, 24.12.2008, p. 84.

¹⁵⁷⁸ Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, O. J. L 309, 24.11.2009, p. 1.

¹⁵⁷⁹ Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, O. J. L 182, 16.7.1999, p. 1.

¹⁵⁸⁰ Directive 2006/11/EC of the European Parliament and of the Council of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, O. J. L 64, 4.3.2006, p. 52 (This directive was implicitly repealed by an amendment to Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, as of December the 22nd 2013. It has been kept in the sample due to its peculiarity, as it will be seen *infra*).

¹⁵⁸¹ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, O. J. L 312, 22.11.2008, p. 3.

¹⁵⁸² Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), O. J. L 344, 17.12.2010, p. 17.

¹⁵⁸³ Commission Decision of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste (notified under document number C(2000) 1147), O. J. L 226, 6.9.2000, p. 3.

¹⁵⁸⁴ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, O.J. L 190, 12.7.2006, p. 1.

States). On the other hand, if sufficiently clear standards are found, the analysis will attempt to ascertain whether the instruments which contain them explicitly establish their own scope of spatial application. While the sample is extremely small, and, therefore, by no means representative of the immense body of EU environmental law, it may suffice for the purposes of the analysis: it will be enough that only one of the instruments in the sample contains sufficiently clear standards and determines its own scope of spatial application.

As regards the first aspect, the question whether EU environmental law may contain sufficiently clear and neat standards of environmentally-relevant behavior: 7 out of the 10 instruments in the sample present this kind of standard. In this sense, the approach taken has been a cautious one: in respect of the directives, only absolutely unequivocal standards have been admitted as such. Articles which could give rise to doubts or discussion have been left unconsidered: for instance, articles which refer to *“the best available techniques”* or to the *“best available technology not entailing excessive costs”*, or articles which only after being transposed may possibly give rise to a clear standard (depending on the manner in which they are transposed by the Member States¹⁵⁸⁵). Notwithstanding this “precautionary approach” in the implementation of the analysis, the forms in which the relevant standards may present themselves vary widely. In some cases, for instance, reference is made to applying a set of *“Environmental quality standards”* which have been placed in an annex to the relevant legal instrument. An example in this sense may be found in Part A of Annex I of Directive 2008/105/CE, which establishes, for instance, that the maximum allowable concentration of benzene in inland surface waters is of 10 µg/l. Other than this, standards may take the form of rules of safety, in the strictest sense of the expression. As an example thereof, point 6 (*“Specific requirements for metallic mercury”*) of Annex II (*“Waste acceptance criteria and procedures”*) of the consolidated version of Directive 1999/31/EC may be mentioned. The said article establishes that *“Containers used for the storage of metallic mercury shall be corrosion- and shock-resistant. Welds shall therefore be avoided. The containers shall comply in particular with the following specifications: — container material: carbon steel (ASTM A36 minimum) or stainless steel (AISI 304, 316L) [...]”*. Finally, in other cases, standards are simply discharge or transport prohibitions. For instance, Article 34 of Regulation (EC) No 1013/2006 establishes that *“[a]ll exports of waste from the [Union] destined for disposal shall be prohibited”*, but that this prohibition *“shall not apply to exports of waste destined for disposal in EFTA countries which are also Parties to the Basel Convention”*¹⁵⁸⁶.

In the light of these considerations, it may be concluded that, in general, the environmental standards contained in EU environmental secondary law are indeed sufficiently clear as to potentially allow considering them overriding mandatory rules. Obviously, as explained, in

¹⁵⁸⁵ An example of this type of wording may be found in Directive 2010/75/UE, Article 14, *“Permit conditions”*: *“1. Member States shall ensure that the permit includes all measures necessary for compliance with the requirements of Articles 11 and 18. Those measures shall include at least the following: (a) emission limit values for polluting substances listed in Annex II, and for other polluting substances, which are likely to be emitted from the installation concerned in significant quantities, having regard to their nature and their potential to transfer pollution from one medium to another; [...]”*.

¹⁵⁸⁶ Another example may be found in Articles 3 and 4 of Directive 2006/11/EC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community. These articles establish prohibitions to discharge the substances reprinted in list I of Annex I of the said Directive (unless an authorization is provided), with the aim of curtailing pollution by the said substances.

order to assert that any given legal instrument is a *loi de police*, several other interrelated elements must concur: i) it must defend the public interest; ii) it must require its application in a mandatory way; and iii) it must determine its own scope of application¹⁵⁸⁷. This latter element precisely leads to the second dimension of this empirical analysis: the search and identification of explicit spatial references within the relevant EU instruments.

As regards this point, only those spatial references which go beyond obvious aspects have been taken into account. This means that those spatial references which reflect the necessarily territorial character of certain aspects of typical public authority / citizen relationships have been disregarded. The same goes for spatial references which reflect the necessarily territorial character of certain administrative powers¹⁵⁸⁸. In this sense, at least 6 of the 7 instruments which were identified as containing sufficiently clear behavioural standards also contain explicit spatial references which may be relevant.

i) Directive 2008/105/EC on environmental quality standards in the field of water policy repeatedly contains references in its recitals to measures, classifications, regulation, etc. “*at Community level*”, whose presence may be possibly explained by the need to justify that the subsidiarity principle is being respected¹⁵⁸⁹. However, recital 26 establishes that “[s]everal Member States are affected by pollution the source of which lies outside their national jurisdiction. It is therefore appropriate to make clear that a Member State would not be in breach of its obligations under this Directive as a result of the exceeding of an EQS due to such transboundary pollution, provided that certain conditions were met and that it had taken advantage, as appropriate, of the relevant provisions of Directive 2000/60/EC”. Article 6 of the same directive goes along the same lines. Directive 2000/60/EC, in turn, establishes in Article 3.5 that “[w]here a river basin district extends beyond the territory of the Community, the Member State or Member States concerned shall endeavour to establish appropriate coordination with the relevant non-Member States, with the aim of achieving the objectives of

¹⁵⁸⁷ Vid. S. FRANCO & W. WURMNST, “International Antitrust Claims under the Rome II Regulation”, *op. cit.*, pp. 114-115.

¹⁵⁸⁸ For instance, Article 4 of Directive 2008/105/CE (classing of certain zones as zones for water mixing) may be taken as an example of a provision having *per se* an eminently territorial nature (“1. Member States may designate mixing zones adjacent to points of discharge. Concentrations of one or more substances listed in Part A of Annex I may exceed the relevant EQS within such mixing zones if they do not affect the compliance of the rest of the body of surface water with those standards”). Vid. similarly, recitals 27, 28 and 29 of Regulation 1107/2009: “(27) [...] For efficiency reasons, a harmonised procedure at Community level should be provided for the assessment of those differences. (28) Good administrative cooperation between Member States should be increased during all steps of the authorisation procedure. (29) [...] To avoid any duplication of work, to reduce the administrative burden for industry and for Member States and to provide for more harmonised availability of plant protection products, authorisations granted by one Member State should be accepted by other Member States where agricultural, plant health and environmental (including climatic) conditions are comparable. Therefore, the Community should be divided into zones with such comparable conditions in order to facilitate such mutual recognition [...]”.

¹⁵⁸⁹ Vid. recitals 10 and 11. Recital 10: “Decision No 2455/2001/EC sets out the first list of 33 substances or groups of substances that have been prioritised for action at Community level. [...]”; Recital 11: “In the interests of the Community and for a more effective regulation of surface water protection, it is appropriate to set up EQS for pollutants classified as priority substances at Community level [...] However, the common standards established for those pollutants proved to be useful and it is therefore appropriate to maintain their regulation at Community level.”.

*this Directive throughout the river basin district. Member States shall ensure the application of the rules of this Directive within their territory*¹⁵⁹⁰. It seems, therefore, that these instruments, despite envisaging a possible “coordination”, actually take a strong stance towards the materialization of their objectives beyond the territory of the Union.

ii) Directive 1999/31/EC on the landfill of waste contains some spatial references pointing to the Union within its recitals (Recital 2 “[...] *only safe and controlled landfill activities should be carried out throughout the Community*”; Recital 11 “[...] *protect, preserve and improve the quality of the environment in the Community*”). Nevertheless, Article 1.1 refers clearly to environmental protection at a global scale: “[...] *the aim of this Directive is, by way of stringent operational and technical requirements on the waste and landfills, to provide for measures, procedures and guidance to prevent or reduce as far as possible negative effects on the environment, in particular the pollution of surface water, groundwater, soil and air, and on the global environment, including the greenhouse effect, as well as any resulting risk to human health, from landfilling of waste, during the whole life-cycle of the landfill*”.

iii) The now implicitly repealed Directive 2006/11/EC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community is dealt with due to its peculiarity. This directive contained explicit spatial references both in its title and its second recital which pointed exclusively towards the intra-EU environment. However, its third recital indicates that this is due to the existence of international conventions on the topic (“*Several conventions are designed to protect international watercourses and the marine environment from pollution. It is important to ensure the coordinated implementation of these conventions*”).

iv) Recital 28 of Directive 2008/98/EC on waste (the “Waste Framework Directive”) makes reference to the fact that its aim should be to “*help move the EU closer to a ‘recycling society’, seeking to avoid waste generation and to use waste as a resource*”.

v) Recital 3 of Directive 2010/75/UE on industrial emissions contains an explicit spatial indication which could easily just respond to the need to reinstate the importance of harmonization in this field for the fulfilment of the objectives of the European internal market (“*Such an approach will also contribute to the achievement of a level playing field in the Union by aligning environmental performance requirements for industrial installations*”).

vi) Finally, Regulation (EC) No 1013/2006 on shipments of waste neatly reflects, both in its recitals and its provisions, an environmental concern which clearly reaches beyond what could be strictly labelled as the EU’s environment (“*It is necessary, in order to protect the environment of the countries concerned, to clarify the scope of the prohibition laid down in accordance with the Basel Convention of exports from the Community of any waste destined for disposal in a third country other than an EFTA (European Free Trade Association) country*”¹⁵⁹¹). However, it must be acknowledged that this concern is by no means surprising since this

¹⁵⁹⁰ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, O.J. L 327, 22.12.2000, p. 1.

¹⁵⁹¹ The recitals of Regulation 259/1993, which preceded Regulation 1013/2006, were even more explicit:

“*Whereas exports of waste for disposal to third countries must be prohibited in order to protect the environment of those countries; whereas exceptions shall apply to exports to EFTA countries which are*

Regulation is the EU's prolongation of the 1989 *Basel Convention on the control of transboundary movements of hazardous wastes and their disposal*.

Taking into account the developments that have been exposed, it may be concluded that 3 out of the 6 instruments which contain sufficiently clear environmental standards and explicit spatial references may even possibly be prone to an extraterritorial application since they refer, with varying degrees of explicitness, to the environment beyond the EU's frontiers.

iv. *Synthesis*

Previous pages have explored the possibility that EU secondary environmental legislation may act as overriding mandatory rules, as *lex specialis*, and / or as self-limited rules, and have introduced a brief empirical quest for explicit spatial references in some selected instruments stemming therefrom. In practical terms, the developments in previous pages mean the following: Let us suppose that company "A" domiciled in "1", a Member State of the European Union, sends to "2", a third country, a shipment of mercury in order to dispose of it. Article 34 of Regulation 1013/2006 prohibits the export of waste for its disposal to non-ETFA and non-Basel-Convention countries. Additionally, following point 6 of Annex II of Directive 1999/31/EC, "*Containers used for the storage of metallic mercury shall be corrosion- and shock-resistant*". Let us suppose that both behavioral standards are breached: the mercury shipment is clandestinely introduced in "2", and the containers are not shock-resistant. As a result, there is a leaking which reaches a source of fresh water and, subsequently, the population in the zone suffers severe health damage. If the local population decided to sue "A" before the courts of "1", there are sufficient indicia which (notwithstanding the need to analyze other elements) would point to interesting possibilities: i) the possibility of attempting to assert that the referred environmental standards are overriding mandatory rules, or ii) the possibility of attempting to assert that, following a *lex-specialis* approach, the spatial applicability of the referred environmental standards may not be determined by the Rome II Regulation¹⁵⁹².

Let us focus briefly on the first of these possibilities. The theoretical framework presented *supra* on the basis of the private enforcement of EU competition law may indeed be transposed to the realm of environmental law, despite the significant and obvious differences in approach between the latter and the former: notwithstanding other elements, the core of EU competition law is constituted by given behavioural standards – prohibition of collusive arrangements and of abuse of dominant position – enshrined in self-executing TFUE articles. EU environmental law, however, stems from a set of non-self-executing TFUE articles which

also Parties to the Basle Convention; Whereas exports of waste for recovery to countries to which the OECD Decision does not apply must be subject to conditions providing for environmentally sound management of waste; Whereas agreements or arrangements on exports of waste for recovery with countries to which the OECD Decision does not apply must be subject to periodic review by the Commission leading, if appropriate, to a proposal by the Commission to reconsider the conditions under which such exports take place, including the possibility of a ban; [...]".

¹⁵⁹² Let us recall that the application by priority of given legal provisions may be independent from the notion of *lois de police* / overriding mandatory rules. *Vid.* S. FRANCO, "The scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the other way around?", *op. cit.*, pp. 358-362.

merely sets policy objectives, orientations, and principles, and, moreover, does not contain any clear and neat behavioural standard for private subjects¹⁵⁹³. This kind of behavioural standards – akin to those present in Articles 101 and 102 TFUE – may only be found in secondary environmental law. Within this latter field, elements may be found which, inasmuch as they deal with the relationship between a public authority and a private subject, are not directly relevant for this sub-section's purposes (communication and information duties for private parties, administrative control and monitoring by public authorities, etc.)¹⁵⁹⁴. However, as seen, other elements may be of interest, inasmuch as, on the one hand, they establish clear technical and “environmental behavior” standards to be followed by private subjects, and, on the other hand, they may have an impact in relationships with other private subjects (irrespective of public-authority involvement)¹⁵⁹⁵.

The above-presented overriding-mandatory-rule approach is narrowly linked with *Ingmar*¹⁵⁹⁶, an ECJ decision on certain provisions in Council Directive 86/653/EEC (“*on the coordination of the laws of the Member States relating to self-employed commercial agents*”), which guarantee certain rights to commercial agents after the termination of agency contracts. In *Ingmar*, the ECJ established that those provisions must be applied “*where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that [non-member] country*”¹⁵⁹⁷. The “mandatory” nature of the referred provisions stems from the fact that “[t]he purpose served by the provisions in question requires that they be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed”¹⁵⁹⁸.

Taking into account the content of *Ingmar*, therefore, it would be necessary to perform further and more intensive empirical research in order to be able to assert with full certainty whether *lois de police* may be found within EU secondary environmental law or not: following *Ingmar*, the “purpose served” by a given legal instrument needs to be analyzed in order to assert its mandatory character, and the said mandatory character is the third necessary and defining

¹⁵⁹³ On the lack of self-executing character, *vid.* N. DE SADELEER, “Droits fondamentaux et protection de l’environnement dans l’ordre juridique de l’UE et dans la CEDH”, *op. cit.*, pp. 28-29.

¹⁵⁹⁴ While they may serve to sustain any of the above-mentioned theories, including the theory of self-limitation, their substantive content may not be relevant for tort-related purposes.

¹⁵⁹⁵ As an additional difference between the fields of competition and environmental law, it may be recalled that a very significant share of EU environmental law is embodied in directives. This means that, when confronted with the need in practice to check the spatial scope of application of EU environmental directives, litigators will need to focus, in most instances, on the spatial scope of application of the domestic transpositions of the said directives.

¹⁵⁹⁶ *Vid.* ECJ, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, judgment, case C-381/98, ECLI:EU:C:2000:605. For commentaries, *vid.*, *inter alia*, T. KRUGER, “Case note on ECJ judgment *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*”, *Columbia Journal of European Law*, 2002, pp. 85-91; A. FONT I SEGURA, “Reparación indemnizatoria tras la extinción del contrato internacional de agencia comercial: imperatividad poliédrica o el mito de Zagreo (STJCE de 9 de noviembre de 2000, As. C-381/98, *Ingmar GB LTD c. Eaton Leonardo Technologies INC.*)”, *Revista de Derecho Comunitario Europeo*, 2001, pp. 259-279.

¹⁵⁹⁷ *Vid.* ECJ, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, judgment, *op. cit.*, para. 26.

¹⁵⁹⁸ *Ibidem*, paras. 22 and 25 respectively.

element of the notion of *loi de police*¹⁵⁹⁹. The existence or lack of the said mandatory nature would need to be empirically assessed on an instrument-by-instrument basis, and this verification falls outside the scope of this dissertation.

However, notwithstanding these considerations, all three above-referred possibilities – overriding mandatory rules, *lex specialis*, and self-limited rules – remain open for EU secondary environmental law. Let us consider what this means in terms of the interplay with Articles 7 and 17 of the Rome II Regulation.

v. *The interplay of standards with Articles 7 and 17 of the Rome II Regulation*

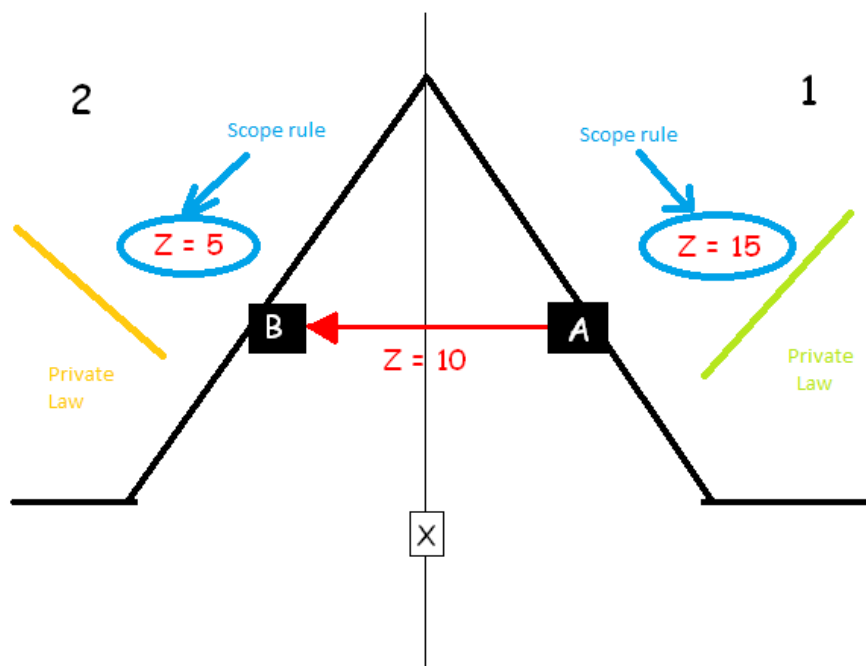


Figure 5

What impact do the three above-referred theoretical constructs have on the effectiveness of Article 7 of the Rome II Regulation? And what is their respective interplay with Article 17? A distinction needs to be drawn at this point between the overriding-mandatory-rules and application-by-priority approaches, on the one hand, and the self-limited-rule notion, on the other:

i) Whenever the environmental standards at stake get to be qualified as *lois de police*, or their spatial scope of application gets to be determined by their own – explicit or implicit – scope

¹⁵⁹⁹ Vid. S. FRANCO & W. WURMNEST, “International Antitrust Claims under the Rome II Regulation”, *op. cit.*, pp. 114-115. Admittedly, it could be argued that the second element enlisted by Franco and Wurmnest, the defense of a public interest, is generally present in environmental legislation. However, for the transposal to fully crystallize, the third element needs to concur: the relevant legal instruments need to “require their application in a mandatory way”.

rules, there will be a “scission” in the applicable law: environmental standards will be subtracted from the reach of the choice of law operated *via* Article 7 of the Rome II Regulation. As seen in figure 5, the $Z = 5$ standard and the $Z = 15$ standard will apply or not depending on their own criteria of spatial applicability (which here constitute scope rules), and Art. 7 will only allow choosing between the private-law regimes in force in State 1 or State 2. Understandably, this scheme not only limits the relevance of the victim’s choice, but also diminishes the possibility of attaining “*higher levels of protection*”, as wished by the European Commission in the explanatory memorandum to the Rome II proposal. Accordingly, a similar conclusion should be reached in respect of Article 17 of the Rome II Regulation if the terms “application” and “taking into account” are to be considered as synonyms: any environmental standard which gets to be considered as *lois de police*, or as being accompanied by a *lex-specialis* scope rule, will be out of reach for Article 17. If, nevertheless, the “application” and “taking into account” terms are to be understood as being different, then the risk of a pro-polluter use of Article 17 seen in the first and second situations of the hypothetical model above may also be present here. However, again, a pro-polluter use of Article 17 needs to be discarded for *effet-utile* reasons (i.e. in order not to undermine Article 7 of Rome II).

ii) Whenever the environmental standards at stake get to be qualified as self-limited rules the situation is different, although it equally limits the relevance of the victim’s Article-7 choice. As seen in figure 6 below, the victim’s choice of law would comprise the entirety of State 2’s legal order, but the $Z = 5$ standard being a self-limited rule, it would not get to be applied, and a different standard from the same legal order (for instance, the *bonus pater familias*) would get to be applied instead.

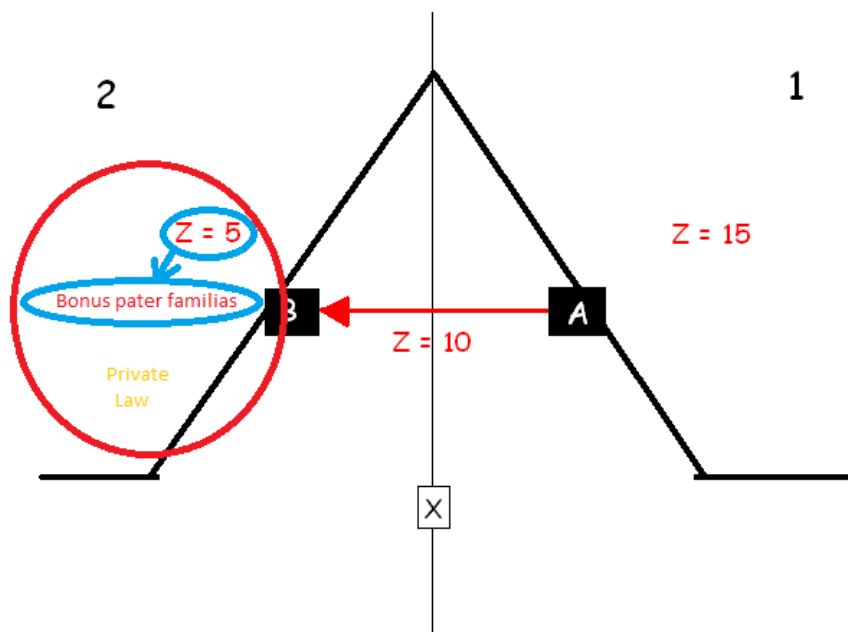


Figure 6

As regards Article 17, the challenges it entails remain within similar coordinates: the risk of a pro-polluter use of Article 17 present in the first and second situations of the hypothetical

model *supra* equally exists in this scenario. Again, the pro-polluter use of Article 17 needs to be ruled out in order not to undermine Article 7 of the Rome II Regulation.

vi. Conclusions on the modern unilateralist approach and related theoretical constructs

The analysis performed seems to indicate that instruments of EU environmental law may contain spatial references which may possibly help determine their scope of spatial application (as *lois de police*, or in a *lex-specialis* fashion), or may be the basis of a self-limitation phenomenon. In all cases, albeit perhaps in different forms, these notions limit the reach of Article 7 of the Rome II Regulation, and therefore, undermine its potential for attaining “*higher levels of protection*” of the environment. Moreover, those spatial references may sometimes point towards the environment beyond the territory of the European Union: this hints at the idea that, possibly, some EU environmental law rules may have the vocation to be applied extraterritorially.

Additionally, as it was the case *supra*, within the frame of the analysis of the conservative position on the spatial applicability of public law, a pro-polluter use of Article 17 of the Rome II regulation remains a significant threat to the *effet utile* of Article 7, that needs to be neutralized, either *via* interpretation or *via* legislative amendment.

Even if the developments in previous pages subtract a significant share of environmental standards from the “black hole” that is the first congenital deficiency presented *supra*, that deficiency remains, in respect of purely domestic standards, and in respect of private-law provisions. Let us, therefore, deal with it.

IV. Possible solutions to the first foundational deficiency

As demonstrated *supra*, Article 7 of the Rome II Regulation bears a failure which clearly has global governance implications. The following pages will explore multiple options in order to mend this dysfunction. Firstly, it will be considered whether the inadequate drafting of the article can be corrected without having to resort to the burden of legislative action. In this sense, both corrective interpretation, and some classic notions from the general theory of private international law (which, historically, have been used to “correct” the results that choice-of-law rules lead to) will be put to the test (A). Once this first step accomplished, it will be necessary to assess whether, possibly, the legislative amendment of the article could provide better results (B).

A. Solutions not requiring legislative action

The general theory of private international law provides some options in order to prevent or correct the possibly unsatisfactory outcomes that the first dysfunction in Article 7 of the Rome II Regulation may lead to. The so-called "escape devices"¹⁶⁰⁰ – *ordre public* exception and overriding mandatory rules, amongst others – have typically been used in such a sense. These corrective solutions are probably the simplest means to proceed with in implementation terms (since respecting the wording of Rome II as it stands nowadays entails no legislative activity) but are equally the most troublesome as regards ensuring homogenous results throughout the Union. In most cases their intervention will lead to the application of the law of the *forum*, but beyond this, there are not many certainties. In this sense, a commentary on the role of public policy and *lois de police* in the frame of the (so-called) "foreign direct liability cases" can be most enlightening:

*"[...] these exceptions are typically applied on a case by case [sic] basis and whether they can result in the application of parts of the law of the [forum] is highly dependent on the particular circumstances of each case. Furthermore, how these provisions will be interpreted in practice is dependent in the end on the national courts of the Member States and the European Court of Justice. This means that as to whether, how and to what extent these exceptions could lead to the applicability of parts of the law of the Handlungsort in foreign direct liability cases, remains, at least for now, highly speculative"*¹⁶⁰¹.

Since, more optimistically, it has also been submitted that "*resorting to forum law to avoid the application of foreign norms manifestly contrary to forum public policy, or to obey and respect the mandatory character of forum norms, can serve to enhance the protection level in a particular environmental claim*"¹⁶⁰², let us deal with the two above-referred tools – *ordre public* exception and overriding mandatory rules – in sequence (i and ii). Once this done, the potential of corrective interpretation will be examined (iii).

i. Ordre Public

As referred by the Explanatory Memorandum to the Rome II Proposal, the *ordre public* exception is a mechanism which "*[...] allows the court to disapply rules of the foreign law designated by the conflict rule and to replace it by the lex fori where the application of the*

¹⁶⁰⁰ Vid. T. C. HARTLEY, "The Modern Approach to Private International Law: International Litigation and Transactions from a Common-Law Perspective", *Recueil des Cours de l'Académie de Droit International*, vol. 319, Leiden, Martinus Nijhoff, 2006, pp. 189 and following.

¹⁶⁰¹ Vid. L. ENNEKING, "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, p. 303. The original quote does not refer to the law of the *forum*, but to the *lex loci actus* (law of the *Handlungsort*). The term *Handlungsort* has been replaced by "*forum*" in order to align Enneking's quote with Otero's (*vid. infra* note 1602), but this does not significantly alter the quotation, for, under Enneking's conception, the law of the *Handlungsort* and the law of the *forum* would be coincident (Following Enneking's understanding, within her "foreign direct liability" theory, the *Handlungsort* would be the corporate headquarters). For further developments, *vid. infra* the sub-section on "*Corrective interpretation*".

¹⁶⁰² Vid. C. OTERO GARCÍA-CASTRILLÓN, "International litigation trends in environmental liability: a European Union-United States comparative perspective", *op. cit.*, pp. 575-576.

foreign law in a given case would be contrary to the public policy of the forum"¹⁶⁰³. Despite the fact that the exception has been specifically enshrined in several EU PIL instruments – as it is the case of Art. 26 of the final enacted version of the Rome II Regulation – the notion of *ordre public* remains "*a national concept*"¹⁶⁰⁴: within the European Union, public policy is not a unitary notion, covering all the same aspects for all Member States. Its content is not commonly established by the ECJ or any other European instance for the ensemble of the EU¹⁶⁰⁵. Notwithstanding this, the ECJ has availed itself the capacity of reviewing the limits within which the courts of the Member States may have recourse to the exception¹⁶⁰⁶.

The ratio behind this exception when dealing with the application of foreign law would lie, following Struycken, on the idea that, while relevant courts recognize foreign law as "law" as a sign of respect and tolerance "*not only for the foreign law but for the legal community behind it [...] tolerance has its limits*"¹⁶⁰⁷. Resort to the exception is deemed to be, however, truly exceptional: the use of the word "*manifestly*" has become an almost customary qualification in recent times in order to benchmark the degree of incompatibility required in order to trigger the use of the exception¹⁶⁰⁸. This means that, it is not sufficient that the relevant court

¹⁶⁰³ Vid. explanatory memorandum to the Rome II proposal, p. 28. Since *ordre public* is a classic concept of private international law, extensive literature exists on the topic, including at least 5 contributions to the *Recueil des Cours*. For their thorough analysis, as well as for their illustrative value in respect of the evolution of the notion, vid. P. DE VAREILLES-SOMMIERES, "L'exception d'ordre public et la régularité substantielle internationale de la loi étrangère", *Recueil des Cours de l'Académie de Droit International*, vol. 371, Leiden, Martinus Nijhoff, 2015; A. BUCHER, "L'ordre public et le but social des lois en droit international privé", *Recueil des Cours de l'Académie de Droit International*, vol. 239, Leiden, Martinus Nijhoff, 1993; T. H. HEALY, "Théorie générale de l'ordre public", *Recueil des Cours de l'Académie de Droit International*, vol. 9, Leiden, Martinus Nijhoff, 1925.

¹⁶⁰⁴ Vid. L. ENNEKING, "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, pp- 306-307.

¹⁶⁰⁵ Moreover, the use of *ordre public* as an exception for the purposes of private international law is just one aspect of a wider and more comprehensive notion of *ordre public* within the European legal order. For a discussion of this wider European-law notion which, furthermore, qualifies *ordre public* as polysemous ("*polysémique*") and shape-shifting ("*protéiforme*"), vid. S. FRANCO, "ordre public : limite ou condition de l'autonomie dans l'Union européenne?", in C. KESSEDJIAN (dir.), *Autonomie en droit européen - Stratégie des citoyens, des entreprises et des Etats*, Paris, Panthéon-Assas Paris II, 2013, pp. 223-242.

¹⁶⁰⁶ Vid. ECJ, *Dieter Krombach v André Bamberski*, judgment, case C-7/98, ECLI:EU:C:2000:164, para. 22 & 23: "*It follows that, while the [Member States] in principle remain free [...] to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention [...] Consequently, while it is not for the Court to define the content of the public policy of a [Member State], it is none the less required to review the limits within which the courts of a [Member State] may have recourse to that concept [...]*".

¹⁶⁰⁷ Vid. A. V. M. STRUYCKEN, "Coordination and co-operation in respectful disagreement - General Course on Private International Law", *op. cit.*, p. 318. For a "law and economics" conceptualization of *ordre public*, vid. J. CARRASCOSA GONZÁLEZ, "Orden público internacional y externalidades negativas", *Boletín del Ministerio de Justicia*, num. 62-2065, 2008, pp. 2351-2378: "[...] en ocasiones, dicha solución, que es «justa» para las partes implicadas, puede producir «efectos negativos» en la sociedad española. En efecto, la aplicación de un Derecho extranjero en España puede generar una «externalidad negativa», es decir, un daño a la «organización moral y económica de la sociedad» del Estado cuyos tribunales conocen del asunto [...]" (p. 2353).

¹⁶⁰⁸ Vid. the parallel provisions in the Rome I Regulation, and the case-law concerning public policy as an exception to recognition and enforcement in the frame of the Brussels I Convention / Regulation, amongst which *Krombach* (judgment, *op. cit.*) and *Renault v. Maxicar* (ECJ, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento*, judgment, case C-38/98, ECLI:EU:C:2000:225). It is

considers that the applicable rules “are wrong as to their substance and conclusion, [...] not even if the incorrectness is manifest”¹⁶⁰⁹. The triggering occurs, therefore, “[...] only when a rule conflicts with fundamental legal principles of the forum, or when its application leads to results which conflict with such principles [...]”¹⁶¹⁰. Bogdan has equally been very insistent in this sense: the “public policy reservation is meant to protect the fundamental values of the forum country, such as its concepts of morality, decency, human liberty or justice”¹⁶¹¹. It is the “last line of defence” [...] for the preservation of the basic values and fundamental principles of the *lex fori*. It is to be relied on in exceptional situations only”¹⁶¹². Therefore, “[o]nly the really fundamental principles of the *lex fori* (some speak in this context of the “core” of the *lex fori*) deserve the protection afforded by the public policy reservation”¹⁶¹³ (emphasis added).

As regards the effects of the exception, as it has been mentioned, the Explanatory Memorandum explicitly refers to the application of the *lex fori* as the immediate consequence of the *ordre public*’s intervention in a given case. This “authorization” to resort to the *lex fori* possibly entails that, despite opinions pleading that the exclusion of a foreign rule should be remedied (where possible) by the application of another rule from the relevant foreign legal system, this outcome is unlikely to arrive in practice¹⁶¹⁴.

In the light of previous paragraphs, could the outcomes of models 1 to 5 *supra* be considered to clash with the *ordres publics* of their respective *fora* (as described in Article 26 of the Rome II Regulation)? Put otherwise, may the applicable laws (that the failure in Article 7 leads to) “manifestly” clash with the public policy of any Member State of the EU? Intuitively, it could be thought that, notwithstanding victim-protection considerations, the Netherlands and the Nordic countries – if any – are the Member States most likely to have possibly incorporated environmental protection values into their public policies. However, this possibility has already been rejected by Dutch Courts¹⁶¹⁵. And beyond Nordic countries, doubts may arise as to whether environmental protection qualifies as being amongst the “fundamental” and “basic” values of other Member States. Nevertheless, providing a clear and precise answer would require a thorough and in-depth research into the case-law of the 28 Member States of the European Union, and such task lies outside the scope of this dissertation. It seems, nevertheless, interesting to point to the fact that difficulties in considering environmental

contended (F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), *op. cit.*, p. 310) that this formulation (“manifestly”) has become customary after its incorporation to the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children.

¹⁶⁰⁹ *Vid.* L. ENNEKING, “The Common Denominator of the *Trafigura* Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law”, *op. cit.*, pp. 306-307.

¹⁶¹⁰ *Vid.* C. OTERO GARCÍA-CASTRILLÓN, “International litigation trends in environmental liability: a European Union-United States comparative perspective”, *op. cit.*, pp. 575-576.

¹⁶¹¹ *Vid.* M. BOGDAN, “Private International Law as a Component of the Law of the Forum. General Course on Private International Law”, *op. cit.*, p. 166.

¹⁶¹² *Ibidem*, p. 170.

¹⁶¹³ *Ibidem*, p. 172.

¹⁶¹⁴ *Vid.* F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), *op. cit.*, p. 326 ; J. CARRASCOSA GONZÁLEZ, “Orden público internacional y externalidades negativas”, *op. cit.*, pp. 2277-2278.

¹⁶¹⁵ G. VAN CALSTER (“The Role of Private International Law in Corporate Social Responsibility”, *Erasmus Law Review*, num. 2014-3, 2014, pp. 125-133, at p. 131) mentions how in one of the branches of the Nigerian Shell case, incompatibility of Nigerian tort law with the Dutch *ordre public* was not withheld.

protection values as a part of public policy may not only derive from the diverging political conceptions within the different Member States as regards environmental matters. Rigaux and Fallon consider that, taking into account the Belgium case-law developed before 2004, it is unlikely that Belgian courts will apply the *ordre public* exception in the frame of disputes concerning any kind of non-contractual liability. Specifically, they refer to a Belgian Supreme Court decision dating from 1957 where the exception was not allowed to succeed as regards foreign rules which, despite recognizing a tort victim's right to compensation, did not provide for such compensation to have the same extent as under Belgian Law¹⁶¹⁶.

If – notwithstanding the need to conduct empirical research – *a priori*, difficulties in conceiving environmental values as being included within the different national notions of *ordre public* are far from being inconceivable, what about a possible inclusion in the *ordre public européen*? Despite the fact that Art. 26 only mentions the public policy of the *forum* State (thus making reference, in principle, to the different sets of values considered essential at a domestic level throughout the EU) the fact that EU law is part of the legal orders of the Member States cannot be neglected¹⁶¹⁷. In this sense, the ECJ's case-law has clearly established that a "*fundamental provision* [of EU law] *which is essential for the accomplishment of the tasks entrusted to the* [EU]" needs to be considered as being a part of the relevant national rules of public policy¹⁶¹⁸. If one was to consider that the principles of environmental law of the EU had reached public-policy status through this reasoning¹⁶¹⁹, the outcome would resemble a paradoxical loop: the same set of European values behind the choice-of-law rule, which was not fulfilled by the very rule, would act as a shield against the unsatisfying results that the rule may lead to. Unfortunately, following the developments presented *supra* (Chapter 2), it seems unlikely that Art. 191 TFUE may be qualified as a "*fundamental provision*" of EU law. The same may be asserted in respect of Art. 37 of the Charter of Fundamental Rights of the European Union¹⁶²⁰.

Some authors do have a more optimistic view on the potential role that the *ordre public* exception could play in environmental tort cases, and consider that, even if exceptionally, it is possible to fit environmental values therein¹⁶²¹. However, even if this was the case, diverging views can be found in academic literature as regards how the exception would operate, either

¹⁶¹⁶ *Vid.* F. RIGAUX & M. FALLON, *Droit International Privé* (3rd ed.), *op. cit.*, p. 931.

¹⁶¹⁷ For further discussion on the interplay between the European *ordre public* and the *ordres publics* of the different Member States (how they relate to and intertwine with each other) *vid.* again S. FRANCO, "*ordre public : limite ou condition de l'autonomie dans l'Union européenne?*", *op. cit.*, pp. 223-242.

¹⁶¹⁸ *Vid.* ECJ, *Eco Swiss China Time Ltd v Benetton International NV*, judgment, case C-126/97, ECLI:EU:C:1999:269, paras. 36 and following, especially para. 37.

¹⁶¹⁹ *Vid.* M. FALLON, B. FAUVARQUE-COSSON & B. FRANCO, "Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge", *op. cit.*, pp. 599-600: these authors consider that despite not being explicitly established in any text, European Law provisions are often public policy provisions.

¹⁶²⁰ For an assessment of these provisions, *vid. supra*, Part I, Chapter 2 (respectively, "*Stricto sensu environmental elements in EU primary law*" and "*The content of Article 37 of the Charter*").

¹⁶²¹ *Vid.* for instance, L. ENNEKING, "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, pp. 306-307: "*Although it seems obvious that the public policy exception could play a role in foreign direct liability cases, it can only do so in very exceptional circumstances*" (The author does not provide further specifications).

in a pro-environmental sense, or in a pro-polluter manner: on the one hand, Bogdan, following Von Bar, asserts that an "*example of a situation where the public policy of the forum may conceivably play a role is the case where the damage cannot be traced to a particular source and the applicable law obligates a whole branch of industry to pay compensation according to the market share of each enterprise*"¹⁶²². On the other hand, Bernasconi and Betlem assert, when discussing cases where public authorizations or permits are involved, that "[...] *in the event that the law of the state that issued the permit (State A) excluded any action for financial compensation, the public policy exception might come into play (both as a barrier to the application of a foreign law and at enforcement stage)*"¹⁶²³.

Since too many uncertainties still revolve around the possible role of *ordre public* in environmental matters, a substantial amount of case-law clarifications will be required before this exception gets to play a bigger role in the field. Consequently, it may be more fruitful to explore whether a closely-related concept, the *lois de police*, can help achieve more environmentally friendly outcomes.

ii. Overriding mandatory rules (*Lois de police*)

Following the ECJ's case-law, *lois de police* or *overriding mandatory rules* are terms which need to be understood as

"applying to 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

¹⁶²² Vid. M. BOGDAN, "Some Reflections Regarding Environmental Damage and The Rome II Regulation", *op. cit.*, p. 102. The example is reproduced from Von Bar's *Recueil* (C. VON BAR, "Environmental damage in Private International Law", *op. cit.*, p. 396). Along similar lines, O. Boskovic (Vid. O. BOSKOVIC, "Droit international privé et environnement. - Conflit de juridictions - Conflit de lois", *op. cit.*, pp. 19-20) contends that the *ordre public* exception may block the recognition and enforcement of a decision which would impose "punitive damages", although she acknowledges that this approach to the problem is being softened. For an explanation of the traditional issues that punitive damages give rise to in private international law, vid. J. Y. GOTANDA, "Damages in Private International Law", *Recueil des Cours de l'Académie de Droit International*, vol. 326, Leiden, Martinus Nijhoff, 2007, pp. 322-402. Gotanda's developments include a distinction from "moral damages" and "aggravated damages" (which relate to "pain and suffering" or "feelings" and do not intend "to punish", pp. 323-324), and contains a survey of the state of the question in different legal systems around the globe (pp. 324-394).

¹⁶²³ Vid. C. BERNASCONI & G. BETLEM, "Cross-border pollution: private international law analysis of administrative authorisations as regulatory compliance defence (A view from Europe)", *op. cit.*, p. 315. Another positive opinion on the role that *ordre public* may play at the level of the selection of the applicable law is O. Boskovic's (O. BOSKOVIC, "Droit international privé et environnement. - Conflit de juridictions - Conflit de lois", *op. cit.*, p. 24). On a different note, it is important to highlight that pro-environmental opinions may be found in literature also at the level of recognition and enforcement: Betlem insists in his individual work that, in the frame of the Brussels I Regulation, the public policy exception cannot be resorted to, in the frame of environmental matters, in order to avoid the recognition and enforcement of a foreign judgment (vid. G. BETLEM, "Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts", *op. cit.*, pp. 288).

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"¹⁶²⁴.

This means two things: First, that, frequently, overriding mandatory rules are "*regulations that intervene in private law legal relationships in order to protect the public interest*"¹⁶²⁵, and that, specifically, in the realm of torts they are "*a means of expressing the State's interest in protecting a group of individuals or safeguarding collective interests against harmful activities*"¹⁶²⁶. Second, this also means that the core difference between the intervention of overriding mandatory provisions and the *ordre public* exception is that whenever a court finds that the *lex fori* contains a rule of this kind that is relevant for the case, the said provision needs to be applied "*automatically, without first looking at the content of the foreign law*"¹⁶²⁷. As explained by Bogdan,

"It is [...] possible to imagine a positive (affirmative) construction of ordre public, where some of the mandatory rules of the lex fori are considered to be so important and sensitive [...] that they are intended to be applied, always or at least when the situation is closely connected with the forum country [...]" ¹⁶²⁸.

It is thus in this sense that Art. 16 of Rome II provides for the immediate application of the provisions of the *lex fori* which are "*mandatory irrespective of the law otherwise applicable to the non-contractual obligation*"¹⁶²⁹. As mentioned, the task of the identification of the provisions which deserve to be labelled as "overriding mandatory" is frequently performed by

¹⁶²⁴ Vid. ECJ, *Arblade* ("*Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)*"), judgement, Joined cases C-369/96 and C-376/96, ECLI:EU:C:1999:575, para. 30. This ruling relates primarily to internal market law, but the definition used is taken from P. Franceskaki's work (P. FRANCESKAKIS, "Quelques précisions sur les lois d'application immédiate et sur leurs rapports avec les règles des conflits de lois", *Revue critique de droit international privé*, 1966, pp. 1-18 ; P. FRANCESKAKIS, "Lois d'application immédiate et règles de conflit", *Rivista di diritto internazionale privato e processuale*, 1967, pp. 691-698). Vid. also A. NUYTS, "L'application des lois de police dans l'espace (Réflexions au départ du droit belge de la distribution commerciale et du droit communautaire)", *Revue critique de droit international privé*, 1999, pp. 31-74.

¹⁶²⁵ Vid. L. ENNEKING, "The Common Denominator of the *Trafigura* Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, pp. 304-305.

¹⁶²⁶ Vid. K. FACH, "The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II", *op. cit.*, pp. 305-306.

¹⁶²⁷ Vid. L. ENNEKING, "The Common Denominator of the *Trafigura* Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, pp. 304-305. Cfr. B. REMY, *Exception d'ordre public et mécanisme des lois de police en droit international privé*, *op. cit.*, p. 173 : "*l'immédiateté de l'application d'une norme n'étant pas l'essence du mécanisme des lois de police, il est concevable, et même souhaitable de s'informer sur la loi « normalement applicable », afin de savoir si celle-ci contrarie l'objectif que l'auteur de la loi de police souhaite voir réalisé*". Further developments in pp. 282 and following.

¹⁶²⁸ Vid. M. BOGDAN, "Private International Law as a Component of the Law of the Forum. General Course on Private International Law", *op. cit.*, p. 182.

¹⁶²⁹ Cfr. Art. 9.1 of the Rome I Regulation. For a specific analysis of Article 16 of the Rome II Regulation, accompanied by considerations on overriding mandatory provisions from third countries and "European" overriding mandatory provisions, vid. J. MASEDA RODRÍGUEZ, "El juego de las normas imperativas en el reglamento roma II sobre ley aplicable a las obligaciones no contractuales: límites a la aplicación de la *lex causae*", *Revista electrónica de estudios internacionales*, num. 25, 2013, pp. 1-45.

courts, specifically, in respect of their own *lex fori*. As explained by T. Hartley, although legislation may possibly state in explicit terms that it is meant to be understood as being a “*loi de police*”, if it is not the case, the relevant court will have to analyze the policy behind it “*in order to ascertain whether it requires the rule to be applied irrespective of the law that would otherwise be applicable*”¹⁶³⁰. In any case, the overriding-mandatory-rule phenomenon should, in principle, remain exceptional¹⁶³¹.

It is said that examples of overriding mandatory rules can be frequently found in the fields of “*anti-trust law, monetary regulations, social law and environmental regulations*”¹⁶³². Specifically, within this last group, it is contended that “*there could be mandatory rules on liability for nuclear damage, on quantifying compensation for environmental damage or on imposing compulsory insurance*”¹⁶³³. Pushing the reasoning further along these very lines, M. Fallon, B. Fauvarque-Cosson and S. Francq suggest the possibility that environmental liability may be completely submitted to overriding mandatory rules, thus leaving no room for the operation of a multilateral choice-of-law rule¹⁶³⁴. This opinion needs to be nuanced, taking into account developments presented in previous chapters on the public / private law divide, and on the distinction between preventive and compensatory legal mechanisms:

¹⁶³⁰ Vid. T. C. HARTLEY, “The Modern Approach to Private International Law: International Litigation and Transactions from a Common-Law Perspective”, *op. cit.*, p. 227. Vid. in the same sense, K. FACH, “The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II”, *op. cit.* pp. 305-306: “*The characterization of such precepts as internationally mandatory does not seem controversial provided that their scope of application is expressly determined; however, rules without any express reference require the interpretation of the courts and thus give rise to greater doubts. [...] it is held that internationally mandatory rules [of the forum] must be applied if it is clear that they are intended to be applied to a particular dispute*”. This reference includes further explanations on the mandatory rules of the law of third states and the mandatory rules of the *lex causae*. Furthermore, it may be helpful to mention that this author considers that “*There is definitely a growing trend favouring the application of mandatory rules in cases of non-contractual liability*”. As a classic reference on the possibility of judicially deducing the overriding-mandatory-rule character of a given law which does not explicitly establish so, H. BATIFFOL, “Le pluralisme des méthodes en droit international privé”, *op. cit.*, pp. 136-144.

¹⁶³¹ Vid. M. BOGDAN, “Private International Law as a Component of the Law of the Forum. General Course on Private International Law”, *op. cit.*, p. 185 (“*The concept of overriding mandatory rules presupposes that they constitute an exception to the ordinarily applicable law*”, emphasis added), and B. REMY, *Exception d’ordre public et mécanisme des lois de police en droit international privé*, *op. cit.*, p. 410 and 419, *inter alia*. The latter author qualifies the mechanism as “*dérogatoire*”.

¹⁶³² Vid. L. ENNEKING, “The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law”, *op. cit.*, pp. 304-305.

¹⁶³³ Vid. K. FACH, “The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II”, *op. cit.* pp. 305-306. Vid., moreover, K. FACH, *La contaminación transfronteriza en Derecho internacional privado: estudio de derecho aplicable*, *op. cit.*, p. 371. Following Fach, in respect of damages derived from pollution, the potential existence of overriding mandatory rules must not be discarded. However, their exact identification and quantification is a complex issue that will depend on the width given to the legal definition of overriding mandatory rules.

¹⁶³⁴ Vid. M. FALLON, B. FAUVARQUE-COSSON & F. FRANCO, “Le régime du risque transfrontière de la responsabilité environnementale : en marche vers un droit spécial des conflits de lois ? Rapport franco-belge”, *op. cit.*, p. 599: “[...] on peut se demander si, de proche en proche, toute la matière de la responsabilité environnementale n’aurait pas vocation à être soustraite à la méthode conflictuelle au profit de celle des lois de police [...]”. O. Boskovic also supports this position (O. BOSKOVIC, “Droit international privé et environnement. - Conflit de juridictions - Conflit de lois”, *op. cit.*, p. 26).

i) On the one hand, there are tortious liability provisions: wherever environmental torts are submitted to general rules on tortious liability, it will be difficult to justify their labelling as overriding mandatory rules. Wherever there are special legal provisions dealing with tortious liability for environmental damage their labelling as *lois de police* may be seriously considered (K. Fach has identified Austrian and Swiss domestic legislation on nuclear-damage-related civil liability as being overriding mandatory instruments¹⁶³⁵). Since there is no EU legal regime on substantive civil liability for environmental torts (the expected civil-liability dimension of the ELD was obliterated along the legislative process¹⁶³⁶) it is only Member-State legislation which may impose its mandatory application, and therefore "block" the operability of Art. 7 of Rome II¹⁶³⁷.

ii) On the other hand, there are the above-discussed environmental standards, very frequently embodied in provisions of public / administrative law, and often-times deriving from EU directives. Their role in cases on international environmental tort, as suggested *supra*, is a complementary one, inasmuch as the applicable law is fault-based. This leads back to the discussions presented above on the self-determination of their own spatial application by EU environmental law provisions¹⁶³⁸, and on the need to overcome the conservative position on the territoriality of public law for environmental-liability-*effet-utile* purposes. These discussions may be considered reproduced here¹⁶³⁹, the point being that if EU-secondary-law-derived or domestic-originated environmental standards are meant to be considered *lois de police*, they may only "block" administrative standards coming from the *lex causae* (since only equivalent provisions from the *lex causae* may be blocked). Thus, the relevant liability provisions will still be identified by the operation of the multilateral choice-of-law rule.

In sum, environmental overriding mandatory provisions may only play a relative role: a standard-setting value, which will only be fully relevant within the frame of fault-based tort liability provisions, if the applicable tort law, following Article 7, is fault-based. If the applicable tort law is strict-liability-based, the standards may only play a smaller role, if any: they may

¹⁶³⁵ Vid. K. FACH, *La contaminación transfronteriza en Derecho internacional privado: estudio de derecho aplicable*, op. cit., p. 340. Fach mentions domestic legal instruments from different countries in the European continent which could possibly be considered overriding mandatory rules: the 1964 Austrian law on liability for nuclear damage, and then, the new Austrian act on civil liability for damage arising from radioactivity (atomhaftpflichtgesetz, p. 342, footnote 38) and the 1983 Swiss act on civil liability from nuclear material (loi du 18 mars 1983, recueil systematique du droit federal 732.44).

¹⁶³⁶ This is why F. MUNARI & L. SCHIANO DI PEPE ("Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity" op. cit., p. 193), contend that "[i]n the absence of an [EU] legal regime governing [substantive] civil liability for environmental torts, the role of [...] Private International Law mechanisms is bound to increase".

¹⁶³⁷ For a summary description of the "blocking" properties of a *loi de police* (as well as other conceptions and explanations of this phenomenon), vid. H. GAUDEMET-TALLON, "Le pluralisme en droit international privé : Richesses et faiblesses (Le funambule et l'arc-en-ciel) - Cours général", op. cit., pp. 271-275.

¹⁶³⁸ On the possibility of understanding provisions issued from European law as being overriding-mandatory rules, vid. K. FACH, *La contaminación transfronteriza en Derecho internacional privado: estudio de derecho aplicable*, op. cit., pp. 348-349 (in the case of directives, it would be the corresponding transpositions into domestic law).

¹⁶³⁹ Vid. *supra* "Empirical research: Spatial references in EU secondary environmental law" and "Challenges from the standpoint of the traditional doctrine on the spatial applicability of public law" (in this very chapter).

become significant, if the relevant provisions on quantification of damage resort to the standard, in any sense, in order to determine the quantum of compensation.

iii. *Corrective interpretation*

Other than the options explored in previous sub-sections, which stemmed from the general theory of private international law, there is an even more general possibility which could be considered: correcting the first congenital deficiency – or at least modulating its results – through judicial interpretation. It merely requires allowing judicial discretion to realign the provision's outcomes with its content-oriented character and policy objectives. Let us go back to models 2 and 3 above, the developing-country factory scenario and the *Trafigura* case. It could be argued that the definition of the place "*in which the event giving rise to the damage occurred*" may be conceived as to comprise: i) the decision made in OZ to place the factory in *Ruritania* (model 2); and ii) the decision made in the UK to dump the chemicals in the Ivory Coast (model 3). In other words, it is conceivable that the notion of the "harmful event" be enlarged in order to reach the western location where the strategic decision that led to the production of the tortious result was made. This idea is by no means a novelty in tort-related private international law literature. For instance, in his contribution to the *Recueil des Cours*, P. Nygh clearly contended that a Western court "*may redefine the tort so as to affix it to a consequential act or omission within the forum*"¹⁶⁴⁰. In a similar sense, Otero has asserted that the developments in the *Lubbe* case – presented in Chapter 3 – reinforce the idea that "*the event giving rise to the damage [may indeed] be a decision taken at the corporation's headquarters*", notably the fact that there was an inquiry:

"[...] *into what part the parent company played in controlling the operations of the group – what directors and employees knew or ought to know, what action was taken and not taken, whether it owed a duty of care to people overseas and whether if so, that duty was broken. Hence, much of the evidence relevant for this inquiry would be documentary and much of it would be found in the offices of the parent company* [...]"¹⁶⁴¹.

¹⁶⁴⁰ Vid. P. NYGH, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort", *op. cit.*, pp. 363-364.

¹⁶⁴¹ Vid. C. OTERO GARCÍA-CASTRILLÓN, "International litigation trends in environmental liability: a European Union-United States comparative perspective", *op. cit.*, pp. 571-572. The idea has been further sustained by O. BOSKOVIC ("Droit international privé et environnement. - Conflit de juridictions - Conflit de lois", *op. cit.*, p. 22) and by L. ENNEKING ("The Common Denominator of the *Trafigura* Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, p. 283).

As regards Otero's position, the part of the original text that referred to the ELD has been omitted, because I personally believe that ELD-liability and common civil-liability arguments should not be mixed up. The omitted part of the text read as follows: "*Despite the fact that this possibility may seem a bit awkward, Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damages, opens an option for accepting its characterization as an event giving rise to damage in EU law. The Directive establishes (Articles 6 and 8) that the responsible person is the "operator", defined as any "natural or legal person, private or public, who operates or controls the occupational activity or, where this is provided for in international legislation, to whom decisive*

However, G. Van Calster asserts that

*“One would have to convince a court in an EU Member State that either direct instructions or negligent lack of oversight by [the parent company] led to the damage at issue and hence constitutes ‘the event giving rise to the damage’. This is not an easy burden of proof [...]”*¹⁶⁴²

Should the corrective interpretation proposal come to be accepted, it would, however, lead to another difficulty: would the *“place of the event giving rise to damage”* be the precise location where the specific decision was taken, or else, the location from where the strategic corporate management is commonly and generally done? Providing evidence on the precise location where the specific decision was made may prove to be extremely difficult for victims – should they feel the need to. This detail therefore points to the simpler option: the place of the constant direction of the corporation.

In any case, what would be the added value of a corrective interpretation when compared with the *ordre public* exception, and with the intervention of overriding mandatory rules? Putting other arguments against them aside, the “corrective” effect of the two above-suggested techniques is too uncertain, since they remain to a large extent in the hands and within the discretion of each individual – domestic – court. However, a European-wide corrective interpretation by the ECJ would adequately achieve the result wished for. Nevertheless, in the absence of ECJ case-law, only an amendment may provide the degree of certainty and uniformity that is required. Let us then consider what outcomes a redrafting approach may achieve.

B. De lege ferenda

Other than attempting to correct the first congenital dysfunction in Article 7 without changing its wording, it is possible to turn to more radical options: if the means provided by the general theory of private international law are not deemed satisfactory enough, the realm of legislative amendments offers further possibilities, whose enactment may possibly bring along more adequate solutions. The path towards finding the most appropriate one amongst them begins by acknowledging the existence of a curious parallelism: ironically, this “black hole” in Article 7 of the Rome II Regulation is actually closely related with the theoretical problems and academic controversies that have surrounded the field of torts in private international law during the last century, and which have ultimately lead to the evolution of the discipline.

economic power over the technical functioning of such activity has been delegated, including the holder of a permit or authorization for such activity” (Article 2)”.

The same author warns, moreover, about the fact that, even if the Lubbe-derived reasoning facilitates locating the event giving rise to damage at the relevant corporation’s headquarters, there may be characterization-related difficulties arising from the *“distinction between torts and the “law of companies”*. As it may be recalled, the latter would be governed by national choice-of-law rules, since it is not covered by the scope of Rome II (Article 1(2)(d)). However, Otero does not further precise how those difficulties may exactly crystallize.

¹⁶⁴² *Vid.* G. VAN CALSTER, “The Role of Private International Law in Corporate Social Responsibility”, *op. cit.*, p. 131

Precisely, it is possible to trace a parallelism between the theoretical *malaises* underpinning, on the one hand, the *Babcock Vs. Jackson* ruling that sparked the American conflicts revolution, and, on the other hand, the current global governance, transnational corporate liability and corporate social responsibility debates. The only difference between them is that while the former were related to the limits of conflicts justice, the latter are related to the limits of substantive justice. As explained by K. Fach:

*"[l]egal scholars have consistently pointed out that it is inappropriate to resolve all international cases of non-contractual liability by reference to the law of the State where the tort occurred. In this sense, many European conflict of laws systems have incorporated various criteria to reduce the role of the lex loci delicti. In US law, the rigid application of the territorial connection has also been rejected and more casuistic methods are now advocated. Such mechanisms deserve to be considered in a positive light, insofar as they offer a "more personalized" solution for resolving the multiplicity of cases of non-contractual liability occurring in practice"*¹⁶⁴³

Models 1 to 5 above feature a similar kind of inappropriateness to the one identified by Fach. Therefore, it may be worth exploring how to export the kind of solution identified in the excerpt, i.e., how to legislatively introduce mechanisms or methods which may reduce the role of the *lex loci delicti* connection for substantive-justice purposes. In such a vein, it will be considered whether the insertion of an additional connecting factor into the rule – either with or without a specialization of the rule itself – may lead to more adequate outcomes (i). This will entail identifying an adequate ratio for the said connecting factor (a), and making a choice (b). Selecting an appropriate connecting factor will lead to discarding some utopian options (ii) (amongst which, whether *favor laesi* could grow from being a principle orienting the development of conflict-of-laws provisions to becoming a connecting factor on its own right (a), an eventual "market-oriented" connecting factor (b), and an "alternative actionability" rule – as opposed to the former Anglo-Saxon double actionability rule – (c)). After further sustaining the choice made (iii), after providing some structural considerations (iv), and after a review of possible criticisms and corresponding counter-arguments (v), a more pragmatic alternative (an adaptation of the spatial scope of the Rome II Regulation) will be presented (vi), before delivering some conclusions on both of the congenital deficiencies of Article 7 of the Rome II Regulation (V).

¹⁶⁴³ Vid. K. FACH, "The Law Applicable to Cross-border Environmental Damage: From the European National Systems to Rome II", *op. cit.*, p. 301 (she quotes P. BOUREL, "Un nouveau champ d'exploration pour le droit international privé conventionnel: les dommages causés à l'environnement", *op. cit.*). In the article, which preceded the Rome II Regulation, the author mentions the following options as alternatives to the *lex loci delicti commissi*: she begins with *lex fori* or the law of the ship's flag in cases of areas not subject to national sovereignty. Then "the question [...] arises as to whether any personal circumstance should be used as a connecting factor for cases of transboundary pollution", after rejecting the law of the common habitual residence. As regards nationality, it "is not considered a suitable replacement [for] the *lex loci delicti* in environmental matters and should thus not be considered when resolving conflicts in this sector of predominantly asset-based claims". Further alternatives explored include, the theory of the ancillary connection, party autonomy, and the closest connection. Thus, very "classical" connecting factors. No mention is made to the domicile of either party (as a distinctive connecting factor, different from the "common habitual residency").

i. The insertion of an additional connecting factor

The first proposal for legislative amendment that is hereby put forward is the addition of a connecting factor to Article 7's current wording, as a "reaction" to the fact that in merely international torts there is, *de facto*, only one law to be applied. In this vein, the next pages will analyze the ratio that the new connecting factor needs to respond to (a) and will attempt to identify the most appropriate connecting factor accordingly (b). Further developments will, moreover, discard utopian options (ii), and elaborate both on justifications for the choice made (iii), and on how to structurally position the connecting factor in the provision (iv). The discussion on this proposal will conclude by exploring the possible criticisms that it may attract (and the corresponding counter-arguments that may be put forward in response) (v), before a second *de lege ferenda* proposal is briefly presented (vi).

a. The ratio behind a new connecting factor

If the first foundational deficiency in Art. 7 of the Rome II Regulation is to be fixed *via* the insertion of an additional connecting factor, that addition needs to lead, in situations of merely international tort, to outcomes akin to those that the provision already produces in transboundary environmental torts. This means that the amendment needs to respond to the *favor laesi* principle, to the principles of environmental law of the EU (amongst which the polluter pays principle), and that it needs to help raise the level of environmental protection.

Let us briefly go back and reconsider the disruptions depicted in models 1 to 5 above. In model number 2, the tortfeasor has established herself deliberately in *Ruritania* in order to avoid the higher environmental standards, and probably even the civil-liability regime, in force in *Oz*. In models number 3, 4 and 5, although the event giving rise to damage and the damage itself are located in a single country, there is an additional element that connects the tort with the country where the tortfeasor is established: the deliberate or reckless breach of rules in force in that country. In model number 1, the tortfeasor has been attracted to the "host country" by the prospect of exploiting local natural resources. However, allegedly, in the process of doing so, not only has she deliberately chosen to ignore the higher environmental standards in force in the EU State of her corporate headquarters, but she has also deliberately chosen not to resort to the more-environmentally-respectful know-how that she possesses. Despite possible considerations as regards the doubtful degree of morality of most of the entrepreneurial decisions made (which is an element that does not necessarily regard law-drafting directly¹⁶⁴⁴), there is a common thread that runs through these models: in all of them the tortfeasors have the knowledge and the capabilities required to avoid the occurrences – *inter alia*, technological know-how, knowledge of the higher standards required at home, etc. – but they deliberately or recklessly choose to ignore them. An even more explicit illustration of the weight of the tortfeasor's knowledge may be provided by an additional – real-life – model:

¹⁶⁴⁴ Any handbook on legal theory and / or philosophy of law may draw a distinction between law and morality, and assert that despite having partially overlapping realms, they are not necessarily coincident. For developments in this respect *vid.*, *inter alia*, A. E. PÉREZ LUÑO, *Teoría del Derecho – Una concepción de la experiencia jurídica* (15th ed.), Madrid, *Tecnos*, 2016, pp. 105 (definitions), 108-124 (account of the historical evolution of their relationship), 125-131 (criteria for their distinction).

BOX 26:**Model 6: Thor Chemicals cases****(Ngcobo v. Thor Chemicals Holdings Ltd and Sithole v. Thor Chemicals Holdings Ltd)**

NATURE: Real-life case

ALLEGED TORTFEASOR(S): Thor Chemicals Holdings Ltd = UK-based corporation (parent company); Thor Chemicals inc = South-African-based subsidiary

ALLEGED VICTIM(S): South-African citizens = injuries. No information on claims on purely environmental damage to the region.

LOCATION OF THE TORTIOUS RESULT(S): Cato-ridge, South-Africa.

OTHER PHYSICAL OR LEGAL PERSONS INVOLVED: None.

DESCRIPTION: "[i]n the Thor Chemicals cases [...] a duty of care was alleged to have existed on the part of a UK parent company on the basis that, in shutting down its mercury factory in England due to health and safety concerns and transferring that factory's operation to a South African subsidiary at the parent company's behest, the parent company owed a duty to see that the same health and safety issues were not repeated in South Africa"¹⁶⁴⁵.

In the light of these 6 models, the third connecting factor should be intimately related to the tortfeasor, and to the European legal system within which she habitually operates: i) the elements described in previous paragraphs link the environmental tort with the tortfeasor's "natural" / "habitual" legal system (i.e., with the legal order within which she is used to operating: in models number 2 and 6 the rules of the said system are being avoided, in models number 3, 4 and 5 they are being breached, and in model number 1 they are being deliberately ignored); ii) in most cases the tortfeasor's "natural" / "habitual" legal system will be better prepared to cope with environmental torts, since it is likely to contain tort provisions which will better respond to the *favor laesi* and EU environmental law principles.

Moreover, at least two sets of considerations would further sustain selecting a connecting factor pointing to the deliberately or recklessly ignored knowledge and capabilities that tortfeasors possess and apply in their home countries (and, therefore, pointing to the legal system where they find their source). On the one hand, the said deliberate or reckless disregard entails a divergence in the tortfeasor's course of action, in the face of similar events, depending on the geographical space concerned: the tortfeasor behaves differently depending on whether the impact of her actions is felt in the home or the host country. Quoting one of the partners of Leigh Day, the British law firm which led the *Trasfigura* claims (model 3 above):

¹⁶⁴⁵ *Vid.* J. FEATHERBY & J. COTTON, "United Kingdom", in J. FEATHERBY (ed.), *Global Business & Human Rights: Jurisdictional comparisons*, The European Lawyer Ref. Series, London, Sweet & Maxwell, 2011, pp. 383-394, at p. 391.

*"Although the events 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"*¹⁶⁴⁶.

This argument could be applied, *mutatis mutandis*, to all the 6 models presented. On the other hand, beyond this inequality of behavior and treatment of other subjects, the existence of the said knowledge and capabilities could be considered to have an analogous role to the one performed, for instance, by the notion of *lex artis* in cases of medical malpractice¹⁶⁴⁷. This idea could be, to a certain extent, an enhancement of the "duty of care" present both in the brief description of the *Thor* cases in Box 26, and in the notion of parent-corporation "*foreign direct liability*" discussed in Chapter 3¹⁶⁴⁸. Let us recall that, following L. Enneking,

*"The fact that the subsidiary has abided by the regulatory standards of the host country – which in most cases happen to be relatively low, as the host country is usually a developing country – is then not sufficient to exonerate the parent company from owing those third parties in the host country a certain duty of care, based upon the higher standards of care that are often applicable in the home country – as this is usually a developed country"*¹⁶⁴⁹ [Emphasis added].

Reproducing Enneking's text in here does not mean that her "*foreign direct liability*" conception is embraced, but simply that the idea hereby put forward, the possibility of conceiving industrial and environmental knowledge as a sort of *lex artis*, shares similar roots to her approach. Thus, as stated, knowledge and deliberate ignorance of that knowledge may provide significant support to the kind of argument made in previous paragraphs. To a certain extent, these ideas simply reflect the well-spread (and somewhat cliché) moral principle that "*with great power comes great responsibility*"¹⁶⁵⁰.

¹⁶⁴⁶ Quoted by L. ENNEKING, "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, pp. 284-285. The difficulties arising from the identification of the "place of action" have already been discussed *supra* (in this very chapter, "*Corrective interpretation*" and "*The lex loci delicti commissi / lex loci actus connection*").

¹⁶⁴⁷ For comparative-law accounts, *vid.*, *inter alia*, J. M. BARENDRECHT, C. E. C. JANSEN, M. B. M. LOOS, A. P. PINNA, R. M. CASCAO, & S. VAN GULIK, *Service Contracts (PEL SC)*, Coll. Principles of European law. Study group on a European civil code, vol. 3, München, Sellier, 2007, pp. 828-826 (*vid.* especially references to Spain and Portugal); and D. GIESEN, *International Medical Malpractice Law – A Comparative Law Study of Civil Liability Arising from Medical Care*, Tübingen, J. C. B. Mohr, 1988, pp. 72 and following (in p. 72, Giesen defines *lex artis* as "[...] art, proper standards and skill of the profession [...]").

¹⁶⁴⁸ In the frame of the description of alternatives to the piercing of the corporate veil (*supra* Part II, Chapter 3, "*Alternatives: Agency in fact and foreign direct liability*").

¹⁶⁴⁹ *Vid.* L. ENNEKING, "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, pp. 285-286. As it may be seen, the same set of arguments can be used in the frame of two different but closely interrelated problems: the attribution of liability within a network of corporations (a corporate-veil-piercing problem) and the determination of the applicable law.

¹⁶⁵⁰ A simple internet search for these terms brings commentaries that attribute the idea to Voltaire (reference is frequently made to volume 48 of his "œuvres" without providing a specific page) or relate

However, while the two additional arguments just put forward may be said to verge on morality issues, it is important not to forget their legal dimensions: respectively, the inequality in treatment and in behaviour, and the professional know-how analogy. Having ascertained that an adequate ratio for the additional connecting factor would be for it to point towards the knowledge, know-how and capabilities that the tortfeasor displays in her home country and, therefore, to the legal system where they find their source, it is necessary to identify which connecting factor may best fulfil this role.

b. The identification of the appropriate connecting factor

Having established that the connecting factor to be added should point to the law of the “home” country of the tortfeasor¹⁶⁵¹, it follows that the subsequent step to be taken is to identify an appropriate connecting factor accordingly. Several “classic” possibilities may correspond with this ratio: the defendant’s main place of business, her habitual residence, her domicile, her place of incorporation, etc. Against these “classic” connecting factors, other less conventional ones could be envisaged, as for instance, the “place of the constant direction”, or the “place of the effective control” of the tortfeasor’s activities, or the “centre of the interests” of the tortfeasor¹⁶⁵². As appealing as these novel connecting factors may seem at first sight, they are frequently redirected in practice to classic ones. Let us take as an example the “centre of interests” connection. It is resorted to, in reference to the debtor, in the frame of international insolvency proceedings in order to establish international jurisdiction. However, both the former EU insolvency Regulation and the new one establish that “*In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary*”¹⁶⁵³. The same connecting factor, this time in reference to the victim, is resorted to by the ECJ in the frame of the *eDate-Martínez* ruling, where the theory of ubiquity is adapted to international jurisdiction in respect

it with passages of the Bible. The most ancient and verifiable source is the *Collection Générale des Décrets Rendus par la Convention Nationale*, vol. 9, Paris, Chez Baudouin, Imprimeur de la Convention Nationale, 1793, p. 72 (which can be fully consulted in Google Books under the following link: https://books.google.es/books?id=D55aAAAACAAJ&printsec=frontcover&hl=es&source=gbs_ge_summa ry_r&cad=0#v=onepage&q&f=false [March the 22nd 2017]). In any case, this idea has made its way into Western popular culture since the 1960s. *Vid.* S. LEE & S. DITKO, *Amazing Fantasy*, num. 15, New York, Marvel, 1962.

¹⁶⁵¹ It seems relevant at this stage to point to the fact that while the connecting factor of the domicile or habitual residence of the victim may be an interesting alternative to be explored in other kinds of tortious liability (as for instance product liability), it provides no added value in the immense majority of scenarios of environmental tort.

¹⁶⁵² Second, in respect of environmental torts, P. NYGH (“The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort”, *op. cit.*, p. 367) refers to the above-mentioned 1994 Osnabrück Colloquium, and to the discussions held therein in respect of a potential “*Convention on the Private International Law of Environmental Damage*”. In the Colloquium “*there was an agreement that the plaintiff in transfrontier pollution cases should be given the option between the law of the place where the damage was suffered (usually the place of residence of the plaintiff) and that of the principal place of business of the polluter (either the place of the activity or of its control) [...]*” [Emphasis added].

¹⁶⁵³ *Vid.* Art. 3.1 and 3.1.2 (respectively) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, O.J. L 160, 30.6.2000, p. 1, and Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), O.J. L 141, 5.6.2015, p. 19.

of libels through the internet¹⁶⁵⁴. In this decision, the ECJ considers that jurisdiction may be accorded, *inter alia*, to the court of the place where the alleged victim has the centre of her interests. However, it is then established that “[t]he place where a person has the centre of his interests corresponds in general to his habitual residence”. While in both cases these “clarifications” are only presumptions, they entail, nonetheless, re-conducting innovative connecting factors to traditional ones. It seems, therefore, more straightforward to directly focus on classic connecting factors. This is so notwithstanding the fact that “indiciary methods” may possibly also have their virtues.

As regards classic connecting factors, the properties of the above-referred suggestions, as well as those of similar proposals, have already been discussed – at varying degrees – by different authors in the past, but mainly in respect of torts in general (not necessarily in respect of environmental ones)¹⁶⁵⁵. In this regard, the assessment of possible connecting factors made (for international torts in general) by P. Nygh, in his contribution to the *Recueil des Cours*, is remarkable¹⁶⁵⁶. Nygh explores the typology of connections that may be relevant in international torts, including the place of result (“*place of primary impact*”), place of acting (“*place of the conduct per se*”) and the residence of the plaintiff¹⁶⁵⁷. Despite the fact that his core concern is jurisdiction¹⁶⁵⁸, his comments are enlightening from a choice-of-law perspective, especially those referring to the “*residence of the defendant*”. He considers that the “*residence / principal place of business of the defendant*” is, in general, the “*natural forum*” of the defendant, which “[i]n most, though not all, [cases] will coincide with the place of conduct [...]”. In this respect,

¹⁶⁵⁴ *Vid.* ECJ, *eDate Advertising*, judgment, *op. cit.*, paras. 48-51.

¹⁶⁵⁵ In their respective contributions to the *Recueil de Cours*, P. E. NYGH (“The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort”, *op. cit.*, pp. 367 and following) and M. C. PRYLES (“Tort and related obligations in private international law”, *Recueil des Cours de l’Académie de Droit International*, vol. 227, Leiden, Martinus Nijhoff, 1991, pp. 51-63 & 100-112) make reference to some of these discussions and proposals, which took place during the 1990s in Europe and the USA. Other than mentioning the “Ten points of Osnabrück”, further reference is made, *inter alia*, to P. J. KOZYRIS “Values and Methods in Choice of Law for Products Liability: A Comparative Comment on Statutory Solutions”, *The American Journal of Comparative Law*, vol. 38-3, 1990, pp. 475-509 (*vid.* especially pp. 48-499 for the comparative review announced in the title, and pp. 499-507 for the analysis of two product-liability-specific connecting factors), and F. K. JUENGER, “Babcok v. Jackson revisited: Judge Fuld’s Contribution to American Conflicts Law”, *Albany LR*, vol. 56, 1992-1993, pp. 727-722 (*Vid.* pp. 750-751, where the author presents a proposal for a general “approach” to tort conflicts).

¹⁶⁵⁶ *Vid.* P. NYGH, “The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort”, *op. cit.*, pp. 363-370. Zioli’s review of potential connecting factors for environmental torts is equally interesting (C. ZIOLI, “Choice of Law”, *op.cit.*, pp. 187-188). She reaches a similar conclusion to the one presented in the following pages.

¹⁶⁵⁷ As regards the plaintiff’s residence, Nygh asserts – reasoning specifically in terms of traffic accidents and activity directed to a given country – that “*if unaccompanied by any other factor, [this] is not a proper forum and proper law*”. In cases of merely international environmental tort, it is very likely that the residence of the plaintiff will be the country where the tortious result manifests, thus providing no added value. Moreover, unless the victim and the tortfeasor share a common residence, it is unlikely that this connecting factor may somehow point to the law of the home country of the tortfeasor. Therefore, it will be given no special attention (as an exception, *vid.* Box 19 *supra*).

¹⁶⁵⁸ Nygh gives special attention to jurisdiction in the light of Ehrenzweig’s “*lex propria in foro proprio*” approach: the best conflict-of-laws solution is to identify the court which “*owing to its contacts with the parties or the case, can properly apply its own law*” (*Vid.* A. A. EHRENZWEIG, *Private International Law*, *op. cit.*, p. 109).

*"If the defendant is an international commercial organization with a head office in one country and branches in several, there is, in my opinion, no objection to hold the organization liable either according to the law of the place of the branch which initiated the conduct, or according to the law of the head office which should have prevented it. [...] there is no undue surprise involved in holding the defendant liable according to the law of his or her residence if that law is more favourable to the plaintiff. This offers the most likely insurable risk"*¹⁶⁵⁹.

The core point in Nygh's considerations is the reference to the lack of "*undue surprise*" or, in other words, the availability of an adequate degree of predictability, which, possibly, other more innovative connecting factors may not provide in equal measure. However, since Nygh's typology makes no reference to the "domicile" as a distinctive connecting factor, it may be guessed that both terms are synonymous for him, which is not the case in EU private international law. This entails, therefore, the need to consider whether to insert the tortfeasor's habitual residence or the tortfeasor's domicile as the third connecting factor needed in Article 7. When considering the issue from a legislative-amendment perspective two sets of arguments would plead for the latter. First, as a matter of systemic coherence, it would be adequate to align the provision with the approach taken in the Brussels I (BIS) Regulation for the purpose of jurisdiction. Secondly, the habitual residence of a corporate defendant is identified as its place of central administration by Article 23 of the Rome II Regulation. As it may be recalled, the domicile of a corporate defendant in the Brussels I BIS Regulation has a triple dimension, for it covers the place of central administration, the statutory seat, and the principal place of business of any given legal person, at the choice of the plaintiff. This triple dimension best allows reaching the legal system where the deliberately or recklessly ignored knowledge, know-how and capabilities that the tortfeasor possesses find their source¹⁶⁶⁰. Moreover, as it may be recalled, this multiple dimension to the defendant's domicile, following P.A. Nielsen, is to be considered a fair outcome, for it arises from the defendant's own entrepreneurial choices, and thus she should be ready to accept its consequences¹⁶⁶¹.

¹⁶⁵⁹ *Vid.* P. NYGH, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort", *op. cit.*, p. 371. Moreover, as regards mass torts, he asserts that since "*the available fora should be either the principal place of business of the defendant or the place of the occurrence [, whichever] forum is invoked should apply its own law*". Nygh's definition of the notion of mass torts is roughly in line with the one provided *supra* Chapter 1 ("*Environmental occurrences as mass-torts and environmental-damage typology*"). He defines them as "*typically involv[ing] a defendant corporation with its principal place of business in one country, a mass disaster in another and plaintiffs from a variety of countries*"-

¹⁶⁶⁰ More precisely, this triple dimension best allows the victim to reach the country from where the actual and constant direction of the defendant's activities takes place, which is synonymous to the legal system where the deliberately or recklessly ignored knowledge and capabilities that the tortfeasor possesses finds its source. However, in order to simplify the explanation this detail has been taken away from the main text. It may be recalled that "the place of the actual and constant direction of activities" was suggested *supra* as a possibility, amongst the innovative connecting factors. Despite the fact that this location is the actually significant one, the burden of proof that it would impose upon victims would be excessive (in the absence of a presumption). For the purposes of this study, in the following pages it will be assumed that the domicile of the tortfeasor, through its triple dimension, allows reaching the place of the constant and actual direction of the corporate defendant.

¹⁶⁶¹ *Vid.* P. A. NIELSEN, "Behind and beyond Brussels I – An Insider's View", *op. cit.*, p. 247.

It may therefore be concluded that the domicile of the defendant is possibly the connection that may best cater for the needs of EU private international law in respect of the insertion of an additional connecting factor in Art. 7 of Rome II¹⁶⁶². Before turning to some additional arguments which may further sustain selecting this connecting factor, let us deal briefly with some alternative options which, despite their interest, do not allow reaching the same quality of results.

ii. *Discarding utopian connecting factors*

Before exploring further virtues of the “domicile of the tortfeasor” connecting factor, let us consider why it is extremely difficult to suitably resort to three other connecting-factor options, whose feasibility may appear as excessively unrealistic (Depending on subjective opinions as to the weight of the different arguments for and against them). These three options are: *favor laesi* as a connecting factor by itself / in its own right (a), a market-oriented connecting factor (b) and “alternative” actionability (c)¹⁶⁶³.

a. *Favor laesi* as a connecting factor per se: enlarged choice

Could *favor laesi* blossom from a guiding principle in private international law into a new independent choice-of-law rule? Could it somehow become a connecting factor in its own right? The following pages contend that, if adequately framed, *favor laesi* may play a bigger role in choice-of-law in environmental torts than it currently does. This idea is closely related to the above-referred trend towards “diversification” (T. Ballarino) or “specialisation” (J. González Campos) in the theory of the conflict of laws, a trend qualified as “recent” in the early 1990s. In his contribution to the *Recueil des Cours*, T. Ballarino cited prior work by Jessurun D’Oliveira in the field of environmental torts, and asserted that the tendency towards “diversification”

“[...] prend souvent la forme de l’option, selon laquelle le délit doit être exclusivement localisé en fonction de celui de ses éléments qui est le plus caractéristique. En matière

¹⁶⁶² While it has been sufficiently explained that the triple dimension of the corporate domicile is nothing but a consequence of the corporation’s strategic choices, and the ensuing lack of predictability is to be assumed by the former (and not the victim), *vid. infra* (“First criticism: The suggested solution may decrease the amount of predictability ensured by the current choice-of-law provision”) for further considerations on lack of predictability.

¹⁶⁶³ A further possibility not explored would be to distinguish between the notion of liability (“responsabilité”) and remedy (“réparation du préjudice”) as O. Boskovic suggests in her PhD dissertation (O. BOSKOVIC, *La réparation du préjudice en droit international privé*, Paris, L.G.D.J., 2003). While the idea of adopting “une règle de conflit distributive, distinguant l’existence de l’obligation et réparation” (p. 172) may be worth exploring in other contexts, it would not be completely helpful in third-world environmental torts, as demonstrated by the “Nigerian case” in Box 6 (*supra* Part I, Chapter 1). In this kind of scenario, problems are to be found both in respect of the existence of the obligation and of the remedies.

de pollution, le souci de protection des victimes a orienté vers le choix de la loi la plus favorable"¹⁶⁶⁴.

This assertion, which could be understood as identifying the protection of the victim as the most characteristic element of environmental torts – and thus, equally identifying *favor laesi* in choice-of-law as being its necessary consequence – clears the way towards a more prominent role by *favor laesi* in the field of environmental torts. In such a vein, *favor laesi*'s full potential may come into perspective by drawing a parallelism to some considerations by P. Lagarde on the "*principe de proximité*" within the 1985 Hague Convention on Trusts¹⁶⁶⁵. As random as the analogy may appear at first sight, its interest will become clear easily. Lagarde comments on the said convention, specifically on how one of its core choice-of-law provisions almost completely "fades" into the proximity principle. Article 7 of the convention provides that

"Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to -

a) the place of administration of the trust designated by the settlor;

b) the situs of the assets of the trust;

c) the place of residence or business of the trustee;

d) the objects of the trust and the places where they are to be fulfilled".

If choice-of-law rules can fade into the principle of proximity, there does not seem be any reason why it could not be the case as well in respect of *favor laesi*¹⁶⁶⁶. Therefore, following the lead of Article 7 of the Hague Convention on Trusts, it would be possible to conceive drafting a rule which could roughly read "the law applicable to an environmental tort is whichever law, amongst those related to the situation, favours the interests of the victim the most". This rather vague formulation may possibly face criticisms as regards whether it introduces a disproportionate imbalance in the relative litigating positions of the victim and the tortfeasor, due to the wide range of choice it provides to the victim. This criticism could be addressed by simply transferring the prerogative of making the choice of law to the relevant courts¹⁶⁶⁷.

¹⁶⁶⁴ Vid. T. BALLARINO, "Questions de droit international privé et dommages catastrophiques", *op. cit.*, p. 376.

¹⁶⁶⁵ Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.

¹⁶⁶⁶ Cfr. J. DOLINGER, "Evolution of principles for resolving conflicts in the field of contracts and torts", *Recueil des Cours de l'Académie de Droit International*, vol. 283, Leiden, Martinus Nijhoff, 2000, p. 494 *mutatis mutandis*: "[...] whereas in torts, where the possibility of choice is much narrower, the principle of proximity by itself would cause uncertainty, and therefore the more specific rules become necessary". It is likely that J. Dolinger may consider that *favor laesi* does not bear a sufficient degree of precision to be more than a guiding principle in private international law, and that, therefore, it would not be positive that the choice-of-law rule got "diluted" into the principle.

¹⁶⁶⁷ Nevertheless, such possibility would have to face the above-referred criticisms against the idea of leaving environmental-tort-related choice-of-law operations in the hands of judges.

By contrast, a positive point about this proposal is that, depending on how largely the notion of laws "related to the situation" is interpreted, it may serve as a means of simultaneously dealing with some of the collateral effects of the very frequent "abuse" of networks of subsidiaries¹⁶⁶⁸. Despite the fact that this chapter presupposes that up-stream difficulties have been resolved before reaching the choice-of-law stage of the litigation, the above-suggested formulation may gain interest in situations where the difficulties related of the existence of a network of multiple subsidiaries cannot or may not be solved¹⁶⁶⁹. In those hypotheses, although the suggested wording cannot do anything in order to attribute the tortious conduct to the parent company (for that is not the purpose of the rule), it may allow holding a solvent subsidiary liable following developed-country standards: it may be argued that the law of the place of constant direction of the subsidiary, the law of the domicile of the parent company, or any other developed-country legal system similarly related to the subsidiary is – at least indirectly – "related to the situation". Of course, this proposal may only work if a European court somehow manages to exert jurisdiction over the relevant subsidiary.

Notwithstanding these considerations, Lagarde actually presents the choice-of-law solution in the Trusts Convention as one of the most extreme examples of the "*quasi-dissolution de la règle de conflit dans le principe fondateur*" (the principle of proximity)¹⁶⁷⁰. He specifically considers that this formulation may certainly lead to *in casu* appropriate results "*mais il n'y a plus de règle, ni de prévisibilité*"¹⁶⁷¹. He consequently contends that

"[...] une place raisonnable pouvait être réservée au principe de proximité, sans pour autant détruire la règle de conflit. Une formule consiste à diversifier la règle de conflit en prévoyant à l'avance les diverses hypothèses concevables et en prédéterminant les groupements d'indices à retenir. Une autre, plus souple, consiste à privilégier un indice déterminé, ou un groupement déterminé d'indices, sauf à l'assortir d'une clause d'exception laissée à l'appréciation du juge. Ainsi, pourront être conciliées la prévisibilité de la solution et la justice du résultat"¹⁶⁷².

In the light of Lagarde's comments, it may be more fruitful to consider a wording which may come closer to providing a "*reasonable place*" to the principle (in this case the *favor laesi* principle) without "*destroying*" the choice-of-law rule. Thus, it would be possible to draft the rule rather openly, as, for instance: "the law applicable to an environmental tort is whichever

¹⁶⁶⁸ It may be recalled that the abusive creation of subsidiary networks is one of the core difficulties in situations involving transnational corporate tortfeasors (as dealt with in Chapter 3).

¹⁶⁶⁹ As referred in Chapter 3, this chapter (Chapter 4) exclusively addresses the problem of the applicable law, thus implicitly considering as already resolved – upstream in the conflict-of-laws process – the significant difficulties that arise from the *forum non conveniens* and the "multiplicity of subsidiaries" stakes.

¹⁶⁷⁰ *Vid* P. LAGARDE, "Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé", *op. cit.*, p. 44.

¹⁶⁷¹ *Ibidem*, p. 45 : "Si [...] le principe de proximité envahit la règle de conflit au point de se substituer entièrement à elle, comme c'est le cas dans les jurisprudences anglaise et française, et de façon beaucoup plus limitée dans la Convention de La Haye sur les trusts, la règle de conflit se réduit au principe que le contrat est régi par l'ordre juridique avec lequel il présente les liens les plus étroits. Il reste un principe, avec lequel on pourra sans doute obtenir des solutions ponctuelles appropriées, mais il n'y a plus de règle, ni de prévisibilité".

¹⁶⁷² *Ibidem*, p. 46.

law favours the interests of the victim the most, as chosen by the alleged victim, amongst the following...". This drafting allows assorting the rule with a fixed set of connecting factors which, beyond the typical *lex loci actus* and *lex loci damni*, may better cater for the needs of *favor laesi*. Some such connecting factors could be those referred in previous pages, as the law of the place of constant direction of the subsidiary, or the law of the domicile of the parent company. This configuration may probably better satisfy the recurrent claim for a minimum degree of foreseeability for potential tortfeasors. Nevertheless, as seen above, the value of foreseeability needs not be exaggerated: on the one hand, it may be recalled that if the nature of pollution makes it difficult to determine the eventual *locus damni* beforehand (since it may spread freely), then the burden of such situation is to be coped with by the tortfeasor and not the victims. On the other hand, moreover, foreseeability needs to be understood in relative terms, depending on the capabilities of each subject: adapting to four different legal systems (which actually means adapting only to the most stringent of the four, or to the most stringent provisions in each of them) may not be easy for an individual person, but it is not unbearable for a transnational corporation. And, then again, individuals do not easily possess the economic capabilities needed to enter the relevant kinds of industry and become large-scale polluters.

b. A market-oriented connecting factor

The second utopian proposal to be put forward, arises from the economic linking between the environmental tort and the market where the relevant products / services are sold / provided, and thus, where the competitive advantage and the economic benefits are obtained, in extra-European merely international torts. This kind of linking could possibly plead for some sort of market-oriented connecting factor. Options in this sense could range from simply considering the application of the law of the country where the tortfeasor's products / services are sold / provided, to introducing complex choice-of-law structures resembling those contained in the Hague Convention on product liability, or in Article 5 of the Rome II Regulation. However, this kind of proposal would face several obstacles: i) First, there is an impossibility to provide a minimal degree of foreseeability to the tortfeasor if she does not directly distribute her products and / or directly provides her services. While, as mentioned *supra*, when trapped in the dichotomy of disadvantaging victims or else reducing the tortfeasor's foreseeability, the latter should be preferred, reducing foreseeability to such a level as to render it void cannot be an acceptable solution either. In this respect, as it may be easily understood, there is a clear parallelism between this market-oriented proposal and the difficulties surrounding product liability. ii) Moreover, the referred product-liability-resembling difficulties are further aggravated by the fact that, while in product liability the product is the very vehicle of the tort, this is not the case in this market-oriented proposal¹⁶⁷³. The fact that the proposal lacks the geographic alignment existing in product liability between the product's movement in the stream of commerce and the tort, will frequently render the solution impracticable. Let us

¹⁶⁷³ For a description of the core difficulties faced by choice of law in the realm of product liability, *vid.*, *inter alia*, the assessment made of the 1973 CPL by M. Fallon (M. FALLON, *Les accidents de la consommation et le droit – La responsabilité du fait des produits en question : droit comparé, droit des conflits de lois avec l'aide de la méthode expérimentale*, *op. cit.*, pp. 235 and following).

suppose that in the frame of model 2 above, the production is exported from *Ruritania* not only to *Oz*, but to 15 additional countries. How may the applicable law be determined then? Should quantitative criteria – as those used in the ECJ’s case-law concerning jurisdiction in contractual matters – be resorted to?¹⁶⁷⁴ iii) Finally, the suggestion may possibly work for final products, but not as regards primary materials, for direct contact with a given final-consumer market is absent.

c. "Alternative" actionability

The third utopian proposal to be put forward is actually the reversal of an ancient conflict-of-laws rule from Anglo-Common Law systems: the so-called "double actionability" rule, whose origins are to be found in the decision in *Phillips v. Eyre*¹⁶⁷⁵. Its interpretation is so complex that commentators have even questioned whether it is a choice-of-court rule, a choice-of-law rule, or simultaneously both of them¹⁶⁷⁶. Irrespective of its nature, following its content, in order for a given tort to be actionable the conduct at stake needed to be considered as tortious simultaneously under the *lex fori* and the *lex loci delicti commissi/lex loci damni*. For the purposes of this sub-section, it is of no relevance whether the nature of the rule was jurisdictional or choice-of-law-related. What is interesting about the rule is its cumulative structure: it is considered to be restrictive for it requires the concurrence of two legal systems in order to trigger its consequences (whatever the kind). Therefore, the rule has been explicitly qualified as being content-oriented towards the favor of the tortfeasor¹⁶⁷⁷. If, however, the structure of the rule was reversed, the outcome would be an enhanced *favor laesi*: a choice-of-law rule bearing the opposite structure, an "alternative actionability" rule, would maximize to the biggest possible extent the favor to the victim, since the *lex fori* would necessarily be a European legal system¹⁶⁷⁸.

iii. Arguments sustaining the domicile of the tortfeasor

The common denominator to the last three proposals is that, despite pointing to the domicile of the tortfeasor, they are either too politically delicate or they comparatively provide lesser foreseeability than the *de lege ferenda* proposal selected *supra*: directly using the domicile of the tortfeasor as a connecting factor best allows reaching the legal system where the

¹⁶⁷⁴ *Vid.* ECJ, *Color Drack GmbH v Lexx International Vertriebs GmbH*, judgment, case C-386/05, ECLI:EU:C:2007:262.

¹⁶⁷⁵ *Vid.* *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1. For a brief commentary of the decision, which praised and defended its content, *vid.* A. A. EHRENZWEIG, "The Not So " Proper" Law of a Tort: Pandora's box", *Int'l & Comp. L.Q.*, vol. 17, 1968, pp. 1-10 (Specifically, for considerations on the "second prong" of *Phillips v. Eyre* *vid.* pp. 4-5). For more detailed attention, *vid.* M. C. PRYLES, "Tort and related obligations in private international law", *op. cit.*, pp. 64-78.

¹⁶⁷⁶ *Vid.* M. C. PRYLES, "Tort and related obligations in private international law", *op. cit.*, p. 67.

¹⁶⁷⁷ *Vid.* P. LAGARDE, "Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé", *op. cit.*, p. 59.

¹⁶⁷⁸ A. A. EHRENZWEIG ("Alternative Actionability in the Conflict of Laws of Enterprise Liability – An American Comment on M'Elroy's case", *Jurid. Rev.*, vol. 63, 1951, pp. 39-49) already put forward a proposal which largely resembles this one.

deliberately or recklessly-ignored knowledge, know-how, and capabilities that the tortfeasor possesses find their source. This is why previous pages have led to selecting the domicile of the tortfeasor as the best candidate for a third connecting factor to be inserted in Article 7 of the Rome II Regulation.

Despite the fact that the very identification of the domicile of the tortfeasor has already entailed putting forward some arguments which demonstrate its adequacy, the following pages will present additional arguments which may further reinforce the choice made.

a. First argument: the law of the domicile of the polluter as her "natural" law

The law of the domicile of the polluter may be considered her "natural" legal environment. It is the main and habitual legal order within which she operates and, consequently, she holds a substantially high degree of familiarity with it. It therefore amounts to be "playing at home" in terms of choice-of-law. Moreover, in terms of predictability, there is nothing more foreseeable than being sued in accordance with the substantive content of the law in force in the country where one is domiciled.

Paradoxically, while the application of the law of any subject's domicile is often times viewed as a litigation advantage, this option faces the most significant opposition in the conflict-of-laws debate in respect of global torts. This is so because, while the contention holds true in many kinds of legal relationship¹⁶⁷⁹, in situations of global (environmental) tort, instead of providing any sort of privilege / advantage, the law of the domicile of the defendant removes the protection or benefit obtained from the race to the bottom¹⁶⁸⁰. Clearly, the simple fact that most entrepreneurial sectors are against this option quite demonstrates that, in practice, it may result in more beneficial outcomes for the victims. But this point will be revisited *infra*¹⁶⁸¹. In any case, after all, since victims hold the possibility of choosing, they will, of course, only resort to the application of the law of the domicile when it benefits them *in casu*.

¹⁶⁷⁹ For instance, in many high-level international contractual relationships, parties agree as to the application of a neutral law.

¹⁶⁸⁰ Two clarifications need to be made in order to complement this assertion. First, this contention holds true as long as there is no off-shoring. However, while the threat of off-shoring exists, it will be empirically demonstrated *infra* that it is not as enormous as academic literature may contend ("*Fifth criticism: The suggested solution would foster the "off-shoring" of European corporations*"). Second, it must be recalled that one of the premises of this chapter is that the defendant, or at least one of the co-defendants, is the parent company; veil-piercing and analog notions are dealt with *supra* (the abuse of networks of subsidiaries is one of the upstream problems dealt with in Chapter 3).

¹⁶⁸¹ Notably, *infra* "*Fourth criticism: The suggested change would entail a competitive disadvantage, and put at risk the global survival of European-based corporations*".

- b. Second argument: the law of the domicile of the polluter as a sign of real environmental-policy leadership and as a sign of well-understood "international comity"

The application of the law of the domicile of the defendant would correspond with the environmentally friendly political image that the EU has tried to avail itself of, in order to make it its "distinctive sign" in the international scene¹⁶⁸². But beyond being a step forward in identity and / or "marketing" terms, in the EU's path to a longed-for position of international environmental leadership, this proposal may have the potential to actually provide serious content thereto: it would be a political and legal gesture of true leadership and assumption of responsibility, as an example-setter in environmental policies. In this sense, the EU would be showing the world that it is willing to invest EU-based "*corporate citizens*" *conduct with civic responsibility*"¹⁶⁸³.

Moreover, this educational – possibly even paternalistic – move may also respond to the need to counterbalance alleged deviances in the practical implementation of "international comity" by developed nations: "*Comity is not achieved when [a western country] allows its multinational corporations to adhere to double standard when operating abroad and subsequently refuses to hold them accountable for those actions*"¹⁶⁸⁴. Therefore, the connection to the law of the domicile would also correspond to academic opinions on the need to understand comity differently: as providing "*specific duties of judicial respect to the Third World peoples and nations [...]*" if only selfishly, since "*[...] such hazardous corporate practices have a boomerang effect. Indeed, mass disasters occurring in the First World also demonstrate the need [...] to protect human life and environment as much as judicially doable within the decisional frameworks of private international law*"¹⁶⁸⁵.

- c. Third argument: the law of the domicile of the polluter as a global adaptation of the Commission's "neighbouring countries" reasoning

It may be recalled that at the core of Article 7's commentary in the explanatory memorandum lied the "neighbouring countries" assumption: the reasoning was built on the basis of two structural biases, i.e. that the relevant environmental torts would only be transboundary torts, and that they would occur amongst countries within (relative) proximity. It is within this context that the availability of the *lex loci actus* as an option to be chosen was supposed to potentially help raise the level of environmental protection. The third possible argument sustaining the introduction of the domicile of the tortfeasor as an additional connecting factor is that it could correct the referred biases, especially in situations of merely international environmental tort taking place outside the UE. This is so because it would allow "*a victim in a low-protection country [to] enjoy the higher level of protection available in [another] countr[y]*"

¹⁶⁸² *Vid.* on this point the references to articles by O. COSTA, *supra* footnote 1455.

¹⁶⁸³ The expression, used in a different context, comes from U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *op. cit.*, p. 340.

¹⁶⁸⁴ *Vid.* Justice Doggett as quoted by U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *op. cit.*, p. 347.

¹⁶⁸⁵ *Ibidem*, p. 348.

[which is relevantly linked to the environmental tort]”, even when the environmental tort is not an intra-European and transboundary one. In other words, the proposed solution relies on the logic displayed in the explanatory memorandum, but adapts the provision, allowing it to adequately address merely international torts in a world-wide context.

It is important to highlight that this proposal does not amount to the creation of an artificial dissociation in a simple tort; it only amounts to the acknowledgement of an existing one: merely international environmental torts are actually complex torts disguised under a covering of simplicity¹⁶⁸⁶. As explained by U. Baxi, “[f]ocusing only upon the “time and circumstance” of litigation enables forgetfulness of the time and space of the patterns of global capital and technology movements across frontiers”¹⁶⁸⁷. These “patterns” actually set in motion the factual mechanisms leading to the production of merely international tortious occurrences. It is in this very sense that T. Ballarino distinguishes three kinds of international elements that may be found in international catastrophes (therefore, not only international torts): the very location / environment where the accident takes place (at sea, in the air, etc.); the scission between the event giving rise to the damage and the tortious result; and finally, “*le rayonnement international d’une activité d’entreprise qui en fait apparaître les conséquences juridiques dans un État différent de celui où s’est déroulé l’acte fautif*”¹⁶⁸⁸. In respect of this latter case, he further explains that

*“l’accident, bien que ses éléments essentiels se soient produits à l’intérieur d’un État, suscite néanmoins des effets hors frontière, à cause de l’internationalisation de l’économie moderne, qui par le moyen de l’exportation des capitaux réalise aussi l’exportation d’un risque au sens du droit civil (dans ce cas, il n’y aucune substance polluante qui traverse la frontière; c’est plutôt le risque d’un accident qui se transfère du pays qui exporte les capitaux au pays d’accueil de l’activité dangereuse [...])”*¹⁶⁸⁹.

He, therefore, concludes that while in transboundary cases the international element bears a physical nature, in merely international cases the international element bears a legal nature: it is the transfer of the risk of an accident¹⁶⁹⁰. It is, thus, the idea of a transfer of risk which leads

¹⁶⁸⁶ This is so, notwithstanding the fact that, as Ballarino explains: “*La seule différence [between merely international and transboundary torts], qui est due moins aux facteurs structurels qu’à l’attitude des parties et souvent à une décision politique, est que les cas qu’on appelle transnationaux seraient passibles d’une solution purement nationale*” (T. BALLARINO, “Questions de droit international privé et dommages catastrophiques”, *op. cit.*, p. 309). *Vid.* also, T. BALLARINO, “La réparation des dommages catastrophiques – Problèmes de droit international privé” in DEPARTEMENT DE DROIT INTERNATIONAL CHARLES DE VISSCHER (ed.), *La réparation des dommages catastrophiques : les risques technologiques majeurs en droit international et en droit communautaire : travaux des XIIIes Journées d’études juridiques Jean Dabin*, Bruxelles, Bruylant, 1990, pp. 59-100, at pp. 60-61.

¹⁶⁸⁷ *Vid.* U. BAXI, “Mass Torts, Multinational Enterprises Liability and Private International Law”, *op. cit.*, p. 325

¹⁶⁸⁸ *Vid.* T. BALLARINO, “Questions de droit international privé et dommages catastrophiques”, *op. cit.*, p. 311.

¹⁶⁸⁹ *Ibidem*, p. 309. Note that Ballarino qualifies transboundary and merely international torts, respectively, as international and transnational cases.

¹⁶⁹⁰ *Vid.* T. BALLARINO, “Questions de droit international privé et dommages catastrophiques”, *op. cit.*, p. 356: “[t]andis que, dans la plupart des cas [...] l’élément transfrontière a une nature substantielle (pollution pétrolière, émission de fumées, dommages causés par des aéronefs ou engins spatiaux...), il possède, dans les cas que j’appelle transnationaux, un caractère juridique: ce n’est pas, en effet, la

Ballarino and Baxi to denounce the underlying identity between transboundary and merely international environmental torts¹⁶⁹¹. However, a detailed observation of the real-life and fictive models and examples provided all-along this dissertation points to a larger element, or at least a further qualification in the reasoning. The underlying ratio is wider than a mere transfer of risk (especially since a transfer-of-risk explanation fits well with accidental damage but does not fit well with rogue or deliberate torts): what crosses state frontiers is not just simply the risk being transferred during the ephemeral moment of the establishment of a local branch, subsidiary or etc. What actually crosses over, in merely international torts committed by corporations, is a constant economic, organizational and communicative structure that "bridges" over the frontier. Thus, modern-life economic and communicative structures have severed the merely international torts that corporate actors may commit from the "common" and "classic" merely international torts that individuals have traditionally been capable of committing (i.e. traffic accidents, medical malpractice, etc.) and have equated them with transboundary torts.

d. Fourth argument: the law of the domicile of the polluter as a beacon of modernization and of human-rights considerations

Finally, inserting the referred connecting factor would satisfy critical voices which, to different extents, and through different kinds of discourse, have denounced "*the impossibility of accomplishing justice for victims of mass disasters within the dominant traditions of conflict of laws discourse*"¹⁶⁹². U. Baxi, who has consecrated a substantial part of his academic career to the analysis of the Bhopal catastrophe¹⁶⁹³, sees private international law as being entrapped in the "*pursuit of anachronistic mediaeval subtilities*". This ultimately means that, to his eyes, "[t]he discourse on mass torts, within and outside private international law, has yet to address mass disasters in terms of human, and human rights, violation"¹⁶⁹⁴. Put otherwise, in his

substance polluante qui traverse la frontière, mais le risque d'accident. Cette exportation devient possible du fait qu'il existe des grandes sociétés ayant un champ d'action qui s'étend sur le territoire de plusieurs États".

¹⁶⁹¹ In a similar sense, U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *op. cit.*, p. 325: "we also see on display the technique of normalization and routinization, a process that de-dramatizes and minimizes the ubiquitously uneven global risk production [...] Decisive for global capital are the ways in which modern law provides facilitation for risk production, management and distribution even in arenas when it could be reasonably foreseen that enormous human harm will result".

¹⁶⁹² *Ibidem*, pp. 305-306

¹⁶⁹³ *Vid.*, *inter alia*, U. BAXI & T. PAUL (eds.), *Mass disasters and multinational liability: the Bhopal case*, Bombay, Tripathi private limited, 1985; U. BAXI, *Inconvenient forum and convenient catastrophe: the Bhopal case*, Bombay, Tripathi private limited, 1986.

¹⁶⁹⁴ *Vid.* U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *op. cit.*, pp. 305-307. Despite the fact that, at first, he does not clearly explain the scope of such assertion, throughout his contribution to the *Recueil des Cours*, the reader may suspect that the author tries to denounce what he considers "anachronistic" solutions to "anachronistic" analyses of problems, through the recourse to "anachronistic" techniques and "anachronistic" connecting factors: "*the standard narratives concerning the "nature" of private international law belong to a tradition of dominant discourse*" which, despite being "*convulsed though from time to time with many an establishment choice of law "revolution" and "counterrevolution" in theory*", cannot "*bring the sense of anger and outrage that the victims often feel : in their eyes the violation consists in the fact that the tortfeasor has "demeaned" and "diminished" them by treating them "less respectfully" than deserved*".

opinion the traditional understanding and conceptions of conflict of laws ignore that "*Private international law cases [...] present problems going beyond the efficiency of judicial administration [...]*" and demands a shift towards considerations on "*the "legitimacy" of judicial process"* from the current "*rhetoric of certainty, predictability and uniformity (or "decisional harmony")*"¹⁶⁹⁵. In this sense, U. Baxi asserts the need to identify, develop and enhance a "social mission" of the conflict of laws. He, nevertheless, decries that

*"the internal quest for decisional harmony makes the notion of the "social mission" of private international law a relative stranger. Precisely at the very moment when global capital creates a borderless world, it becomes the salient task of private international law (at least when it concerns mass disasters or mass torts) to create new national frontiers of responsibility for the conduct of global capital"*¹⁶⁹⁶.

Throughout his reflections, Baxi stands convinced that the root of the problem lies in the disguised persistence of racist and colonialist philosophies in private international law, and uses a rather strong language in such sense¹⁶⁹⁷. It is against these tendencies that he strongly pleads for the acknowledgement of the referred social mission of private international law. This leads to the question of how to define precisely the contours of such social mission ("*are there any substantive principles of rights and justice that ought to inform any order of responsive regulation of mass disasters as they incarnate themselves in "mass torts"?*"¹⁶⁹⁸). As an answer, he proposes a strong advocacy of human rights:

"From the perspective of those violated, the tasks of protection and promotion of human rights summon the most sustained attention. It is time after more than a half century of the Universal Declaration of Human Rights to re-orient our concerns about

¹⁶⁹⁵ Vid. U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *op. cit.*, pp. 311-312.

¹⁶⁹⁶ *Ibidem*, pp. 311-312.

¹⁶⁹⁷ *Ibidem*, pp. 313-316. As an example (p. 316): "*Global corporations that like parasites thrive on the bodies of workers and affected communities, as well as ecosystems, in Third World societies stand invested with a higher evolutionary status. These are economic rational agents, the wealth-maximizers heralding a New World Economic Order Inc., a higher and more complex form of life, compared with mere moths, these lowly forms of life, that breed in prolific abundance and are blest with a finite lifetime, which global capital may justly foreshorten. The inaugural Denning metaphor [on plaintiffs being attracted to US courts "like moths to a flame"] and its mindless ad nauseam reiteration in contemporary conflicts theory and practice embodies Social Darwinism not of the nineteenth century verity but of late twentieth Christian century's conflicts species apartheid, the performative characteristic of contemporary globalization. [...] Mass disasters, in the life of contemporary private international law, seem to trigger many manifestations of the colonial residue*". Moreover, he further asserts (pp. 314-315): "*The second half of the twentieth Christian century marks a struggle to outlaw racism and colonialism as principles of legitimation of international order. It also inaugurates an Age of Human Rights. The new episteme renders unworthy any racially animated conflicts theory and practice. And yet one wonders whether the residues of conflicts apartheid persist in the transition of the formerly barbarous countries into "new", "developing", "Third World", "South" categories. Does the old episteme govern, after all, the various "revolutions" and "counter-revolutions" (at least as described in American jurisprudence) in choice of law doctrines? Or is there now in emergence a genuine order of comity, such that accords deference to sovereign equality of all States and human rights of all peoples? The record here is at best a mixed one*".

¹⁶⁹⁸ Vid. U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *op. cit.*, p. 322.

private international law in the direction of human rights of those violated, often with impunity, by multinational enterprises. Mass torts provide a singular starting-point for renewal of concern with rights and justice in private international law in the circumstance of contemporary globalization"¹⁶⁹⁹.

Nevertheless, this assertion raises several fundamental questions: first, how is that "responsive [Human-Rights-based] regulation" ought to be articulated in the conflict-of-laws process? Is Baxi necessarily referring to content-oriented choice-of-law rules? If so, how are those provisions meant to be drafted? – a human-rights-based approach is as much a vague indication for statutory drafters as the notions of "closest connection" and *favor laesi*, if not more – And, in any case, taking into account the significant fragmentation of the law of human rights (as described *supra*, Chapter 2), which human-rights regime or regimes is / are meant to be used to implement his proposal? There are several possible answers to these questions. One of them would be that regional human-rights arrangements need to permeate into the conflict-of-laws systems whose territorial scopes they overlap with. This would mean, for instance, that the EU's system of private international law would need to incorporate influences from the European Convention on Human Rights¹⁷⁰⁰. However, the most likely answer to these questions is that Baxi's mention of human rights is not to be understood as referring to any given regime thereof, but mostly to the underlying philosophy common to all of them¹⁷⁰¹, which would then act as a policy orientation in the conflict-of-laws process. Such orientation would then need to crystallize in specific connecting factors. If such reading of Baxi's ideas was correct, then the above-referred proposal of inserting the law of the domicile of the tortfeasor as a connecting factor could be considered to possibly answer to human-rights-oriented concerns.

But there may even be more to this, in *stricto sensu* tort-law and conflict-of-law terms. Despite the highly politicized character of the explanations that led Baxi to make the above-presented proposal, P. Nygh reaches similar conclusions using strictly legal considerations. He precisely makes his point having the Bhopal case in mind. In his own words:

*"[if a choice] is made by a peremptory rule referring to the law of the place of wrong, there arises another unfairness: why should an American corporation be held to a lesser liability in respect of a tort committed in India than it would be if it committed the same tort in the United States? Indeed, it may be that because of lesser liability, or standards of compensation, such organizations are less careful in the third world than they would be at home"*¹⁷⁰².

¹⁶⁹⁹ *Ibidem*, pp. 306-307.

¹⁷⁰⁰ While the main text refers to the European Convention on Human Rights, it must be recalled that the EU's own legal order comprises other human-rights manifestations, as its Charter of Fundamental Rights, and human rights as general legal principles. However, it must also be recalled that the Charter's environmental value is weak, for Art. 37 only reproduces the integration principle found in Article 11 TFUE (The discussion in Chapter 2, "*The content of Article 37 of the Charter*", needs to be understood as reproduced here).

¹⁷⁰¹ *Vid.* "*Human rights law*" (Part I, Chapter 2), and especially the references to F. SUDRE and O. DE SCHUTTER.

¹⁷⁰² *Vid.* P. NYGH, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort", *op. cit.*, p. 370.

This is why Nygh contends that in international torts, *“Even in the case of [torts] committed wholly in one country, [...] it is reasonable to expect the defendant to insure against the highest risk whether it be that of his or her own country or that in which the incident is foreseeable”*. This is so, despite the fact that the identity of the tortfeasor’s counterpart is generally not known in advance, because, in most cases, it is possible to make risk calculations *ex ante* and insure against the occurrence. Under these conditions, he concludes, on the one hand, that the risk insured against *“should be the highest risk, provided it is foreseeable”* and, on the other hand, *“that the victim should be allowed a choice of applicable law as a general principle in relation to international torts, not limited to cross-border torts or specific torts”*¹⁷⁰³.

In sum, be it through the lens of the advocacy of a human-rights approach to conflict of laws, or else in the frame of a pure tortious-liability reflection, it is possible to conclude that there is a need for a more progressive understanding of the issues at stake, and that the proposal of adding the connection to the law of the domicile of the tortfeasor would cater for such need. Thus, having presented four additional ratios for the said proposal, let us now search for the adequate structural configuration for the insertion of the connecting factor into Article 7, before dealing with the arguments that could be raised against it.

iv. Structural considerations

If the proposal of the insertion of the domicile of the tortfeasor as a third connecting factor was to be accepted, then a discussion on how to fit it into the article’s already existing structure would be required. Since the mechanism in Article 7, as it stands nowadays, provides satisfying results in certain transboundary environmental torts, a first possibility would be not to alter the structure to a significant extent. In this sense, if need be, access to the third connecting factor could be restrained to situations where the place of the event and the place of the tortious result are the same place (i.e. choice of the law of the domicile of the tortfeasor available only where the *lex loci damni* and the *lex loci actus* are coincident).

BOX 27

Article 7

Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law

¹⁷⁰³ All literal quotations and ideas are taken from P. NYGH, “The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort”, *op. cit.*, pp. 368-370. Interestingly, this work, written in the 1990s, contains a line of argumentation that strongly resembles the EU commission’s “neighboring countries” reasoning, but adequately adapted to a global mindset. *Vid., inter alia*: “[...] A manufacturer in the United States should not be allowed to rely on the lower levels of liability and recovery of the third world country where it has chosen to export to, or carry on activities in. Conversely, a manufacturer should not be allowed to escape a higher risk by establishing itself in a low-risk haven as a base for its activities [...]”.

determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

If, however, the laws designated in the first paragraph are coincident, the person seeking compensation for damage may choose to base his or her claim on the law of the country where the tortfeasor has his or her domicile.

Alternatively, a "specialization" of the choice-of-law rule could be performed¹⁷⁰⁴: the choice-of-law rule as it stands nowadays would only address cases of transboundary environmental tort and a new rule, addressing merely international environmental torts exclusively, would be added. This new choice-of-law rule would be similar to the current one, but would allow victims in "merely international" cases to choose between *lex loci damni* and the law of the domicile of the tortfeasor. As it may be easily understood, this option is only formally different from the one presented in the previous paragraph. In practical terms, it amounts to a similar result.

BOX 28

Article 7

Environmental damage

¹⁷⁰⁴ "Specialization" in the sense proposed by J. D. GONZALEZ CAMPOS in his *Recueil des Cours* ("Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé", *op. cit.*, pp. 156-213). This notion is also commented by T. BALLARINO in his own *Recueil* ("Questions de droit international privé et dommages catastrophiques", *op. cit.*, pp. 376 and following). Ballarino identifies the tendency to what he calls "diversification" as a recent trend in the theory of the conflict of laws at the time of his course (beginning of the 1990s). Referring to the work of Jessurun D'Oliveira he asserts: "*Cette diversification prend souvent la forme de l'option, selon laquelle le délit doit être exclusivement localisé en fonction de celui de ses éléments qui est le plus caractéristique. En matière de pollution, le souci de protection des victimes a orienté vers le choix de la loi la plus favorable*". Furthermore, P. LAGARDE ("Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé", *op. cit.*, p. 122): "*Sans minimiser le risque de dépeçage résultant de la clause d'exception, il est donc permis de constater que ce morcellement des catégories de rattachement est dans la logique de raffinement constant des règles de conflit de lois et que peut-être le dépeçage résultant dans une espèce particulière du jeu d'une clause d'exception est l'amorce d'une future nouvelle règle de conflit différenciée*". This aspect was already dealt with *supra*, when assessing *favor laesi* as a possible connecting factor in its own right. Interestingly, there seems to be an embryo / precedent for these ideas in J. H. C. MORRIS, "The Proper Law of a Tort", *op. cit.*, p. 892: "*A third advantage of the proper law of the tort doctrine is that it would enable the problems to be broken down into smaller groups and thus facilitate a more adequate analysis of the social factors involved. The questions that may arise in the field of torts are, no doubt, less various than those that arise in the field of contracts. But they are numerous enough to suggest doubts as to whether the application of a single formula – the law of the place of wrong – can possibly produce socially adequate results*".

The law applicable to a non-contractual obligation arising out of transboundary environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

The law applicable to a non-contractual obligation arising out of merely international environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country where the tortfeasor has his or her domicile.

A third and final possibility¹⁷⁰⁵, which would more importantly depart from the two previous ones, would be the insertion of the referred third connecting factor as a third alternative possibility that the victim could freely choose (i.e. free choice between the *lex loci actus*, *lex loci damni* and the law of the domicile of the tortfeasor; thus placing the latter, at least *a priori*, in equal footing with the already existing two connecting factors). Possibly, this option is the one that “discriminates” the most “in favour of the victim”, for it opens the range of choices the most and, therefore, enhances the possibilities of maximizing the compensation. Moreover, it may be much more interesting than the previous two for victims in situations of extra-European transboundary tort (as would be the case of Peruvian plaintiffs in the above referred Lago Agrio - Chevron case, as pollution was transported downstream through rivers from Ecuador to Peru)¹⁷⁰⁶.

BOX 29

Article 7

Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim either on the law of the country in which the event giving rise to the damage occurred, or on the law of the country where the tortfeasor has his or her domicile.

¹⁷⁰⁵ While a conditional “waterfall” structure could be envisaged (a structure similar to the one borne by Article 5 of the Rome II Regulation), it will not be considered, for it entails an excessive departure from the freedom of choice currently present in Article 7.

¹⁷⁰⁶ *Vid.* Box 2 (Chapter 1).

In all three cases above, the *lex loci damni* could be kept as the default option if no choice-of-law is performed by the victim in due course (naturally, as determined by the procedural law of the relevant Member State).

v. *Possible criticisms and corresponding counter-arguments*

It is likely that the solution to Article 7's black hole suggested in previous pages will attract a certain share of criticism. At least five different arguments may be put forward against the proposal. First, it may be argued that it may entail a decrease in the amount of predictability of the law applicable to international environmental law torts (a). Second, it may be considered to embody a significant departure from the reigning principle in European private international law: the principle of proximity / closest connection (b). Third, it may be argued that it may introduce a competitive disadvantage in the economic operations of European-based corporations (c). Fourth, the suggested change may undo the balance supposedly struck by the European legislator amongst the interests at stake (d). Finally, the proposal may possibly foster the eventual problem of the "off-shoring" of European corporations (e). Let us deal with these criticisms in sequence, simultaneously presenting the relevant counter-arguments to each of them¹⁷⁰⁷.

a. First criticism: The suggested solution may decrease the amount of predictability ensured by the current choice-of-law provision

It may be recalled from the discussion in Chapter 1 that predictability – or, else, foreseeability – of the applicable law is one of the core values and parameters which determines the mission of private international law (up to the point of being considered by some authors one of the paramount and essential objectives of this field)¹⁷⁰⁸. As a consequence, one of the most delicate issues, both in modern and traditional conflict of laws, is the tension between predictability and flexibility when drafting new pieces of legislation. This tension is, to a significant extent, nothing but a reflection of the overall clash between Continental legal systems and Common Law systems in respect of their overarching approaches to the law-making phenomenon. Precisely from this perspective, Article 7 was a source of controversy during the legislative *iter* of Rome II: while the Commission maintained that environmental torts required a specific and flexible choice-of-law rule – as opposed to the predictable main rule in the Regulation – the European Parliament defended the need to suppress the specific rule on environmental torts, and to increase the degree of flexibility of the main rule in the

¹⁷⁰⁷ Again, veil-piercing-related difficulties (and any other sort of difficulty stemming from ensuring that the parent corporation is one of the defendants, or the defendant) have already been considered *supra*, as part of the "upstream" problems (*vid.* Chapter 3).

¹⁷⁰⁸ *Vid. supra* Part I, Chapter 1, "The functions of Private International Law in general". As an example of authors who contend that predictability is a core objective *vid.* T. C. HARTLEY, "The Modern Approach to Private International Law: International Litigation and Transactions from a Common-Law Perspective", *op. cit.*, pp. 25 and following.

Regulation. In the end, it seems that the EU Commission got its way, for the final rule resembles enormously the rule included in the Commission's proposal¹⁷⁰⁹.

From this standpoint, it may be discussed whether a proposal like the one submitted in previous pages may have an impact on the degree of predictability of the relevant choice-of-law solution: it may be argued that adding an additional connecting factor may reduce the amount of predictability, either as a consequence of the very content of the new connecting factor, or either as a result of the modification of the structure of the article caused by the addition. As regards the first aspect (i.e. possible decrease in predictability deriving from the very connecting factor), it must be noted that the *lex loci damni* connecting factor may be a highly unstable and variable connecting factor by itself. In other words, *lex loci damni* entails *per se* the introduction of unpredictability into the choice-of-law equation (depending, of course, on the kind of industry considered). From this standpoint, the addition of the "domicile of the tortfeasor" connecting factor to the article does not reduce foreseeability for, in principle, it is a rather stable connecting factor, just as the *lex loci actus* is¹⁷¹⁰. Moreover, as it has been suggested *supra*, at the end of the day, is there anything more foreseeable than the possibility of occasionally being sued under the law applicable in the country where one's domicile is located?¹⁷¹¹

¹⁷⁰⁹ *Vid.* F. MUNARI & L. SCHIANO DI PEPE, "Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity", *op. cit.*, pp. 193-204. The elaboration of Article 7 of Rome II was a winding road, just as much as the very process of drafting the entire Regulation. As it has been correctly pointed out, the article evolved notably throughout the different stages of the legislative process, mutating from nothing more than a very classic choice-of-law rule in the "anteproyecto" to the content-oriented choice-of-law rule featured in the enacted final version of the Regulation (*vid.* F. GRISEL, "Analyse critique de l'article 7 du règlement du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles ("Rome II")", *op. cit.*, pp. 149-150). Ironically, the divergences in approach amongst the European Institutions as regards the rule mirrored conversely the even more essential divergences that separated their points of view on how the Rome II Regulation needed to be built. As explained by L. ENNEKING ("The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation - An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law", *op. cit.*, pp. 294-295; referring to the general approach of the Rome II project): "*The original Commission proposal and the subsequent amendments to it proposed by the Parliament evidenced a divergence in views on how best to deal with the subject [...] Other major sources of disagreement between the Institutions involved were the inclusion of special provisions on road traffic accidents, on violations of privacy and rights relating to personality, on unfair competition, on product liability and on environmental damage*". In other words, in the Draft Proposal, the Commission opted for a "*simple and strict general rule, leaving little room for exceptions*" as the core of the Regulation, accompanied by a rule on environmental damage that was quite close to the provision's final wording. Conversely, the Parliament chose "*a more flexible general rule, allowing courts more leeway in 'choosing the solution which best accords with the need to do justice to the victim and with the reasonable expectations of the parties'*", but wanted to eliminate the article on environmental damage. After a long and difficult legislative process that reached the conciliation stage, the Regulation as it stands nowadays includes an article on the law applicable to environmental damage (which consecrates *favor laesi* by resorting to a structure which reflects the theory of ubiquity).

¹⁷¹⁰ It must be reminded here again that the multiple dimension of the domicile of the tortfeasor is just a fair consequence of the corporate defendant's entrepreneurial choices, as pointed out by Nielsen (*Vid.* P. A. NIELSEN, "Behind and beyond Brussels I – An Insider's View", *op. cit.*, p. 247).

¹⁷¹¹ It may be recalled that, although the point is never made in respect of torts, it is generally considered in international commercial litigation that the application of the law of the domicile of the defendant may be convenient / advantageous for her. The law of the domicile of the tortfeasor is

As regards the second aspect, ascertaining to what extent the addition of the new connecting factor may decrease foreseeability depends on what structural choice – from those presented *supra* – the legislator may make: restricted / subsidiary access to the new connecting factor, specialization of the choice-of-law rule, or free access to the new connecting factor. The first two structural arrangements would not entail any significant change – positive or negative – in the level of predictability of the applicable law to environmental torts. In the first case (i.e. restrained access to the third connecting factor), the possibility of choosing the law of the domicile of the defendant would only be available under specific circumstances, i.e. in those hypotheses where the alternative structure has collapsed. Thus, re-introducing an alternative structure which previously existed does not entail any significant change in the relevant degree of foreseeability. In the second case, the specialization of the choice-of-law rule would only entail having two different choice-of-law rules – one for transboundary environmental torts, and another one for merely international torts – which would replicate the structure of the current one.

Therefore, if any, it is only the third possible structural arrangement – placing the domicile of the tortfeasor on equal footing with the other two connecting factors – which may possibly cause a decrease in the degree of foreseeability of the choice-of-law solution. But, supposing that this was indeed the case, this would beg a question: why would the unpredictability of an alternative (elective) choice between three connecting factors be less acceptable in policy terms than the unpredictability of an alternative (elective) choice between two connecting factors? Would this configuration be detrimentally unpredictable to a significant extent? By enacting the proposal, uncertainties would simply get “harmonized” in most cases of transboundary environmental tort and in most cases of merely international environmental tort, without altering to a significant extent the degree of predictability for tortfeasors.

In any case, should the proposal be deemed detrimentally unpredictable, to what extent a decrease in the level of predictability could be an argument against introducing such a *favor-laesi*-oriented proposal? Put otherwise, to what extent may the victims have to bear the eventual need to ensure a certain degree of predictability to potential tortfeasors? In the frame of the academic debate on tort in private international law, predictability for the tortfeasor is considered to be a fair counterpart to the victim’s – eventual – *favor laesi* privileges. Interestingly, P. Nygh refers to case-law by the Australian, American, Canadian and Irish High / Supreme Courts which protects foreign defendants against the undue surprise which would ensue, in terms of international jurisdiction, if the she was attracted to the referred countries¹⁷¹². It must be noted, however, that this argument regards tort cases where

generally the legal system within which she is used to operating: she should be highly familiar with it, and her possibilities of having a better defense may possibly increase.

¹⁷¹² *Vid.* P. NYGH, “The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort”, *op. cit.*, pp. 362-363 (“*the other side of the equation: fairness to the defendant*”). The referred comments regard heads of jurisdiction, but the ratio is general, and could be transposed to the field of choice-of-law rules. In the cases referred, protection is articulated through the characterization of the tort or else the characterization of the place where the tort was committed. Such characterization is restrictive / qualified, in order to amount to the referred degree of protection. The author acknowledges to conclude – in coincidence with Fawcett – that the “*mere impact or even foreseeability as a possibility is not enough, but that the harm in the forum must result from some activity initiated by the defendant*”

both parties had voluntarily entered beforehand in direct or indirect contact with each other through the commerce of goods or services, and this is generally not the case of environmental torts. As regards these latter cases (be they accidental or deliberate), as well as in respect of other instances of accidental damage, it has been submitted that any lack of predictability arising therein should be put up with by the tortfeasor¹⁷¹³. This is due to the fact that, generally, if any of the two subjects may perform a risk calculation and / or exert control to any extent over the activity giving rise to the environmental tort, it is the polluter, and not the victim (who usually has no control whatsoever over the events). In the words of S. Symeonides¹⁷¹⁴:

"[...] foreseeability has two sides—that of the tortfeasor and that of the victim. When [...] both sides can foresee the injury occurring in the victim's home state, the foreseeability criterion may be less critical in resolving the conflict. But when [...] only the tortfeasor is in a position to foresee this eventuality and the victim cannot foresee it, the scale tips against the tortfeasor, not the victim".

As a corollary to this reasoning, it may be possible to contend, before moving on to the second criticism, that environmental-tort victims are possibly weak parties to the non-contractual relationships they find themselves entangled in. It is rather straightforward to see that the imbalance in economic and litigation capabilities between an environmental victim and her tortfeasor will generally be more substantial than the possible difference between two random citizens involved in a car accident. Therefore, should any hesitation arise, despite the arguments advanced in this sub-section, it may be argued that the policy choice to be operated should be *in dubio pro victim*.

- b. Second Criticism: The suggested solution is not in accordance with the principle of proximity - Lack of proximity of the applicable law to the harmful result

In one of the first pieces of academic work fully devoted to the Rome II Regulation, N. Joubert asserted that choice-of-law mechanisms for environmental torts needed to designate as the

from abroad, either direct, for example sending a letter, or at a remove, for example distributing goods through an agent or subsidiary".

¹⁷¹³ Vid. P. NYGH, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort", *op. cit.*, p. 368: "The only party to whom certainty and predictability can be assured is the potential wrongdoer. A system which insists on the application of a rigid rule, such as the *lex loci delicti*, more often than not disadvantages the victim" [*Lex loci delicti* is to be understood in this excerpt in its *lex loci damni* dimension]. Thus, Nygh identifies a fundamental tension between the value the tortfeasor would like to see enshrined to the biggest possible extent, and the legitimate expectations of the victim, for its embodiment in a rigid rule would disadvantage the latter.

¹⁷¹⁴ Vid. S. C. SYMEONIDES, "Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should", *op. cit.*, p. 378. Even beyond these kinds of consideration, Zilioli (C. ZILIOLO, "Choice of Law", *op. cit.*, pp. 179-180) contends that in the case of a conflict between, on the one hand, victim protection and environmental protection, and, on the other hand, legal certainty, the former should have priority, and the latter should be subordinated.

applicable law a legal order located “as close as possible” to the damage¹⁷¹⁵. This is nothing but a reflection of the well-known “*principe de proximité*” – the application of the law of the closest connection. The principle of proximity is considered to be the very core of modern private international law, both in Europe, and within the approach to conflict of laws fostered by the Hague Conference on Private International Law¹⁷¹⁶.

Despite its content-orientedness, as it stands nowadays, Article 7 of the Rome II Regulation does not depart significantly from the principle of proximity: when considered individually, each of its alternative (elective) connecting factors is a mere reflection thereof. Even more so: even when considered globally, Article 7’s substantive-justice dimension is articulated in such a manner as to remain entrapped in closest-connection / proximity considerations. Conversely, the proposed solution – insertion of the domicile of the tortfeasor as a connecting factor – entails, at least from a “classic” standpoint, a significant departure from the principle of proximity: traditionally, proximity / closest connection has generally been understood in Europe as a purely geographical notion, and to a certain extent a mathematical one, for it is based on the observation and counting of the amount of elements pointing to each of the legal orders connected to the situation at stake¹⁷¹⁷. Therefore, it becomes clear that the law of the domicile of the tortfeasor will not be the closest possible law to be applied in the majority of cases of merely international environmental tort, especially those taking place outside the European Union.

However, let us go back to models 2 and 3 above¹⁷¹⁸. From a classic perspective, the first reaction would be to qualify *Ruritania* and the Ivory Coast as the countries respectively bearing the closest connections to the relevant torts as: i) mathematically, most of the elements of the tortious relationships lie there; ii) geographically, most of such elements are spatially located in the referred countries. But what would happen if the “closest connection” was understood in more qualitative terms? What if a given connection pointing to a certain country was so

¹⁷¹⁵ Vid. N. JOUBERT, “Les Règles de Conflit Spéciales en Matière de Délits dans le Règlement du 11 juillet 2007 (Rome II)”, in S. COURNELOUP & N. JOUBERT (eds.), *Le Règlement Communautaire Rome II sur la loi applicable aux obligations non-contractuelles*, Travaux du Centre de recherche sur le droit des marchés et des investissements internationaux, vol. 31, Paris, Litec – L.G.D.J., 2008, pp. 55-84, at p. 72.

¹⁷¹⁶ P. Lagarde’s seminal 1986 contribution to the *Recueil des Cours* praises the virtues of the closest connection principle. Vid. also J. DOLINGER, “Evolution of principles for resolving conflicts in the field of contracts and torts”, *op. cit.* (pp. 371-443 for an assessment of the principle of proximity in the field of contracts, and pp. 485-488, for a brief review within the field of torts).

¹⁷¹⁷ Vid. S. C. SYMEONIDES, “The American choice-of-law revolution in the courts: today and tomorrow”, *op. cit.*, pp. 60-61, where the author compares the North-American “*most significant relationship*” with the European “*closest connection*”: “*although acoustically the Restatements catch phrase may suggest otherwise, the state of the most significant relationship is not to be chosen by the quantity or even the closeness of its factual contacts, but rather “under the principles stated in § 6”, which include consideration of the policies and interests of the contact states*”; vid. similarly O. LANDO, “New American Choice-of-Law Principles and the European Conflict of Laws of Contracts”, *The American Journal of Comparative Law*, vol. 30-1, 1982, pp. 19-35, at p. 31 (“*Of the majority of courts which now applied the methods and rules of the Restatement 2d, most relied on the contacts of the contract only, thus following a center-of-gravity or grouping of contacts test in the European meaning of these terms; that is, they applied the law of the state with which the contract had its closest relationship*”) [Emphasis added]. Vid. also P. LAGARDE, “Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé”, *op. cit.*, for instance, p. 103 where he refers to “*indices cumulés*” as the crystallization of the “*liens les plus étroits*”.

¹⁷¹⁸ Vid. *supra* Boxes 22 and 23.

relevant as to deserve being highlighted over a given set of connections, all pointing to a different one? Then, in models 2 and 3, the "center of gravity" of the situations may possibly be said to lie, respectively, in Oz, and in the UK or The Netherlands, as the core intellectual elements which lead to the crystallization of the environmental torts take place there (respectively, the decision to place a factory in a given location to operate it under certain conditions, and the decision to dump the chemical waste). This would be even more the case if, in model 2, the products manufactured in *Ruritania* were commercialized in Oz, entailing that the core reason behind the choice of *Ruritania* as the factory's location was to reduce production cost, in order to maximize the profits arising from the sales in Oz. These ideas point towards a different understanding of the "*principe de proximité*" based on "proximity" to the intellectually decisive element in the referred cases. While they may certainly be criticized from a traditional European perspective, they may be an interesting possibility to explore¹⁷¹⁹. This is especially the case when taking into account how the ECJ "read" a "*center of interests of the victim*" head of jurisdiction into Article 7.2 of the Brussels I Regulation in its decision in the *eDate* advertising case¹⁷²⁰. This outcome may be considered the breakthrough of a more substantive and less mathematical understanding of proximity in Europe.

In any case, irrespective of the feasibility – or lack thereof – of the interpretative proposal just submitted, a departure from the traditional European understanding of the proximity principle is actually no obstacle as regards the insertion of the "domicile of the tortfeasor" connecting factor. This is so because in the event of a clash between conflicts justice and substantive justice considerations, the latter are to be understood as superseding the former. This assertion is true in, at least, two respects:

i) Implicit primacy of substantive justice over conflictual justice: All of the so-called "escape devices" in private international law generally aim at obtaining the application of *lex fori* to the case at stake, whether directly (*ordre public*, overriding mandatory rules, etc.) or indirectly (characterization, *renvoi*, etc.). The purpose behind targeting the *lex fori* actually lies in superseding the substantive-justice considerations in the *lex causae* with those which prevail in the *forum*. Therefore, throughout the historic evolution of private international law, all those theoretical constructions have *de facto* contributed to "substantivizing" the discipline. In other words, they are just a reflection of the fact that, through different techniques and to different extents, courts have tended to privilege the *forum's* conception of substantive justice over conflicts justice¹⁷²¹. If this practice exists, and has not been radically suppressed, a

¹⁷¹⁹ In other words, despite being possible, the suggested interpretation is very unlikely to be welcomed in Europe, for it entails, to a certain extent, aligning the European approach to conflicts justice to the American one (*vid. supra* note 1717; in the United States, the reigning perspective on these issues, as it stems out of the Restatement (the Second) of the Conflict of Laws, is to search for the law bearing the "*most significant relationship*" to the situation at stake).

¹⁷²⁰ *Vid. ECJ, eDate Advertising*, judgment, *op. cit.*

¹⁷²¹ *Vid. inter alia*, T. C. HARTLEY ("The Modern Approach to Private International Law: International Litigation and Transactions from a Common-Law Perspective", *op. cit.*, pp. 189-190) who explicitly asserts that escape devices may be "*manipulated to produce almost any result*", and S. VRELLIS ("Conflit ou coordination de valeurs en droit international privé – À la recherche de la justice", *Recueil des Cours de l'Académie de Droit International*, vol. 328, Leiden, Martinus Nijhoff, 2007, pp. 309-311) who criticizes that what lies beneath alleged quests for substantive justice is the will to apply *lex fori*.

supposed sublimation of conflicts justice cannot be used as an argument to block the insertion of a connecting factor which responds to substantive-justice considerations.

ii) Explicit primacy of substantive justice over the proximity principle: P. Lagarde and P. M. Patocchi explicitly defend that, in a situation of clash, substantive justice is to be privileged over conflictual justice¹⁷²². For this sub-section's purposes, this means that it is legitimate to consider that, in terms of legislative policy, in the event of a clash, the closest connection test must give way to *favor laesi* considerations.

c. Third criticism: The suggested solution would undo the balance allegedly struck between the interests at stake

Following recital 19 of the Regulation "[s]pecific rules [are] laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake". It may be recalled that, as it was briefly commented in Chapter 1, K. Fach considers that this goal was successfully attained in respect of Article 7 for, in her opinion, the provision provides a "*well-balanced solution*" in situations of international environmental tort¹⁷²³. If this position was to be accepted, it could then be argued that the current balance would be disrupted should there be any change in the article.

However, it is to be hoped that, at this stage of the dissertation, the reader may have gathered that the existence of a "balance" is to be questioned, to say the least. On the one hand, the tortfeasor and the victim are far from being on equal standing in terms of economic capability and, generally, also in terms access to legal counseling. As long as that reality is not fully acknowledged, a real "balance" of interests will not be possible. On the other hand, by placing on equal standing values which cannot be placed on a level-playing field, actually, an imbalance of interests in disguise is provoked.

As regards the first aspect, the un-acknowledged lack of equal standing between subjects, it could be argued that victims of environmental torts, as already suggested, should actually be

¹⁷²² Vid. P. LAGARDE, "Le principe de proximité dans le droit international privé contemporain ; cours général de droit international privé", *op. cit.*, p. 116, and P. M. PATOCCHI, *Règles de rattachement localisatrices et règles de rattachement à caractère substantiel : de quelques aspects récents de la diversification de la méthode conflictuelle en Europe*, Etudes suisses de droit international vol. 42, Genève, Georg, 1985, p. 319. Lagarde contends that : "Ainsi, [...] nous constatons que la clause d'exception a vocation à s'appliquer à la quasi-totalité des règles de conflit de lois. La seule exception paraît être constituée par les règles de conflit alternatives, édictées en vue de l'obtention d'un certain résultat matériel : établissement d'une filiation, validité d'un testament, etc. Dans ces situations, c'est à dessein que le législateur envisage l'application d'une loi qui peut n'avoir que très peu de liens avec la situation, mais qui a au moins le mérite de consacrer la solution matérielle voulue par l'auteur de la règle de conflit. Ecarter cette loi en raison de son manque de liens avec la situation irait évidemment contre le but de la règle de conflit". In turn, Patocchi asserts that: "[...] Cependant lorsque la règle de rattachement favorise un effet de droit matériel précis [...] l'étendue de la réalisation de cet effet matériel croît au fur et à mesure que l'éventail des lois potentiellement applicables est étendu et que la localisation s'estompe par voie de conséquence [...]".

¹⁷²³ Vid. Part I, Chapter 1, "Presentation of Article 7, on environmental torts". Vid. also Symeonides' considerations on Article 7 (S. C. SYMEONIDES, "Rome II and Tort Conflicts: A Missed Opportunity", *op. cit.*, pp. 209-211).

considered weak parties to the legal relationship that binds them to the polluter, over which they had no *ex ante* control, and which is imposed to them without regard to their will. Therefore, in order to strike a “reasonable balance”, other than mending the “congenital deficiencies”, further privileges – resembling those contained in Articles 17 to 19 and 20 to 23 of the Brussels I BIS Regulation, or in Articles 6 and 8 of the Rome I Regulation – need to be introduced¹⁷²⁴.

As regards the second aspect, placing in equal footing values whose weight ought to be different amounts to *de facto* mutilating one of them, as it is the case when *favor laesi* is placed in the same basket as considerations on “fairness towards the tortfeasor”, predictability, the “tortfeasor’s legitimate expectations”, and etc. While these latter values need to be respected inasmuch as possible, sustaining them in case of conflict “neutralizes” victim-favouring approaches, and the “favor” that is supposed to be given to the victims is washed away.

This is why the rule in its current wording, actually, should only be considered as being “partially content-oriented”, and, consequently, the argument of the “balance struck” should be considered inappropriate.

- d. Fourth criticism: The suggested change would entail a competitive disadvantage, and put at risk the global survival of European-based corporations

It has been submitted that the application of the law of the domicile of the tortfeasor in the frame of transnational tort litigation may lead to the potential distortion of trade and investment patterns. This is thought to be so because, from a law and economics perspective, there may be an “implicit discrimination” in the applicability of [diverging] legal rules to producers or investors of different nationalities¹⁷²⁵: if only a given set of competitors in global markets – for instance, North-American, or European-based firms – has the law of its domicile applied when confronted with transnational torts, then an implicit discrimination against them – and a competitive advantage to the benefit of the rest of their competitors – allegedly arises. From this standpoint, A. O. Sykes asks whether “global welfare [may] be enhanced through the application of superior tort law -tort law that promotes greater cost internalization by firms-only to some of the firms in the industry”, and reaches a negative conclusion¹⁷²⁶. He moreover contends that, in the long run, “if some firms are subject to higher tort liability across the set of jurisdictions that they serve, [the] cost disadvantage [...] may eventually drive them from the market”¹⁷²⁷. In sum, he considers that the referred “distortions in trade and investment patterns” reduce global economic welfare and, consequently, provide “an important argument

¹⁷²⁴ It may be recalled that, for instance, an alleged polluter may avail herself of the theory of ubiquity in Art. 7.2 of the Brussels I BIS Regulation in order to start proceedings at the most convenient *forum* for the purpose of being declared non-labile.

¹⁷²⁵ *Vid.* A. O. SYKES, “Transnational Tort Litigation as a Trade and Investment Issue”, *The journal of legal studies*, vol. 37-2, 2008, pp. 339-378, at p. 339.

¹⁷²⁶ *Ibidem*, p. 351.

¹⁷²⁷ *Ibidem*, p. 366.

*for limiting foreign tort plaintiffs to the law and forum of the jurisdiction where the harm arose*¹⁷²⁸.

Interestingly, while as regards most kinds of legal relationships, parties are delighted by the prospect of the application of their "natural" law – law of their domicile, law of their nationality, etc. – it is not the case as regards tortfeasors in private-international-law relationships. When observed through a global-governance lens, however, their stance in this respect comes as no surprise: if carefully assessed, Sykes' position amounts to nothing but a "law and economics" justification for the race-to-the-bottom phenomenon, and Western firms are not going to renounce willingly to the benefits arising thereof.

Paradoxically, an analysis similar to Sykes' was performed before the enactment of the Rome II Regulation in Europe, and it led to the opposite conclusion. When considering whether *lex loci damni* was an adequate policy choice for the main rule in the Rome II Regulation, opinions were submitted as to the potential hindrance to the free movement of goods and the free provision of services that it could entail within the EU's internal market: in Europe, during past decades, the tendency, in every political debate, has been to constantly plead for the application of the law of the establishment of the economic operator, as regards every possible aspect of all economic activity, under the argument that it avoids any potential hindrance to commerce¹⁷²⁹. Amongst the praises to this policy option, one may find the advantage for operators of always operating under a single legal system (independently of where they operate). The conclusion reached in Europe was that the application of *lex loci damni* would not cause the feared hindrances¹⁷³⁰. This led, therefore, to converse standpoints on roughly the same subject, within practically the same period of time, on each side of the Atlantic¹⁷³¹: while in the US, it was contended that the application of the law of the domicile of the tortfeasor would be economically detrimental, in Europe, an alleged economic hindrance was pleaded in order to attempt to avoid a departure from the – almost holly – law-of-the-establishment-of-the-operator approach. It may be argued that both debates presuppose different geographical contexts: while Sykes' analysis aims at the global level, the European debate dealt exclusively with the framework of the EU's internal market. Nevertheless, it may be wondered whether such difference is so significant as to justify the diverging views.

Notwithstanding these differences in approach from Europe to the United States, what if the issue was not conceived as whether or not to accept an alleged economic disadvantage, but as

¹⁷²⁸ *Ibidem*, p. 339.

¹⁷²⁹ The ensemble of the controversy surrounding the European e-commerce directive (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O.J. L 178, 17.7.2000, p. 1) is likely the best possibly example thereof. It must be noted that even tortious liability came within the scope of this debate. For some further developments on these points *vid.* M. FALLON & J. MEEUSEN, "Le commerce électronique, la directive 2000/31/CE et le droit international privé", *Revue critique de droit international privé*, num. 3/2002, 2002, pp. 435-490.

¹⁷³⁰ *Vid.* A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, *op. cit.*, pp. 35-60, and 643-659. This whole paragraph is a synthesis of Dickinson's discussion on the topic, to which he refers at several points in his work: sporadically, within the discussion of the legislative "iter" of the Regulation and, thoroughly, towards the end of his monograph, where he deals with the relationship between Rome II and the remainder of EU law.

¹⁷³¹ Sykes' article was published in 2008, and the Rome II Regulation was enacted in 2007.

a matter of eliminating an inadequate economic advantage? There is no need to resort to U. Baxi's human-rights approach to private international law¹⁷³², or to P. Nygh's parallel approach¹⁷³³, or even to ethical considerations to address this point. The adequacy referred bears an economic nature: literature in the field of economic analysis of environmental law stresses the need to ensure that environmental costs are internalized by firms, and that the idea that polluting is free needs to be eradicated¹⁷³⁴. In this sense, respectfully, one of the core assumptions upon which the ensemble of Sykes' article is built is not accurate. He contends that *"Forum shopping will often entail inefficiencies because plaintiffs do not internalize all of the costs and benefits of their forum choice"*¹⁷³⁵. However, actually, what has not been internalized, to begin with, is the environmental cost of the tortfeasor's actions which gave rise to the forum shopping. Thus, at the end of the day, from a global-governance perspective, all that is being asked is that Western societies and Western corporations internalize the environmental costs that they tend to externalize towards third world countries.

e. Fifth criticism: The suggested solution would foster the "off-shoring" of European corporations

It could be argued that the logical and necessary suite to the fourth criticism presented would be a massive off-shoring of European-based corporations towards third countries, and, consequently, an ensuing significant damage to the European economy. Nevertheless, it remains to be empirically assessed whether, and if so to what extent, a rule like the one suggested may actually have the potential to cause such effect. Since legal literature on off-shoring has tended to focus, at least during the last decades, on labour-related aspects of the relocation of industries, and on social dumping, it may not be very useful to resort to it¹⁷³⁶.

¹⁷³² *Vid. supra* "Fourth argument: the law of the domicile of the polluter as a beacon of modernization and of human-rights considerations".

¹⁷³³ *Ibidem*.

¹⁷³⁴ For an introduction to these notions, *vid.* M. FAURE, *L'Analyse économique du droit de l'environnement*, Bruxelles, Bruylant, 2007, pp. 11 and following.

¹⁷³⁵ *Vid.* A. O. SYKES, "Transnational Tort Litigation as a Trade and Investment Issue", *op. cit.*, p. 339.

¹⁷³⁶ *Vid., inter alia*, J. EMILCAR, "A Proposal to Prevent Offshoring: An Analysis of the Latest Anti-Offshoring Proposals"; *J. Int'l Bus. & L.*, vol. 11, 2012, pp. 205-224; D. FARREL, "Offshoring in perspective", *Geo. J. Int'l Aff.*, vol. 6, 2005, pp. 53-60; A. GUPTA & D. SAO, "Anti-Offshoring Legislation and United States Federalism: The Constitutionality of Federal and State Measures Against Global Outsourcing of Professional Services", *Tex. Int'l L. J.*, vol. 44, 2008-2009, pp. 629-663. There is, however, some literature which points towards the developments referred in further paragraphs of this sub-section. As explained by De Smedt (K. DE SMEDT, "Is Harmonization of Environmental Liability Rules needed in an Enlarged European Union?", *RECIEL*, vol. 13-2, 2004, pp. 164-174, at pp. 168-169) in respect of general environmental law: *"The second indicator that has to be examined is whether environmental quality standards would influence industry location decisions. Indeed, a commonly used justification for centralized regulation to prevent a race to the bottom in environmental regulation is that the stringency of environmental standards would be an important determinant for locating a business. Yet, despite much effort, empirical evidence of relocation of industry because of stringent environmental regulation is weak. Based on an extensive survey of existing location studies, Jaffe et al. conclude that the effect of environmental regulation on business location decisions is either small or statistically insignificant. Nevertheless, they add that, although the stringency of environmental regulations will not induce existing firms to relocate, it might influence decisions for new plant locations. This finding can be*

A priori, it may be intuitively thought that provisions stemming from other fields of law, such as tax and labour law, may have a bigger and more direct impact on the decision whether to relocate or not a corporation: comparatively speaking, it may be imagined that the weight of rules on private international law may be rather humble when confronted with the weight of the former. Moreover, and more significantly, it may be supposed that business factors – as for instance geographical-strategy factors – may equally bear a bigger value when it comes to deciding on possibly relocating a corporation.

These ideas are supported by some empirical research performed by Eurostat in 2007 and 2011. Following Eurostat, the factor "*less regulation affecting the enterprise, e.g. less environmental regulation*" is amongst the least heavy-weighting factors motivating international off-shoring¹⁷³⁷. Despite being a choice-of-law rule on environmental liability, Article 7 of Rome II could be thought to come within the referred category, because, at least from a *lato sensu* perspective, it qualifies as "*environmental regulation*". This means that, notwithstanding the need to conduct more specific empirical research, the evidence available thus far seems to discredit the fifth criticism.

Additionally, as contended by R. Wai, the international mobility of corporate actors is not as absolute as academic literature may make it seem: corporate actors still need to have "roots" somewhere¹⁷³⁸. The best and most graphic example of this point may be provided by one of the myriads of ramifications of the Chevron - Lago Agrio saga: the recognition and enforcement of the Ecuadorian Supreme-Court ruling against Chevron is being sought in Canada, and while Chevron could strip away the assets its subsidiary had in Ecuador, it is unable to do the same as regards the assets held in Canada¹⁷³⁹. In the light of this example, it

explained by the fact that other factors, such as tax levels, public services, proximity to markets and raw materials, availability of transportation networks and the unionization of the labour force, are much more important determinants of competitiveness. Environmental regulation appears to be only a minor determinant in industrial location decisions. The Jaffe et al. survey, however, has been refined somewhat by the study of Xing and Kolstad. Xing and Kolstad found that lenient environmental regulations may indeed be a significant determinant for foreign direct investment of heavily polluting industries, like chemicals and primary metals. However, conforming to the study by Jaffe et al., they find that lenient environmental regulations are insignificant for less-polluting industries".

¹⁷³⁷ These researches are part of a set of 4 studies published by Eurostat on September 2013. The precise study commented in this page ("*Motivation factors for international sourcing by economic activity (2009-2011)*") can be found under the following URL:

http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=iss_11sbmot&lang=en

Furthermore, the meta-data for all Eurostat statistics on "international sourcing - all activities" can be found under the following url: http://epp.eurostat.ec.europa.eu/cache/ITY_SDDS/EN/iss_esms.htm. All of these URL's were operational on February the 23rd 2017.

¹⁷³⁸ *Vid.* R. WAI, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization", *op. cit.*, p. 265. This is so beyond the idea that arbitration, as an adjudication system that facilitates the disconnection between corporate actors and state jurisdiction, "*still relies very much on the support of national legal systems*" (p. 267). The kind of "root" that is aimed at in these pages (and which is not really considered by Wai, who focuses largely on arbitration and *lex mercatoria*-related issues) is the kind of root exemplified by the upcoming Chevron example.

¹⁷³⁹ *Vid.* REUTERS, "Court rejects bid to enforce Ecuador judgment on Chevron Canada", available on March the 21st 2017 (<http://www.reuters.com/article/us-canada-ecuador-chevron-idUSKBN1542U2>). While enforcement has been rejected due to the separate legal personality of the Canadian subsidiary of Chevron, lawyers for the plaintiffs have already appealed the decision: FINANCIAL POST, "Ecuadorian

seems adequate to sustain, with R. Wai, that advantage must be taken of these “*touchdown points*” which

*“are potential locations to regulate conduct of transnational actors. It is particularly important to use “touchdown” points as locations to protect the interests of third parties who are affected by the goods, production, or other conduct of transnational actors. National private law regimes such as regimes of tort law in common law jurisdictions and delict in civil law jurisdictions provide a significant tool for parties who are not necessarily parties to contract to seek effective control and redress for the harmful impact of international activity”*¹⁷⁴⁰.

Consequently, it is appropriate to contend that the EU should embrace and assume its responsibility as the touchdown point for its many corporate actors, and that, since this fifth criticism and the four former have been mostly discarded, the insertion of the domicile of the tortfeasor as an additional connecting factor should proceed. The domicile of the tortfeasor appears as an adequate and appropriate possibility, from a *favor-laesi* and an EU-environmental-principles perspective, in order to correct the so-called “black hole” in Article 7 of the Rome II Regulation. This is so, notwithstanding the fact that there is, at least, one more *de lege ferenda* possibility which deserves to be considered, even if only briefly.

vi. *A practical solution: Manipulation of the spatial scope of the Rome II Regulation*

As seen *supra*, the first foundational deficiency in Article 7 of the Rome II Regulation (global governance aspect) arises, *inter alia*, from the discordance between, on the one hand, the universal scopes of the Rome II Regulation and the EU’s environmental policy, and, on the other hand, the “neighbouring” / intra-European reasoning embodied in the provision¹⁷⁴¹. This discordance prevents the rule from living up to its environmentally-protective vocation *inter alia* in merely international environmental torts arising outside of Europe. Taking this into account, an additional *de lege ferenda* possibility to be considered entails manipulating the spatial scope of application of Rome II, so that the elements at stake get to be realigned in a policy-coherent way. In this sense, manipulating the spatial scope of application as regards Article 7 would be a means to counteract the “neighbouring” reasoning that underlies the provision, and to allow the article to properly develop its role in a global governance framework. For instance, the following paragraph could be added to Article 3 of the Regulation:

plaintiffs appeal Chevron Canada court ruling”, available on June the 24th 2017 (<http://business.financialpost.com/legal-post/ecuadorian-plaintiffs-appeal-chevron-canada-court-ruling/wcm/9993fff7-1651-4c3c-8f9b-772193ef5fc5>).

¹⁷⁴⁰ *Vid.* R. WAI, “Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization”, *op. cit.*, p. 266.

¹⁷⁴¹ *Vid. supra* “The first congenital deficiency of Article 7 of Rome II”. It must be recalled that: i) the universal character of the Rome II Regulation (its application to any given situation despite its geographical location) arises from Article 3 of the Regulation, and ii) not only the EU’s environmental policy is global in its scope, but also many instruments of EU environmental law establish their “extraterritorial” application.

"As an exception, Article 7 may only point to the law of a Member State of the European Union. If the relevant events arise outside the European Union, Article 7 may only lead to the application of the law of the most closely connected Member State".

This proposal has the disadvantage, however, of blocking the application of an extra-European *lex loci damni* even in those hypotheses where the victim would consider that its content is beneficial for her purposes¹⁷⁴². While the suggestion just put forward would be the most coherent one (in the light of the developments presented in previous chapters) it is possible to equally conceive manipulating the scope of application of the Regulation in the opposite sense: if the protective dimension of Article 7 is to be understood as being limited to the European territory, Article 3 and / or recitals 24 and 25 of the Regulation may explicitly state that Article 7 only aims at achieving protective outcomes as regards the environment and environmental victims of the EU. However, while this is legally feasible, on the political and policy levels, it would significantly undermine the EU's desired environmental leadership. Neither of both proposals does, nevertheless, address the potential deficiencies in the article's performance in intra-European merely international environmental torts.

On a different note, these considerations point to a different debate which is too large and complex to be fully addressed in here, but which can, nonetheless, be summarily introduced. In recent times, the European Union has chosen to legislate in the field of private international law by enacting universal instruments, therefore establishing rules which are meant to be resorted to both in intra-European and extra-European cases¹⁷⁴³. Nevertheless, the policy implications of a given set of events may vary widely depending on whether it arises within or outside the EU's context. Therefore, before enacting universal rules, it should be carefully considered whether it is politically acceptable that the same policies be implemented in both kinds of situation or not. Or in other words, whether both kinds of situations require and / or deserve equal treatment. This is by no means a plead for an answer in one sense or in the other, especially since the topic, as stated, would require a thorough study. It is, however, a plead for consistency. If it is not politically acceptable that the same policies be implemented in intra-European and Extra-European situations, then rules need not be universal, or else corrective mechanisms – as for instance, the Anglo-common law *forum non conveniens* – need

¹⁷⁴² Moreover, it entails a minor technical change: the disconnection between the two senses of the notion of spatial scope of application. The spatial scope of application of the Rome II Regulation has two different dimensions: one of its dimensions refers to the spatial / geographical coordinates of the factual situation at stake (i.e. where in the world the tortious events took place), and the other, the one explicitly enshrined in Article 3, refers to which legal systems may be rendered applicable by the Regulation's choice-of-law rules ("Article 3 Universal application" – "Any law specified by this Regulation shall be applied whether or not it is the law of a Member State"). The proposal, on a technical level, entails a scission between the two dimensions of the spatial scope of application of the Regulation. It, nevertheless, does not have major practical consequences.

¹⁷⁴³ "Universality", in this sentence, is used in order to refer to instruments which are to be applied irrespectively of where in the world the relevant facts take place. For a reflection on the two distinctive senses of the term "universality" (as regards the geographical placement of situations covered, or else as regards the countries whose laws can be pointed to by the choice-of-law rule) *vid.* M. FALLON, "Les conditions d'un code européen de droit international privé", in M. FALLON, P. LAGARDE, S. POILLOT-PERUZZETTO (dir.), *Quelle architecture pour un code européen de droit international privé*, Peter Lang, 2011, pp. 1-30, at pp. 14-16 ; and then, more specifically, M. FALLON, "Le domaine spatial d'un code européen de droit international privé", in M. FALLON, P. LAGARDE, S. POILLOT-PERUZZETTO (dir.), *Quelle architecture pour un code européen de droit international privé*, Peter Lang, 2011, pp. 137-184.

to be introduced in order to operate distinctions¹⁷⁴⁴. If, on the other hand, it is indeed politically acceptable that the same policies be implemented in intra-European and Extra-European situations, then the rules enacted need to fully and effectively fulfill their objectives in both kinds of situations. These considerations should have been kept in mind when Article 7 of the Rome II Regulation was drafted.

V. Conclusions on the foundational deficiencies of Article 7 of the Rome II Regulation

The EU's seemingly well-intentioned introduction of Article 7 in the Rome II Regulation was probably not accompanied by an exhaustive exploration of the adaptations that the Regulation's general rules would require in order to adequately accommodate that provision. In this sense, the above-presented assessments of Article 17 and Article 7 of the Rome II Regulation have made obvious that their underlying ratios seem to contradict each other and clash. How is it possible to conciliate a provision which aims at striking "*a reasonable balance between the parties*" and a provision which aims at "*a high level of protection based on*", amongst others, "*the principle of discriminating in favour of the person sustaining the damage*"?¹⁷⁴⁵ This could have been noticed from the very early stages of the Rome II legislative process: prongs number 1 and number 5, amongst the relevant excerpts from the explanatory memorandum identified above, already depict this conflict¹⁷⁴⁶: the focus in the first prong on "*strict liability*" indicates that whether the conduct is reprehensible or not is considered to be irrelevant, hence why *lex loci damni* (and not *lex loci actus*) is the "*primary solution*" in the elective structure of Article 7. Conversely, the fifth prong, which deals with the interplay with Article 17, expresses the wish to somewhat justify the polluter's conduct, thus introducing a fault-based conception of liability. This concern for striking "*a fair balance*" is, therefore, not compatible with a strict / objective conception of liability. Moreover, the ratio

¹⁷⁴⁴ Precisely, this point should be considered carefully. It is true, for instance, that, in general, in North-American conflict of laws, (case-law) rules tend to apply both to inter-state conflicts and international conflicts. However, the different – Federal or international – policy stakes are addressed on a case-per-case basis, and modulated through the recourse to mechanisms as *forum non conveniens* or else to the flexibility provided by the case-law nature of rules. The fact that the EU is building its private international law on universally applicable statutory rules, and that such universality is not accompanied with mechanisms resembling those referred may put the EU in a delicate situation as regards external / international conflicts of laws. Until the entry into force of the *Treaty of Lisbon* the EU's private international law was built upon an "internal market" logic. This logic is probably evolving now that one of the EU's goals is the construction of an "Area of freedom, security and Justice". Can the – statutory and case-law – private international law solutions conceived in an internal-market frame be "exported" to an international / global context? Would there be any change on the answer to the previous question with the change in paradigm from "internal market" to "Area of freedom, security and Justice"? Are there two different logics to private international law depending on whether the situation at stake is internal or external? Could this give rise to two different sets of – statutory or case-law – private international law rules? And would the fact of having two different sets of private international law rules amount to discrimination / breach of equal treatment?

¹⁷⁴⁵ *Vid.* Rome II, recitals 34 and 25, respectively.

¹⁷⁴⁶ *Vid. supra* Box 20.

behind Article 17 further clashes with the multiple references to the EU's Commission alleged will to "*rais[e] the general level of environmental protection*": it makes no sense to introduce means to reduce reparation / compensation, due to the fact that rules of security and conduct are more permissive elsewhere, when the alleged intent of Article 7 is to force potential polluters "*to abide by the higher levels of protection in neighbouring countries*".

In the current state of affairs, if Article 17 is literally interpreted, the alleged quest for a reasonable balance between the parties to the dispute would seem to annihilate the core principles that sustain Article 7. This interpretative choice would entail severe legal consequences, which could amount to *de facto* blocking the effectiveness of Article 7, and completely voiding the set of interests reflected therein. In the light of these considerations, Article 17 would urgently require an amendment, or interpretative adaptation, in respect of environmental torts, in order to adapt its content to that of Article 7.

As a consequence of all that has been explained, the second congenital deficiency of Article 7 (its environmental-standards-related difficulties) must be dealt with as follows:

- i) First, the alleged inability (following a conservative approach) of choice-of-law rules to "drag" public-law rules when the *lex causae* is not the *lex fori* simply cannot be accepted as regards Article 7, in order to preserve the provision's *effet utile*: if the said classic postulate is not ignored and rejected Article 7's effectiveness would simply be severely undermined.
- ii) Second, as regards the incompatibility between Article 7 and Article 17: the latter cannot be used in a pro-polluter sense because, otherwise, it would *de facto* undermine the former's effectiveness.

If these goals cannot be attained through judicial interpretation, then Article 17 of Rome II, as a general provision in the Regulation, must be amended to cater for the needs of Article 7, a content-oriented and special provision.

Ultimately, the maximization of the *effet utile* of Article 7 would require: i) that it was fully capable of determining the spatial applicability of any relevant environmental standard whenever the victim needed it; ii) that the victim was allowed, if needed, to perform a *dépeçage* in her choice, and select the standards from one legal system and the private-law elements from another. As it may be understood, this is unlikely to become the case, *inter alia* because it would require a substantial amendment of the article, which would run against some traditional ideas in the general theory of private international law. Other than these reflections, it seems important to highlight that this pertinence of *dépeçage* somewhat points to the idea that the North-American assumptions described in previous chapters on the loss-distributing and conduct-regulating rule typology, and their different vocations for spatial applicability, are not absolute. The country where the effects of a certain conduct are felt may have a legitimate interest – and indeed an acute one – in regulating conduct that impacts in its territory, inasmuch as it does impact upon it.

Yet there is another foundational deficiency: the one that arises from the misalignment between, on the one hand, the spatial scopes of application of the Rome II Regulation and the EU's environmental law and policy, and, on the other hand, the spatial reasoning which

underlies Article 7 of the Rome II Regulation. Previous sections have demonstrated the existence of this additional deficiency, and thus, that the provision is incapable of fulfilling its policy objectives in a significant share of the cases that may come within its scope.

After having explored several different proposals in order to correct or mend the said congenital deficiency – amongst which, both *de lege lata* and *de lege ferenda* options – it would seem that the best *de lege ferenda* option is the insertion of a connecting factor pointing to the domicile of the tortfeasor. Arguments in favor and against this proposal, as well as counterarguments, have been put forward. Overall, introducing the said connecting factor would bring Article 7 of the Rome II Regulation in line with the global environmental leadership role that the EU, allegedly, intends to fulfill.

It seems, therefore, that while, in principle, the environmental policy of the European Union has the potential to be adequately enforced (“privately” enforced) through its environmental PIL mechanism, the way that the law stands nowadays, such enforcement does not live up to the objectives that had been set during the enactment of Rome II. Beyond these considerations, some final conclusions to the ensemble of this dissertation will be delivered in the following pages.

Final conclusions

Chapter 1 begun by introducing the core concepts and notions that revolve around this dissertation's theme, and went on to provide a first approximation to one of its fundamental questionings: ascertaining whether it is effective to intervene in environmental matters through the means of multilateral choice-of-law rules – any multilateral choice-of-law regime on environmental torts, not necessarily the one in force in the EU. It concluded by acknowledging the existence of a first problematic issue: due to the difficulties faced by substantive tort law in prompting deterrence as regards economically powerful tortfeasors, it is highly unlikely that potential polluters may feel a threat coming from multilateral choice-of-law rules dealing with international environmental torts. Therefore, it was established that the core result that may be achieved through the intervention of multilateral private international law in environmental matters is, in principle, damage compensation, but hardly ever deterrence.

Chapter 2 approached the said intervention from a different perspective: it provided an assessment of the interplay and relationships amongst any multilateral choice-of-law regime dealing with environmental torts – again, not necessarily the one in force in the EU – and other preexisting legal mechanisms and regimes in respect of the protection of the environment. This assessment led to consider that, despite the chaotic multiplicity of international legal instruments that are involved in one way or another in environmental protection, most of them are preventive in nature, and very few of them are compensatory. Consequently, multilateral choice-of-law mechanisms benefit from an extremely important leeway for their involvement in environmental occurrences for compensation purposes (there are very few “blocked fields”), and may, moreover, fulfill a default role (*“droit commun”*) wherever a specific thematic field has been occupied by another compensation-providing international legal mechanism (as it is the case, for instance, in respect of oil-pollution at sea). These findings reinforce the impression, already voiced some 15 years ago by M. Anderson, that:

“The considerable growth in transnational environmental tort cases is likely to continue simply because affected communities and environmental activists find this to be the only legal tool at their disposal. Yet problems of corporate structure, access to courts, and applicable law continue to pose real obstacles to the application of effective environmental standards through tort litigation. Civil liability has an important but inevitably limited role to play in environmental management. That its profile is much

*higher in the transnational context is simply testimony to the lack of other accountability mechanisms*¹⁷⁴⁷.

After having abstractly examined in Part I (Chapters 1 and 2) whether it is effective to intervene in environmental matters *via* multilateral choice-of-law rules, and having concluded that the answer is, in principle, positive, the effectiveness of the specific environmentally-protective mechanism of private international law enacted by the EU was put to the test in Part II.

Chapter 3 constituted a transition from the general framework of thinking embodied in Part I to a specific European-centered reasoning, focused on the very mechanism enacted in the EU. It did so by introducing several effectiveness-hindering stakes which may be faced by any similar mechanism enacted anywhere in the world, but presenting, however, the responses – or lack thereof – that EU has provided. It only extended its considerations to the US legal system wherever comparative-law thinking was needed, or the very nature of the topic addressed required a review of the developments of the North-American legal experience. The said stakes did not directly pertain to the nature of or to any specific configuration of choice-of-law rules, but to structural (scope and operability-related) aspects or “procedural” elements (*forum non conveniens* and the use of the separate legal personality of subsidiaries to build shields of networks thereof). The analysis of the said stakes led to concerning conclusions in many instances, as it was the case of *forum non conveniens*, which despite appearances, has not been completely neutralized in the European Union. This was also the case, notably, in respect of the lack of appropriate means of environmental collective redress at EU level, which, coupled with the limitation in the involvement of the State in private-redress proceedings, meant that there is a significantly worrying obstacle in the redressability of damage to the *stricto sensu* environment in the EU. This is a consequence of the fact that the *stricto sensu* environment is a collective legal good, and, procedurally, the concurrence of all relevant subjects would be required in order to enforce the relevant rights, unless any given subject is individually provided with appropriate entitlement to legally do so. It was established that, as a public legal good, the *stricto sensu* environment needed to be somehow “translated” into private-law terms, in order to un-block its private enforcement, which, as the law stands nowadays, is subtly underdeveloped in the EU. In order to do so, the introduction of North-American-style “citizen-suit” provisions and “Cy pres” schemes of compensation was suggested.

The fourth and final chapter addressed two intrinsic (hidden) failures in the EU’s choice-of-law rule on environmental torts, which significantly undermine its effectiveness. It first addressed the complexities that arise from the interface between public-law environmental standards and private international law, and assessed Article 17 of the Rome II Regulation, which is meant to help manage the said complexities. It was concluded that, in environmental damage cases, if literally interpreted, the current configuration of Article 17 is incompatible with the *favor laesi* principle, the polluter-pays principle, and, possibly, other principles of EU environmental law. And therefore, if literally interpreted, Article 17 severely undermines the *effet utile* of Article 7. Moreover, if there is not, at least, an analogical pro-victim interpretation

¹⁷⁴⁷ M. ANDERSON, “Transnational Corporations and Environmental Damage: Is Tort Law the Answer?”, *op. cit.*, p. 424.

and application of Article 17, the provision, under its current wording, is plainly contrary to the *favor laesi* principle.

An additional foundational deficiency that Article 7 suffers from is that it is not able to “increase the level of environmental protection” (as the European Commission contended it would) in a specific set of situations which, nevertheless, come within its material scope: the rule is ineffective when confronted with “merely international” environmental catastrophes caused by European polluters in developing countries. In these cases, chances of attaining deterrence of environmental damage shift from “rare” to “almost impossible”, and compensation remains, due to the specificities of these scenarios, very limited. It is true that “merely international” torts may be problematic *per se*, irrespective of their location: in both intra-European “merely international” torts and Extra-European ones there is a mismatch between the environmental objectives established for Article 7 and the “neighbouring” logic that the said provision is built upon. However, the issue is less acute in intra-European cases because: i) environmental standards are supposed to be fairly decent, and to a certain extent “similar” throughout the European Union (there is – allegedly – a minimum amount of environmental harmonization, through directives); ii) private-law systems are supposed to be able to cope with these sophisticated torts (which should render the lack of choice less harmful). Moreover, there is an additional dimension of mismatch in respect of Extra-European merely international torts: the lack of satisfactory results in these scenarios (despite the “universal application” of Article 7 of Rome II) is in dissonance with the universal scope of the EU’s environmental policy (and the extraterritorial application of certain EU environmental law instruments). This latter aspect allows to qualify the problem in respect of Extra-EU situations as a global governance gap.

To be sure: what is at stake in here is not whether the European Union wants to provide “humanitarian environmental help” to third countries (possibly at the expenses of its industry) or not. The problem lies on the fact that a universal scope of application has been granted to the relevant article, but its structure does not allow it to fulfill the objectives that have been assigned thereto at a global scale. Thus, since (at least at first sight) Article 7 seems to be better prepared to cope with transboundary environmental torts (where if one legal system is unsatisfactory, hopefully the other will not be), this dissertation has suggested that the outcomes that the article leads to should be corrected. This may be done, either through legislative amendments (for instance, as suggested in Chapter 4, through the insertion of an additional connecting factor pointing to the domicile of the polluter), or else without changing the article’s wording, through corrective interpretation. This is so, because, overall, the root of the problem lies in the fact that “merely international” environmental torts and transboundary environmental torts are conceived as being different problems, but treated identically, and this is troublesome in conflict-of-laws terms. For the system to run smoothly, and for the relevant policies to unravel adequately, one out of two possible shifts is required: i) if the two situations are going to be considered as different problems, due to the apparent differences in their geographical structures, then two different rules are required, catering in each case for their apparent different natures and specificities (specialization of the choice-of-law provisions); ii) if both situations are going to be dealt with through the means of a single choice-of-law rule, then the rule needs to overcome the apparent structural differences and treat both situations identically, as a single problem: as contended *supra*, it needs to be understood then, that in

“merely international torts” not only the environmental risk, but the command and control schemes (transmission of orders) bridge over national frontiers.

Amongst the options that do not require legislative action, overriding mandatory rules and the *ordre public* exception were also considered, but discarded, for they are unsuitable options. Overriding mandatory rules may possibly help under very specific conditions (whenever the relevant environmental standards are low, the overriding mandatory rule establishes a higher environmental standard, and the applicable tort law is fault-based) but are of no use when difficulties arise from the inadequacy of the applicable tort law (for, in principle, at least at European level, there are no environmental-tort-law overriding mandatory provisions). Then, as regards the *ordre public* exception, notwithstanding the need to conduct empirical research, it seems unlikely that environmental values may have reached the *ordre public* status anywhere, if not in the Scandinavian countries. The only potential role that *ordre public* may, perhaps, come to play does not rest on the *stricto sensu* notion of the environment, but on the *lato sensu* one. If instead of considering the defense of the environment *per se*, the defense of human life and health, or even human property, are considered the conclusion may change: taking into account the human-rights *acquis* shared by the EU Member States, a potential *ordre public* exception seems more likely to succeed if its aim is to block the application of a legal system which nullifies the fundamental right to life and / or health by providing inadequate or non-existing compensation. Moreover, if the application of a legal system leading to the award of “disproportionately high” (punitive) damages cannot be accepted (following certain academic accounts), why should it not be the case as regards “disproportionately low” (human-dignity-breaching) ones too?¹⁷⁴⁸ It must be acknowledged, however, that this human-dignity-inspired *ordre public* would not necessarily help the *stricto sensu* environment, or, in any case, only collaterally¹⁷⁴⁹.

These last remarks actually point to the need to ensure that, whenever environmental policy is dealt with and discussed, environmental damage *lato sensu* and environmental damage *stricto sensu* are neatly distinguished – as it has been the case throughout this dissertation – for the policy arguments and policy reasoning that work in respect of one may not work in respect of the other. This goes beyond the fact that, as seen in Chapter 3, entitlement and procedural paths to defend each of them varies widely. This idea refers to the fact that, for instance, as environmentally-counterproductive as it may seem, arguments on economic sovereignty in respect of natural resources may possibly justify, to a certain extent, *stricto sensu* environmental damage (provided that the damage remains within the relevant State’s national borders and does not impinge upon neighbouring / other countries). But, the same arguments may not justify, however, *lato sensu* environmental damage, for, again human dignity should act as a limit thereto¹⁷⁵⁰. Therefore, it is fundamental to insist again on the idea that the two

¹⁷⁴⁸ Ordre-public blocking of inadequate compensation and Ordre-public blocking of punitive damages are the reverse of the same coin: Foreign law not accepted under a certain threshold of “money damages” for ordre-public reasons (breaching human dignity).

¹⁷⁴⁹ If the deterrent value of tort law was to be accepted, then it would be possible to potentially envisage a protective *effet reflète*, whenever procedural means allow for that: the fear of paying adequate compensation on human life may indirectly protect the *stricto sensu* environment.

¹⁷⁵⁰ If not human rights, for it may be controversial to resort to them (as explained in Chapter II, they suffer of fragmentation, despite the common underlying philosophy which connects all the various human rights regimes in force around the globe).

dimensions of the environment (*lato sensu* and *stricto sensu*) need to be clearly distinguished whenever policy reasoning and law-drafting are on the making.

All of these reflections lead to consider that, while the specific provision enacted by the EU is disappointing (for, as previously indicated, it does not fully and adequately fulfill, under all circumstances, the objectives that had been assigned thereto during the enactment of Rome II), in general, it may be effective to intervene in environmental matters *via* multilateral choice-of-law rules. In other words, putting aside the fact that the EU's attempt fell short of its own pretensions, the resort to content-oriented choice-of-law rules seems to be a suitable method for the construction of private international law as a tool of global governance in the 21st century: it is possible and effective to project substantive policies to the transnational sphere *via* conflict-of-laws (even when it is not done correctly). Some of the objections that may be raised against this opinion were already addressed in Chapter 4, as objections against the *de lege ferenda* proposal presented therein. As it may be recalled, the threat of offshoring, as an argument against the projection of substantive policies, needs to be relativized: corporate mobility depends on an ensemble of factors, not on the amendment of a single act or legal provision (unless the provision in question is absolutely fundamental for the corporate actor in question). And, moreover, Eurostat's empirical research demonstrates that regulatory frameworks (especially, "environmental" law) are not the most decisive elements within the said ensemble of factors. Furthermore, the alleged corporate "liftoff" that R. Wai assesses in his work only exists, as Wai acknowledges himself, because States support its existence¹⁷⁵¹. And, even more so, even if a worst-case scenario in terms of corporate mobility was presupposed, actors still need to have "roots" somewhere. Thus, since "*touchdown points are potential locations to regulate conduct of transnational actors*"¹⁷⁵², there may be a strong argument for asserting that the potential of choice-of-law as a tool of global governance is already significant and should be further explored. This suggestion may be controversial: projecting values towards the supranational sphere goes directly against some of the classic "myths" that private international law has traditionally been built upon (conflicts justice, conflict-of-laws neutrality, international uniformity of solutions, etc.). Abandoning those myths may, nevertheless, be the only way to move forward in respect of important themes in global governance, as the protection of the environment, and in respect of the role that private litigation may play therein.

The projection of values faces, however, possible difficulties, amongst which, diplomatic friction: States other than the "asserting" one, may consider that the projection of values through choice-of-law rules leads to unacceptable outcomes in situations where their subjects are involved. By fortune, this scenario, as delicate as it may seem, may, paradoxically, lead to positive outcomes, under certain circumstances: it is contended that moderate diplomatic friction "*actually promotes long-run international cooperation by providing stronger incentives*

¹⁷⁵¹ *Vid.* R. WAI, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization", *op. cit.*, p. 264 (Wai's account of the "liftoff" is however limited, in my opinion: he focuses on international arbitration as a means to "escape" domestic courts. I believe it is more important to keep in mind, if anything, the potential for mobility that corporations, at least theoretically, have).

¹⁷⁵² *Vid.* R. WAI, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization", *op. cit.*, pp. 265-266.

to negotiate”¹⁷⁵³. A rather graphic environmental example thereof may be found in the facts that have ensued the above-commented *Air Transport Association of America and others* ECJ-ruling (which, although not explicitly, is a choice-of-law case): the aftermath of the decision has led to the negotiation, within the framework of the International Civil Aviation Organization (ICAO), of a “*global market-based mechanism to address international aviation emissions by 2020*”¹⁷⁵⁴.

In other cases (i.e., in those situations where no diplomatic tension with other States appears), the projection of values is a responsible legislative attitude for States to take, even when it is difficult to assume and implement. The realm of environmental matters also provides a good example in this sense: whenever the projection of environmental values does not impact upon the subjects of other States, and does not, therefore, “*provide incentives to negotiate*”, States face a first-mover dilemma: they may be reluctant to enforce environmental values (be it through multilateral choice-of-law means or otherwise) if other States do not act similarly, for the move may be detrimental to their interests, and those of their own corporate actors. As mentioned *supra*, following Sykes, industrial sectors from other States (the non-movers) would be economically advantaged by the responsibility that “green States” would impose upon the shoulders of their own industries. How to respond to this challenge is a matter of political will, one which in the European Union should be considered from the standpoint of the alleged environmental leadership that the EU intends to assume. It is certainly not a matter of (lack of) technical feasibility: this dissertation has demonstrated that private international law possesses the means to effectively introduce (and assert) substantive values in global governance schemes (even in environmental global governance), through multilateral content-oriented choice-of-law rules.

Therefore, it all boils down to, again, the maxim that “*with great power comes great responsibility*”. Also in terms of international jurisdiction and choice of law.

¹⁷⁵³ W. S. DODGE, “Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism”, *Harv. Int’l. L. J.*, vol. 39, 1998, pp. 101-169, at p. 106.

¹⁷⁵⁴ *Vid.* the explanations provided in the following official webpages (available on March the 17th 2017):
https://ec.europa.eu/clima/policies/transport/aviation_en and
https://ec.europa.eu/transport/modes/air/environment_nl

LITIGACIÓN MEDIOAMBIENTAL “INTERNACIONAL PRIVADA” ANTE TRIBUNALES
EUROPEOS: LA ELECCIÓN DEL DERECHO APLICABLE COMO HERRAMIENTA DE GOBERNANZA
GLOBAL MEDIOAMBIENTAL

Durante el siglo XX y el comienzo del siglo XXI nuestra sociedad ha evolucionado enormemente como resultado del desarrollo de la ciencia, el comercio, la industria y la tecnología. Esta evolución, aunque enriquecedora, ha tenido y sigue teniendo un profundo impacto en el frágil equilibrio natural de nuestro planeta. Tanto los dramáticos accidentes ecológicos que han ocurrido en las últimas décadas como el impacto de la contaminación diaria derivada de actividades empresariales están ejerciendo una intensa presión sobre los ecosistemas y los recursos naturales de todo el globo. Esta presión puede llegar a amenazar la vida humana a largo plazo. Debido a ello, han surgido, a escala global, serias preocupaciones respecto a la calidad del medioambiente. El carácter internacional de estas preocupaciones se debe, generalmente, al hecho de que las amenazas medioambientales tienden a tener una dimensión global, pero también, específicamente, al hecho de que muchas formas de contaminación no “conocen” fronteras, y pueden propagarse fácilmente de un país a otro. Estas preocupaciones tienen su origen en dos fenómenos sociales acaecidos durante la segunda mitad del siglo XX: por un lado, el desarrollo de un amplio trabajo de sensibilización, realizado por la comunidad científica, en relación con la necesidad urgente de actuar para proteger el medio ambiente a escala mundial. Por otro lado, el impulso paralelo ganado en todo el mundo por el ecologismo como movimiento social. Gracias a este contexto, la comunidad internacional tomó conciencia de la necesidad de contar con instrumentos jurídicos, nacionales e internacionales, destinados a proteger el medio ambiente de los daños causados por las actividades humanas. En este sentido, en esta “era de la movilidad global sin precedentes del capital y del ser humano”¹⁷⁵⁵, han aparecido varias tendencias legales, tanto a nivel nacional como internacional, que abordan la protección del medioambiente en un sentido amplio: protección como diversas formas de acción preventiva, y protección como reparación y compensación del daño ya acaecido.

Tradicionalmente, tal vez siguiendo el conocido dicho “*más vale prevenir que curar*”, el objetivo principal de la acción legislativa medioambiental ha sido la creación de marcos legales de tipo preventivo (evitación del acaecimiento de daños medioambientales). Esto se debe, probablemente, a que los daños al medioambiente tienden, con demasiada frecuencia, a ser irreparables. Los referidos marcos legales se componen, principalmente, de mecanismos jurídicos impulsados por sujetos públicos, y reflejan diversas formas de control administrativo

¹⁷⁵⁵ Vid. U. BAXI, "Mass Torts, Multinational Enterprises Liability and Private International Law", *Recueil des Cours de l'Académie de Droit International*, vol. 276, Leiden, Martinus Nijhoff, 1999, p. 307.

/ regulatorio de las actividades privadas, y de la gestión de los recursos naturales, etc. Esto ha sucedido tanto a nivel nacional, como a nivel internacional. La tendencia a privilegiar la prevención *ex-ante* es, probablemente, incluso más clara en el segundo. Sin embargo, como se ha mencionado, aparte de la acción preventiva, un enfoque alternativo a los problemas medioambientales ha visto la luz en tiempos recientes: un enfoque *ex post*, compensatorio, que se centra en sujetos privados (contaminadores sujetos-privados y víctimas sujetos-privados), lo que lleva a una conceptualización de derecho privado de los problemas del medioambiente. Esta tendencia se resume en que una situación de daño ambiental puede ser concebida en términos legales como una relación extracontractual entre sujetos privados, que daría lugar a la obligación de compensación / reparación del daño por el - supuesto - autor del mismo. Esta conceptualización se ha expandido lentamente, tanto en el plano nacional como en el internacional, donde es reconocida incluso por juristas internacional-publicistas.

En consecuencia, a pesar de la preeminencia evidente de formas de intervención legal *ex ante*, ciertos esfuerzos han cristalizado en décadas recientes, tanto a nivel nacional como internacional, en lo que se refiere a centrar la reparación de daños al medioambiente en sujetos privados: en Europa Occidental, se pueden encontrar ejemplos de esta tendencia en Alemania o Italia, por ejemplo. Dichos esfuerzos legislativos, sin embargo, han adoptado diferentes formas a nivel nacional: en ciertas ocasiones han llevado a la elaboración de normas especiales específicas; en otros casos, simplemente han conllevado una interpretación amplia o reconceptualización de las reglas generales sobre responsabilidad civil extracontractual. A nivel internacional, este marco de razonamiento ha conducido a la aparición de una corriente de pensamiento que sostiene la necesidad de la participación del Derecho Internacional Privado en asuntos medioambientales.

El Derecho Internacional Privado puede ser definido como la disciplina jurídica que se ocupa de relaciones jurídicas entre sujetos de derecho privado que se caracterizan por la presencia de un elemento internacional¹⁷⁵⁶. En consecuencia, si la conceptualización compensatoria y *iusprivatista* antes mencionada se aplica a daños medioambientales surgidos a nivel internacional, esto conlleva necesariamente la intervención del Derecho Internacional Privado. Esta intervención puede adoptar dos formas principalmente: la primera forma de intervención es la elaboración de normas sustantivas uniformes, consagradas en convenios internacionales. El ámbito medioambiental cuenta con varios instrumentos internacionales que establecen regímenes sustantivos de responsabilidad civil. Estos instrumentos tienen por objeto la protección de ciertos aspectos específicos del medio ambiente, mediante la canalización de la responsabilidad a sujetos privados. La segunda forma de intervención, que es la más común – hasta el punto de que muchos autores identifican esta técnica con la noción misma de Derecho Internacional Privado – es el llamado método conflictual: debido a que el mundo está compuesto por una pluralidad de órdenes jurídicos, las relaciones de derecho privado que están simultáneamente conectadas con varios de los mismos requieren la identificación del derecho aplicable a las controversias que derivan de las mismas y – con carácter previo, la identificación de los tribunales nacionales competentes para dictar sentencia al respecto. Así, a través del método conflictual, el Derecho Internacional Privado

¹⁷⁵⁶ Vid. J.C. FERNÁNDEZ ROZAS & S. SÁNCHEZ LORENZO, *Curso de Derecho Internacional Privado* (7 ed.), Madrid, Civitas, 2013, p. 24.

funciona como una herramienta de coordinación entre ordenamientos jurídicos nacionales: en materia medioambiental, la necesidad de dicha coordinación jurídica se corresponde principalmente con el hecho de que, dejando a un lado los referidos convenios sobre responsabilidad por daños a aspectos específicos del medio ambiente, siguen existiendo importantes divergencias entre los diferentes ordenamientos jurídicos nacionales.

Sin embargo, más allá de este necesario rol de coordinación jurídica, imprescindible en aras de permitir la existencia del enfoque de reparación / compensación internacional *ex post*, el Derecho Internacional Privado puede contribuir aún más a la mejora de la protección del medio ambiente a nivel internacional: frente a la mera coordinación jurídica articulada a través de “normas de conflicto” clásicas (que, en principio, son neutrales / ciegas a políticas legislativas), se sostiene que las llamadas normas de conflicto “materialmente orientadas” pueden sostener ciertas políticas materiales en la escena internacional, como la protección del medio ambiente. Por lo tanto, a través de normas de conflicto “materialmente orientadas”, el Derecho Internacional Privado puede responder a la necesidad de nuevas formas de intervención jurídica en asuntos medioambientales: dichas normas pueden determinar la aplicación de sistemas jurídicos que fomenten la implementación de políticas pro-ambientales.

Después de algunas décadas de reflexión académica, la Unión Europea ha reconocido el potencial del Derecho Internacional Privado como mecanismo para intervenir en casos de daño medioambiental internacional, y ha legislado a nivel europeo en consecuencia: en el marco de Derecho Internacional Privado de la Unión Europea se ha introducido un artículo específico sobre derecho aplicable a daños al medioambiente en el Reglamento (CE) nº 864/2007. Dicho Reglamento (conocido como Reglamento “Roma II”) es el instrumento jurídico que, de modo general, se ocupa, en la actualidad, de la cuestión del derecho aplicable a obligaciones no contractuales cuando se plantean litigios relativos a las mismas ante los tribunales de toda la UE (con la excepción de Dinamarca).

El “artículo específico” que se ha mencionado es el artículo 7 del Reglamento, que se inspira en los principios de Derecho Medioambiental de la Unión Europea, y en el principio *favor Laesi* – el principio de discriminar en favor de la persona dañada. Este artículo establece que las víctimas de daños medioambientales pueden elegir la ley aplicable a tales daños a su conveniencia, entre la *lex loci delicti commissi* – la ley del lugar donde el hecho causal del daño se produce – y la *lex loci damni* – la ley del lugar donde el resultado dañoso se produce. A través de la elección entre las dos referidas leyes potencialmente aplicables, se ofrece a la víctima la posibilidad de maximizar la reparación que el contaminador debe pagar, a través de la elección de aquella que conduzca a una compensación económica más sustancial. Se supone que este privilegio estratégico tiene por objeto producir un intenso efecto disuasorio en posibles contaminadores, lo que debería conllevar un aumento del nivel de protección medioambiental vigente en la escena internacional. Así, la Comisión Europea considera que el objetivo de la norma referida no sólo contribuir al respeto de los intereses legítimos de las víctimas, sino también el establecer una política legislativa que contribuya a elevar el nivel general de protección del medio ambiente.

El artículo 7 del Reglamento Roma II está acompañado en el campo de la competencia judicial internacional de los *foros* contenidos en los artículos 4.1 y 7.2 del Reglamento (UE)

nº 1215/2012. Este Reglamento, conocido como Reglamento "Bruselas I BIS", es el instrumento jurídico que regula de modo general la competencia judicial internacional y el reconocimiento y ejecución de resoluciones judiciales en materia civil y mercantil en la UE. En conjunto, los tres artículos mencionados constituyen las principales disposiciones de Derecho Internacional Privado que son pertinentes para los daños internacionales al medioambiente; las mismas crean un micro-régimen de "Derecho Internacional Privado Medioambiental".

El hecho de que en el mundo actual se realicen esfuerzos creativos e innovadores para tratar de abordar problemas transnacionales complejos, como los relacionados con el medio ambiente global, debe ser celebrado. Sin embargo, tras la descripción hecha en las páginas precedentes, es legítimo preguntarse si este tipo de intervención legal es realmente útil en términos de protección medioambiental. ¿Es realista tratar de difundir políticas protectoras del medioambiente a través de mecanismos de Derecho Internacional Privado? Si fuera así, ¿qué políticas? ¿preventivas, compensatorias? ¿Y respecto a qué ámbito territorial, global o regional? Dicho de otra manera, ¿qué roles o funciones pueden ser efectivamente cumplidos por este tipo de herramientas legales? ¿Puede este tipo de herramientas, más allá de proporcionar protección, mejorarla? A la luz de todo lo anterior, la presente tesis doctoral se dio por objetivo el evaluar la manera en que el Derecho Internacional Privado puede contribuir a la protección del medio ambiente a través de normas de conflicto multilaterales relativas a las obligaciones no contractuales que surgen de los daños al medioambiente. Para ello, se centró principalmente en el ejemplo antes mencionado, proporcionado por la legislación de la Unión Europea, ya que es posiblemente la ilustración principal del enfoque referido.

En consecuencia, la tesis se estructura en torno a una interrogación aparentemente bastante sencilla: desde el punto de vista de la protección del medio ambiente ¿es eficaz intervenir en cuestiones medioambientales a través de las normas de conflicto multilaterales materialmente orientadas? Y, aún más, ¿es eficaz intervenir en dichas cuestiones con el tipo específico de norma de conflicto multilateral materialmente orientada en vigor hoy en día en la UE? El término eficacia, tal y como se ha utilizado, hace referencia a la noción de "*eficacia política*", como la describe por L. PRIETO SANCHÍS: eficacia desde la perspectiva de los objetivos políticos establecidos al elaborar la norma¹⁷⁵⁷. A la luz de las dos preguntas referidas, el objetivo del análisis realizado es doble: en primer lugar, dicho análisis intenta determinar si el Derecho Internacional Privado *en abstracto* puede servir para cumplir, de manera satisfactoria, con los objetivos de la protección del medio ambiente en general. En segundo lugar, el análisis tiene por objeto verificar si el micro-régimen de "Derecho Internacional Privado Medioambiental" vigente en la Unión Europea puede satisfacer los objetivos

¹⁷⁵⁷ L. PRIETO SANCHÍS, *Apuntes de teoría del Derecho* (9th ed.), Colección Estructuras y Procesos. Derecho, Madrid, Trotta, 2014, p. 85: "*En el sentido que he llamado político la eficacia de las normas alude a la satisfacción o realización de las finalidades u objetivos sociales o políticos en vista de los cuales fueron establecidas esas normas. Como ya sabemos, el Derecho es un instrumento para ordenar la sociedad de acuerdo con un cierto modelo o proyecto ideológico, filosófico, etc., y cuando el legislador dicta una norma en principio hemos de pensar que lo hace para algo, para producir un impacto en la sociedad a través de la orientación de las conductas de los destinatarios. A veces, las normas se muestran como instrumentos idóneos para alcanzar esos fines, y entonces se dice que son eficaces; pero en otras muchas ocasiones el legislador no acierta en el diseño de la norma y ésta o no produce los efectos esperados o incluso obtiene justamente los contrarios*".

medioambientales que le ha asignado el legislador europeo, y en su caso, bajo qué circunstancias.

El capítulo primero de la tesis comienza con la introducción y presentación de las nociones y conceptos básicos que giran en torno al tema de la misma, y proporciona una primera aproximación a una de las cuestiones fundamentales que se acaban de exponer: determinar si es eficaz intervenir en materia medioambiental a través de normas de conflicto multilaterales (cualquiera norma de tal tipo, no necesariamente la vigente en la UE). Dicho capítulo concluye reconociendo la existencia de un primer elemento problemático: debido a las dificultades con que se tropieza la responsabilidad extracontractual sustantiva para provocar disuasión en contaminadores potenciales que cuenten con poder económico, es harto improbable que los mismos puedan sentirse amenazados por las normas de conflicto multilaterales en materia de daños al medioambiente. Por ello, es preciso reconocer que el principal resultado que puede lograrse mediante la intervención del Derecho Internacional Privado en asuntos medioambientales es, en principio, la compensación de daños, pero casi nunca un efecto disuasorio.

El capítulo segundo aborda la intervención de normas de conflicto multilaterales en materia de daños al medioambiente desde una perspectiva diferente: proporciona un examen de la articulación y de las relaciones existentes entre cualquier norma de conflicto multilateral en materia de daños ambientales – no necesariamente la norma en vigor en la UE – y otros mecanismos y regímenes legales de protección medioambiental preexistentes. Esta evaluación lleva a considerar que, a pesar de la caótica multiplicidad de instrumentos jurídicos internacionales que participan de una u otra forma en la protección del medio ambiente, la mayoría de los mismos tienen una naturaleza preventiva, y sólo muy pocos son de tipo compensatorio. En consecuencia, las normas de conflicto multilaterales en materia de daños ambientales disponen de un margen de maniobra muy importante para intervenir en cuestiones medioambientales con fines de reparación (hay muy pocos “ámbitos bloqueados”), y pueden, además, actuar como “*droit commun*” respecto a aquellos ámbitos temáticos específicos que hayan sido ocupados por otros mecanismos jurídicos internacionales de tipo indemnizatorio (como ocurre, por ejemplo, con respecto a la contaminación marítima por hidrocarburos).

Después de haber examinado de manera abstracta en la primera parte (capítulos 1 y 2) si es eficaz intervenir en materia medioambiental a través de normas de conflicto multilaterales, y habiendo llegado a la conclusión de que la respuesta es, en principio, positiva, la eficacia del específico mecanismo de Derecho Internacional Privado “medioambiental” promulgado por la UE se ha puesto a prueba en la Parte II.

El capítulo tercero constituye una transición desde el marco de reflexión general de la Parte I a un razonamiento específico centrado en la Unión Europea, y específicamente, en el mecanismo promulgado en la misma. Dicho capítulo presenta varios obstáculos que pueden limitar la eficacia de cualquier mecanismo similar que se promulgue en cualquier parte del mundo, pero, sin embargo, analiza únicamente las respuestas que la UE ha proporcionado – o la falta de las mismas. El capítulo sólo extiende sus consideraciones al ordenamiento jurídico estadounidense cuando se requiere una perspectiva de derecho comparado, o la naturaleza

misma del tema tratado exige una explicación relativa a la evolución de la experiencia jurídica norteamericana. Los “obstáculos” tratados en el capítulo tercero no se refieren a la naturaleza o a la configuración de ninguna norma de conflicto en particular, sino a elementos estructurales o a aspectos colaterales de tipo procesal (*forum non conveniens* y el uso de la personalidad jurídica separada de las filiales en los grupos de sociedades para construir escudos que protejan a la sociedad matriz frente a demandas de responsabilidad extracontractual).

El análisis de estos “obstáculos” lleva a conclusiones preocupantes en muchos casos, como por ejemplo en el caso del *forum non conveniens*, que, a pesar de las apariencias, no ha sido neutralizado por completo en la Unión Europea. Este es también el caso, en particular, de la falta de mecanismos de recurso colectivo medioambiental a nivel de la UE, lo que, unido a las limitaciones de la intervención del Estado en los procedimientos de carácter privado, significa que existe un obstáculo significativo a la reparación de daños al medio ambiente *stricto sensu* en la UE. Esto es una consecuencia del hecho de que el medio ambiente *stricto sensu* es un bien jurídico colectivo, y, procesalmente, sería necesaria la concurrencia de todos los sujetos pertinentes en aras de forzar judicialmente su reparación, a no ser que se “legitime” de forma individual algún sujeto determinado. Como bien jurídico público, el medio ambiente *stricto sensu* necesita ser “traducido” a términos de derecho privado, en aras de desbloquear su “*private enforcement*”, que, en el estado actual del Derecho Europeo, está poco desarrollado en el UE. Para ello, debería de considerarse el introducir “citizen-suit provisions” y compensación “Cy pres”, al estilo norteamericano.

El cuarto y último capítulo versa sobre dos fallas intrínsecas ocultas en la norma de conflicto europea en materia de daños al medioambiente, que socavan significativamente la eficacia de la misma. En primer lugar, el capítulo aborda las dificultades que surgen de la interacción entre las normas medioambientales de derecho público y el artículo 7 de Roma II, y evalúa el modo en que el artículo 17 del mismo Reglamento (“*Normas de seguridad y comportamiento*”) puede ayudar a gestionar dicha interacción: en situaciones de daños al medioambiente, si se interpreta literalmente, la configuración actual del artículo 17 es incompatible con el principio *favor laesi*, el principio de quien contamina paga, y otros principios del Derecho Medioambiental de la UE. Por tanto, si se interpreta literalmente, el artículo 17 socava gravemente el *efecto útil* del artículo 7. Para que el artículo 17 pueda contribuir adecuadamente a la realización de los objetivos del artículo 7 en supuestos de daño medioambiental, resulta imperativo que se realice una interpretación analógica a favor de la víctima de dicha disposición. En suma, la disposición, en su redacción actual, es contraria al principio *favor Laesi*.

La segunda deficiencia congénita de la que adolece el artículo 7 es que no es capaz de “*aumentar el nivel de protección del medio ambiente*” (como la Comisión Europea sostuvo que haría) en un conjunto específico de situaciones que, sin embargo, entran en su ámbito de aplicación material: la regla es ineficaz cuando se enfrenta a catástrofes medioambientales “meramente internacionales”¹⁷⁵⁸ causadas por contaminadores europeos en países en vías de desarrollo. En estos casos, las posibilidades provocar disuasión en potenciales contaminadores

¹⁷⁵⁸ Es decir, no transfronterizas: el elemento internacional del supuesto es la identidad del contaminador, por ejemplo, una sociedad extranjera asentada en el país en el que se produce el daño.

pasan de ser "escasas" a "casi imposibles", y el potencial de compensación sigue siendo muy limitado debido a las especificidades de estos supuestos. Es cierto que los daños medioambientales "meramente internacionales" son problemáticos *per se* con independencia de su ubicación: tanto en supuestos intra-europeos como en los extra-europeos existe una discordancia entre los objetivos medioambientales establecidos para el artículo 7 y la lógica transfronteriza / "de vecindad" sobre la que se construyó dicha disposición. Sin embargo, los problemas son menos grave en los supuestos intra-europeos porque: i) al menos en principio, hay – supuestamente – un mínimo de armonización medioambiental en el territorio de la UE, articulado mediante directivas europeas; ii) se supone que los sistemas de derecho privado de los países de la UE deberían de ser capaces de hacer frente, al menos mínimamente, a situaciones de daño complejas / sofisticadas, como suelen ser las situaciones de daño al medioambiente. Adicionalmente, existe una dimensión suplementaria de "desajuste" respecto en los supuestos de daño medioambiental meramente internacional extra-europeos: la falta de resultados satisfactorios en estos supuestos (pese a la "aplicación universal" del artículo 7 de Roma II) está en discordancia con el alcance universal de la política medioambiental de la UE (y la aplicación extraterritorial de algunos instrumentos jurídicos europeos en materia de medio ambiente). Este último aspecto permite calificar la dificultad relativa a las situaciones extra-europeas como un problema de gobernanza global.

En cualquier caso, lo que está en juego aquí no es si queremos o no proporcionar "ayuda humanitaria medioambiental" a terceros países (posiblemente a expensas de nuestra industria). El problema, puramente legal, radica en el hecho de que se le ha conferido un ámbito de aplicación universal al artículo 7, pero su estructura no le permite cumplir los objetivos que se le han asignado a escala global. Por lo tanto, puesto que (a primera vista al menos) el artículo 7 parece estar mejor preparado para hacer frente a los daños ambientales transfronterizos (en los que, si un sistema jurídico es insatisfactorio, es de esperar que el otro no lo sea), esta tesis doctoral ha sugerido que los resultados (insatisfactorios) que el artículo produce deben ser corregidos. Esto puede realizarse, ya sea a través de modificaciones de tipo legislativo (por, ejemplo, como se sugiere en el capítulo 4, mediante la inserción en el artículo 7 de un punto de conexión que dirija hacia el ordenamiento jurídico del domicilio del contaminador), o bien, sin cambiar la redacción del artículo, a través de una interpretación correctiva, o de la utilización de nociones clásicas del Derecho Internacional Privado (como la excepción de orden público y las leyes de policía). En realidad, la raíz del problema reside en el hecho de que los daños medioambientales "meramente internacionales" y los daños medioambientales transfronterizos son concebidos como problemas diferentes, pero tratados de manera idéntica, y esto es problemático en términos de Derecho Internacional Privado: para que el sistema funcione sin problemas y para que las políticas pertinentes sean implementadas adecuadamente, se requiere realizar uno de los dos siguientes cambios posibles: i) si las dos situaciones van a ser consideradas como problemas diferentes, debido a las diferencias que, en apariencia, existen entre sus estructuras geográficas, entonces se requieren dos normas diferentes, que respondan en cada caso a sus aparentemente divergentes naturalezas y especificidades; ii) si ambas situaciones van a ser tratadas a través de una única norma de conflicto, entonces dicha norma tiene que superar la apariencia de divergencia estructural y tratar ambas situaciones de manera idéntica, como un único problema: se debe entender, por tanto, que en los supuestos de daño "meramente

internacional", no sólo el riesgo medioambiental, sino también los sistemas de mando y control (transmisión de órdenes) corporativos atraviesan las fronteras nacionales.

Todas estas reflexiones llevan a considerar que, si bien la disposición específica promulgada por la UE es decepcionante (puesto que, como se ha indicado, no cumple plena y adecuadamente con los objetivos que se le habían asignado durante la elaboración de Roma II), en general, puede resultar eficaz intervenir en materia medioambiental a través de normas de conflicto multilaterales. En otras palabras, dejando a un lado el hecho de que el intento realizado por la UE no haya alcanzado sus objetivos, el recurso a normas de conflicto materialmente orientadas puede ser un método adecuado para la construcción del Derecho Internacional Privado como instrumento de gobernanza mundial en el siglo XXI: es posible y efectivo proyectar políticas materiales a la esfera transnacional a través de normas de conflicto (incluso cuando no se realiza correctamente). Algunas de las objeciones que pueden plantearse en contra de este argumento son abordadas en el capítulo 4, como objeciones contra la propuesta *de lege ferenda* que en el mismo figura, como, por ejemplo, la amenaza de deslocalización masiva de empresas europeas hacia terceros países.

Sin embargo, la amenaza de la deslocalización, como argumento contra la proyección de políticas sustantivas, debe relativizarse: la movilidad corporativa depende de un conjunto de factores, no de la modificación de un solo instrumento jurídico o disposición legal (a menos que la disposición en cuestión sea absolutamente fundamental para el actor corporativo del que se trate). Adicionalmente, las investigaciones empíricas de Eurostat citadas en el capítulo 4 demuestran que los marcos regulatorios (especialmente, el derecho "medioambiental") no se encuentran entre los elementos más decisivos dentro de dicho conjunto de factores. Por otra parte, el supuesto "*liftoff*" corporativo que denuncia R. Wai en su trabajo sobre aspectos de gobernanza global (también comentado en el capítulo 4) sólo existe, como reconoce el propio Wai, porque los Estados apoyan su existencia. Y, más aún, incluso situándonos en el peor de los casos en términos de movilidad corporativa, toda empresa necesita tener "raíces" en alguna parte.

Por lo tanto, ya que, como admite Wai, los puntos donde se echan esas raíces son lugares potencialmente idóneos para regular la conducta de los actores transnacionales, existen razones de peso para reivindicar el potencial de las normas de conflicto para actuar como herramientas de gobierno global, que es ya importante y que debe ser examinado más a fondo. Esta sugerencia puede ser controvertida: proyectar valores hacia el ámbito supranacional va directamente en contra de algunos de los "mitos" clásicos sobre los que tradicionalmente se ha basado el Derecho Internacional Privado (justicia conflictual, neutralidad de las normas de conflicto, uniformidad internacional de soluciones, etc.). No obstante, el abandono de esos mitos puede ser la única forma de avanzar en aspectos importantes de la gobernanza mundial, como la protección del medio ambiente, y el papel que la litigación privada pueden desempeñar respecto a la misma.

La proyección de valores propuesta se enfrenta, sin embargo, a otras posibles dificultades, como, por ejemplo, la fricción diplomática: otros Estados, distintos del que realice la proyección de valores, pueden considerar que dicha proyección a través de normas de conflicto conduce a resultados inaceptables en aquellas situaciones en las que sus nacionales /

sociedades se vean involucrados. Por fortuna, esta situación, pese a parecer delicada, puede, paradójicamente, conducir a resultados positivos, en ciertas circunstancias: W. S. DODGE afirma que una fricción diplomática moderada “en realidad promueve la cooperación internacional a largo plazo, proporcionando incentivos para negociar”. Se puede encontrar un ejemplo bastante gráfico en este sentido, en el ámbito medioambiental, en los hechos que se han derivado de la decisión del Tribunal de Justicia de La Unión Europea en el asunto *Air Transport Association of America and others* (tratado en el capítulo 4): raíz del fallo se ha llevado a cabo una negociación, en el marco de la Organización de Aviación Civil Internacional (OACI), en aras de promulgar, antes de 2020, un mecanismo global de mercado de emisiones de CO₂ derivadas de la aviación internacional¹⁷⁵⁹.

En otros casos (es decir, en aquellas situaciones en las que no existe tensión diplomática con otros Estados), la proyección de valores es una actitud legislativa responsable que debe ser adoptada por los Estados, aun cuando sea difícil de asumir e implementar. El ámbito de las cuestiones medioambientales también proporciona un buen ejemplo en este sentido: cada vez que la proyección de valores medioambientales no afecta a otros Estados, y, por tanto, no proporciona incentivos para negociar, los Estados se enfrentan a un “first-mover dilemma”: los mismos pueden ser reacios a implementar valores ambientales (ya sea a través de normas de conflicto multilaterales o de otra manera) si otros Estados no actúan de manera similar, porque dicha implementación puede resultar perjudicial para sus intereses y los de sus propios actores corporativos. En este sentido, A. O. SYKES considera que los sectores industriales de otros Estados (los “non-movers”) resultarían económicamente favorecidos por la responsabilidad que los “Estados verdes” impondrían sobre sus propias industrias. Cómo responder a este desafío es una cuestión de voluntad política, que debe ser considerada, en la Unión Europea, desde la perspectiva del supuesto liderazgo medioambiental global que la misma pretende asumir. Ciertamente, no es una cuestión de viabilidad técnica: esta tesis ha puesto de manifiesto que el Derecho Internacional Privado posee medios para introducir de modo efectivo valores materiales en los esquemas de gobernanza global (incluso en la gobernanza medioambiental global), a través de normas de conflicto multilaterales materialmente orientadas.

Por tanto, todo se reduce a la máxima de que “*un gran poder conlleva una gran responsabilidad*”. También en términos competencia judicial internacional y derecho aplicable.

¹⁷⁵⁹ Vid. la explicación aportada en los enlaces de internet siguientes (17 de Marzo de 2017):

https://ec.europa.eu/clima/policies/transport/aviation_en
https://ec.europa.eu/transport/modes/air/environment_nl

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