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Derecho Internacional Privado y Desarrollo Sostenible: Perspectivas Globales y Latinoamericanas

Editoras:
Verónica Ruiz Abou-Nigm y María Mercedes Albornoz

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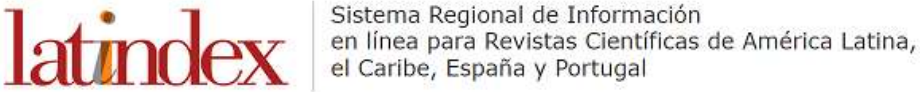
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V. 07, N. 03, Tomo I, Edição Especial

Setembro- Dezembro, 2023

SUMÁRIO

NOTA EDITORIAL

NOTA EDITORIAL

A **Revista Direito.UnB** do Programa de Pós-graduação em Direito (PPGD) apresenta seu número especial com o dossiê temático "**Derecho internacional privado y desarrollo sostenible: perspectivas globales y latinoamericanas"**, organizado por Verónica Ruiz Abou-Nigm, professora Catedrática de Derecho Internacional Privado da Universidad de Edimburgo (Escocia, Reino Unido) e María Mercedes Albornoz, professora Investigadora Titular do Centro de Investigación y Docencia Económicas (CIDE, México).

Esta Edição Especial apresenta artigos sobre as pesquisas do dossiê temático, expostas nas *Jornadas da Associação de Direito Internacional Privado (ASADIP)* durante a XV Conferência realizada em Assunção, no Paraguai, em outubro de 2022[1]. Nessa conferência surgiu a ideia de organizar um dossiê temático na Revista Direito.UnB, visando publicar os trabalhos apresentados e divulgar as contribuições do direito internacional privado para o desenvolvimento sustentável a partir de perspectivas globais e latino-americanas.

Essa ideia foi inspirada nos trabalhos realizados em 2021, com o lançamento do livro intitulado **The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law,** editado por Ralf Michaels, Verónica Ruiz Abou-Nigm e Hans van Loon, cujo projeto foi coordenado por por Samuel Zeh. Esta obra, de forma inovadora, desvendou a importância do direito internacional privado para a realização da Agenda 2030 para uma boa governança dos 17 objetivos de desenvolvimento sustentável (ODS) e de suas 169 Metas a serem alcançadas. Os organizadores trouxeram à baila uma equívoca "marginalização" do direito internacional privado, afirmando que:

1 Ver ASADIP. https://www.asadip.org/v2/?p=6806.

> There is a near-complete absence of any reference to the role of private, including commercial, law, and the role it plays via private international law in our global economy and emerging world society. This is a significant gap. Most transactions, most investments, most destruction of our environment, happen not through public but through private action, and are governed not exclusively by public law but also, perhaps predominantly, by private law. Private law, therefore, has an important role to play in the quest for sustainability, and this is increasingly being recognised. What remains under the radar, so far, is private international law[2].

Como resultado do projeto, todos os autores envolvidos convergiram para três pontos essenciais na interligação entre o direito internacional privado e o desenvolvimento sustentável. O primeiro ponto demonstra "o direito internacional privado tem um papel a desempenhar na realização da Agenda 2030". O segundo aponta para "a subutilização, ou mesmo o desrespeito do direito internacional privado na estrutura de governança dos ODS". Além disso, os autores "lamentam o ponto cego no que diz respeito à função do direito privado e do direito internacional privado nos instrumentos globais relevantes para os ODS". Por fim, o terceiro ponto diz respeito à convicção de muitos autores "de que existe uma necessidade urgente de o direito internacional privado se tornar (muito) mais consciente e empenhado na realização dos ODS e, para esse fim, reorientar-se para estes objetivos e, se necessário, conceitualizar-se"[3].

A partir desses estudos, a proposta desta edição especial é demonstrar a importância do direito interancional privado sob as lentes de pesquisadores globais e latino-americanos. Este número apresenta o prefácio "**Hacia un derecho internacional privado comprometido con la materialización de soluciones "glocales**", de autoria das professoras Verónica Ruiz Abou-Nigm y María Mercedes Albornoz. Além disso, agraciaram a edição com a organização e revisão dos sete artigos submetidos à **Revista Direito.UnB,** conectados ao eixo Derecho internacional privado y desarrollo sostenible.

O desenvolvimento sustentável pressupõe o acesso aos bens e serviços, sem comprometer os mesmos direitos às gerações futuras, promovendo um diálogo entre o direito internacional público e o direito internacional privado. Desse modo, "para que o direito internacional privado se comprometa com os objetivos globais da Agenda 2030 da

2 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law.** Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p. 9.

3 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law**. Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p. p. 15.

ONU, é necessário mais do que mapear as metodologias e técnicas existentes”[4].

Por fim, na fase de editoração da Revista.Direito.UnB recebemos a triste notícia do falecimento da jovem pesquisadora Mathilde Brackx. Gostaríamos de registrar neste editorial a valiosa contribuição de seu artigo intitulado “Access to Remedy for Victims of Corporate Human Rights Abuse: Civil Liability Litigation in Europe, Enforcement in Latin America” (In memoriam Mathilde Brackx - 22/10/1998 - 10/10/2023). Descanse em paz! O legado da autora continuará a ressoar eternamente nas páginas deste periódico.

Boa leitura!

Inez Lopes

Editora-chefe

Revista Direito.UnB

4 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law.** Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p.p. 27.

NOTA EDITORIAL

La Revista Direito.UnB del Programa de Postgrado en Derecho (PPGD) presenta su número especial con el dossier temático **“Derecho internacional privado y desarrollo sostenible: perspectivas globales y latinoamericanas” ,** editado por Verónica Ruiz Abou-Nigm, Profesora Titular de Derecho Internacional Privado de la Universidad de Edimburgo (Escocia, Reino Unido) y María Mercedes Albornoz, Profesora Investigadora Titular del Centro de Investigación y Docencia Económicas (CIDE, México).

Este Número Especial presenta artículos sobre las investigaciones del dossier temático, que fueron presentados en la Conferencia de la Asociación de Derecho Internacional Privado (ASADIP) durante las XV Jornadas celebradas en Asunción, Paraguay, en octubre de 2022[1]. De esta conferencia surgió la idea de organizar un dossier temático en la Revista Direito.UnB, con el objetivo de publicar los trabajos presentados y difundir las aportaciones del Derecho internacional privado al desarrollo sostenible desde perspectivas “glocales” y latinoamericanas.

Esta idea se inspiró en el trabajo realizado en 2021, con el lanzamiento del libro titulado **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law,** editado por Ralf Michaels, Verónica Ruiz Abou-Nigm y Hans van Loon, cuyo proyecto fue coordinado por Samuel Zeh. Este innovador trabajo desvela la importancia del Derecho internacional privado para la realización de la Agenda 2030 para la buena gobernanza de los 17 Objetivos de Desarrollo Sostenible (ODS) y sus 169 metas a alcanzar. Los organizadores sacaron a la luz la idea errónea de que el Derecho internacional privado ha sido “marginado”, afirmando que:

1 Véase ASADIP. https://www.asadip.org/v2/?p=6806.

> There is a near-complete absence of any reference to the role of private, including commercial, law, and the role it plays via private international law in our global economy and emerging world society. This is a significant gap. Most transactions, most investments, most destruction of our environment, happen not through public but through private action, and are governed not exclusively by public law but also, perhaps predominantly, by private law. Private law, therefore, has an important role to play in the quest for sustainability, and this is increasingly being recognised. What remains under the radar, so far, is private international law[2].

Como resultado del proyecto, todos los autores participantes convergieron en tres puntos esenciales en la interconexión entre el derecho internacional privado y el desarrollo sostenible. El primer punto demuestra que "el derecho internacional privado tiene un papel que desempeñar en la realización de la Agenda 2030". El segundo señala "la infrautilización, o incluso el desprecio del derecho internacional privado en el marco de gobernanza de los ODS. Además, los autores "lamentan el punto ciego en cuanto al papel del Derecho privado y del Derecho internacional privado en los instrumentos globales relevantes para los ODS". Por último, el tercer punto se refiere a la convicción de muchos autores "de que existe una necesidad urgente de que el Derecho internacional privado sea (mucho) más consciente y se comprometa más con la consecución de los ODS y, para ello, se reoriente hacia estos objetivos y, si es necesario, se conceptualice a sí mismo"[3].

Basándose en estos estudios, el propósito de este número especial es demostrar la importancia del Derecho internacional privado a través de la lente de investigadores mundiales y latinoamericanos. Este número cuenta con el prólogo **"Hacia un derecho internacional privado comprometido con la materialización de soluciones glocales**", escrito por las profesoras Verónica Ruiz Abou-Nigm y María Mercedes Albornoz. También colaboraron en la organización y revisión de los siete artículos presentados a la revista Direito.UnB, relacionados con el eje de derecho internacional privado y desarrollo sostenible.

El desarrollo sostenible presupone el acceso a bienes y servicios sin comprometer los mismos derechos para las generaciones futuras, promoviendo un diálogo entre el Derecho internacional público y el Derecho internacional privado. Así, "para que el Derecho internacional privado se comprometa con los objetivos globales de la Agenda 2030 de la

2 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law.** Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p. 9.

3 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law.** Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p. p. 15.

ONU, es necesario hacer algo más que mapear las metodologías y técnicas existentes"[4].

Por último, durante la fase editorial de Revista.Direito.UnB, recibimos la triste noticia del fallecimiento de la joven investigadora Mathilde Brackx. Queremos dejar constancia en este editorial de su valiosa contribución en su artículo titulado "Access to Remedy for Victims of Corporate Human Rights Abuse: Civil Liability Litigation in Europe, Enforcement in Latin America" (In memoriam Mathilde Brackx (22/10/1998 - 10/10/2023). ¡Descansa en paz! Tu legado seguirá resonando para siempre en las páginas de esta revista.

¡Buena lectura!

Inez Lopes

Jefa de Redacción

Revista Direito.UnB

4 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law.** Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p.p. 27.

AGRADECIMIENTOS

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A Revista Direito.UnB do Programa de Pós-graduação em Direito (PPGD) agradece às organizadoras desta edição especial, Verónica Ruiz Abou-Nigm, Professora Catedrática de Direito Internacional Privado da Universidade de Edimburgo (Escócia, Reino Unido), e María Mercedes Albornoz, Professora Investigadora Titular do Centro de Investigación y Docencia Económicas (CIDE, México), pelo tema "Direito internacional privado e desenvolvimento sustentável: perspectivas globais e latino-americanas». Agradecemos pela contribuição e pela revisão dos textos selecionados.

Expressamos nossa gratidão aos autores que contribuíram para a publicação desta edição especial. As contribuições vieram de professores de universidades do Brasil, da América Latina e da Europa, além de instituições como o Instituto Max Planck de Hamburgo e a Organização dos Estados Americanos (OEA).

À equipe editorial, nossos sinceros agradecimentos pela editoração dos textos. A dedicação e o empenho de todos foram cruciais para tornar esta edição possível.

O reconhecimento da qualidade da Revista Direito.UnB é fruto da contribuição contínua de nossos colaboradores, que nos incentivam a trabalhar incessantemente para manter e elevar os padrões de excelência com temas vitais à sociedade contemporânea.

Que esta publicação inspire, informe, incite novos caminhos e reflita as contribuições do direito internacional privado para o desenvolvimento sustentável.

Gratidão!

AGRADECIMiENTOS

La Revista Direito.UnB del Programa de Postgrado en Derecho (PPGD) agradece a las editoras de este número especial, Verónica Ruiz Abou-Nigm, Profesora de Derecho Internacional Privado de la Universidad de Edimburgo (Escocia, Reino Unido), y María Mercedes Albornoz, Profesora Titular de Investigación del Centro de Investigación y Docencia Económicas (CIDE, México), por el tema **"Derecho internacional privado y desarrollo sostenible: perspectivas globales y latinoamericanas**". Agradecemos a los autores sus contribuciones y la revisión de los textos seleccionados.

Expresamos nuestra gratitud a los autores que contribuyeron a la publicación de este número especial. Las contribuciones proceden de profesores de universidades de Brasil, América Latina y Europa, así como de instituciones como el Instituto Max Planck de Hamburgo y la Organización de Estados Americanos (OEA).

Nuestro sincero agradecimiento al equipo editorial por la edición de los textos. Su dedicación y compromiso han sido cruciales para hacer posible este número.

El reconocimiento de la calidad de la Revista Direito.UnB es el resultado de la continua contribución de nuestros colaboradores, que nos animan a trabajar sin cesar para mantener y elevar el nivel de excelencia con temas vitales para la sociedad contemporánea.

Que esta publicación inspire, informe, incite nuevos caminos y refleje las contribuciones del Derecho Internacional Privado al desarrollo sostenible.

¡Muchas gracias!!

ACCESS TO REMEDY FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSE: CIVIL LIABILITY LITIGATION IN EUROPE, ENFORCEMENT IN LATIN AMERICA

ACESSO A RECURSOS PARA VÍTIMAS DE ABUSOS CORPORATIVOS DE DIREITOS HUMANOS: LITÍGIOS DE RESPONSABILIDADE CIVIL NA EUROPA, APLICAÇÃO NA AMÉRICA LATINA

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ABSTRACT

In the challenging search for access to effective remedies for victims of corporate human rights abuse and environmental harm, there has been a growing trend of transnational civil liability litigation before European courts. This trend raises private international law questions regarding the cross-border recognition and enforcement of judgments, which is an essential part of access to justice. Focusing on litigation before European courts ensuing from corporate human rights abuse in Latin America, this article demonstrates the role of rules on recognition and enforcement of foreign judgments in Latin America by providing concrete examples of ongoing cases. Moreover, the suitability of the new 2019 Judgments Convention and of domestic rules on recognition and enforcement for such transnational business and human rights litigation is analyzed. The article demonstrates that the role of cross-border recognition and enforcement rules should not be over- nor underestimated, and that despite a number of shortcomings, the 2019 Judgments Convention can be an important step forward in this regard.

Keywords: Business and human rights; access to remedy; civil liability; private international law; cross-border recognition and enforcement of judgments.

† Died on 10 October 2023.

RESUMO

Na difícil procura de acesso a vias de recurso eficazes para as vítimas de violação dos direitos humanos e danos ambientais das empresas, tem havido uma tendência crescente de litígios transnacionais de responsabilidade civil perante os tribunais europeus. Esta tendência levanta questões de direito internacional privado relativamente ao reconhecimento e execução transfronteiriça de sentenças, que é uma parte essencial do acesso à justiça. Centrando-se nos litígios perante os tribunais europeus resultantes do abuso dos direitos humanos das empresas na América Latina, este artigo demonstra o papel das regras sobre o reconhecimento e execução de sentenças estrangeiras na América Latina, fornecendo exemplos concretos de casos em curso. Além disso, é analisada a adequação da nova Convenção de Sentenças de 2019 e das regras internas sobre reconhecimento e execução de tais litígios transnacionais empresariais e de direitos humanos. O artigo demonstra que o papel das normas de reconhecimento e execução transfronteiriça não deve ser sobrestimado nem subestimado, e que apesar de uma série de deficiências, a Convenção de Sentenças de 2019 pode constituir um importante passo em frente a este respeito.

Palavras-chave: Empresas e direitos humanos; acesso a recursos; responsabilidade civil; direito internacional privado; reconhecimento e execução de sentenças transfronteiras.

1. INTRODUCTION: ACCESS TO REMEDY FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSE

The 2030 Agenda for Sustainable Development recognizes the business sector as a key partner in achieving the sustainable development goals (SDG 17).[1] Investment by transnational corporations is an important catalyst for development. However, such companies are still often involved in adverse human rights and environmental impacts,[2] as such interfering with a variety of SDGs. Ensuring access to effective forms of justice and remedies for victims of such business-related human rights abuse is essential for realizing sustainable development. This is laid down in SDG 16, which calls for states to "promote the rule of law at the national and international levels and ensure equal access to justice for all". Effective access to justice for all is essential to provide all citizens with protection and redress and as such enables inclusive economic growth.[3] As regards private business activity, the 2030 Agenda refers to the UN Guiding Principles on Business and Human Rights (UNGPs), which contain a third pillar on access to remedy for victims of corporate

1 See Information Note UN Human Rights Office of the High Commissioner, The business and human rights dimension of sustainable development: Embedding "Protect, Respect and Remedy" in SDGs implementation, Geneva, 30 June 2017.

2 Corporate adverse human rights and environmental impacts are often closely related. For the purpose of this paper, the term 'corporate human rights abuse' will be used as including both.

3 ZAMFIR, Ionel, European Parliamentary Research Service, "Peace, justice and strong institutions EU support for implementing SDG 16 worldwide", PE 646.156, July 2022, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646156/EPRS_BRI(2020)646156_EN.pdf.

human rights abuse.[4] The concept of access to remedy as set forth in the UNGPs is derived from and dependent on the right to access to justice, which is an internationally recognized human right enshrined in various international and regional human rights instruments.[5]

Realizing access to effective judicial remedies for victims of corporate human rights abuse has, however, proved to be a persisting challenge.[6] Transnational corporations' complex corporate structures and global supply chains pose significant regulatory challenges and have often led to corporate impunity for adverse human rights and environmental impacts. Transnational corporate civil liability litigation, although only one possible strategy, plays an increasingly important role in attempts to hold companies accountable for such adverse impacts. In these cases, a civil lawsuit is brought in one state, often in the Global North, against a corporation for harm arising from adverse human rights or environmental impacts in another state, often in the Global South.[7]

Such transnational business and human rights litigation is, however, often hampered by various legal, practical and procedural barriers. While extensive research has been conducted on these barriers, this research has largely focused on challenges that can arise before and during proceedings, such as difficulties and costs to secure legal representation and issues regarding jurisdiction of the home state court. However, when corporate civil liability is established in such transnational litigation, an understudied question of private international law arises: the cross-border recognition and enforcement of judgments establishing corporate civil liability.

The epitome of enforcement difficulties in business and human rights litigation – and of a troubling interplay between jurisdiction and enforcement from an access to remedy perspective – can be found in the *Lago Agrio* litigation saga. The case concerned

4 The UNGPs build on the 'Protect, Respect and Remedy' Framework, which corresponds to three pillars for action: (1) the state duty to protect against human rights abuses, (2) the corporate responsibility to respect human rights and (3) the victims' right to access to remedy.

5 E.g. Art. 8 of the Universal Declaration of Human Rights; Art. 2 of the International Covenant on Civil and Political Rights; Art. 8 and 25 of the American Convention on Human Rights; Art. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 47 of the EU Charter of Fundamental Rights.

6 Under the traditional state-centric approach to international law, only states have the obligation to ensure the respect and protection of human rights. As a result, victims of corporate adverse human rights and environmental impacts must seek remedy before domestic courts. Numerous sources have, however, identified the challenges that can arise during such proceedings before domestic courts, both in the state where the damage occurred as well as in transnational proceedings: e.g. BRIGHT, Claire and WRAY, Benedict S. **Corporations and Social Environmental Justice: The Role of Private International Law**, European University Institute Law Working Paper 2012/02; ENNEKING, Liesbeth. **Judicial Remedies: The Issue of Applicable Law**. In: ÁLVAREZ RUBIO, Juan José and YIANNIBAS, Katerina (eds.). Human Rights in Business. Routledge, 2017; MARX, Axel et al. **Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries**. Study for the European Parliament, 2019.

7 The terms 'Global North' and 'Global South' are used here as alternatives to 'developed countries' and 'developing countries' respectively and are as such based not on geographical location but on socio-economic and political characteristics.

severe environmental damage caused by Texaco's oil operation activities in the Oriente region in Ecuador. The US courts, where the victims first sought remedy, dismissed the lawsuits on *forum non conveniens* grounds, stating that Ecuador was a more appropriate forum.[8] The claimants therefore resorted to Ecuadorian courts, where they were awarded a multibillion-dollar judgment. Efforts to enforce this Ecuadorian judgment against Texaco's successor Chevron have, however, continuingly failed in various countries, including Argentina, Brazil, Canada and the US. A Canadian Court of Appeal, for example, decided that Chevron's assets in Canada could not be used to satisfy the claim as Chevron Canada is a separate legal entity, while US courts blocked enforcement finding that the decision was obtained by corrupt means.[9]

Such enforcement difficulties, which undermine the right to access to justice of victims of corporate human rights abuse, are worth considering in the context of the recent wave of transnational corporate civil liability litigation in EU countries, including for human rights abuses in Latin America. Ongoing examples of such litigation include the case of *Luciano Lliuya v. RWE* filed before German courts by a Peruvian farmer on climate change and its consequences for his livelihood, a case in France against French retail group Casino over illegal deforestation and human rights abuses in the Amazon in its beef supply chain, and the cases of *Unión Hidalgo community v. EDF* in France and *Maceió victims v. Braskem* in the Netherlands which will be discussed in more detail below. This article therefore demonstrates the relevance and potential as well as possible shortcomings of private international law rules on cross-border recognition and enforcement of judgments in providing victims of corporate human rights abuse with an effective remedy through such transnational litigation.

The article will first contextualize the growing trend of transnational business and human rights litigation, focusing on the European Union, and illustrate this trend with further discussion of a few – non-exhaustive – examples of cases in EU countries ensuing from corporate human rights abuse in Latin America (section 2). The cases in question (*Unión Hidalgo community v. EDF* in France and *Maceió victims v. Braskem* in the Netherlands) will also serve as concrete examples of the potential role of private international law rules on cross-border recognition and enforcement of judgments in providing access to remedy for victims of corporate human rights abuse throughout the article. In section 3, the importance of cross-border enforcement of judgments in transnational corporate civil liability cases in light of the right to an effective remedy is discussed, as well as difficulties

8 Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002).

9 See FERNÁNDEZ ARROYO, Diego P. Adjudicating public interests by private means: the inescapable involvement of States in the Chevron/Ecuador saga. In: MUIR WATT, Horatia, BÍZIKOVÁ, Lucia, BRANDÃO DE OLIVEIRA, Agatha and FERNÁNDEZ ARROYO, Diego P. (eds.). **Global Private International Law**. Edward Elgar Publishing, 2019; GOMEZ, Manuel A. **A Sour Battle in Lago Agrio and Beyond**: **The Metamorphosis of Transnational Litigation and the Protection of Collective Rights in Ecuador**, FIU Legal Studies Research Paper Series, Research Paper No. 15-35, December 2015.

that can arise in this regard, both for judgments awarding damages as well as for other remedies. Section 4 then focuses on the rules on recognition and enforcement of foreign judgments in Latin America and the coexistence of global, regional and domestic private international law regimes in this regard, discussing the new 2019 Judgments Convention as well as domestic rules in Brazil and Mexico. The previous sections will allow for some broader reflections on the potential and limitations of private international law in providing victims of corporate human rights abuse with an effective remedy (section 5), before concluding in section 6.

2. TRANSNATIONAL CORPORATE CIVIL LIABILITY IN THE EUROPEAN UNION

2.1 Setting the scene

In Latin America, business-related human rights abuse and environmental harm are prevalent, for example, in the agriculture sector and in the extractive industries, including illegal deforestation, large-scale mining disasters and oil spillage.[10] Corporate activity in the region furthermore often impacts indigenous rights, ranging from the absence of prior consultation to adverse environmental and health impacts leading to the forced displacement of entire communities.

Incidents of corporate human rights abuse have led to various types of business and human rights litigation in Latin American countries, including different kinds of domestic proceedings in the state where the abuse took place. Such domestic litigation can range from civil and criminal liability claims and administrative proceedings against companies to constitutional protection mechanisms, which can also sometimes be used directly against companies whose acts or omissions violate human rights.[11] Victims of corporate human rights abuse can face various obstacles when pursuing remedy through such domestic proceedings, including a lack of jurisdiction over a corporation domiciled abroad, excessive delays in proceedings or an absence of enforcement mechanisms

10 The Business and Human Rights Resource Centre has an extensive database of cases of adverse human rights and environmental impacts from corporate activities, including in Latin America, available at https://www.business-humanrights.org/en/latest-news/?&language=en.

11 CANTÚ RIVERA, Humberto (ed.). **Experiencias Latinoamericanas sobre reparación en materia de empresas y derechos humanos**. Konrad Adenauer Stiftung and Global Business and Human Rights Scholars Association: América Latina. Cases can be found in the database of the Business and Human Rights Resource Centre (cf. footnote 10).

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to implement a successful judgment.[12] Furthermore, for host states, efforts to address human rights violations often collide with a need to attract foreign investment in order to generate economic development.[13] This tendency to be on the side of foreign companies – and as such of the more powerful party – can be exacerbated by arbitration proceedings initiated against host states by companies trying to evade responsibility for their adverse human rights impacts.

It is against this background that a growing trend of transnational corporate civil liability cases emerged in jurisdictions in the Global North for corporate human rights abuse in the Global South, including in Latin America. Taking into account the case-law developments in recent years and the emergence of mandatory human rights due diligence legislation, it is to be expected that the occurrence of transnational civil liability cases in which corporations are held liable for harm arising from human rights abuse will increase.[14]

While recent judgments of the US Supreme Court have severely limited the types of claims that can be brought against corporate defendants under the Alien Tort Statute (ATS),[15] case-law developments in other jurisdictions show increasing willingness to strengthen corporate accountability for human rights abuses.[16] Examples can be found in case-law of the UK Supreme Court (*Lungowe v. Vedanta Resources Plc and Okpabi and others v. Royal Dutch Shell Plc*) and of the Canadian Supreme Court (*Nevsun Resources Ltd. v. Araya*). As regards the European Union, the Dutch case of F*our Nigerian Farmers and Milieudefensie v. Shell* is seen as a landmark ruling in the field of business and human rights and as a significant step forward in providing remedies for victims of corporate human rights abuse.[17] In this case, a Dutch court of appeal found Shell's Nigerian subsidiary SPDC liable for damage caused by oil spillage arising out of the company's extraction

12 *Supra* note 6.

13 See e.g. Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Mexico, A/HRC/35/32/Add.2 and Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Peru, A/HRC/38/48/Add.2.

14 ARISTOVA, Ekaterina. **Private International Law and Corporate Accountability for Human Rights Violations**. In: KONRAD, Duden (ed.), IPR für eine Bessere Welt. Mohr Siebeck, 2022; ROUAS, Virginie. **Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries**. University of London Press, 2022.

15 See e.g. CHAMBERS, Rachel and BERGER-WALLISER, Gerlinde. **The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison**, American Business Law Journal 58/3, 2021.

16 ARISTOVA, Ekaterina. **Private International Law and Corporate Accountability for Human Rights Violations**. In: KONRAD, Duden (ed.), IPR für eine Bessere Welt. Mohr Siebeck, 2022.

17 ROUAS, Virginie. A**chieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries**. University of London Press, 2022.

activities.[18] In addition, it held that parent company Royal Dutch Shell owed the plaintiffs a duty of care to prevent the oil spillage and is liable for any failure to install a leak detection system in order to stop future oil leaks earlier. As such, this was the first case in which a parent company was held responsible for the actions of its subsidiary in another country.[19] While Shell filed an appeal in cassation against the measures it was ordered to take to detect future oil spills earlier, and thus against the part of the judgment directed against the parent company, the case was eventually settled in December 2022, settling all claims and ending all pending litigation related to the spills in question (cf. section 3.1).[20]

Several European countries have furthermore adopted legislative initiatives imposing corporate mandatory human rights due diligence (mHRDD) obligations.[21] In France, for example, this mHRDD legislation includes an explicit civil liability regime. The 2017 French Duty of Vigilance Act requires large French companies to publish an annual 'vigilance plan', establishing effective measures to identify risks and prevent severe impacts on human rights and the environment resulting from their own activities and the activities of their subsidiaries or suppliers.[22] The Act provides the possibility of both preventive as well as a liability actions before the civil court.[23] The preventive action or injunction claim, which must be preceded by a three month formal notice, does not require the occurrence of damage and can lead to injunctive relief to force compliance and avoid potential violations.[24] Furthermore, harmed individuals can bring a civil liability lawsuit based on French tort law to seek damages resulting from a company's failure to comply with these human rights and environmental due diligence obligations.[25] Legal remedies for corporate adverse human rights and environmental impacts has furthermore made

18 Gerechtshof Den Haag, 29 January 2021, ECLI:NL:GHDHA:2021:1825, Rechtspraak.nl.

19 Milieudefensie, "Milieudefensie's lawsuit against Shell in Nigeria", https://en.milieudefensie.nl/shell-in-nigeria, accessed 27 March 2023.

20 Milieudefensie, "Hoge Raad gaat oordelen over rol Shell in olieramp Nigeria", 3 May 2021, https://milieudefensie.nl/actueel/hoge-raad-gaat-oordelen-over-rol-shell-in-olieramp-nigeria#:~:text=De%20oliegigant%20is%20in%20cassatie,te%20compenseren%20voor%20de%20schade, accessed 27 March 2023 and Shell media release, "Shell and Milieudefensie Settle Long-Running Case over Oil Spills in Nigeria", https://www.shell.com.ng/media/2022-media-releases/shell-and-milieudefensie-settle-long-running-case-over-oil-spills-in-nigeria.html, published 23 December 2022, accessed 27 March 2023.

21 *E.g.* the Norwegian Transparency Act (Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions) entered into force on 1 July 2022 (see https://lovdata.no/dokument/NLE/lov/2021-06-18-99). The German Act on corporate due diligence in supply chains (Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten) entered into force on 1 January 2023 (see https://perma.cc/8JUX-ET2Q). On these two laws, see e.g. KRAJEWSKI, Markus, TONSTAD, Kristel and WOHLTMANN, Franziska. **Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?**, Business and Human Rights Journal 2021/6.

22 Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (available at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/).

23 Art. 1 of the French Duty of Vigilance Act.

24 COSSART, Sandra and CHATELAIN, Lucie. **Human Rights Litigation against Multinational Companies in France**. In: MEERAN, Richard and MEERAN, Jahan (eds.). Human rights litigation against multinationals in practice. Oxford University Press, 2021.

25 Art. 2 of the French Duty of Vigilance Act.

it onto the agenda of policy makers at the European Union level. On 23 February 2022, the European Parliament and the Council adopted a proposal for a directive on corporate sustainability due diligence.[26] The proposal aims to require Member States to ensure that companies exercise human rights and environmental due diligence and to improve access to remedies for those affected by corporate adverse human rights and environmental impacts. To this end, it includes the requirement to put in place an adequate civil liability regime for damages resulting from a corporation's failure to comply with their mHRDD obligations.[27]

These case-law and legislative developments have also been used to seek remedy before courts in various EU countries for corporate adverse human rights and environmental impacts in Latin America. The two following examples are apt illustrations of these developments: the *Unión Hidalgo community v. EDF* case before the French courts and the *Maceió victims v. Braskem* case before Dutch courts.

2.2. Example 1: the *Unión Hidalgo community* v. EDF case

In October 2020, a civil lawsuit was filed before French courts against French utility company EDF (Électricité de France) regarding violations of indigenous rights in relation to EDF's wind park project in Mexico. EDF planned to build the Gunaá Sicarú wind park on the land of the indigenous Unión Hidalgo community through its local Mexican subsidiary and project promotor, without respecting their right to free, prior and informed consent.[28] This generated division among the inhabitants which escalated into violent conflict, including violence against human rights and land defenders of the community. In 2018, representatives of the Unión Hidalgo community, supported by ProDESC (Proyecto de Derechos Económicos, Sociales y Culturales, A.C.), filed a complaint against EDF before the French National Contact Point, a non-judicial access to remedy mechanism

26 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

27 *Ibid*., Art. 22.

28 Protected in particular by the International Labour Organization Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries, Arts. 6-7. In the Inter-American human rights system, the consultation right of indigenous peoples has been anchored on Art. 23 along with Arts. 1, 2, 21 and 24 of the American Convention on Human Rights of 1969. As regards companies, according to principle 18 of the UNGPs, for example, the process of identification and assessment of actual or potential adverse human rights impacts should involve meaningful consultation with potentially affected groups and other relevant stakeholders. Furthermore, many Latin American countries' legislation, such as Art. 30(15) of the Constitution of Bolivia, include safeguards regarding indigenous peoples' rights to prior consultation. See JAMES-ELUYODE, Jide. **Corporate Responsibility and Human Rights: Global Trends and Issues Concerning Indigenous Peoples**. Lexington Books, 2019, p. 120 and p. 135 ff.

supporting the OECD Guidelines for Multinational Enterprises.[29] The complainants, however, considered these proceedings ineffective and eventually filed a preventive civil lawsuit in France, based on EDF's violation of the French *loi de vigilance*.[30] In this civil lawsuit, representatives of the indigenous Unión Hidalgo community and NGOs ProDESC and the European Center for Constitutional and Human Rights (ECCHR) requested for EDF's vigilance plan to be modified. In light of the prolonged legal proceedings and the imminent risk of irreparable and serious human rights violations, the plaintiffs submitted a request for interim measures as long as EDF's vigilance plan did not effectively prevent violations of the indigenous peoples' right to free, prior and informed consent and of the physical integrity of human rights defenders. In this request, the plaintiffs called for the Gunaá Sicarú project to be suspended until a decision on the merits was taken.[31] In November 2021, the Paris civil court dismissed both the request for interim relief to suspend the construction of the wind park and the injunction claim on procedural grounds. In June 2022, however, the Mexican authorities themselves cancelled the electricity supply contract for the Gunaa Sicarú project.[32] As a result, the project was cancelled before its completion. According to the ECCHR, "this decision is a great success for the indigenous group – but due to prior damages, the proceedings in France continue".[33] The appeal filed by the plaintiffs in December 2021 was held admissible in March 2023, providing the opportunity for an assessment on the merits of the claimants' injunction claim and request for interim measures after all.[34]

29 France Point de Contact National, "Specific instance 'EDF and EDF Renewables in Mexico': Follow-up Statement of the French NCP (12 July 2022)", available at https://www.tresor.economie.gouv.fr/Institutionnel/Niveau3/Pages/8fd9ecb1-2cb5-4e35-95b7-587b6793f341/files/f28dc42f-543f-46c1-8f32-b1d029b363d5.

30 ECCHR, "Civil society space in renewable energy projects: A case study of the Unión Hidalgo community in Mexico", Policy Paper, December 2019, available at https://www.ecchr.eu/fileadmin/Publikationen/ECCHR_PP_WINDPARK.pdf; ECCHR, ProDESC and Terre Solidaire, "Wind farm in Mexico: French energy firm EDF disregards indigenous rights", Case Report, October 2020, available at https://www.ecchr.eu/fileadmin/Fallbeschreibungen/20201013_Case_report_EDF_EN.pdf; ProDESC Annual Activity Report 2021, available at https://prodesc.org.mx/wp-content/uploads/2022/06/informe-actividades-2021-ingles-opt.pdf, accessed 30 March 2022.

31 ECCHR, ProDESC and Terre Solidaire, "From right to reality: Ensuring a rights-holder-centred application of the French *Duty of Vigilance* law. Early lessons learned from Unión Hidalgo v EDF", 2023, available at https://media.business-humanrights.org/media/documents/ECCHR_EDF_WEB.pdf, accessed 27 June 2023.

32 The decision was announced at Oaxaca's First District Court (Mexico), where ProDESC has carried out a litigation regarding the wind park. See ProDESC, "Set Back to EDF in Mexico! The Zapotec Community of Unión Hidalgo and ProDESC Achieve the Definitive Cancellation of the Wind Park Megaproject 'Gunaa Sicaru", available at https://prodesc.org.mx/en/set-back-to-edf-in-mexico-the-zapotec-community-of-union-hidalgo-and-prodesc-achieve-the-definitive-cancellation-of-the-wind-park-megaproject-gunaa-sicaru/.

33 See ECCHR, "Wind park in Mexico: French firm disregards indigenous rights", https://www.ecchr.eu/en/case/wind-park-in-mexico-french-firm-disregards-indigenous-rights/, accessed 30 March 2023.

34 ECCHR, ProDESC and Terre Solidaire, "From right to reality: Ensuring a rights-holder-centred application of the French Duty of Vigilance law. Early lessons learned from Unión Hidalgo v EDF", 2023, available at https://media.business-humanrights.org/media/documents/ECCHR_EDF_WEB.pdf, accessed 27 June 2023.

This case is particularly noteworthy from a sustainable development perspective, as it originates in a climate agenda consisting of a green energy transition that, however, failed to take into account indigenous rights. Indigenous communities, including in Latin America, have suffered numerous cases of adverse human rights and environmental impacts as a result of extractive projects within or around their territories, often causing long-term adverse health impacts and undermining their way of life as a people.[35] Such violations of indigenous rights, and of human rights more generally, also occur in industries that in se contribute to sustainable development, such as the renewable energy sector. The electric cars industry, for example, has also been linked to degrading working conditions, child labour and abuses of indigenous rights in cobalt and lithium mining projects, including in Latin America.[36]

In Mexico, the development of the renewable energy sector was facilitated by a political and legislative reform in the 2000s and opened up to private investment in 2013. Since then, various multinational companies have established numerous industrial-scale wind farm projects in the country, including in the Isthmus of Tehuantepec in the state of Oaxaca, where the community of Unión Hidalgo is located.[37] Much like other projects in the region,[38] EDF's Gunaá Sicarú project has generated violent social conflict, land grabbing and systematic human rights abuses in the local community.[39] These projects are furthermore characterized by a lack of economic benefits for local populations, who, for example, do not receive any of the electricity generated on their lands, in some cases leaving them without access to electricity. This has led to various legal actions in Mexico and abroad, including the civil lawsuit before the French courts discussed above.

These examples of human rights abuses in the renewable energy sector demonstrate the importance of the principle of 'leaving no one behind' in the implementation of the SDGs. While renewable energy can contribute to energy security and economic development and is an important factor in combatting climate change, those often left

35 See Corporate Responsibility and Human Rights: Global Trends and Issues Concerning Indigenous Peoples p. 15-21.

36 See *e.g.* Business and Human Rights Resource Centre, "Human Rights in the Minteral Supply Chains of Electric Vehicles", https://www.business-humanrights.org/en/from-us/briefings/transition-minerals-sector-case-studies/human-rights-in-the-mineral-supply-chains-of-electric-vehicles/, accessed 26 March 2023.

37 CCFD-Terre Solidaire, ECCHR and ProDESC, "Vigilance Switched Off: Human Rights Violations in Mexico: What are the Responsibilities of EDF and the APEA?", June 2021, available at https://www.ecchr.eu/fileadmin/Publikationen/2021-06-08_-_Vigilance_switched_off_-_Report_-_EN.pdf.

38 See *e.g.* ProDESC, "Victoria Legal para Comuneros de Unión Hidalgo Fija Precedente para la Defensa de la Tierra Contra Abusos de Parques Eólicos", https://prodesc.org.mx/victoria-legal-para-comuneros-union-hidalgo-fija-precedente-para-defensa-tierra-contra-abusos-parques-eolicos/, accessed 26 March 2023.

39 CCFD-Terre Solidaire, ECCHR and ProDESC, "Vigilance Switched Off: Human Rights Violations in Mexico: What are the Responsibilities of EDF and the APEA?", June 2021, available at https://www.ecchr.eu/fileadmin/Publikationen/2021-06-08_-_Vigilance_switched_off_-_Report_-_EN.pdf.

behind, including indigenous peoples, must be heard and able to benefit from this positive impact, while adverse social, human rights and environmental impact must be avoided. Contributing to one or more SDGs does not absolve companies from their responsibility to respect human rights and the environment in their activities and supply chains.[40] The green energy transition can only really be sustainable if it respects the rights to land, natural resources, and fundamental rights of local communities such as the right to free, prior and informed consent.[41]

The *Unión Hidalgo community* v. EDF case furthermore exemplifies how private international law rules on recognition and enforcement can be relevant in the road to access to remedy for victims of corporate human rights abuse. This will be discussed in section 3.

2.3. Example 2: the *Maceió victims v. Braskem* case

Another example, in which a Dutch court has recently handed down its decision on the question of jurisdiction, is the *Maceió victims v. Braskem* case. Brazilian petrochemicals company Braskem SA operated salt mines in the Brazilian state of Alagoas from the 1970s until 2019. In 2018, earthquakes caused severe damage to streets, houses and other buildings in several neighborhoods in Maceió. Many residents were forced to leave their homes. Proceedings in Brazil have led to a settlement in which Braskem agreed to carry out a 'Financial Compensation and Relocation Support Program' (the 'PCF program'). While residents who do not agree with Braskem SA's compensation offer under the PCF program can start 'liquidation proceedings' with the Brazilian judges, such proceedings seem to be stayed in Brazil for an extended period of time.[42] Thousands of victims are still waiting to be compensated, and those who have received financial aid argue that it is not enough.[43] Braskem's 'moral damages' offers, for example, have been made on a per-household rather than on a per person basis, and the company has failed to accept liability.[44] On 10 November 2020, a group of eleven Brazilian residents therefore sued Braskem SA and its three Dutch subsidiaries before a Rotterdam court in the Netherlands. The plaintiffs seek to hold Braskem SA and the Dutch subsidiaries jointly and severally liable for the damages

40 VAN DAM, Cees and TIEMERSMA, Heleen. Mainstreaming Human Rights in Sustainable Business. In: Mainstreaming Sustainable Business: 20 years Business-Society Management, 20 years impact?. Rotterdam: Stichting Maatschappij en Onderneming, 262-268, 2018.

41 ECCHR, ProDESC and Terre Solidaire, "Wind farm in Mexico: French energy firm EDF disregards indigenous rights", Case Report, October 2020, 3 June 2022, https://www.ecchr.eu/fileadmin/Fallbeschreibungen/20201013_Case_report_EDF_EN.pdf, accessed 30 March 2023.

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they suffered, alleging that the earthquakes were caused by Braskem's mining activities in Maceió.

On 21 September 2022, the Rotterdam Court importantly held that the *Maceió* case can continue in Dutch courts, not only against the Dutch subsidiaries but also against Brazilian company Braskem SA.[45] Like in the abovementioned case of *Four Nigerian Farmers and Milieudefensie v. Shell*, the Dutch court based its jurisdiction over this non-EU defendant on a domestic jurisdictional rule regarding connected claims laid down in article 7(1) of the Dutch Code of Civil Procedure.[46] The Rotterdam court furthermore dismissed Braskem's argument that the case should be stayed based on *lis pendens* grounds and rejected the argument that the use of the Dutch entities as anchor defendants constitutes an abuse of process. It is, however, outside of the scope of this article to elaborate further on the question of jurisdiction.

This lawsuit is somewhat atypical in the sense that transnational corporate civil liability litigation usually aims to hold Global North based (parent) companies accountable in their home states for human rights abuse in host states in the Global South. In the *Maceió* case, on the other hand, jurisdiction of the Dutch courts is based on Dutch subsidiaries of the Brazilian top holding Braskem SA as anchor defendants. This could also complicate enforcement of a possibly successful judgment in the future, which will be discussed in the following section.

3. THE IMPORTANCE AND DIFFICULTY OF CROSS-BORDER RECOGNITIOAN AND ENFORCEMENT OF JUDGMENTS

The right to access to justice – and hence target 16.3 of the sustainable development goals – remains a dead letter if a judicial decision cannot be enforced in practice.[47] In transnational litigation, such as cross-border corporate civil liability cases, the cross-border recognition and enforcement of judgments is therefore essential in order to provide claimants with an effective remedy in practice.[48] This is confirmed by the ASADIP Principles on Transnational Access to Justice, which stipulate that "the extraterritorial

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47 As mentioned in the introduction, the right to access to justice is an internationally recognized human rights, laid down *e.g.* in Art. 8 and 25 of the American Convention on Human Rights and in Art. 2(3) of the International Covenant on Civil and Political Rights. The latter contains a paragraph c providing that each State Party to the present Covenant undertakes "to ensure that the competent authorities shall enforce such remedies when granted".

48 See e.g. DE CARVALHO RAMOS, André. **Curso de Direito Internacional Privado**. Saraiva Jur, 2021, p. 516.

effect of decisions is a fundamental right, closely related to the right to access to justice and fundamental due process rights".[49] The European Court of Human Rights has similarly held that the right to a fair trial in article 6 of the European Convention on Human Rights entails a fundamental right to the enforcement of foreign judgments.[50] In business and human rights litigation, however, even where the claimant is successful, the cross-border enforcement of the judgment can be an additional barrier to access to justice.[51]

3.1. Judgments awarding damages

The growing trend of transnational business and human rights litigation in several jurisdictions, including in the European Union, evidently raises questions regarding the cross-border recognition and enforcement of judgments in such transnational cases. The enforcement of judgments awarding damages against corporate defendants depends on the company's activities and assets location. As such, enforcement can be a true quest for assets and can lead to various jurisdictions. Because of the doctrine of separate legal personality, a judgment against one member of a corporate group will generally not be enforceable against other members of the group.[52] This can be demonstrated by the abovementioned *Lago Agrio* litigation saga, in which the Canadian courts, for example, rejected the enforcement of the Ecuadorian judgment based on the separate legal personality of Chevron's subsidiary in Canada. This emphasizes the importance of a careful consideration of the enforceability of a potentially successful judgment in the choice of forum and defendant companies in transnational business and human rights litigation.

Cross-border enforcement of judgments awarding damages to the claimants will be necessary in particular when the judgment involves foreign defendant companies. In the Dutch *Four Nigerian Farmers* case against Shell, for example, the Court of Appeal of The Hague ordered Shell's Nigerian subsidiary SPDC to compensate the claimants

49 ASADIP Principles on Transnational Access to Justice (TRANSJUS), approved in Buenos Aires on 12 November 2016, available at http://www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-ES-FINAL18.pdf. The ALI/UNIDROIT Principles of Transnational Civil Procedure furthermore stipulate that "A final judgment awarded in another forum in a proceeding substantially compatible with these Principles must be recognized and enforced unless substantive public policy requires otherwise" (Principle 30), available at https://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf.

50 ECHR, *McDonald v. France*, no. 18648/04, 29 April 2004.

51 *E.g.* ZERK, Jennifer. **Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies**. A report prepared for the Office of the UN High Commissioner for Human Rights, 2014.

52 SECK, Sara L. and OGUNRANTI, Akinwumi. **Accountability: Legal Risks and Remedies**. *In*: Corporate Social Responsibility – Sustainable Business: Environmental, Social and Governance Frameworks for the 21st Century. Kluwer Law International, 685-610, 2020.

for the damage ensuing from the oil spillage.[53] In December 2022, however, Shell and Milieudefensie, with the consent of the Nigerian farmers and their communities, reached a settlement agreement in which Shell agreed to pay € 15 million as reparation for the oil pollution.[54] In the Maceió case, claims were filed before the Dutch courts not only against Dutch entities of Braskem, but also against the Brazilian top holding Braskem SA. In this regard, the Rotterdam court already held that complications in the handling of the case by the Dutch court or in the enforcement of a Dutch judgment in this case are insufficient grounds to decline jurisdiction.[55]

Where a company performs operations and holds assets can furthermore change over the course of proceedings, especially taking into account the fact that business and human rights proceedings are often delayed by various procedural and other challenges. Indeed, companies can as such try to hide behind the separate legal personality doctrine. To mitigate the risk of ending up with an unenforceable judgment, freezing injunctions have been obtained against defendant companies in several business and human rights cases in the United Kingdom. As such, the company can be prevented from disposing of their assets. Such a freezing injunction was obtained, for example, in a case against British mining company Monterrico Metals concerning mistreatment by the Peruvian Police, assisted by the defendant's employees and security guards, of protestors against the Rio Blanco copper mine.[56] The claimants in this case obtained a freezing order in October 2009 restraining Monterrico from disposing of its assets to an extent that would leave it with less than a sum of GBP 5.015 million in the UK.[57] The company eventually settled the case in 2011 by compensation payments, without admitting liability.[58] Similar legal concepts in EU countries could provide useful in the context of transnational corporate

53 Gerechtshof Den Haag, 29 January 2021, ECLI:NL:GHDHA:2021:1825, Rechtspraak.nl.

54 The settlement negotiations allowed more affected parties to be involved. Nigerian farmers brought six cases against Shell for oil leaks in the Nigerian villages of Goi, Oruma and Ikot Ada Udo. The court of appeal judgment of 29 January 2021 concerned only the leak which occurred at the Nigerian village of Oruma in 2005. The settlement that was reached, however, is for the benefit of the communities of Oruma, Goi and Ikot Ada Udo who were impacted by four oil spills in total that occurred between 2004 and 2007.

55 Rechtbank Rotterdam, 21 September 2022, ECLI:NL:RBROT:2022:7549, Rechtspraak.nl, para. 6.23. The court said this in response to the fact that defendants seemed to resort to '*forum non conveniens*' grounds to dismiss jurisdiction. "Complications in the handling of the case" may refer to, for example, issues regarding collection of evidence.

56 "While the suit was pending in the English Court, the defendant, in May 2009, announced its intention to de-list from the AIM UK stock exchange on June 3, 2009. This move would have depleted the defendant's assets in the UK and stripped the English court of its jurisdiction." from SECK, Sara L. and OGUNRANTI, Akinwumi. **Accountability: Legal Risks and Remedies**. In: Corporate Social Responsibility – Sustainable Business: Environmental, Social and Governance Frameworks for the 21st Century. Kluwer Law International, 685-610, 2020.

57 Guerrero v. Monterrico Metals PLC [2009] EWHC 2475 (QB) (Eng.).

58 Leigh Day, 2011 News, "Peruvian torture claimants compensated by UK mining company: Monterrico Metals PLC settles Peruvian cases without admission of liability", 20 July 2011, https://www.leighday.co.uk/latest-updates/news/2011-news/peruvian-torture-claimants-compensated-by-uk-mining-company/, accessed 7 October 2022.

civil liability litigation.

3.2. A 'bouquet of remedies'

While financial compensation is often an important part of access to remedy for victims of corporate adverse human rights and environmental impacts, they should, however, have access to other forms of remedies as well. A July 2017 Report in which the UN Working Group on Business and Human Rights unpacks the concept of access to effective remedies under the UNGPs stipulates that victims of corporate human rights abuse should be able to "seek, obtain and enforce a bouquet of remedies: a range of remedies depending upon varied circumstances, including the nature of the abuses and the personal preferences of rights holders".[59] This 'bouquet of remedies' refers to the different substantive forms of remedies as mentioned in the UNGPs, including apologies, financial or non-financial compensation and the prevention of future harm through, for example, injunctions or guarantees of non-repetition.[60]

Non-financial remedies will often have to be implemented in the state where the damage occurred. The process of remedying ecological damage, such as the clean-up of oil spillage, for example, must be performed in the territory of the state where the ecological damage occurred.[61] n transnational business and human rights litigation, this means that the final judgment will have to be recognized and enforced across borders. The Dutch *Four Nigerian Farmers* case can again serve as an example here. In this case, an obligation was imposed on Royal Dutch Shell and its Nigerian subsidiary SPDC to provide certain pipelines with a leak detection system, so that future leaks can be detected sooner. It has been confirmed that a leak detection system was installed by SPDC on the oil pipelines in question, in compliance with the Court of Appeal judgment.[62] The plaintiffs therefore did not have to ask for recognition and enforcement of the judgment in Nigeria. This, however, does not mean that the enforceability of this part of the judgment is not important. Enforceability may, for example, be an incentive for defendants to voluntarily enforce a judgment.

59 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/72/162, 18 July 2017.

60 Commentary to Guiding Principle 25, available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

61 See NGUYEN, Thu Thuy. **Transnational corporations and environmental pollution in Vietnam: Realising the potential of private international law in environmental protection**, Journal of Private International Law 18:2, 238-265, 2022.

62 Shell media release, "Shell and Milieudefensie Settle Long-Running Case over Oil Spills in Nigeria", https://www.shell.com.ng/media/2022-media-releases/shell-and-milieudefensie-settle-long-running-case-over-oil-spills-in-nigeria.html, published 23 December 2022, accessed 27 March 2023.

In the abovementioned French case against EDF, claimants attempted to obtain a French court order to suspend the construction of the company's wind park project in Mexico. While the project was eventually shut down by Mexico itself, the question rises how such an order to suspend a project would be enforced, and what the role of private international law rules on recognition and enforcement of foreign judgments would be in this regard. It remains to be seen what role non-financial remedies will play in future transnational corporate civil liability cases and how these will be enforced in practice.

4. RECOGNITION AND ENFORCEMENT OF FOREING JUDMENTS IN LATIN AMERICA

In order to provide victims of corporate human rights abuse with an effective remedy through transnational litigation, a successful judgment might have to be enforced in a variety of jurisdictions, including in the state where the abuse occurred. As such, Latin American private international law rules on recognition and enforcement of foreign judgments can come into play in transnational litigation regarding corporate human rights abuse in Latin America.

Latin American private international law is characterized by a coexistence of global, regional and domestic regimes, including as regards rules on recognition and enforcement of foreign judgments. Several regional private international law instruments contain provisions on the cross-border enforcement of judgments, such as the Montevideo Treaty on International Procedural Law of 1889, the Bustamante Code of 1928 and the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.[63] There is furthermore sub-regional codification of private international law within Mercosur, including the Las Leñas Protocol of 1992 on cooperation and Jurisdictional Assistance in Civil, Commercial, Labour and Administrative Matters of which chapter 5 lays down rules on recognition and enforcement of foreign judgments.[64] The scope of application of these instruments is, however limited to judgments rendered in one state party and which are to be recognized and/or enforced in another state party. These regional instruments will as such not be applicable when victims of corporate human rights abuse seek to enforce a successful judgment from a court of an EU Member State in the region.

63 See *e.g.* MARÍN FUENTES, José Luis. **Reflexiones sobre de la figura del exequatur desarrollada por el Tratado de Derecho Procesal Internacional de Montevideo de 1889 y su influencia en el contexto procesal Latinoamericano**. In: DE AGUIRRE Cecilia Fresnedo and LORENZO IDIARTE, Gonzalo A. Legado y futuro de sus soluciones en el concierto internacional actual: 130 Aniversario de los Tratados de Montevideo de 1889. Fundación de Cultura Universitaria, 2019.

64 Protocol of Co-operation and Jurisdictional Aid on Civil, Commercial, Labour and Administrative Issues between the Government of the Member States of the MERCOSUL and the Republic of Bolivia and the Republic of Chile (Las Leñas Protocol).

The Hague Conference on Private International Law (HCCH), however, recently adopted a long-awaited global framework on recognition and enforcement of foreign judgments in civil or commercial matters. This Convention has the potential of becoming a true global framework for the cross-border circulation of judgments. The following sections discuss this new Convention and the default application of domestic rules on recognition and enforcement of foreign judgments respectively.

4.1. The 2019 Judgments Convention

On 2 July 2019, after many years of preparatory work that began as early as in 1992, the delegates of the 22nd Diplomatic Session of the HCCH completed the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the '2019 Judgments Convention').[65] After the negotiations for a *convention double* had failed,[66] the HCCH limited the scope of the Convention to judgment recognition and enforcement. The 2019 Judgments Convention deals with the question of jurisdiction only indirectly through review in the requested court of the court of origin's jurisdiction. Article 5 lists thirteen 'jurisdictional filters' which the courts of the requested state are to apply to determine if the court of origin had an acceptable basis of jurisdiction to give a judgment that can be enforced under the Convention. If one of the thirteen jurisdictional tests is satisfied, the judgment may circulate under the Convention, subject to the grounds for non-recognition in article 7. These grounds for refusal are exhaustive and include concerns such as fraud, public policy, conflicting judgments and lack of notice. While the courts of the requested state may not refuse recognition and enforcement based on other grounds under national law, article 15 allows the recognition and enforcement of judgments under national law that is more liberal.[67] According to article 4(2), there shall be no review of the merits of the judgment.

The question rises to what extent the 2019 Judgments Convention will apply to the cross-border recognition and enforcement of judgments in transnational corporate civil liability cases and can as such enhance access to remedy for victims of business-related human rights abuse, including in Latin America. At least three concerns come to mind in

65 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Given the improbability of a choice of court agreement between the parties in business and human rights litigation, the Hague Convention of 30 June 2005 on Choice of Court Agreement (the '2005 Choice of Court Convention') is unlikely to apply.

66 See *e.g.* VAN LOON, Hans. T**owards a Global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters**, Nederlands Internationaal Privaatrecht, 4, 2020.

67 With the exception of the exclusive forum of jurisdiction in matters relating to rights *in rem* in immovable property (article 6).

this regard. First, at the time of writing, the only Latin American states that have signed – but not ratified – the 2019 Judgments Convention are Costa Rica and Uruguay, the latter of which was the first state to sign the instrument.[68] The EU was the first party to ratify the Convention on 12 July 2022. With Ukraine as a second ratifying party, the Convention will enter into force on 1 September 2023 for all EU Member States (except Denmark) and Ukraine. The Convention constitutes an important step towards a global framework for the circulation of judgments. The 2030 Agenda for Sustainable Development can provide an extra incentive for states to ratify this new instrument, which aims to simultaneously enhance effective access to justice and facilitate cross-border trade, investment and mobility.[69]

Second, it remains to be seen to what extent judgments in transnational corporate civil liability litigation will pass the jurisdictional test in article 5 of the Convention.[70] According to article 5, 1, a), a judgment passes the jurisdictional filter if the defendant in the enforcement proceedings was habitually resident in the state of the main proceedings at the time when it became party to those proceedings. For legal persons, article 3(2) of the Convention refers to four alternative connecting factors: the statutory seat, the law of incorporation or formation, the central administration or the principal place of business. As such, a judgment in which, for example, a German court orders a German company to implement certain measures in order to prevent future harm by oil spills will be eligible for circulation under the Convention subject to the grounds for non-recognition in article 7.

This indirect 'home jurisdiction' basis will, however, not apply to corporate civil liability claims against foreign defendants in the court of origin.[71] Dutch courts, for example, can exercise jurisdiction over foreign non-EU defendants based on domestic

68 The current status table of the Convention is available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=137. It has also been held that it is to be expected that Mexico will sign the Convention (Contreras Vaca, Francisco José. **Comentarios Al Convenio De La Haya Del 2 De Julio De 2019 Sobre Reconocimiento Y Ejecución De Sentencias Extranjeras En Materia Civil Y Comercial**, Revista Mexicana Derecho Internacional Privado y Comparado 45, 2021, p. 110).

69 HCCH, GARCIMARTÍN Francisco and SAUMIER Geneviève, Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf.

70 On the jurisdictional filters in the 2019 Judgments Convention: see WELLER, Matthias. **The 2019 Hague Judgments Convention: The Jurisdictional Filters of the HCCH 2019 Judgments Convention**, Yearbook of Private International Law 21, 2019/2020, p. 279 and ECHEGARAY DE MAUSSION, Carlos. **El Derecho Internacional Privado en el contexto internacional actual: Las reglas de competencia judicial indirecta en el Convenio de la Haya de 2 de Julio de 2019 y el accesso a la justicia**, Revista mexicana de Derecho internacional privado y comprado 45, 128-139, 2021. The jurisdictional filters are also discussed in GARCIMARTÍN, Francisco. **El convenio de La Haya de 2 de julio de 2019 sobre reconocimiento y ejecución de sentencias: una primera aproximación**, Revista Electrónicade Estudios Internacionales, Crónicade Derecho Internacional Privado 38, December 2019, p. 17. Available at: https://repositorio.comillas.edu/xmlui/bitstream/handle/11531/44114/REEII%20DICIEMBRE%202019.pdf?sequence=%20-1.

71 GODDARD, David and BEAUMONT, Paul, **Recognition and Enforcement of Judgments in Civil or Commercial Matters**. *In*: BEAUMONT, Paul and HOLLIDAY, Jayne, A Guide to Global Private International Law. Hart Publishing, 2022, p. 413.

jurisdiction rules, such as in the *Four Nigerian Farmers and Milieudefensie v. Shell* and the *Maceió* case, which have no equivalent in article 5 of the Convention.[72] In this regard, the jurisdictional filter regarding non-contractual obligations in article 5(1)(j) comes to mind.[73] The scope of this provision is, however, limited to non-contractual obligations arising from death, physical injury, damage to or loss of tangible property. It remains to be seen how these concepts will be applied in practice, taking into account the requirement of uniform interpretation in article 20 of the Convention. Furthermore, the jurisdictional filter in article 5(1)(j) is based on the act or omission causing the harm occurring in the state of origin of the judgment. As regards foreign defendants in the court of origin, to whom this jurisdictional filter is limited considering the scope of article 5(1)(a),[74] it seems unlikely that this requirement will be fulfilled in transnational corporate civil liability litigation.[75] As acknowledged in the explanatory report to the Convention, however, it is such judgments against foreign defendants that will often necessitate enforcement outside the state of origin.[76]

Furthermore, interim measures of protection are expressly excluded from the scope of the 2019 Judgments Convention.[77] According to the explanatory report, 'interim measures' refer to preliminary means of securing assets, such as freezing orders, and measures maintaining the status quo pending determination of an issue at trial. This means that an interim injunction to suspend a project, as was requested in the EDF case, would fall outside the scope of the Convention. Foreign interim measures can, of course, still be recognized and enforced under national law.[78]

On the other hand, the definition of 'judgment' in the Convention does include final non-monetary judgments and can as such facilitate the cross-border enforcement of a

72 On an EU level, there have also been proposals on the extension of the jurisdictional grounds in the EU Brussels Ia Regulation to foreign, non-EU defendants. (*e.g.* MARX, Axel et al. **Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries**. Study for the European Parliament, 2019; European Parliament Committee on Legal Affairs, Draft Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, 2020/2129(INL)).

73 On a discussion of article 5(1)(j) of the 2018 Draft Convention, see also VAN LOON, Hans. **Towards a Global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters**, Nederlands Internationaal Privaatrecht, 4, 2020.

74 HCCH, GARCIMARTÍN Francisco and SAUMIER Geneviève, Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf, para. 194.

75 The mining activities of Brazilian company Braskem SA allegedly causing the harm subject to the claim in the Dutch Maceió case, for example, took place in Brazil, not in the forum state.

76 HCCH, GARCIMARTÍN Francisco and SAUMIER Geneviève, Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf, para. 194.

77 Art. 3(1)(b) of the 2019 Judgments Convention.

78 HCCH, GARCIMARTÍN Francisco and SAUMIER Geneviève, Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf, para. 99.

'bouquet of remedies' as discussed in section 3.2. Furthermore, the enforcement regime established in the Convention also applies to judicial settlements approved by a court or concluded in the course of court proceedings and which are enforceable in the same manner as a judgment in the state of origin.[79] This is important given the fact that as of today, a 'successful' case in business and human rights litigation has mainly been a settled one.[80] In jurisdictions like the United States and the United Kingdom, most cases that have not been dismissed have been settled, and litigation on the merits has been rare. The question rises whether transnational corporate civil liability cases in the EU will follow suit. Indeed, the uncertain and lengthy character of transnational business and human rights litigation today can be important incentives for claimants to engage in settlement negotiations. In a case under the French *loi de vigilance* against French retail group Casino over illegal deforestation and human rights abuses in the Amazon in its beef supply chain, for example, a French court proposed judicial mediation between the parties, which was, however, refused by the claimants.[81] It remains to be seen to what extent and how the Judgments Convention will apply to settlements in the context of transnational business and human rights litigation in the EU.[82]

4.2. Domestic rules

In the meantime, awaiting the entry into force and further ratifications of the 2019 Judgments Convention, domestic rules of private international law will often apply as the default regime when victims of corporate human rights abuse seek to enforce a judgment from an EU Member State court in Latin America, provided that there is no applicable bilateral treaty containing rules on recognition and enforcement of judgments.[83] As such, national regimes on the cross-border circulation of judgments can play an important role

79 Art. 11 of the 2019 Judgments Convention.

80 KHOURY, Stefanie and WHYTE, David, C**orporate Human Rights Violations: Global Prospects for Legal Action. Routledge**, 2017, p. 99.

81 See JABKHIRO, Juliette and VIDALON, Dominique, "French retailer Casino, Amazon tribes offered mediation over deforestation row", Reuters, 9 June 2022, https://www.reuters.com/business/environment/french-retailer-casino-amazon-tribes-offered-mediation-over-deforestation-row-2022-06-09/, accessed 7 October 2022 and Business and Human Rights Resource Centre, "Deforestation in the Amazon: organisations refuse the mediation proposal in the legal action against Casino, 2 December 2022, https://www.business-humanrights.org/en/latest-news/deforestation-in-the-amazon-organisations-refuse-the-mediation-proposal-in-the-legal-action-against-casino/, accessed 26 March 2023.

82 On the application of the 2019 Judgments Convention and the 2005 Choice of Court Convention in the context of class action judgments and collective settlements: TAKAHASHI, Koji and TANG, Zheng Sophia. **Collective Redress**. *In*: BEAUMONT, Paul and HOLLIDAY, Jayne, A Guide to Global Private International Law. Hart Publishing, 2022.

83 An example of such a bilateral treaty is the Co-operation Agreement on Civil Issues between Brazil and France: Co-operation Agreement on Civil Issues between the Government of the Federative Republic of Brazil and the Government of the French Republic, enacted in Brazil by Decree No 3.598, dated 12 September 2000.

in providing victims of corporate human rights abuse with an effective remedy. Generally, many countries in Latin America have adapted their legal systems to enable globalization and international trade, including the recognition and enforcement of foreign judgments in their jurisdictions.[84] In line with the examples discussed in section 2 of the French *Unión Hidalgo community v. EDF* case and the Dutch *Maceió victims v. Braskem*, the following paragraphs touch on the domestic rules on recognition and enforcement of foreign judgments in Mexico and in Brazil. Rather than an exhaustive discussion of these rules, the aim is to provide some remarks that are potentially relevant to the cross-border recognition and enforcement of judgments in transnational corporate civil liability litigation, including on possible benefits of ratification by these countries of the 2019 Judgments Convention.

4.2.1. *Brazil*

In Brazil, domestic private international law contains a very open system for the recognition and enforcement of foreign judgments.[85] The reciprocity requirement was abolished already at the end of the 19th century, at a time of opening of the Brazilian economy.[86] The competence to recognize foreign judgments through the 'homologation' procedure (*homologação*) as a preparation for enforcement is, however, concentrated in the highest body of the Judiciary, unless there is a special provision to the contrary by law or treaty.[87] This competence first belonged to the Supreme Court and was then transferred to the Superior Tribunal of Justice (STJ).[88] Once the foreign judgment is recognized by the STJ, it can be enforced before a federal court of first instance in accordance with Brazilian law.[89]

The analysis carried out by the STJ for the recognition of a foreign judgment is limited to an assessment of the legal requirements set out in the law, without any review

84 PEREZNIETO CASTRO, Leonel. Notas sobre el derecho internacional privado en América Latina, Boletín Mexicano de Derecho Comparado, 144, September-December 2015, p. 1080.

85 SPITZ, Lidia. **Homologação De Decisões Estrangeiras No Brasil: A Convenção de Sentenças da Conferência da Haia de 2019 e o contrôle indireto da jurisdição estrangeira**. Arraes Editores, 2021, p. 240.

86 DE CARVALHO RAMOS, André. **Curso de Direito Internacional Privado**. Saraiva Jur, 2021, p. 528 and DOLINGER, Jacob and TIBURCIO, Carmen. **Private International Law in Brazil**. Kluwer Law International, 2017, p. 321.

87 SPITZ, Lidia. **Homologação De Decisões Estrangeiras No Brasil: A Convenção de Sentenças da Conferência da Haia de 2019 e o contrôle indireto da jurisdição estrangeira**. Arraes Editores, 2021, p. 394.

88 DOLINGER, Jacob and TIBURCIO, Carmen. **Private International Law in Brazil**. Kluwer Law International, 2017, p. 334 .

89 Arts. 523 et seq. of the new Brazilian Code of Civil Procedure (Law No. 13105/2015 in force since March 2016).

of the merits of the foreign judgment.[90] As of today, these requirements are stipulated in article 15 of the Introductory Law to the Brazilian Legal System, article 963 of the new Brazilian Code of Civil Procedure and in article 216-A to 216-X of the Internal Regulation of the Superior Tribunal of Justice. The conditions for recognition laid down in these provisions include requirements regarding translation and legalization formalities, the international jurisdiction of the rendering court, due service of process, enforceability of the foreign decision in the state of origin, no violation of a Brazilian *res judicata* decision and the absence of a manifest offense to public policy.[91]

Brazilian legislation does not specify indirect bases of jurisdiction for the purpose of the recognition and enforcement of foreign judgments. The STJ interprets the requirement of international jurisdiction of the rendering court in a very lenient manner, limiting this control to a verification that there has been no breach of exclusive bases of jurisdiction of the Brazilian courts.[92] The new Code of Civil Procedure expressly establishes that a foreign judgment shall not be recognized when the Brazilian courts have exclusive jurisdiction over the matter.[93] Article 23 of the Code of Civil Procedure gives exclusive jurisdiction to the Brazilian courts in certain matters of succession and divorce, and to hear actions relating to real property situated in Brazil. In cases where the defendant is domiciled in Brazil or where the event or act leading to the lawsuit occurred in Brazil, like in the *Maceió victims v. Braskem* case, Brazilian jurisdiction is 'concurrent' with possible other internationally competent courts and as such does not exclude the recognition and enforcement of a foreign judgment. When assessing the legitimacy of the foreign court's jurisdiction, the STJ thus does not engage in any analysis of the reasonableness of the links between the rendering state and the case under review. This has been criticized in literature for insufficiently protecting Brazilian litigants against the improper exercise of jurisdiction.[94] Indeed, such a limited control of indirect jurisdiction significantly increases the likelihood of recognition and enforcement of foreign judgments.

90 This is called a 'limited control system' (sistema de contenciosidade limiitada), with only a formal assessment of the foreign decision (juízo de delibação), SPITZ, Lidia. **Homologação De Decisões Estrangeiras No Brasil: A Convenção de Sentenças da Conferência da Haia de 2019 e o contrôle indireto da jurisdição estrangeira**. Arraes Editores, 2021, p. 228. See also DE ARAUJO, Nadia. Direito Internacional Privado: Teoria E Prática Brasileira., 8th ed. Thomson Reuters, 2019, p. 256.

91 Exceptionally and only in cases of foreign judgment of tax enforcement, the requirement of reciprocity must be added (art. 964, § 4 of the new Code of Civil Procedure).

92 SPITZ, Lidia. **Homologação De Decisões Estrangeiras No Brasil: A Convenção de Sentenças da Conferência da Haia de 2019 e o contrôle indireto da jurisdição estrangeira**. Arraes Editores, 2021, p. 220; DE ARAUJO, Nadia and DE NARDI, Marcelo. **Projeto de Sentenças Estrangeiras da Conferência de Haia: por um regime global de circulaçao internacional de sentenças em matéria civil e comercial**. Revista Estudos Institucionais 2, 2016, p. 714.

93 Art. 964 of the new Code of Civil Procedure. The exclusive bases of jurisdiction can be found in in art. 23 of this code.

94 SPITZ, Lidia. **Homologação De Decisões Estrangeiras No Brasil: A Convenção de Sentenças da Conferência da Haia de 2019 e o contrôle indireto da jurisdição estrangeira**. Arraes Editores, 2021, chapter 7.

This does not mean, however, that foreign judgments are automatically recognized in Brazil without any assessment by the STJ. One relevant example in which the recognition of a foreign judgment was denied can be found in the case of *Salazar and Others v. Chevron*,[95] ensuing from the abovementioned *Lago Agrio* litigation saga. In this case, the claimants sought to enforce the Ecuadorian multi-billion dollar judgment for environmental damages against Chevron Brasil Petróleo Ltda, an indirect low-level subsidiary of the Chevron Corporation. Like in other jurisdictions, however, this enforcement attempt failed. The STJ held that there was a lack of a connection between the Ecuadorian proceedings and the Brazilian state, as the defendant in the Ecuadorian judgment was not domiciled in Brazil and Chevron Brasil is a separate legal entity. The recognition request was therefore denied based on a lack of jurisdiction,[96] which, according to the STJ, led to a lack of procedural interest in the request (*interesse processual*).[97] As such, while the STJ performs only a very limited jurisdictional control without analyzing the reasonableness of the links between the case under review and the rendering state, it does analyze the reasonableness of the link between the case and the Brazilian state. The presence of assets, in the form of an indirect low-level subsidiary of the defendant in the main proceedings, was deemed insufficient in that regard. This case again highlights the importance of enforceability considerations in the choice of forum and defendants in business and human rights litigation, as even in an open system like Brazil, the separate legal entity principle can bar enforcement of a foreign judgment.

The relevant provisions on the recognition and enforcement of foreign judgments in Brazil do not distinguish between foreign monetary and non-monetary judgments. Non-monetary judgments are therefore enforceable under the same conditions as judgments awarding damages.[98] Furthermore, while article 961 of the Code of Civil Procedure and article 216-D of the Internal Regulation of the Superior Tribunal of Justice refer to a final foreign decision, article 962 of the Code of Civil Procedure stipulates that foreign judgments granting interlocutory relief (*decisão interlocutória estrangeira concessiva de medida de urgência*) may be enforced without following the 'homologation' procedure before the STJ. The urgency of the measure must have been decided on by the rendering court. The STJ can furthermore itself grant injunctions allowing the provisional enforcement of a foreign judgment.[99]

95 SEC 8542, STJ, Special Panel of STJ, rapporteur Justice LUIS FELIPE SALOMÃO, 29 November 2017.

96 According to this case, the jurisdiction of the court to decide is an essential precondition applicable to any judicial action brought in Brazil, including the recognition process which was under analysis.

97 SPITZ, Lidia. **Homologação De Decisões Estrangeiras No Brasil: A Convenção de Sentenças da Conferência da Haia de 2019 e o contrôle indireto da jurisdição estrangeira**. Arraes Editores, 2021, p. 200-201.

98 See CAMARGO RODRIGUES, Adriana. Brazil. In: GARB, Louis and Lew, Julian D.M. (eds.). **Enforcement of Foreign Judgments**: Volume 1. Kluwer, March 2022.

99 Art. 961, § 3 of the new Code of Civil Procedure.

It follows that the 2019 Judgments Convention is mainly an opportunity for Brazil to increase the receptiveness abroad of judgments rendered by Brazilian courts. As mentioned above, the Convention allows the recognition and enforcement of judgments under national law that is more liberal and is as such an instrument of minimum harmonization.[100] This means that even if Brazil would ratify the Convention, domestic law and the lenient interpretation of the indirect jurisdiction control laid down in article 963(I) of the Code of Civil Procedure can continue to be applied.[101] This limited jurisdiction control enables the recognition and enforcement of foreign judgments in business and human rights litigation where the link with the forum state is rather limited, such as in the Dutch *Maceió victims v. Braskem* case, which concerns a lawsuit for environmental damage against a Brazilian parent company and its Dutch subsidiaries that had no operational involvement in the mining activities. Furthermore, while the 2019 Judgments Convention expressly excludes interim measures of protection from its scope, such measures would still be eligible for enforcement under Brazilian private international law. The Convention would, on the other hand, facilitate a broader recognition and enforcement of Brazilian judgments in the rest of the world, as many countries do not share the same open, *favor recognitionis* domestic system for the recognition and enforcement of foreign judgments.[102] As such, ratification of the Convention can still improve access to remedy for victims of corporate human rights abuse in the country, where claimants are successful in local proceedings with cross-border elements.

4.2.2. *Mexico*

In Mexico, private international law aspects *in civil matters*, including the recognition and enforcement of foreign judgments in civil matters, fall within the competence of the Mexican states. Each of these states has its own civil code and civil procedure code, containing rules on the recognition and enforcement of foreign judgments. This makes finding the relevant provisions on the recognition and enforcement of a foreign judgment rather complicated. Most of these local codes, however, follow the relevant

100 Art. 15 of the 2019 Judgments Convention.

101 See also SPITZ, Lidia. H**omologação De Decisões Estrangeiras No Brasil: A Convenção de Sentenças da Conferência da Haia de 2019 e o contrôle indireto da jurisdição estrangeira**. Arraes Editores, 2021. Spitz therefore suggests a change in domestic private international law rules on the recognition and enforcement of foreign judgments (more specifically on the indirect jurisdiction control).

102 *Ibid*. p. 240; DE ARAUJO, Nadia, DE NARDI, Marcelo, LOPES, Inez and Polido, Fabrício. **The Hague Conference's Judgments Project: highlights of the text and advantages for Latin America**. Revista de Direito Internacional: Crônicas de Direito Internacional Privado 16/1, 18-34, 2019.

federal provisions very closely or make explicit reference to them.[103] Not all local civil procedure codes furthermore regulate indirect jurisdiction.[104] In the absence of local rules on the matter, the rules on indirect jurisdiction in federal legislation serve as a guide for local Mexican judges to assess whether the rendering court based its jurisdiction on acceptable grounds.[105] In what follows, the focus will therefore be on the relevant federal rules regarding the recognition and enforcement of foreign judgments. On 7 June 2023, a new National Code of Civil and Family Procedure was published in the *Diario Oficial de la Federación (DOF)*.[106] The aim of the Code is to unify civil procedure rules among the different Mexican states, including rules on the recognition and enforcement of foreign judgments. The new Code will, however, be implemented gradually, requiring both the Federal and Local governments to adopt it no later than 1 April 2027.[107] The following analysis is based on the federal rules in force at the time of writing as laid down in the *Código Federal de Procedimientos Civiles* (*CFPC*, DOF 24-02-1943).

The federal provisions on the recognition and enforcement of foreign judgments in the *CFPC* build on the abovementioned 1979 Inter-American Foreign Judgments and Arbitral Awards Convention.[108] The conditions for a foreign judgment to be enforceable according to article 2 of this Convention include formal authenticity, translation and legalization, international jurisdiction of the rendering court, the due legal form of the summon or subpoena, the opportunity for the parties to present their defense, the *res judicata* force of the judgment in the rendering state, and the absence of a violation of public policy. These conditions are reflected in articles 571 and 572 *CFPC*, which add a number of additional requirements, such as the fact that the foreign judgment has not been issued following an action *in rem* and the non-existence of *lis pendens* in Mexico.[109] According to article 571, paragraph 2, the court may furthermore deny enforcement if it is proven that foreign judgments or awards are not enforced in similar cases in the

103 ALBORNOZ, María Mercedes. Mexico. In: BASEDOW, Jürgen, RÜHL, Giesela, FERRARI, Franco and DE MIGUEL ASENSIO, Pedro (eds.). **Encyclopedia of Private International Law**. Edward Elgar Publishing, 2017, p. 2333-2334.

104 This is true *e.g.* for Oaxaca, which is the state where French energy giant EDF constructed a wind park project on lands of Unión Hidalgo that led to a civil liability case before the French courts (section 2.2). The Code of Civil Procedure of the state of Oaxaca contains rules on the enforcement of foreign judgments in its articles 586 to 588, but does not contain rules on indirect jurisdiction. The Code of Civil Procedure of the Federal District, on the other hand, refers to internationally recognized rules that are compatible with those contained in that code or in the Federal Code of Civil Procedure.

105 PEREZNIETO CASTRO, Leonel. Derecho internacional privado: parte general (10a edición). Oxford University Press México, 2015, p. 317 ff.

106 Decreto por el que se expide el Código Nacional de Procedimientos Civiles y Familiares, available at https://dof.gob.mx/nota_detalle.php?codigo=5691385&fecha=07/06/2023#gsc.tab=0.

107 *Ibid*., Art. 2 Artículos Transitorios.

108 ALBORNOZ, María Mercedes. Mexico. In: BASEDOW, Jürgen, RÜHL, Giesela, FERRARI, Franco and DE MIGUEL ASENSIO, Pedro (eds.). **Encyclopedia of Private International Law**. Edward Elgar Publishing, 2017, p. 2333-2334.

109 Art. 571, II and VI *CFPC*.

country of origin and as such contains the principle of reciprocity. Several local codes of civil procedure also include such a reciprocity requirement.[110] There is no review of the merits of the foreign decision.[111]

As to the requirement of jurisdiction of the rendering court, article 571 *CFPC* stipulates that the rendering court must have had jurisdiction to hear and try the case "in accordance with the rules recognized in international law that are compatible with those adopted by this Code".[112] Articles 564 to 568 of the Federal Code of Civil Procedure contain rules on indirect jurisdiction (*'Competencia en Materia de Ejecución de Sentencias'*). According to these provisions, a foreign judgment is enforceable if the foreign court has assumed jurisdiction either based on criteria that are compatible with or analogous to Mexican law principles, to avoid a denial of justice or based on an agreement between the parties. A foreign judgment will not be enforceable if the Mexican courts had exclusive jurisdiction over the matter, for example in cases concerning lands and waters located in the national territory or acts of authority or related to the internal regime of the state.[113]

As a general rule, in the absence of a choice of court agreement between the parties, a judgment will thus be recognized in Mexico if the foreign court seized jurisdiction in a manner that is compatible with or analogous to Mexican law principles. If the Mexican court considers the jurisdiction of the rendering court to be exorbitant, which will be assessed according to Mexican law principles, it can refuse the enforcement of the foreign judgment. The mere physical presence of the defendant, for example, will be considered an exorbitant jurisdictional basis.[114] According to the Mexican direct jurisdiction rules, the competent courts for non-contractual obligations are those of the place where the defendant is domiciled.[115] As such, it seems that a strict interpretation of this indirect jurisdiction control could lead to a refusal of the recognition and enforcement of foreign

110 *E.g.* Art. 606 Code of Civil Procedure of the Federal District contains a similar provision: "*No obstante el cumplimiento de las anteriores condiciones el Juez podrá negar la ejecución si se probara que en el país de origen no se ejecutan sentencias, resoluciones jurisdiccionales o laudos extranjeros en casos análogos". Art. 586 of the Code of Civil Procedure of the state of Oaxaca, for example, states that "Las sentencias y demás resoluciones judiciales dictadas en países extranjeros, tendrán en el Estado la fuerza que establezcan los tratados respectivos celebrados con la República Mexicana o en su defecto se estará a la reciprocidad internacional.*"

111 Art. 575 Federal Code of Civil Procedure.

112 Art. 571, III, own translation (Spanish text: "*Que el juez o tribunal sentenciador haya tenido competencia para conocer y juzgar el asunto de acuerdo con las reglas reconocidas en el derecho internacional que sean compatibles con las adoptadas por este Código.* […]").

113 Art. 568 *CFPC*.

114 SILVA SILVA, Jorge Alberto. **Reconocimiento y ejecución de sentencias de Estados Unidos de América en México**. Universidad Nacional Autónoma de México, 2011, available at https://biblio.juridicas.unam.mx/bjv/id/3006, p. 77-79.

115 ALBORNOZ, María Mercedes. Mexico. *In*: BASEDOW, Jürgen, RÜHL, Giesela, FERRARI, Franco and DE MIGUEL ASENSIO, Pedro (eds.). **Encyclopedia of Private International Law**. Edward Elgar Publishing, 2017, p. 2333-2334: "At the domestic level, Mexican law has no special jurisdiction rule for non-contractual obligations. Consequently, the general rule for *in personam* proceedings (art 24(IV) Federal Code of Civil Procedure and art 156(IV) Code of Civil Procedure for the Federal District) shall be applied."

judgments in transnational business and human rights litigation against Mexican (parent or subsidiary) companies.[116] The indirect jurisdiction rule on denial of justice, however, could offer a solution in this regard. According to article 565 *CFPC*, when asked to recognize a foreign judgment, it is sufficient for a Mexican court to establish that the rendering judge assumed jurisdiction to avoid denial of justice. This provision has been held to enable the recognition and enforcement of foreign judgments based on the doctrine of *forum necessitatis*.[117] Victims of corporate human rights abuse in particular are often faced with such a denial of justice.

Like in Brazil, the Mexican Federal Code of Civil Procedure does not distinguish between the recognition and enforcement of foreign monetary and non-monetary judgments, so that a foreign non-monetary judgment can also be recognized and enforced in Mexico.[118] The recognition and enforcement of foreign interim orders, on the other hand, like an order for suspension of a project as was requested in the case of *Unión Hidalgo community v. EDF*, seems to be prevented by the requirement of *res judicata* of the foreign judgment, at least in some Mexican states.[119]

Ratification of the 2019 Judgments Convention by Mexico would facilitate both the recognition and enforcement of foreign judgments in Mexico and of Mexican judgments in the rest of the world. In civil matters, generally, the competence to recognize foreign judgments belongs to the Mexican states. This means that the requirements for recognition and enforcement of foreign judgments in civil matters are scattered in the local codes of each of these states. The 2019 Judgments Convention, including its jurisdictional filters that include, for non-contractual obligations arising from death, physical injury, damage to or loss of tangible property, the act or omission directly causing the harm, could provide more clarity and legal certainty in this regard. Furthermore, a broad ratification and implementation of the Judgments Convention would facilitate the enforcement abroad

116 This question will not rise in the *Unión Hidalgo community v. EDF* case, as the lawsuit was filed only against the French parent company EDF and not against, for example, EDF Renewables Mexico (a subsidiary of EDF) or Eólica de Oaxaca (the project promoter for EDF in Unión Hidalgo). See CCFD-Terre Solidaire, ECCHR and ProDESC, "Vigilance Switched Off: Human Rights Violations in Mexico: What are the Responsibilities of EDF and the APEA?", June 2021, available at https://www.ecchr.eu/fileadmin/Publikationen/2021-06-08_-_Vigilance_switched_off_-_Report_-_EN.pdf.

117 GONZÁLEZ MARTÍN, Nuria and RODRÍGUEZ JIMÉNEZ, Sonia. **Derecho internacional privado: Parte general**. Universidad Nacional Autónoma de México, 2010, available at http://ru.juridicas.unam.mx/xmlui/handle/123456789/12165.

118 CABRERA COLORADO, Orlando Federico. Mexico. In: GARB, Louis and Lew, Julian D.M. (eds.). **Enforcement of Foreign Judgments**: Volume 1. Kluwer, April 2021.

119 *Ibid*. The requirement of res judicata is provided for in Article 571, V CFPC. While the Civil Procedure Code for the Federal District reiterates this res judicata requirement in its provisions on the recognition and enforcement of foreign judgments, such a requirement is not included in the local code of the states of Oaxaca, for example.

of Mexican judgments,[120] including in local business and human rights litigation, as such contributing to the realization of access to remedy for victims of corporate human rights abuse.

5. POTENTIAL AND LIMITATIONS OF PRIVATE INTERNATIONAL LAW

The use of transnational private law mechanisms in the context of corporate adverse human rights and environmental impacts activates private international law in human rights enforcement and in addressing environmental challenges. As such, private international law can play an important role in realizing the sustainable development goals, including – but not limited to – target 16.3 on access to justice. As views on the field of private international law have changed from being value-neutral, apolitical and insulated from public interests,[121] to playing an indispensable role in realizing the sustainable development goals,[122] the question rises what its true potential is to deal with corporate human rights abuse and adverse environmental impacts as one of the most pressing challenges posed by globalization.

First, the cross-border aspect of transnational business and human rights litigation entails a number of difficulties regarding access to court. Research has shown that victims of corporate human rights abuse are faced with many practical and procedural hurdles when pursuing remedy through such transnational cases, including in the European Union.[123] Examples include the high cost of transnational litigation, difficulties to secure legal representation and issues related to access to and collection of evidence. It is especially in this regard, however, that the field of private international law has great potential. As to the cross-border taking of evidence, for example, reference can be made to the German case of *Luciano Lliuya v. RWE* filed by a Peruvian farmer on climate change and its consequences for his livelihood, in which German judges recently travelled to Peru to collect evidence.[124] Between its State parties, including several Latin American countries, the 1970 Hague Evidence Convention furthermore establishes methods of co-

120 DE ARAUJO, Nadia, DE NARDI, Marcelo, LOPES, Inez and Polido, Fabrício. **The Hague Conference's Judgments Project: highlights of the text and advantages for Latin America**. Revista de Direito Internacional: Crônicas de Direito Internacional Privado 16/1, 18-34, 2019.

121 ENNEKING, Liesbeth. Judicial Remedies: The Issue of Applicable Law. *In*: ÁLVAREZ RUBIO, Juan José and YIANNIBAS, Katerina (eds.). **Human Rights in Business**. Routledge, 2017.

122 MICHAELS, Ralf, RUIZ ABOU-NIGM, Veronica and VAN LOON, Hans (eds.). **The Private Side of Transforming our World: UN Sustainable Development Goals 2030 and the Role of Private International Law**. Intersentia Online, 2021, available at https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p.

123 *Supra* note 6.

124 LUTZI, Tobias, "German Judges Travel to Peru in Climate-Change Trial", Conflict of Laws: Views and News in Private International Law, 31 May 2022, https://conflictoflaws.net/2022/german-judges-travel-to-peru-in-climate-change-trial/.

operation for the taking of evidence abroad in civil and commercial matters.[125] If ratified more widely, the 1980 Access to Justice Convention could also enhance access to justice for victims of corporate human rights abuse.[126] As such, the fourth private international law pillar on judicial and administrative co-operation too can improve access to remedy for victims of corporate adverse human rights and environmental impacts.

Furthermore, as mentioned above, the UNGPs refer to a range of different remedies that should be available to victims of corporate human rights abuse. Not all remedies, however lend themselves to enforcement, be it in domestic or transnational litigation. It is, for example, questionable whether apologies could ever be enforced, let alone in a cross-border context. On the other hand, transnational injunctive relief could play an important role in providing victims with the 'bouquet of remedies' referred to by the UNGPs. It is especially in this regard that the cross-border enforcement of judgments is essential. The 2019 Judgments Convention provides for recognition and enforcement of such non-monetary judgments and could as such, when ratified broadly, significantly contribute to access to remedy for victims of corporate human rights abuse.[127] The same is true for the enforcement of judicial settlements, although it is of utmost importance to ensure that victims' right to an effective remedy are adequately taken into account in settlement negotiations in the context of business and human rights litigation. Indeed, while settlements offer the advantage of being more speedy and less risky than litigation on the merits, they also, for example, allow defendant companies to avoid the attribution of liability and the establishment of precedents.[128]

The foregoing does not aim to diminish the importance of complementarity of different avenues to remedy and as such of an 'all roads to remedy' approach in the context of corporate human rights abuse.[129] The UNGPs refer to various fora to provide access to remedy, including both state-based and non-state-based as well as judicial and non-judicial processes. Indigenous peoples' customary institutions, for example, can play

125 Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Latin American states party to this Convention include Argentina, Brazil, Costa Rica, Mexico and Venezuela (status table available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=82).

126 Convention of 25 October 1980 on International Access to Justice. The only Latin American countries that have ratified this Convention are Brazil and Costa Rica (status table available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=91). See VAN LOON, Hans. **At the Cross-roads of Public and Private International Law: The Hague Conference on Private International Law and Its Work**. *In*: CHENG, Chia-Jui. Collected Courses of the Xiamen Academy of International Law. Xiamen Academy of International Law Summer Courses, 2017, p. 40 ff.

127 GODDARD, David and BEAUMONT, Paul, **Recognition and Enforcement of Judgments in Civil or Commercial Matters**. In: BEAUMONT, Paul and Holliday, Jayne, A Guide to Global Private International Law. Hart Publishing, 2022, p. 411.

128 LINDT, Angela. **Transnational Human Rights Litigation: A Means of Obtaining Effective Remedy Abroad?**. Journal of Legal Anthropology 4(2), 2020, p. 71.

129 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/72/162, 18 July 2017.

a core role in ensuring access to remedy in the context of business-related impacts on indigenous peoples' rights.[130] As mentioned above, incidents of corporate human rights abuse have also led to various types of domestic business and human rights litigation in Latin America. In this regard, the Inter-American Court of Human Rights has affirmed that states subject to the jurisdiction of the court must guarantee that companies will be held accountable for human rights abuse derived from the business operations in their territory.[131] Not only is transnational litigation significantly more costly than local litigation, host state courts are also likely to be better placed to both assess and address the true damage caused by the corporate conduct.[132] Excessive reliance on transnational litigation has furthermore been criticised for carrying a colonial connotation and for impeding empowerment of and development in the states in which the harm occurred.[133] However, taking into account the power imbalances between countries and companies in the Global South and in the Global North, transnational corporate civil liability litigation, often forms an essential part of this 'wider system' of possible avenues towards remedy.[134] Furthermore, private international law can play a role not only in transnational litigation but also in proceedings in the state where the damage occurred, for example when they include a foreign defendant company. The plaintiff's decision to include a foreign parent company in their claim will often be motivated by financial reasons. A successful judgment, like in the *Lago Agrio* case, will then have to be enforced across borders.

6. CONCLUSION

This article has demonstrated the role and potential of private international law rules on the cross-border recognition and enforcement of judgments in providing victims of corporate human rights abuse with an effective remedy. It discussed the reasons for and some examples of the growing trend of transnational civil liability litigation in the Global North for corporate human rights abuse in the Global South, including in Latin America.

130 See *e.g.* European Network on Indigenous Peoples, "Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples", Report 16 (2014), available at https://www.iwgia.org/images/publications/0684_IGIA_report_16_FINAL_eb.pdf.

131 *E.g.* Inter-American Court of Human Rights, *Lemoth Morris et al. v. Honduras*, 31 August 2021.

132 OPPONG, Richard Frimpong. **SDG 6: Clean Water and Sanitation**. *In*: MICHAELS, Ralf, RUIZ ABOU-NIGM, Veronica and VAN LOON, Hans (eds.). The Private Side of Transforming our World: UN Sustainable Development Goals 2030 and the Role of Private International Law. Intersentia Online, 2021, available at https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p.

133 *Ibid*; ARCHER, Simon. **The Trafigura Actions as Problems of Transnational Law**. In: MUIR WATT, Horatia (ed.), Global Private International Law: Adjudication without Frontiers. Edward Elgar Publishing, 2019, p. 106.

134 Commentary to Guiding Principle 25, available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

This trend raises questions regarding the cross-border recognition and enforcement of successful judgments in such transnational litigation. We have seen that the separate legal personality doctrine not only complicates attribution of liability in business and human rights litigation, but can also be invoked at the enforcement stage to prevent corporate accountability. Enforceability considerations are therefore important when choosing the forum and defendant company or companies. Litigation that includes a foreign defendant company, such as the *Maceió victims v. Braskem* case in the Netherlands, will activate rules on cross-border recognition and enforcement of judgments. Freezing injunctions and similar legal concepts can be a useful tool to mitigate the risk of ending up with an unenforceable judgment awarding damages. Victims should, however, have access not only to financial compensation but also to other forms of remedies, such as injunctions or guarantees of non-repetition. In transnational business and human rights litigation, rules on cross-border recognition and enforcement of judgments can have an important role to play in providing victims with a 'bouquet of remedies'.

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Private international law in Latin America is characterized by a coexistence of global, regional and domestic regimes, including for rules on the cross-border recognition and enforcement of judgments. The new 2019 Judgments Convention will enter into force for all EU Member States (except Denmark) and Ukraine on 1 September 2023. While the Convention's provisions raise a number of concerns in light of transnational business and human rights litigation, the instrument does have the potential to improve access to remedy for victims of corporate human rights abuse. Broad ratification is therefore important, not only to facilitate global trade but also to improve access to justice, and provides several advantages for Latin American countries. Section 4.2 discussed a few of these advantages for Brazil and Mexico in particular. Generally, a broadly ratified Convention on the cross-border circulation of judgments would, for cases that fall under its scope, provide more legal certainty in cross-border proceedings, including in transnational business and human rights litigation.

Complementarity of different avenues to remedy and an 'all roads to remedy' approach is essential in the context of corporate human rights abuse. While this paper focused on transnational litigation in countries in the Global North for adverse human rights and environmental impacts in Latin America, questions of private international law can also arise in domestic litigation in the country where the damage occurred. Cross-border aspects, either in local or in transnational litigation, activate the field private international law in providing victims of corporate human rights abuse with an effective remedy, a role which we should not overestimate but still take seriously. Continuing research on – and efforts to reduce – private international law barriers to accessing both local and transnational judicial remedies is therefore essential. Research into the cross-border enforcement of judgments establishing civil liability for corporate adverse

human rights and environmental impacts is an indispensable part thereof. Considering the enforceability of a possible judgment or settlement is, furthermore, important when adopting a certain litigation strategy and in the context of settlement negotiation. The PhD research project of which this article forms part aims to contribute to this important and timely topic by examining the legal framework on and the practice of cross-border enforcement of remedies in transnational corporate civil liability cases filed in the EU.

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