ESTABLISHING EXTRATERRITORIAL JURISDICTION OF HOME STATE FOR INVESTOR ACCOUNTABILITY: ENGLISH AND DUTCH ANCHORING MECHANISM AND AN IIA COMPLEMENT OR ALTERNATIVE

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ABSTRACT

*There is an international trend of holding investors liable through the judicial process of home states for their infringements committed in host states. In such civil proceedings, English and Dutch courts adopted an anchoring mechanism for jurisdictional issues, from which lessons can be learned by other investors' home state courts. However, there are problems with its legal basis. Firstly, it relies upon the "Brussels Regulation" which should not be applicable to cases concerning the jurisdiction of non-EU states. Even assuming that it is applicable, the English anchoring mechanism now faces a renewed "*forum non conveniens*" challenge with Brexit. Compared to the English "necessary or proper party" gateway, the Dutch anchoring mechanism under Article 7(1) of the Dutch Code of Civil Procedure confuses the necessity of joint consideration and the ground of extraterritorial jurisdiction, without any requirement of links between the forum state and the claims. This article advocates international investment agreements (hereinafter "IIAs") provision on investor liability in the home state to complement or replace the anchoring mechanism, which can be*

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臺灣大學學術期刊資料庫

justified as an analogy to an exceptional arrangement to territorial principle. The existing provision shall be improved, such as by taking the IIA with such a provision as part of the applicable laws and considering the application of home state laws, designating a specific home state court or adopting further junctions where domicile of defendant and place of tort are inapplicable, and clarifying plaintiff qualification based on victims of investor infringements.

KEYWORDS: *investor liability, home state, investor accountability, extraterritorial jurisdiction, anchor defendant, infringement, Brussels Regulation, necessary or proper party, joint consideration, international investment agreements, applicable law, domicile*

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I. INTRODUCTION

Transnational investments have been proven to be both contributive to the development of host countries and detrimental to the environment, human rights and other public and private interests of local communities.[1] For decades, the accountability of investor infringements and abuses has barely been addressed by international investment law. In recent years, however, the emergence of host state counterclaims, investor misconduct and contributory fault of investors have brought about some changes in the situation.[2] A more remarkable phenomenon is that civil litigations against multinational corporations and their overseas subsidiaries have been brought before the courts of investors' home states.[3] Since the alleged acts or decisions occurred within an investor's host state, it was almost impossible for the investor's home state court to assert jurisdiction directly upon those well-recognized grounds of jurisdiction, such as territoriality. Home state courts have to employ special interpretative tools and even develop brand-new principles or mechanisms if they are intended to exercise jurisdiction. Unlike the United States that has acted as a leader in accountability of multinational corporations[4] by frequent application of its domestic laws with extraterritorial effects,[5] English courts adopted an anchoring mechanism. In response to challenges of jurisdiction, particularly the objections based on "*forum non conveniens*",[6] English courts have

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[1] *See* Yulia Levashova, *The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States Through International Investment Law*, 14(2) UTRECHT L. REV. 40, 40 (2018).

[2] *See* Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, 113 AJIL UNBOUND 33, 35-37 (2019); MARTIN JARRETT, CONTRIBUTORY FAULT AND INVESTOR MISCONDUCT IN INVESTMENT ARBITRATION 2-3 (2019); Jean-Michel Marcoux & Andrea K. Bjorklund, *Foreign Investors' Responsibilities and Contributory Fault in Investment Arbitration*, 69(4) ICLQ 877, 882 (2020); Xuan Shao, *Environmental and Human Rights Counterclaims in International Investment Arbitration: At the Crossroads of Domestic and International Law*, 24(1) J. INT'L ECON. L. 157, 158 (2021).

[3] Apart from the English and Dutch cases discussed in this article, there are other civil lawsuits against investors before the courts of investors' home states such as the United States, Canada, and Italy among others. *See* Ekaterina Aristova, *Tort Litigation Against Transnational Corporations in the English Courts: The Challenge of Jurisdiction,* 14(2) UTRECHT L. REV. 6, 6 (2018).

[4] *See* Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30(2) BERKELEY J. INT'L L. 259, 259 (2012).

[5] In cases against torts and abuses of rights, the US federal courts have widely applied the Alien Tort Statute [hereinafter ATS]. Although the US Supreme Court expressly noted in *Kiobel* that "the presumption against extraterritoriality applies to claims under the ATS," some federal courts have still applied the ATS to decide tort litigations involving American corporations because of the possibility of displacing "the presumption against extraterritorial application" where ATS claims "touch and concern the territory of the United States" "with sufficient force." Esther Kiobel v. Royal Dutch Petroleum Co. et al., 569 U.S. 108, 133 S. Ct. 1659, 1669 (2013).

[6] This principle was derived from Scottish judicial practice, having been developed by English courts and adopted by many states of the United States. According to an explanation made by Justice

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considered whether the parent companies owe a duty of care to the claimants and thus could be taken as "anchor defendants."[7] In similar proceedings against the Royal Dutch Shell PLC and its Nigerian subsidiary concerning oil leakages caused by the subsidiary in Nigeria, the Appeal Court of the Hague used a similar term "*ankervorderingen*" (anchor claim) in determining jurisdiction.[8] According to the judgments concerned, both English and Dutch courts have based the anchoring mechanism on the Brussels Regulation[9] together with their domestic civil procedure rules.[10] Interestingly enough, the results of their assessments are not identical, which implies that there might be differences between their criteria.

Compared to the local remedies of an investor's host state, the judicial process of the home state has a stronger prospect for investor accountability. Although the traditional structure that foreign investments flowed from developed economies to developing countries has changed fundamentally,[11] it still happens not infrequently that the legal systems of an investor's host country are not sound, with relatively poor legal resources available to those affected by investor misconduct. In addition to the earlier literature,[12] recent cases brought in English and Dutch courts can further illustrate that in some cases, an investor's home state is more likely to offer access to justice to the victims than the host state.[13] The key problem is how to establish extraterritorial jurisdiction of a home state court for accountability of

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Brandeis in 1932, *forum non conveniens* means that "courts of equity and of law also occasionally decline to exercise jurisdiction, in the interest of justice, where . . . for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." Ben F. Cameron, *Forum Non Conveniens*, 23(1) MISS. L.J. 11, 12 (1951); Ronald A. Brand, *Challenges to Forum Non Conveniens*, 45(4) N.Y.U. J. INT'L L. & POL. 1003, 1015-17 (2013); Grant Stirling, *Company Group Liability and Extra-territorial Jurisdiction: The Considerable Post-Brexit Obstacles to the UK as a Major Forum for Competition Law Damages Actions*, 14(1) GLOBAL COMPETITION LITIG. REV. 27, 31 (2021).

[7] Lungowe v. Vedanta Resources PLC & ORS [2020] EWHC (TCC) 749.

[8] Friday Alfred Akpan v. Shell, ECLI:NL:GHDHA:2015:3587, ¶¶ 2.2, 2.5 (Dec. 18, 2015) [hereinafter *Akpan v. Shell* (2015)].

[9] It refers to Council Regulation 44/2001, 2001 O.J. (L 012) 1 (EC) (end of validity on 9 January 2015) [hereinafter Brussels Regulation] or Regulation 1215/2012, 2012 O.J. (L 351) 1 (entered into force on 10 January 2015) [hereinafter Recast Brussels Regulation].

[10] The investor liability cases brought before English courts and cited by this article arose from alleged infringements that were committed before Brexit, by which time Brussels Regulation was applicable to the United Kingdom, including the England and Wales.

[11] Typically, developed countries like the United States, Singapore and Germany are top host economies of FDI inflows while China, India and several developing countries are important capital-exporting economies in the world. *See* UNITED NATIONS CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2021, at 5-7 (June 21, 2021), https://unctad.org/system/files/official-document/wir2021_en.pdf.

[12] *See* Surya Devad, *Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?*, 5 MELB. J. INT'L L. 37, 50-51 (2004).

[13] For example, in *Lungowe v. Vedanta Resources PLC*, Justice Coulson found adequate evidences that the claimants could not obtain justice in Zambia, the host state at issue, which led the Justice and the Supreme court to conclude that England was a proper place to bring the claims. *See* Dominic Liswaniso Lungowe & Others v. Vedanta Resources PLC & Konkola Copper Mines PLC [2016] EWHC (TCC) 975 [hereinafter *Lungowe v. Vedanta Resources PLC* [2016]].

臺灣大學學術期刊資料庫

investor infringements that take place in a host state. Some ideas under consideration have the potential to solve the problem, such as establishing a special universal jurisdiction for human rights abuse on the ground of *forum necessitatis* (the jurisdiction by necessity)[14] or taking a multinational corporation and its foreign subsidiaries as a single economic entity.[15] As another option, the anchoring mechanism has already been utilized by English and Dutch courts for holding investors accountable. Therefore, this article will focus on this mechanism to find out whether it is well-grounded and worth promoting. For this purpose, the next section is devoted to the rationale and good points of the mechanism based on jurisprudence of English and Dutch courts. Section III then discusses the problems of the mechanism by examining its legal basis. Based on that, the final section explores another alternative of establishing jurisdiction of home state court for investor accountability according to the existing provisions on investor liability in a few international investment agreements (hereinafter "IIAs"), which may be developed to complement or even replace the anchoring mechanism.

II. RATIONALE OF THE ENGLISH AND DUTCH ANCHORING MECHANISM AND LESSONS LEARNED

Recently, English and Dutch courts have applied the anchoring mechanism to jurisdictional issues in infringement claims against multinational investors. Notwithstanding differences in domestic legal basis, there are similarities in the rationale of the anchoring mechanism, from which some lessons can be learned by other courts of transnational investors' home states and victims of investor infringements.

A. Deciding Jurisdiction over an Anchor Defendant First that Is Originally Subject to Jurisdiction of Home State

In English and Dutch investor liability cases involving the application of the anchoring mechanism, all the courts decided first the jurisdiction over

[14] For instance, Chilenye Nwapi came up with five conditions of applying the *forum necessitatis* doctrine. The idea of a *forum necessitatis* to avoid denials of justice was considered by the European Commission to be included in the Recast Brussels Regulation. Although it does not appear in the final Regulation, the doctrine and the conditions put forward by Chilenye Nwapi have been adopted by some Member States of the EU. For example, the "necessary or proper party" gateway that will be discussed below reflects some factors of the *forum necessitatis* doctrine. *See generally* Chilenye Nwapi, *Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor*, 30(78) UTRECHT J. INT'L & EUR. L. 24 (2014); Adeline Michoud, *Of Rights and Men: An Assessment of European Jurisdictional Rules over Transnational Corporate Abuse Claims*, 22 TRINITY C.L. REV. 7, 23-28 (2019).

[15] *See* Kirshner, *supra* note 4, at 267-68; Michoud, *supra* note 14, at 13.

臺灣大學學術期刊資料庫

the claims against a parent company. Since such parent company was within the jurisdiction of the forum state from the outset on general grounds, such as nationality, residence or domicile, it was likely to act as an anchor defendant. In particular, the alleged multinationals normally had a domicile in Europe where a court of a European Member State can assert jurisdiction according to the Brussels Regulation. Article 2(1) of the 2001 Brussels Regulation (the same as Article 4(1) of the Recast Brussels Regulation) provides that: "[s]ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

While English courts have frequently encountered the "*forum non conveniens*" objection where the alleged acts were committed abroad, Article 2(1) of the 2001 Brussels Regulation has made a difference. For example, in *Lungowe v. Vedanta Resources PLC*,[16] Justice Coulson of the High Court of England and Wales noted that "[t]he appropriate starting point for deciding an appropriate forum is the place of commission of the tort. In the present case that was Zambia."[17] However, by invoking the *Owusu v. Jackson* decision of the European Court of Justice which had specified the inapplicability of *forum non conveniens* to Article 2(1) of the Brussels Regulation,[18] Justice Coulson concluded that "the Brussels Convention precludes a court of a contracting State from declining the jurisdiction conferred on it by Article 4 on the ground that a court of a non-contracting State would be a more appropriate forum."[19] In 2020, the judge in *Jalla v. Royal Dutch Shell PLC* reiterated that "[t]he effect of the mandatory terms of Article 4(1) is that jurisdiction that is vested in the English Court by the article may not be challenged on *forum non conveniens* grounds."[20]

In the practice of Dutch courts, the Brussels Regulation has also played a significant role in the establishment of jurisdiction over an anchor defendant. For instance, in *Akpan v. Shell*,[21] Shell Petroleum Development Company of Nigeria (hereinafter "SPDC") argued that it was an abuse of law

[16] This case was initiated by 1826 Zambian residents against Vedanta, a multinational company domiciled in England, as well as its Zambian subsidiary, Konkola Copper Mines PLC [hereinafter KCM], for damages caused by the pollution and environmental impacts from a copper mine operated by KCM in Zambia.

[17] *Lungowe v. Vedanta Resources PLC* [2016], *supra* note 13, [41].

[18] *See* Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-01383.

[19] *Lungowe v. Vedanta Resources PLC* [2016], *supra* note 13, [49].

[20] Harrison Jalla & Others v. Royal Dutch Shell PLC, Shell International Trading and Shipping Company Limited, Shell Nigeria Exploration and Production Company Limited [2020] EWHC (TCC) 459 [209] [hereinafter *Jalla v. Royal Dutch Shell PLC*].

[21] It is one of a series of joint actions against Royal Dutch Shell PLC [hereinafter RDS] and Shell Petroleum Development Company of Nigeria [hereinafter SPDC] before the District Court of the Hague brought by four Nigerian farmers and fishermen together with Friends of the Earth (*Milieudefensie*), a Dutch non-governmental organization. They claimed damages for several oil leakages in various areas of Nigeria related to the oil pipelines operated by SPDC. Akpan is one of those farmers.

臺灣大學學術期刊資料庫

for Akpan to sue Royal Dutch Shell PLC (hereinafter "RDS") and SPDC together before the District Court of the Hague because the sole purpose of suing RDS was for the Dutch court to establish jurisdiction over the claims against SPDC. An important fact there was that RDS, although incorporated in England, was headquartered in the Netherlands. Pursuant to Article 60(1) of the 2001 Brussels Regulation, "a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business." Therefore, the Dutch court also concluded that it had jurisdiction over the claims against RDS by invoking several provisions of the Brussels Regulation.

B. Imposing a Duty on the Anchor Defendant to Claimant as a Cause of Action

The fact that a parent company is domiciled within a forum state only provides a possibility for the forum state to decide disputes against the parent. If the parent company does not owe any legal obligation to the claimant, the forum state has no reason to decide that it has jurisdiction over a claim against the parent company. In other words, a cause of action is necessary to substantiate the jurisdiction of the forum state over a parent company. In this regard, both English and Dutch courts have recognized a duty of care as a possible cause of action against a parent company. However, they adopted different criteria to review whether a parent company owes a duty of care to the claimants.

In determining jurisdiction over the claims against the parent companies, English courts have conducted a degree of substantive review of whether the parent companies owe a duty of care to the claimants. In the absence of "special doctrine of parent company responsibility" under English law,[22] general rules of negligence under common law were applied. The most basic rule is the three-part test submitted by the House of Lords in *Caparo v. Dickman*, including foreseeability of damages, proximity and reasonableness of imposing a duty.[23] Among them, proximity seems to outweigh other two factors because the three-part test is usually determined by the relevance of a parent company to the alleged infringement of its subsidiary, which depends upon the degree of control and supervision that the parent has exercised over the subsidiary.[24] To test proximity, English courts always turn to the *Chandler v. Cape* criteria although they were only concerned about the

[22] *See* Andrew Sanger, *Transnational Corporate Responsibility in Domestic Courts: Still Out of Reach?*, 113 AJIL UNBOUND 4, 6 (2019).
[23] *See* Caparo Industries PLC v. Dickman and Others [1990] 2 AC 605; [1990] B.C.C. 164 (HL).
[24] *See* Adeline Michoud, *Mind the (Liability) Gap: The Relevance of the Duty of Care to Hold Transnational Corporations Accountable*, 40 WINDSOR REV. LEGAL & SOC. ISSUES 141, 143 (2019).

臺灣大學學術期刊資料庫

relationship between a parent company and the employees of its subsidiary at the outset. According to the criteria, there are four circumstances under which a parent company takes responsibility for the health and safety of its subsidiary's employees, including:

> (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.[25]

These circumstances have been applied to testing the existence of a duty of care in a general parent-subsidiary relationship. For instance, RDS, as the ultimate holding company of its Nigerian subsidiary, SPDC, conducted no business in Nigeria and was even not permitted by Nigerian law to participate in any oil pipeline operation. Based on these facts, the first instance judge in *Okpabi v. Royal Dutch Shell PLC* denied that the requirement of proximity was satisfied because RDS did not have superior knowledge or expertise compared to SPDC; nor did it know that SPDC was relying upon it to protect the claimants.[26] In the appeal proceeding, the majority of the court also found that the claimants had not demonstrated a sufficient degree of control of SPDC's operations in Nigeria by RDS to establish the necessary degree of proximity.[27] The claimants failed to establish a case against the parent company which could not work as an anchor defendant. Apparently, this finding was partly attributed to the English courts' substantive analysis of whether the parent company owned a duty of care to the claimants.

There was a different picture in the Dutch courts' jurisprudence in *Akpan v. Shell*. Addressing the defendants' argument that "the claimants know or should know there is no opportunity for the claims against RDS to succeed under Nigerian laws," the District Court of the Hague noted that "in certain circumstances, a parent company is held responsible for those affected by the activities of its subsidiaries."[28] Before coming to this conclusion, the Court had no scrutiny of the rules of Nigerian law that may impose a duty of care on a parent company or the facts relating to the legal relations between

[25] David Brian Chandler v. Cape PLC [2012] EWCA Civ 525; [2012] WLR 3111 [80].
[26] *See* His Royal Highness Emere Godwin Bebe Okpabi and Others v. Royal Dutch Shell PLC & Shell Petroleum Development Company of Nigeria LTD [2017] EWHC (TCC) 89, [2017] Bus. L.R. [1335], [1381]-[1383] [hereinafter *Okpabi v. Royal Dutch Shell PLC*].
[27] *See id.* [1022], [1049].
[28] Friday Alfred Akpan v. Shell, ECLI:NL:RBDHA:2013:BY9854, ¶ 4.3 (Jan. 30, 2013) [hereinafter *Akpan v. Shell* (2013)].

臺灣大學學術期刊資料庫

SPDC and RDS. The only basis of the presumption that RDS might be held liable seemed to be the *Chandler v. Cape* case. However, in the latter part of the same judgment, the Court decided that under Nigerian law, a parent company like RDS, in general, is not obliged to prevent its (small) subsidiary (such as SPDC) from causing damages to third persons through its operations.[29] On the merits, the Court finally looked at the facts relating to the corporate structure of the Shell group, different businesses that RDS and SPDC were involved in, and the fact that RDS had no superior knowledge or expertise than SPDC.[30] These facts are almost the same as those considered by the English courts of *Okpabi v. Royal Dutch Shell PLC* in their decisions on jurisdiction.[31] The Hague Court of Appeal stated more specifically that "in some circumstances, the possibility that a parent company may be held liable for the damages resulted from the acts or omissions of its (small) subsidiary cannot be precluded" and "the anchor claims are not obviously without prospects of success."[32] That is to say, to determine the jurisdiction over claims against a parent company, the Dutch courts tend to conduct no substantive review of whether the parent company actually owes a duty of care to the claimant. A possibility that a parent company may own such a duty is sufficient to establish a cause of action.[33]

C. Extending the Jurisdiction over Anchor Defendants to Foreign Subsidiaries According to Procedure Rules on Joint Consideration

After establishing jurisdiction over the claims against anchor defendants, both English and Dutch courts have extended the jurisdiction to the claims against foreign subsidiaries of the parent companies according to their domestic procedure rules on joint consideration.

In English jurisprudence, there is a "necessary or proper party" gateway through which an English court may assert jurisdiction over a foreign defendant by joining it as a necessary or proper party to the litigation against an anchor defendant. It is based on Article 3.1(3) of Practice Direction 6B of the Civil Procedure Rules (CPR).[34] The relevant part of the Article reads as below:

> The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where . . . (3) A claim

[29] *Id*. ¶ 4.26.
[30] *Id*. ¶¶ 4.29-.33.
[31] *See Okpabi v. Royal Dutch Shell PLC*, *supra* note 26.
[32] *Akpan v. Shell* (2015), *supra* note 8, ¶¶ 2.2, 2.5.
[33] *See* Nicola Jägers et al., *The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell*, 108(1) AJIL UNBOUND 36, 40 (2014).
[34] Civil Procedure Rules 1998, S.I. 1998/3132 (Eng.) [hereinafter CPR].

臺灣大學學術期刊資料庫

> is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

In *Lungowe v. Vedanta Resources Plc*, the application of this gateway succeeded in establishing the jurisdiction of the English courts over Konkola Copper Mines PLC (KCM), the foreign subsidiary at issue. This case law provided a five-step test for applying the gateway based on Justice Coulson's five questions with some adjustments made by the Supreme Court, including:

> (a) Step 1: Does the claimants' claim against the foreign subsidiary have a real prospect of success?
> (b) Step 2: If so, is there a real issue between the claimants and the parent company?
> (c) Step 3: Is it reasonable for the court to try that issue?
> (d) Step 4: Is the foreign subsidiary a necessary or proper party to the claim against the parent?
> (e) Step 5: Is England the proper place in which to bring the claim?[35]

Justice Coulson answered all these questions in the affirmative and thus dismissed the defendants' jurisdictional objections.[36] This five-step test was also applied by other English courts in subsequent cases.[37]

Dutch courts have extended the jurisdiction over anchor claims to the claims against foreign subsidiaries according to their procedure rules on joint consideration of multiple-defendant litigations. That is Article 7(1) of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) which provides that:

> If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint

[35] *Lungowe v. Vedanta Resources PLC* [2016], *supra* note 13, [97].
[36] *Id*.
[37] *See Okpabi v. Royal Dutch Shell PLC*, *supra* note 26, [1358].

臺灣大學學術期刊資料庫

consideration is justified for reasons of efficiency.[38]

In *Akpan v. Shell*, the District Court of the Hague found that the claims against RDS and SPDC had the same legal basis, namely, the tort of negligence under Nigerian laws to demonstrate that a joint consideration of them was justified for reasons of efficiency.[39] With a reference to Article 6(1) of the Brussels Regulation,[40] the Hague Court of Appeal noted that "the claims against RDS and SPDC are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."[41] Besides, it emphasized that an international jurisdiction over the foreign subsidiary established under Article 7(1) of the Code of Civil Procedure would not cease to exist during the process even if the anchor claim is proved to be without merits, which is in line with the principle of *perpetuatio fori*.[42]

Based on the foregoing analysis of the anchoring mechanism adopted by English and Dutch courts, some lessons can be learned by other courts of investors' home states in order to establish extraterritorial jurisdictions over investor infringements. First, a court can anchor jurisdiction over a parent company or any other defendant which is originally subject to the jurisdiction of the forum state. Secondly, it is necessary to recognize a duty that may be imposed on the anchor defendant to the claimant as a cause of action. In the event that the alleged infringements are carried out by foreign persons related to the anchor defendants, a home state court may extend the jurisdiction over the anchor defendants to the foreign parties according to the applicable rules on joint consideration. These lessons are also applicable to the victims of investor infringements who are potential claimants because their assertions and arguments may affect the way a dispute is resolved. In fact, the anchoring mechanism was not entirely created by English or Dutch courts. The claimants of the above cases also contributed a lot to the formation of the mechanism. Despite the lessons learned, the anchoring mechanism also has many uncertain elements, which will be addressed in the

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[38] An unofficial English translation of the Dutch Code of Civil Procedure is available at *Code of Civil Procedure*, DUTCH CIV. L., http://www.dutchcivillaw.com/civilprocedureleg.htm (last visited July 27, 2021).

[39] *See Akpan v. Shell* (2013), *supra* note 28, ¶¶ 4.2-.7.

[40] Article 6(1) of the 2001 Brussels Regulation reads as:

> [W]here he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 8(1) of the Recast Brussels Regulation remains the same content.

[41] *Akpan v. Shell* (2015), *supra* note 8, ¶ 2.5.

[42] *Id.* ¶ 2.8.

臺灣大學學術期刊資料庫

following section.

III. PROBLEMS OF THE ENGLISH AND DUTCH ANCHORING MECHANISM REGARDING ITS LEGAL BASIS

The anchoring mechanism seems well grounded on Brussels Regulation together with the English and Dutch domestic civil procedural laws. However, it is questionable whether the Brussels Regulation is applicable to determining extraterritorial jurisdiction of an EU national court in investor infringement cases involving foreign infringers and foreign claimants of non-EU member states. Moreover, the discrepancies between the English and Dutch anchoring mechanisms imply that they may have their own problems.

A. A Common Problem: Applicability of the Brussels Regulation to Cases Concerning the Jurisdiction of Non-EU States

In elaborating the anchoring mechanism, both English and Dutch courts have relied upon Articles 2(1), 4(1) and 60(1) of the 2001 Brussels Regulation as well as their successors in the Recast Brussels Regulation. Articles 2(1) and 60(1) were invoked to establish jurisdiction over anchor defendants that are domiciled in EU Member States while Article 6(1) was used to demonstrate the necessity of joint consideration in addition to the rules of domestic procedure rules. Where an alleged infringement occurred in a foreign country, determining jurisdiction according to provisions of the Brussels Regulation seems on a stronger ground than merely applying domestic laws even though they, in substance, set out the same legal principles, such as the principle of *actor sequitur forum rei*.[43] Especially for English courts that generally recognize the principle of "*forum non conveniens*", the Brussels Regulation has been relied upon to exclude the objection based on this principle.[44] Nonetheless, the applicability of the Brussels Regulation to those cases is questionable.

As part of EU law with direct effect[45] and supremacy[46] within the EU

[43] This principle is embodied not only in Article 2(1) of the 2001 Brussels Regulation, but also in the English and Dutch domestic civil procedural laws. For example, Article 2 of the Dutch Code of Civil Procedure provides that "[w]here legal proceedings are to be initiated by a writ of summons, Dutch courts have jurisdiction if the defendant has his domicile or habitual residence in the Netherlands."

[44] *See* Owusu v. Jackson, *supra* note 18; *Lungowe v. Vedanta Resources PLC* [2016], *supra* note 13, [49]; *Okpabi v. Royal Dutch Shell PLC*, *supra* note 26, [1363]-[1364]; *Jalla v. Royal Dutch Shell PLC*, *supra* note 20.

[45] *See* Case 26/62, N.V. Algemene Transport - en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastinger, 1963 E.C.R. 1, 16.

[46] *See* Case 6/64, Flaminio Costa v. E.N.E.L., 1964 E.C.R. 587, 599.

臺灣大學學術期刊資料庫

Member States, the Brussels Regulation can be applied directly by a Member State internally. However, from a perspective outside the EU, the Regulation amounts to a regional treaty concluded between some European States. Indeed, the Regulation succeeded to the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.[47] The difference is that the Regulation is a legislation adopted by the EU Council, binding on the Member States with no need to be ratified. However, this evolution does not change its nature of a regional treaty from an external perspective of a non-EU state. Under international law, the Brussels Regulation shall only bind the Member States as a treaty binds its contracting parties and applies within the territories of its Member States.[48] As an attempt to harmonize rules of private international law between Member States and to allocate jurisdiction to national courts in the appropriate and efficient manner,[49] the Regulation can address civil and commercial relations across the Member States but not beyond the EU sphere. Nonetheless, previously mentioned investor accountability cases before English and Dutch courts were initiated by nationals of non-EU Member States for damages caused by nationals of host states, including Zambia and Nigeria. Thus, the resolution of these cases concerned the jurisdiction of non-EU Member States which is not subject to allocation or harmonization of the Brussels Regulation because these countries had not participated in the negotiation and legislation of this EU law. Under this circumstance, the Brussels Regulation should not be applicable. Moreover, although the Regulation is an international agreement from an external perspective, it still constituted a unilateral action[50] when English and Dutch courts applied it in investor liability cases that concerned the jurisdiction of non-EU host states without their consent.

B. A Problem with the English Anchoring Mechanism: Renewed "Forum Non Conveniens" *Challenge with Brexit*

Even if the Brussels Regulation was applicable to the foregoing English and Dutch cases as part of the procedural laws of the forum state according to the *lex fori* rule, which is debatable because *lex fori* normally refers only

[47] 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L 299) 32.
[48] *See* Vienna Convention on the Law of Treaties arts. 26, 29, May 23, 1969, 1155 U.N.T.S. 331.
[49] *See* Michoud, *supra* note 14, at 9.
[50] Unilateral action refers to an act or decision solely decided or taken by a state that may affect the rights or interests of other state(s). It usually takes the form of domestic action, rather than cooperative arrangement or joint agreement. However, whether an act or decision is a unilateral action depends on its substance that it is unilaterally decided by a state but concerns the rights or interests of others. *See* Richard B. Bilder, *The Role of Unilateral State Action in Preventing International Environmental Injury*, 14(1) VAND. J. TRANSNAT'L L. 51, 54 (1981).

臺灣大學學術期刊資料庫

to the domestic laws of the forum, there is a challenge for post-Brexit English courts to follow the existing anchoring mechanism.

As discussed above, it was the mandatory application of Article 2(1) of the 2001 Brussels Regulation that has always excluded the *forum non conveniens* objection faced by English courts while deciding investor liability cases resulting from overseas investment misconduct. With the Brexit and the completion of the transition period, the Brussels Regulation is no longer applicable to the UK as a whole.[51] It implies that English courts need to reconsider whether the principle of *forum non conveniens* constitutes a barrier to their exercise of jurisdiction in civil litigations against infringements or misconduct committed in foreign countries. As a matter of fact, commentators had already foreseen the impact of Brexit on the *forum non conveniens* issue, not only for multinational corporation responsibility, but also for competition law damages actions brought in the UK courts. One predicted that English courts would "have to consider the risk of multiplicity of proceedings and irreconcilable judgments as paramount considerations in determining *forum conveniens*"[52] while another considered it dependent on whether the UK would be a party to an international agreement that excludes the principle of *forum non conveniens* as the Brussels Regulation does.[53] The first suggestion still seems to be based on the Brussels Regulation, more specifically, Article 6(1) of the 2001 Regulation or Articles 8(1) and 34 of the Recast Regulation.[54] In comparison, the latter point of view resonates more with this article, which will be discussed in the following section. What is clear now is that Brexit removes an important pillar from the English anchoring mechanism as far as it goes, and makes the *forum non conveniens* principle a renewed challenge of jurisdiction in investor liability cases involving overseas infringements.

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[51] *See* Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community art. 67, Nov. 12, 2019, 2019 O.J. (C 384 I) 1.

[52] *See, e.g.*, Lorna E. Gillies, *Appropriate Adjustments Post Brexit Residual Jurisdiction and Forum Non Conveniens in UK Courts*, 3 J. BUS. L. 161, 179 (2020).

[53] *See* Stirling, *supra* note 6, at 31.

[54] Article 34 of the Recast Brussels Regulation provides in relevant part that:

> 1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:
> (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings; [. . .]
> 2. The court of the Member State may continue the proceedings at any time if:
> (a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments; [. . .]

臺灣大學學術期刊資料庫

C. A Problem with the Dutch Anchoring Mechanism: Confusion Between the Necessity of Joint Consideration and the Ground of Extraterritorial Jurisdiction

In *Akpan v. Shell*, it appears that the Dutch courts have extended the jurisdiction over the claims against the parent company, RDS to the claims against the subsidiary, SPDC, merely based on the necessity of joint consideration of these claims. The soundness of this approach requires scrutiny.

Clearly, joint consideration and jurisdiction are two independent issues. Joint consideration is a process that claims of more than one legal proceeding are brought into a single proceeding and decided in a joint way, in order to resolve the disputes more efficiently and avoid conflicts of judgments arising from multiple proceedings. Generally, the substantive requirement of joint consideration is that the original claims in separate proceedings should be closely connected, involving (in whole or in part) the same factual or legal issues.[55] Both English and Dutch courts have considered this requirement in the previously mentioned cases, namely the connections between the claims against a parent company and the claims against its subsidiary. It is even the sole requirement of the Dutch courts in applying Article 7(1) of the Dutch Code of Civil Procedure. By contrast, the five-step test of the English "necessary or proper party" gateway includes other factors, such as whether it is reasonable for an English court to try the issue between the claimants and the parent company and whether England is the proper place to bring the claim against the subsidiary.[56] These factors hit the jurisdictional point because jurisdiction is based on some nexus between a case and the forum state.[57] In particular, the exercise of extraterritorial jurisdiction has only been recognized by the international community in limited circumstances under which there are certain links between a legal action or matter and the forum state.[58]

It is quite confusing though that the issues of joint consideration and jurisdiction are intertwined under Article 7(1) of the Dutch Code of Civil Procedure, which provides in relevant part that "[i]f legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with

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[55] *See, e.g.*, North American Free Trade Agreement art. 1126.2, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, 107 Stat. 2057; Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 9.28.1, Mar. 8, 2018, https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf; Comprehensive Economic and Trade Agreement art. 8.43.1, Can.-EU, Jan. 14, 2017, 2017 O.J. (L 11) 23; United States-Mexico-Canada Agreement art. 14.D.12, Nov. 30, 2018, https://ustr.gov/sites/ default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf.

[56] *See Lungowe v. Vedanta Resources PLC* [2016], *supra* note 13, [97].

[57] *See* Michoud, *supra* note 14, at 15.

[58] *See* Joel Colón-Ríos, *Constituent Power, the Rights of Nature, and Universal Jurisdiction*, 60 MCGILL L.J. 127, 157 (2014).

臺灣大學學術期刊資料庫

respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings." However, it only requires that "the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency." There is nothing more than the requirement of a general case of joint consideration. In this sense, the "jurisdiction" in Article 7(1) can only be construed as jurisdiction of the kind parallel to subject matter jurisdiction instead of extraterritorial jurisdiction at the level of national jurisdiction. More specifically, the necessity of joint consideration cannot serve as a ground of extraterritorial jurisdiction and satisfaction of the requirements of joint consideration alone does not suffice the exercise of extraterritorial jurisdiction. Hence, in *Akpan v. Shell*, by extending the jurisdiction over RDS to SPDC according to the requirements of joint consideration, the Dutch courts might have confused the necessity of joint consideration and the ground of extraterritorial jurisdiction. By failing to consider the links of the claims against the foreign party (SPDC) to the forum state (the Netherlands), in contrast to the English "necessary or proper party" gateway, the Dutch courts have created a different anchoring mechanism to establish jurisdiction over the claims against SPDC, which was without a substantial ground of jurisdiction.

To summarize, the existing anchoring mechanism adopted by English and Dutch courts has many problems in terms of its legal basis. Firstly, in cases concerning the jurisdiction of non-EU states, it is not appropriate to apply the Brussels Regulation to the establishment of an EU national court's extraterritorial jurisdiction which is a unilateral action. Even assuming that the Brussels Regulation was applicable to the past cases, the English anchoring mechanism, with the removal of the Brussels Regulation by Brexit, now faces a real challenge on the ground of the "*forum non conveniens*" principle. As for the Dutch anchoring mechanism, Article 7(1) of the Dutch Code of Civil Procedure provided an excuse for Dutch courts to obtain jurisdiction over the claims against foreign subsidiaries of domestic companies simply for reasons of joint consideration. There was no requirement of nexus between the forum state and the claims against the overseas infringements, which constitutes the substantial ground of extraterritorial jurisdiction. The existence of these problems cannot nullify the potential value of the anchoring mechanism. However, it lacks appropriate and sufficient legal basis under the present framework of English and Dutch laws. It is thus necessary to consider whether there are other existing legal frameworks that may be used as complementary legal basis of the anchoring mechanism or even as replacements for this mechanism for the purpose of establishing jurisdiction of an investor's home state court for investor accountability. In this respect, a rare and imperfect provision on investor liability in few existing IIAs is promising to serve for both functions

臺灣大學學術期刊資料庫

and therefore becomes the subject of the next section.

IV. A COMPLEMENT OR AN ALTERNATIVE OF THE ANCHORING MECHANISM: IIA PROVISION ON INVESTOR LIABILITY IN HOME STATE

Among the new generation of IIAs,[59] several signed treaties and IIA models have included a kind of provision on deciding investor liability through the judicial process of investors' home states. Although such a provision has not yet been applied in practice, it has a bright prospect given the current popularity of remedies in investors' home states. Thus, this section will study the development and status quo of such an IIA provision first, then explain why and how it can be used as a complementary legal basis or a complete alternative of the anchoring mechanism, and finally make recommendations to improve such a provision.

A. Development and Status Quo

Based on the known texts of IIAs formulated in this century, including treaty models and signed treaties, the first IIA text that includes provision on deciding investor liability through the judicial process of home states[60] is the 2005 Model International Agreement on Investment for Sustainable Development of International Institute for Sustainable Development (IISD) (hereinafter "IISD Model"). There are two relevant Articles. Article 17 (investor liability) provides that "[i]nvestors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state." As a companion, Article 31 (Investor liability in home state) further requires home states to ensure the practicality of Article 17 and to take host state laws as applicable laws to such proceedings.[61] According to the notes of the IISD Model, these provisions "set the principle that courts in the home state will have jurisdiction to hear a case for civil damages against an investor for acts

[59] IIAs referred to herein include international investment treaties like bilateral investment treaties (BITs) and comprehensive economic agreements with provisions on investment, such as free trade agreements (FTAs).

[60] The author makes this explanation in order to avoid potential misconception about the originator of such IIA provision and the positions that it may represent, considering that some existing observation of such provision ignored the IISD Model. *See, e.g.*, Rachel Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct*, 14(2) UTRECHT L. REV. 22, 36 (2018).

[61] *See* HOWARD MANN ET AL., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT, NEGOTIATORS' HANDBOOK 43 (2d ed. 2006).

臺灣大學學術期刊資料庫

or decisions taken with respect to the investment in question."[62]

At the beginning, these provisions seemed to be welcomed by African states in particular. For example, soon after the advent of the IISD Model, the Economic Community of West African States (hereinafter "ECOWAS") incorporated these provisions into the Community's rules on investment.[63] In 2012, the Southern African Development Community also brought these provisions into a Community Model Bilateral Investment Treaty (hereinafter "BIT") and combined them as one clause.[64] More recently, the Morocco-Nigeria BIT concluded in 2016 included the content of Article 17 of the IISD Model.[65] In addition to African countries, India had also considered these provisions in drafting its new BIT model,[66] but deleted them in the end.

B. Why and How It Can Complement or Replace the Anchoring Mechanism?

For the sake of investment regulation, the judicial process of home states may have advantages over local remedies of host states. However, from the perspectives of host states, there is a risk that home states may regulate investors as an excuse to implement their domestic policies extraterritorially in host states, thereby intervening in the internal affairs of the host states.[67] If the power of a home state court to decide investor liability is based on an IIA between home and host states, that concern is expected to be released. It can be demonstrated by an analogy to a well acknowledged exception to the territorial principle of national jurisdiction.

Among all the principles of national jurisdiction, the territorial principle is supreme and generally exclusive because jurisdiction is primarily territorial.[68] Although it is not absolute, only a few exceptions to the supremacy and exclusivity of territoriality have been accepted by the international community. One of them is that states reach an agreement to arrange jurisdiction over disputes or matters of common interest and

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[62] *Id.* at 28.

[63] Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS arts. 17, 29, Dec. 19, 2008, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3266/download.

[64] SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY 37 (2012).

[65] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria art. 20, Dec. 3, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download.

[66] A previous draft included these provisions. *See* Bilateral Investment Treaty Between the Government of India and _ (2015), https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

[67] *See* Chambers, *supra* note 60, ¶ 32.

[68] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 299 (7th ed. 2008); CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 36 (2d ed. 2015).

臺灣大學學術期刊資料庫

concern. For instance, during the construction and operation of the Channel Tunnel, the UK and France concluded a series of agreements concerning the allocation and exercise of extraterritorial jurisdiction. Such an exceptional arrangement for territorial jurisdiction is widely recognized by the international community because it is jointly decided with the consent of all the countries concerned,[69] distinguished from a unilateral approach which is usually based on domestic laws or policies.

Similarly, allocating extraterritorial jurisdiction for investor accountability to home states of investors through IIAs can be taken as an exceptional arrangement to the rule of *forum loci delicti*. It is very likely to be accepted by the international community without criticism of unilateralism. On one hand, both home and host states would have participated in making such an arrangement, especially with prior consent of the host states where investor infringements are expected to take place naturally. Therefore, subsequent exercise of jurisdiction by courts of home states will not illegally intervene in the internal affairs of the host states; on the other hand, due to the reciprocal basis of an IIA, every contracting state has the same chance to become home or host states of the covered investors, indicating an equal opportunity to exercise extraterritorial jurisdiction allocated to the home states of investors.

Such an IIA provision on investor liability in home state, if incorporated into IIAs between the UK or the Netherlands and their overseas investors' host states, can effectively complement the existing English and Dutch anchoring mechanism, which was inappropriately and insufficiently grounded on the Brussels Regulation and domestic laws. Firstly, unlike the Brussels Regulation that only involves the participation of the EU Member States, an IIA provision jointly decided by the home and host states of an investor can provide a better jurisdictional base for the investor's home state court and avoid the criticism of unilateralism. Even if the application of the Brussels Regulation to previous English and Dutch investor liability cases was free from this criticism, such an IIA provision on investor liability in the home state can be used to fill the gap of the English anchoring mechanism created by Brexit relating to the "*forum non conveniens*" challenge, not retroactively but worth considering for the future. For the Dutch anchoring mechanism, such an IIA provision can also be considered as a complement to the ground of extraterritorial jurisdiction over the claims against foreign parties under Article 7(1) of the Dutch Code of Civil Procedure which ignored the requirement of links between the claims and the forum state.

Furthermore, an IIA provision on investor liability in home state can even replace the anchoring mechanism because "investors" under an IIA are generally interpreted as including both foreign investors and their

[69] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 939 (7th ed. 2014).

臺灣大學學術期刊資料庫

subsidiaries (if there are) in the host states. It means that under such an IIA provision, a home state court can exercise jurisdiction over the claims against both domestic investor and the foreign subsidiaries for the infringements conducted by the foreign subsidiaries even without the anchoring mechanism. Thus, this approach is also desirable to other states that are intended to regulate investor misconduct more effectively.

Despite the foregoing justification, provision for allocating jurisdiction for investor accountability to home states has not yet been popularized among IIAs. Beyond the difficulty of reaching a political consensus on such an IIA provision, another factor may be that the existing provision drafted by the IISD remains imperfect and requires improvements.

C. Imperfections and Recommendations for Improvements

As admitted by the negotiators of the IISD Model, Article 17 "is a simple article in principle, but can be more difficult in practice" and "there is no statement of the standard of liability—due diligence, strict or absolute."[70] Except for the matters that depend on the civil liability rules in home and host states, there are several issues that shall be made clear by an IIA provision concerned.

1. Applicable Laws — The existing IIA provision on investor liability in home state only recognizes host state laws on liability as applicable laws. It overlooks the IIA containing such a provision itself, which shall be applied at least as to whether a defendant is an investor covered by the IIA at issue, whether the alleged acts or decisions are related to a covered investment, and therefore whether a civil action against an investment infringement is subject to jurisdiction of the home state. Where an IIA provides investor obligations, it may also be applied as a cause of action against an investor. Moreover, if an investor argues that the alleged acts or decisions are a defense against the arbitrary or discriminatory measures of its host state, an IIA between the home and host states is also relevant to abatement or immunity of the investor's liability. In other words, an IIA containing provision on investor liability in the home state may not only affect jurisdiction of a home state court that seizes the case, but also liability of an investor. For these reasons, such an IIA should also be taken as part of the applicable law in a legal proceeding in the home state.

Beyond that, a more aggressive option is worth considering, that is whether to make an adjustment to the *lex loci delicti* rule. Although this traditional rule of conflict norms is very significant and normally complied with in determining applicable laws to international civil relations, a host state, as the place where an investor infringement occurs, may lack legal

[70] MANN ET AL., *supra* note 61, at 28.

臺灣大學學術期刊資料庫

rules on foreign investor accountability. For instance, the *Akpan v. Shell* court dismissed the claims against the ultimate investor, RDS, just because under Nigeria laws, the host state laws in that case, a parent company generally was not obliged to prevent its subsidiary from damaging third persons.[71] There might be a different picture if the home state laws, namely Dutch laws were applied in this case because "under Dutch law, it is possible to hold corporations liable for human rights violations under domestic tort law."[72] In the current situation of investor regulation, there are reasons for an investor's home state court to be allowed to apply its domestic laws, especially if the host state laws are obviously inadequate to hold a foreign investor liable. That would require a departure from the *lex loci delicti* rule, which is however feasible, given that the rule is not a peremptory norm.[73] Moreover, as jurisdiction can be allocated based on an international agreement, an adjustment of applicable law should also be allowed based on an IIA provision. In that case, if the host state laws do not impose adequate liability on a foreign investor, then a home state court may decide the investor's liability according to its domestic laws. However, whether to make this adjustment and how to coordinate the application of the host state laws and the home state laws where there are conflicts between them should depend on the legal systems of the contracting states.

2. Specific Court of Home State to Decide Investor Liability — The existing IIA provision on investor liability in home state has solved the general jurisdictional constraints on a home state court, but it fails to specify which court of the home state is entitled to try a specific case for investor liability.

The foregoing English and Dutch investor liability cases did not show this problem because in most cases, domestic procedural laws of the home state can be applied to identifying a specific court to resolve an international civil dispute. Generally, the court of the place where a defendant is domiciled shall exercise jurisdiction[74] and for a tort litigation, the court of the place where the infringement is committed has a special jurisdiction. However, an investor's infringement is expected to take place in the host state. Place of tort is thus unlikely to locate a court of the home state. As for the former junction, there are also possibilities that domicile of defendant may not point to any court of the home state of an investor. For example, an investor may be a natural person without any domicile in his or her home state even though he or she has a nationality of that state. After all, the criteria for a domicile and a nationality are different.

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[71] *See Akpan v. Shell* (2013), *supra* note 28, ¶¶ 4.26-.34.
[72] Jägers et al., *supra* note 33, ¶ 38.
[73] Party autonomy on the choice of law can serve as a proof of that.
[74] As previously mentioned, it is known as the "*actor sequitur forum rei*" principle. *See, e.g.*, Article 2(1) of the 2001 Brussels Regulation.

臺灣大學學術期刊資料庫

Considering the risk that neither domicile of defendant nor place of tort can help identifying a court in the home state, contracting states of an IIA which are intended to establish jurisdiction of the home state for investor accountability may designate a specific court or tribunal respectively from their domestic courts for that purpose. Otherwise, they need to consider more effective junctions that can be used to identify a court of an investor's home state, such as the birthplace of a natural investor. In any case, they shall make sure that victims of an investor's infringements know where to bring a claim.

3. Plaintiff Qualification — While the defendant in a civil action in the home state can be identified by the definition of "investors" under the applicable IIA, the existing provision on investor liability in the home state is silent on plaintiff qualification. It may cause ambiguity about who can be a plaintiff in an investor infringement proceeding before the investor's home state court. For instance, amongst comments on the previously-mentioned draft of Indian Model BIT that contained the content of Article 17 of the IISD Model, there is a host government-plaintiff view that:

> Although the purpose of this provision is clearly to allow the State of India to sue the investor in its home state, for jurisdictional purposes, the provision is not clear about who must do what and where for courts of the host state to have jurisdiction and for the State of India to have standing.[75]

It is questionable though whether the plaintiff of such a proceeding has to be the host state of an investor.

Normally, the plaintiff in an infringement litigation is the infringed, namely victims themselves or their legal successors if they die after the infringement is committed. Even if victims are legal persons or persons with no or limited legal capacity, they can still be and generally are plaintiffs in legal actions for their damages. They just need to be represented or assisted by their legal representatives or guardians. Accordingly, plaintiffs in a civil action against an investor in the investor's home state should be victims of the investor's infringement or their successors if they die. The language "significant damage, personal injuries or loss of life in the host state"[76] in Article 17 of the IISD Model implies that acts or decisions relating to an investment may cause damages to both public and private rights, interests and benefits. Therefore, victims of an investor's infringement and potential plaintiffs are not necessarily the host state of the investor but could also be private parties. Furthermore, where an investor causes significant damages to the public interests of its host state, competent authorities of the host state

[75] Won Kidane, *China's and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa,* 49(2) LOY. U. CHI. L.J. 405, 456 (2017).
[76] MANN ET AL., *supra* note 61, at 28.

臺灣大學學術期刊資料庫

can directly take actions against the investor. There is no need for the host state to sue the investor for damages in its home state.

The host government-plaintiff view might be affected by the traditional approach of diplomatic protection which relies upon the political intervention of an investor's home state. A similar point of view can be seen among recent proposals for holding an investor liable through investment arbitration. One proposal is that the host state of an investor or home state of a victim can represent the victim to sue the investor.[77] However, a civil litigation conducted in an investor's home state is different from a dispute involving diplomatic protection or an investment arbitration. A basic principle of a civil litigation is the principle of equality, which requires that the parties to a civil proceeding are on an equal footing.[78] It is thus unreasonable to let the host state of an investor get involved. In the English and Dutch investor liability cases discussed above, no plaintiff was a host state. Even in the cases against Shell's oil leakages that had caused serious damages to the environment, human rights and other public and collective interests of Nigeria, it was the local residents themselves who brought civil litigations for their private damages, not represented by the host state, Nigeria.

Therefore, in formulating an IIA provision about investor liability in the home state, it should be made clear that victims of an investor's infringement can bring a lawsuit against the investor by themselves or their legal successors if they die, and not to leave room for ambiguity.

In a word, it is an international issue for a court of an investor's home state to exercise extraterritorial jurisdiction over a civil action for the investor's liability caused in the host state. It is thus justifiable for the home and host states of the investor to agree on that arrangement through an international agreement, such as an IIA. The IISD Model provides an innovative but less perfect example that calls for improvements on practical matters.

V. CONCLUDING REMARKS

International investments have both positive and negative impacts on the economic and social development of host states and international society. During the process of promoting investment liberalization and facilitation, the need to regulate investor misconduct and hold them liable for their infringements cannot be overlooked. In addition to the traditional approach

[77] *See* JOSE DANIEL AMADO ET AL., ARBITRATING THE CONDUCT OF INTERNATIONAL INVESTORS 172 (2018); Jackson Shaw Kern, *Investor Responsibility as Familiar Frontier*, 113 AJIL UNBOUND 28, 32 (2019).

[78] For example, Article 1.1 of the CPR specifies the requirement of "ensuring that the parties are on an equal footing."

臺灣大學學術期刊資料庫

of local remedies and investment arbitration that has a potential for investor accountability, the judicial process of the investor's home state plays an increasing role in deciding investor liability. This article further explored the key question about how to establish extraterritorial jurisdiction of an investor's home state court and focused on the anchoring mechanism adopted by English and Dutch courts. Although there are lessons that can be learned by other courts of investors' home states, the anchoring mechanism has some problems that are difficult to solve due to its inappropriate or insufficient legal basis. In particular, the Brussels Regulation should not be applicable to international civil disputes concerning the jurisdiction of non-EU states. Even assuming that it was applicable to the foregoing English and Dutch investor liability cases, the English anchoring mechanism now faces a renewed "*forum non conveniens*" challenge with the removal of the Brussels Regulation by Brexit. The procedure rule on joint consideration applied by Dutch courts confuses the necessity of joint consideration and the ground of extraterritorial jurisdiction, without a requirement of links between the forum state and the claims against the foreign subsidiaries. Based on that, the article ended up with advocating an IIA proposal of home state jurisdiction for investor liability, which can effectively complement or even replace the anchoring mechanism. However, the existing IIA provision on investor liability in the home state needs to be improved regarding applicable laws, specification of a home state court and plaintiff qualification.

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