

## Transnational Corporate Liability Litigation and Access to Environmental Justice: *The Vedanta v Lungowe Case*

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### ABSTRACT

*On April 10, 2019, the Supreme Court of the United Kingdom released the Vedanta Resources Plc & another v Lungowe & others judgment. This case dealt with an English domiciled parent company's possible liability for alleged environmental damage caused by one of its subsidiaries in Zambia. Based on the arguable duty of care Vedanta could owe to foreign claimants affected by the operations of one of its overseas subsidiaries, the Supreme Court ruling adopted a 'new approach' regarding transnational corporate liability litigation, which established that the parent company's home state's national courts might have jurisdiction to hear this case. This article seeks to explore the Supreme Court's judgment, which is expected to have significant consequences and influence the reasoning of other courts in countries where parent companies are located. Although the Supreme Court's decision aims to give access to justice to the affected (Zambian) community, this article argues that it is questionable whether the adoption of this 'new approach' would encourage parent companies to adopt measures oriented towards the compliance of international environmental standards. Instead, the Court's ruling could lead parent companies to assume less responsibility and be less transparent regarding operations carried out by their foreign subsidiaries.*

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## INTRODUCTION

It is evident that the polluting activities of corporate groups have caused harm to communities in developing countries. This constitutes a challenge for traditional legal control methods.<sup>1</sup> While in Western countries operations leading to environmental damage have increasingly come under legal scrutiny, these activities often ‘go unchecked’ in developing countries.<sup>2</sup> Consequently, local communities are more vulnerable to environmental contamination.<sup>3</sup>

Furthermore, as Croser and others explain, when vulnerable communities try to obtain effective legal remedies in their home states, they often face significant difficulties.<sup>4</sup> Firstly, people living in these communities do not usually have enough funds to hire lawyers and experts to pursue litigation in their home countries. Moreover, some of these experts are reluctant to do work that implicates giving evidence against polluting entities because they prefer not to threaten their future job opportunities.<sup>5</sup> Secondly, polluting companies often hire people from vulnerable communities, creating dependencies between the corporations and those communities. Thirdly, the activities of a corporation may be directed from one of its parent company’s offices, often located in developed countries and far from where such activities take place.<sup>6</sup>

As a result, communities susceptible to environmental pollution often lack effective legal mechanisms in their home countries to claim the violation of their rights. One alternative, under this particular circumstance, is to seek justice by bringing a lawsuit against the parent company in its home state, in what is known as ‘transnational court litigation’. Through this type of litigation, claimants often

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<sup>1</sup>Carrie Bradshaw, ‘Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court’ [2020] 32(1) *Journal of Environmental Law* 139.

<sup>2</sup>Samvel Varvastian and Felicity Kalunga, ‘Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe’ [2020] 9(2) *Transnational Environmental Law* 324.

<sup>3</sup>*ibid.*

<sup>4</sup>Marilyn Croser, Martyn Day, Mariette Van Huijstee, Channa Samkalden, ‘Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability’ [2020] 5 *Business and Human Rights Journal* 130.

<sup>5</sup>Felicity Millner, ‘Access to Environmental Justice’ [2011] 16 *Deakin Law Rev* 201.

<sup>6</sup>Varvastian (n 2) 324.

seek to prevent and stop harmful activities as well as obtain compensation outside their home country for the damage caused.<sup>7</sup>

Varvastian argues that it may be advantageous to sue a parent company in its home state for the activities carried out by one of its foreign subsidiaries.<sup>8</sup> For instance, parent companies often have greater financial resources to cover damages than their subsidiaries abroad. Likewise, other factors, such as a lack of legal expertise, cost of litigation, and ineffective enforcement in the subsidiary's host state, could be crucial for the outcome of the case if the lawsuit is pursued locally.

Traditionally, restrictions imposed by tort law and domestic rules lead to negative results for vulnerable or affected communities who start these sorts of claims.<sup>9</sup> Over the last few years, however, domestic courts in developed countries, such as the United Kingdom, the Netherlands, and Canada, have challenged these traditional constraints and started to take a 'new approach' that sets an example for transnational litigation. In these cases, claims brought by foreign residents against a parent company for alleged harm abroad have proceeded in the company's home jurisdiction.

Following this 'global trend',<sup>10</sup> on the 10<sup>th</sup> of April 2019, the Supreme Court of the United Kingdom ('Supreme Court') released a judgment which confirmed that an English domiciled parent company can be liable for environmental damage caused by one of its overseas subsidiaries located in Zambia.<sup>11</sup> In *Vedanta Resources Plc & another v Lungowe & others (Vedanta)*,<sup>12</sup> the Supreme Court's ruling allowed this case to proceed based on the possible duty of care the parent

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<sup>7</sup>Hans van Loon, 'Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters' [2018] 23(2) Oxford University Press 324.

<sup>8</sup>Varvastian (n 2) 330.

<sup>9</sup>Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' [2019] 4 Business and Human Rights Journal 273.

<sup>10</sup>Richard B. Swan and Gannon G. Beaulne, 'Legal uncertainty increasing when doing business abroad' [2020] 1(7) Canadian Mining Journal 5.

<sup>11</sup>Lyra Jakulevičienė and Dovilė Gailiūtė-Janušonė, 'The Scope of Legal Expectations from Business in Human Rights: Carrot or Stick?' [2020] 8(2) Entrepreneurship and Sustainability Issues, Entrepreneurship and Sustainability Center 940.

<sup>12</sup>*Vedanta Resources Plc & Anor (Apellants) v Lungowe & Ors* (Respondents) [2019] UKSC 20.

company could owe to foreign claimants affected by the harmful operations of Vedanta's foreign subsidiaries. Within this 'new approach', the British court also established that the parent company's home state's national courts might have jurisdiction to hear this case.

This article seeks to explore the Supreme Court's judgment, which is expected to influence the reasoning of other courts in countries where parent companies are located and address some key questions which arise simultaneously,<sup>13</sup> such as: which factors did the Supreme Court take into account when adopting this 'new approach'? What was the tribunal's reasoning regarding the claimant's right to access to environmental justice? How likely is it that this approach will fulfil the objective of providing justice to the claimants? Will this judgment create incentives for parent companies to be liable for polluting operations of their subsidiaries?

An examination of the Supreme Court's ruling is convenient for several reasons. First, although this decision has not gone unnoticed among international environmental law scholars, the adoption of this 'new approach' has not yet generated a significant level of in-depth discussions. Additionally, the existing literature tends to pay more attention to the developments of parent company liability for environmental rights harms caused by their subsidiaries, leaving aside the analysis of how likely this 'new approach' will meet its desired objectives. Furthermore, while academic attention has focused on the relevance of this decision, stating that the Supreme Court's judgment could give an impetus to future claims and have significant consequences,<sup>14</sup> little of the existing literature pays attention to the downsides or potential risks of such an approach.

In this regard, this article argues that although the Supreme Court's decision aims to give access to justice to a particular community harmed by environmental pollution, the judgment does not provide a generally effective legal remedy to vulnerable people on every occasion. Moreover, it is questionable whether the adoption of this 'new approach' will encourage parent companies to adopt measures oriented towards compliance with international environmental standards. Instead, this article argues that the Supreme Court's ruling could lead

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<sup>13</sup>Andrew Sanger, 'Parent company duty of care to third parties harmed by overseas subsidiaries' [2019] 78 *The Cambridge Law Journal* 489.

<sup>14</sup>Varvastian (n 2) 325.

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parent companies to assume less responsibility and be less transparent regarding operations carried out by their overseas subsidiaries.

Part I summarises the UK Supreme Court judgment. Since the emphasis of this article is on general debates, the analysis leans towards the reasoning behind the Supreme Courts' justification to adopt the 'new approach'. Specifically, it briefly explains and describes the grounds of this approach regarding the parent company's duty of care, the proper place to bring the claim, and the claimants' access to substantial justice. Part II discusses access to justice from two different perspectives: (A) as a human right and (B) for environmental matters. This analysis helps in understanding how the reasoning of the British court could contribute to the aforementioned 'global trend'. Part III attempts to critically illustrate the downsides and limitations of the approach adopted in the judgment, which could result in potentially harmful consequences to vulnerable communities in the long term. Finally, the Conclusion summarizes the main ideas developed in this article. It is worth noting that it is not within the scope of this article to discuss a case where a parent company has been involved in polluting activities abroad, neither is it the objective to examine cases in which damage has been caused by subsidiaries incorporated in the parent company's home state.

## I. THE ADOPTION OF A 'NEW APPROACH'

This section will briefly summarize the judgment in *Vedanta*<sup>15</sup> which has signalled promising developments regarding the establishment of parent company accountability for harms caused by its foreign subsidiaries.<sup>16</sup> Before doing so, however, it is worth mentioning that this section's purpose is to explore general arguments and approaches relevant to the questions addressed in this article. Thus, instead of addressing all of the arguments and particularities raised in this case, the following discussion is held general and puts aside specific details and complexities. In this regard, from the four major issues brought before the Supreme Court, this section only examines the following: (i) real triable issue, (ii) proper place, and (iii) substantial justice, leaving out the analysis of abuse of European Union ('EU') Law.

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<sup>15</sup>*Vedanta* (n 12).

<sup>16</sup>Croser (n 4) 136.

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**A. Facts of the case**

In 2015, a group of 1,826 rural citizens from the Chingola District of Zambia filed a claim before the Technology and Construction Court High Court in England and Wales (TCC) against the mining company Vedanta Resources Plc ('Vedanta') and Konkola Copper Mines Plc ('KCM'). Vedanta is a company incorporated in the United Kingdom<sup>17</sup> and listed on the London Stock Exchange Market.<sup>18</sup> It is the parent company of a large multinational corporate group that employs more than 80,000 people worldwide in operations including minerals, power, oil, and gas.<sup>19</sup> Vedanta is the ultimate parent company of the subsidiary KCM, a public company incorporated and operating in Zambia. Alongside the Zambian government, Vedanta is the owner of the Nchanga Copper Mine ('Copper Mine'), situated in the Chingola District of Copperbelt Province (Zambia). Although not fully owned by Vedanta, information published by this company emphasises that the ultimate control of KCM is not 'to be regarded as any less than it would be if wholly owned'.<sup>20</sup>

The plaintiffs claimed that the Copper Mine – reportedly the second largest in the world<sup>21</sup> and the largest non-public employer in Zambia<sup>22</sup> – repeatedly discharged toxic materials into local watercourses over the course of 15 years.<sup>23</sup> Since these watercourses were the only source of drinking water and irrigation for the villagers, they alleged that these discharges irreversibly harmed their health, livelihood, and farming activities.<sup>24</sup> They also alleged personal injury, damage to property, loss of income, amenity, and enjoyment of land.<sup>25</sup>

The claimants sued both KCM and Vedanta before the TCC in England. Although KCM is the owner and operator of the Copper Mine, they argued that Vedanta maintained a high degree of control and direction over KCM's mining

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<sup>17</sup>*Dominic Liswaniso Lungowe and Ors v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC) (*Lungowe*) [13].

<sup>18</sup>Bradshaw (n 1) 140.

<sup>19</sup>*ibid.*

<sup>20</sup>*Vedanta* (n 12) [2].

<sup>21</sup>*ibid* [1]-[3].

<sup>22</sup>Varvastian (n 2) 325.

<sup>23</sup>*Vedanta* (n 12) [1]-[3].

<sup>24</sup>*Lungowe* (n 17) [12].

<sup>25</sup>*Vedanta* (n 12) [1]-[3].

operations. The plaintiffs based their claims mainly on common law negligence and breach of statutory duty in accordance with Zambian law.<sup>26</sup> In particular, they claimed that, as the parent company established health, safety, and environmental standards for the KCM to comply with, Vedanta owed them a duty of care directly.<sup>27</sup>

### ***B. Real triable issue (Vedanta's duty of care)***

To the Supreme Court, it was crucial to examine whether the claim contained a 'real triable issue' against Vedanta that was reasonable enough for the Court to serve KCM outside of its jurisdiction,<sup>28</sup> as required by the necessary or proper party gateway.<sup>29</sup> In this regard, the Supreme Court analysed if Vedanta had sufficiently intervened in the management of the Copper Mine to have assumed itself a common law duty of care to the plaintiffs.<sup>30</sup> In particular, the Court evaluated whether Vedanta exercised a sufficiently high level of control and direction over the mining operations, with enough knowledge of the scope of KCM's activities to damage surrounding watercourses through toxic matter discharges.<sup>31</sup>

Vedanta argued that the claimants' argument of neglecting a duty of care would cause a novel and controversial extension of the boundaries of negligence.<sup>32</sup> In this sense, Vedanta claimed that it could not incur a duty of care by only establishing group-wide policies and expecting the management of those subsidiaries to comply with them.<sup>33</sup> To Vedanta, there was thus no real triable issue against the company in its submission to the Supreme Court.

The Supreme Court rejected Vedanta's argument and concluded there was an arguable case against the parent company. It pointed out three different ways in which parent companies incur a duty of care to affected individuals.<sup>34</sup> First, by

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<sup>26</sup>ibid [3].

<sup>27</sup>*Lungowe* (n 17) [31].

<sup>28</sup>ibid [142].

<sup>29</sup>*Vedanta* (n 12) [20].

<sup>30</sup>ibid [44], [50].

<sup>31</sup>ibid [55].

<sup>32</sup>ibid [46].

<sup>33</sup>Croser (n 4) 133.

<sup>34</sup>*Vedanta* (n 12) [52]-[53].

spreading deficient group-wide policies and guidelines containing systemic errors, which cause harm to third parties when implemented by a subsidiary. Second, by taking active steps to assure the implementation of group-wide policies by its subsidiaries. Third, by developing such policies, holding itself out as exercising supervision and control of its subsidiaries, even if it does not in fact do so.

As the question was to be examined on a case-by-case basis, the Supreme Court based its decision on Vedanta's published documents and materials which reported on the implementation of its group-wide policies on environmental management.<sup>35</sup> For example, the Court noted that the report 'Embedding Sustainability' emphasised the way Vedanta's subsidiaries rested closely with the board of Vedanta.<sup>36</sup> The Court's ruling concluded that, through the published material, Vedanta asserted its own assumption of responsibility for both the establishment of proper group-wide standards of environmental control and sustainability and the implementation of those standards within the group through training, monitoring and enforcement.<sup>37</sup>

Indeed, the judgment further emphasised that whether Vedanta owed a direct duty of care in a parent-subsidiary relationship depended on the extent and the way in which the parent company had the opportunity to supervise, control, or advise the management of the relevant operations of the subsidiary.<sup>38</sup> In sum, the Court explained that Vedanta asserted its own assumption of responsibility for the maintenance of proper environmental control standards over its subsidiaries' activities, and particularly, operations at the Copper Mine.<sup>39</sup>

### ***C. Proper place to bring the claim (Jurisdiction)***

The Supreme Court's main question, however, was whether or not the plaintiffs could issue proceedings against Vedanta and KCM before English

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<sup>35</sup>ibid [58].

<sup>36</sup>ibid.

<sup>37</sup>ibid [61].

<sup>38</sup>Lise Smit, Claire Bright, Irene Pietropaoli, Julianne Hughes-Jennett and Peter Hood, 'Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies' [2020] 5 *Business and Human Rights Journal* 264.

<sup>39</sup>*Vedanta* (n 12) [61].

domestic courts.<sup>40</sup> To bring an action against Vedanta in its home country, the claimants relied on the Recast Brussels Regulation,<sup>41</sup> and to sue KCM outside of its jurisdiction, they relied on the necessary or proper party gateway of the English Civil Procedure Rules (CPR).<sup>42</sup>

Both defendants, however, challenged the jurisdiction of English courts granted by the High Court Judge and the Court of Appeal by arguing that the case did not disclose a real triable issue against Vedanta to render KCM a proper party to proceedings in England.<sup>43</sup> They argued that the claimants' use of the Brussels Regulation resulted in an abuse of EU Law, since they were using a claim against the parent company in the UK for the sole purpose of attracting English jurisdiction against a foreign defendant (KCM), who is the real target of the claim.<sup>44</sup> According to the defendants, the claimants could not prove that the company did anything sufficiently related to the Mine's operation which gave rise to either a common law duty of care or a statutory liability as a participant in breaches of Zambian legislation.<sup>45</sup> Furthermore, besides claiming that no real justiciable issue arose against Vedanta, they also affirmed that Zambia was the proper forum for the claim in which substantial justice could be achieved.

As a general rule, English courts may be allowed to serve foreign defendants out of jurisdiction if the United Kingdom is the 'proper place' in which the case should be tried.<sup>46</sup> In other words, England ought to be the appropriate forum, or *forum conveniens*.<sup>47</sup> To decide whether or not this state is the appropriate forum, it is required to examine the connecting factors between the case and the relevant jurisdictions in which it could be litigated.<sup>48</sup> As the Supreme Court mentioned,

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<sup>40</sup>*ibid* [4].

<sup>41</sup>Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L351/1.

<sup>42</sup>Civil Procedure Rules 1998 (UK), S.I. 1998 No. 3132, CPR Practice Direction 6B, para 3.1.

<sup>43</sup>*Dominic Liswaniso Lungowe and Ors v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC) and *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, respectively.

<sup>44</sup>*Vedanta* (n 12) [18].

<sup>45</sup>*ibid* [17].

<sup>46</sup>Bradshaw (n 1) 144.

<sup>47</sup>*Vedanta* (n 12) [66].

<sup>48</sup>*ibid*.

even if other connecting factors favour a foreign jurisdiction, the avoidance of irreconcilable judgments arising from proceedings in different jurisdictions against each defendant has frequently been found to be decisive in holding England as the proper place.<sup>49</sup>

Nevertheless, in this particular case, the Supreme Court considered that the risk of avoiding irreconcilable judgments was not a decisive ‘trump card’.<sup>50</sup> Instead, it was just one factor considered in the Supreme Court’s analysis.<sup>51</sup> In this sense, other connecting factors were analysed, such as the place where the alleged wrongful acts or omissions occurred, the place where the causative link between the allegedly negligent operation of the Copper Mine and the damage happened, the difficulties arising from language and monetary resources to travel to England, as well as the location of all important documentation of the case, which was located in Zambia.<sup>52</sup> Thus, the Supreme Court concluded that Zambia was overwhelmingly the appropriate forum for the claim to be heard.<sup>53</sup>

#### ***D. Substantial justice***

As explained above, a foreign jurisdiction would have been the proper place for the claim against KCM to be tried.<sup>54</sup> Nonetheless, the Supreme Court held that, if there is convincing evidence of a real risk that substantial justice will not be achieved in that foreign jurisdiction, it might allow a foreign defendant to be served in England.<sup>55</sup> Specifically, the Supreme Court asserted that where there is a risk of denial of substantial justice in a specific jurisdiction, it is unlikely for the jurisdiction to be the appropriate forum in which the claim can be most suitably tried for the interests of all parties and the ends of justice.<sup>56</sup> To determine whether it was possible to obtain substantial justice in Zambia, the Court was required to carefully examine the distinctive evidence,<sup>57</sup> specifically whether resources, such

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<sup>49</sup>*ibid* [75].

<sup>50</sup>*ibid* [84]-[87].

<sup>51</sup>*ibid*.

<sup>52</sup>*ibid*.

<sup>53</sup>*ibid* [85].

<sup>54</sup>*ibid* [88].

<sup>55</sup>*ibid*.

<sup>56</sup>*ibid*.

<sup>57</sup>*ibid* [89].

as financial, legal, and technical expertise, were available to enable the effective litigation of this complex case.<sup>58</sup>

The Supreme Court concluded that claimants lacked the sufficient resources to fund the trial themselves, even as a large group.<sup>59</sup> In addition, the plaintiffs could not obtain legal aid for their lawsuit. Furthermore, since conditional fee agreements (CFAs) are unlawful in Zambia, the claimants were reliant on the available CFAs in England.<sup>60</sup> In sum, as claimants faced significant barriers to obtaining effective litigation,<sup>61</sup> the Court established that there was a risk of not obtaining substantial justice in Zambia. In this sense, the Supreme Court upheld the High Court and the Court of Appeal's decisions, ruling in favour of the plaintiffs and dismissing both the defendant's arguments against bringing their case in England.

## II. UNDERSTANDING ACCESS TO JUSTICE

Within transnational corporate liability litigation, *Vedanta*<sup>62</sup> has become an important precedent for two main reasons.<sup>63</sup> Firstly, as explained above, the UK Supreme Court has provided access to justice to foreign claimants. Secondly, since English companies are present worldwide, some of which own subsidiaries involved in polluting activities in host states, the judgment 'opens the door' to future claims brought to English courts for environmental damages.<sup>64</sup> While the former is related to general access to justice, that is, for instance, claimants seeking to enforce a human right and obtain reparation for harm, the latter concerns access to justice regarding environmental issues. In order to understand the relevance of *Vedanta*<sup>65</sup> and how this decision could motivate future claims,<sup>66</sup> this section aims to examine the reasoning behind the adoption of the Supreme Court's 'new approach' in relation to access to justice.

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<sup>58</sup>*ibid.*

<sup>59</sup>*ibid* [90].

<sup>60</sup>*ibid* [89]-[90].

<sup>61</sup>*ibid.*

<sup>62</sup>*ibid.*

<sup>63</sup>*ibid.*

<sup>64</sup>Bradshaw (n 1) 141.

<sup>65</sup>*Vedanta* (n 12).

<sup>66</sup>*ibid.*

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**A. Access to justice as a human right**

Access to justice emerged in customary international law as part of state's responsibility for injuries to aliens.<sup>67</sup> This concept has been documented in several fields of law, including human rights law<sup>68</sup> and environmental law.<sup>69</sup> Under a general approach, access to justice in international law refers to the possibility for individuals to bring their claims before a tribunal and have a tribunal adjudicate them.<sup>70</sup> The term has been used as a synonym of judicial protection, as it describes the right of any individual to seek a remedy before a court or judicial body. In the application of the law, this judicial body must guarantee both independence and impartiality. From a more specific approach, access to justice does not only refer to the right of a person to enter a court of law. It also refers to the right to have their claim heard and adjudicated in accordance with standards of justice and fairness.<sup>71</sup> The third aspect of this concept has been used to report the legal aid for people with less financial resources.<sup>72</sup> Under this narrower approach, the impediment to access of justice occurs when judicial remedies are only available to people with enough available resources, which allows them to hire lawyers and meet the administration of justice.

Access to justice, thus, arises as a tool to ensure the protection of a human right that has been violated, regardless of whether it was committed by a private entity or a state official.<sup>73</sup> In this sense, accessible remedies must be available within domestic legal systems, so individuals are ensured the protection of their

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<sup>67</sup>Francesco Francioni, 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) 2.

<sup>68</sup>See the Universal Declaration of Human Rights (UDHR), Article 8; European Convention on Human Rights and Fundamental Freedoms (ECHR), Article 13; American Convention on Human Rights (ACHR); African Charter on Human and Peoples' Rights (ACHPR).

<sup>69</sup>See the Rio Declaration on Environment and Development, Principle 10; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), Aarhus (Denmark), Article 9.

<sup>70</sup>Francioni (n 67) 1.

<sup>71</sup>*ibid.*

<sup>72</sup>*ibid.*

<sup>73</sup>Prisca Listiningrum, 'Transboundary Civil Litigation for Victims of Southeast Asian Haze Pollution: Access to Justice and the Non-Discrimination Principle' [2019] 8(1) *Transnational Environmental Law*, Cambridge University Press 127.

human rights.<sup>74</sup> Furthermore, the protection of human rights is only guaranteed when effective judicial remedies are available.<sup>75</sup> This has been confirmed by multiple international instruments which have recognised the right to access to justice. For instance, the United Nations Universal Declaration of Human Rights (UDHR) establishes the right of every person ‘to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law’.<sup>76</sup>

In addition, states have acknowledged this right in regional human rights treaties. The European Convention on Human Rights (ECHR), for example, establishes that anybody whose rights and freedoms are violated shall have an effective remedy before a national authority.<sup>77</sup> Likewise, the American Convention on Human Rights (ACHR) recognises the right to judicial protection and establishes that every person ‘has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights’.<sup>78</sup> Not only do these multilateral treaties demonstrate that access to justice is broadly recognised as a human right; since it is possible to obtain a remedy, these treaties also confirm this right’s procedural character.<sup>79</sup>

It is worth noting that, since access to justice arises as a consequence of the breach of the enforcement of other substantive rights, it is not recognised as a self-standing human right.<sup>80</sup> Instead, access to justice is considered to be a procedural guarantee, as its existence is subjected to the extent that there is a substantive enforceable right. In this sense, the term ‘enforceable right’ is important for practical reasons. Since not all human rights are enforceable through judicial means, there is a fundamental distinction between, on the one side, civil and political rights, and, on the other side, economic, social, and cultural rights. While the former entails ‘negative’ obligations upon states, the latter

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<sup>74</sup>*ibid* 126.

<sup>75</sup>Francioni (n 67) 1.

<sup>76</sup>Universal Declaration of Human Rights (UDHR) art 8.

<sup>77</sup>European Convention on Human Rights, art 13.

<sup>78</sup>American Convention on Human Rights, art 25.

<sup>79</sup>Listiningrum (n 73) 127.

<sup>80</sup>*ibid*.

imposes 'positive' obligations. In other words, the first category of rights is enforceable before domestic courts and ought to be implemented without delay, by passing laws and designating state officials to enforce this enacted legislation.<sup>81</sup> The second category, however, ought to be implemented at a policy level.<sup>82</sup>

Thus, while it is possible to fully enforce the first category of rights through good governance and non-interference in human liberty spheres, states require economic resources to enforce the second category.<sup>83</sup> Although it is not justifiable to maintain a rigid distinction between both categories for the purpose of determining the legal basis and scope of access to justice today,<sup>84</sup> when dealing with human rights violations states have discretion to decide available remedies. In fact, international law has not yet prescribed forms in which access to justice should be provided.<sup>85</sup>

### ***B. Access to environmental justice***

Access to justice for environmental matters is at the convergence between procedural human rights, environmental law, and good governance.<sup>86</sup> This right has been recognised in various international instruments. For instance, principle 23 of the United Nations World Charter (1982) states that everyone 'shall have access to means of redress when their environment has suffered damage or degradation'.<sup>87</sup> Principle 10 of the Rio Declaration (1992) also establishes that,<sup>88</sup> at a national level, each individual has three different pillars of rights: (i) the right to access information concerning the environment; (ii) the right to participate in decision-making processes; and (iii) the right to effective access to judicial and administrative proceedings, including redress and remedy.

The first international treaty that addressed access to environmental justice was the Convention on Access to Information, Public Participation in Decision

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<sup>81</sup>*ibid.*

<sup>82</sup>Francioni (n 67) 30.

<sup>83</sup>*ibid.*

<sup>84</sup>*ibid.* 31.

<sup>85</sup>Rhona Smith, *International Human Rights Law* (Oxford University Press 2014) 181–183.

<sup>86</sup>Catherine Redgwell, 'Access to Environmental Justice' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) 153.

<sup>87</sup>United Nations World Charter, Principle 23.

<sup>88</sup>Rio Declaration on Environment and Development, Principle 10.

Making and Access to Justice in Environmental Matters (1998) (Aarhus Convention). In article 9, the Aarhus Convention internationally codifies minimum standards with respect to the three pillars of this procedural human right: (i) access to environmental information; (ii) public participation in environmental decision-making; and (iii) access to justice for environmental matters.<sup>89</sup> Not only do those pillars set a benchmark for attaining environmental democracy but they also demonstrate the intersection between human rights and environmental law.<sup>90</sup> Indeed, as Redgwell explains, article 9 of the Aarhus Convention appears to be an application of the right to a fair hearing (Article 6(1) of the European Convention on Human Rights (ECHR)) which has been adapted to environmental issues and their specific characteristics.<sup>91</sup>

Although the Aarhus Convention symbolises a major improvement for the critical issue of enforcement of environmental law,<sup>92</sup> it is still a regional treaty and thus does not apply worldwide. Therefore, regardless of the progress on good governance and public participation in international forums, such as the United Nations Conference on Environmental and Development (UNCED) (1992) and the World Summit on Sustainable Development (WSSD) (2002), there remains a gap in the international legal framework for access to justice in environmental matters.<sup>93</sup>

Nevertheless, although current international legal instruments are not binding, access to environmental justice is an emerging principle of environmental law. Therefore, even if there is an absence of provisions in international environmental treaties, access to environmental justice is widely accepted by states today.<sup>94</sup> As Listiningrum mentions, the definition in Principle 10 of the Rio Declaration contains the word ‘shall’, which expresses the *opinion juris* character of

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<sup>89</sup>Aarhus Convention, art 9.

<sup>90</sup>Redgwell (n 86) 154.

<sup>91</sup>*ibid.*

<sup>92</sup>Charles Poncelet, ‘Access to Justice in Environmental Matters—Does the European Union Comply with its Obligations?’ [2012] 24(2) *Journal of Environmental Law* 308; Gor Samvel, ‘Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice’ [2020] 9(2) *Transnational Environmental Law*, Cambridge University Press 214.

<sup>93</sup>Redgwell (n 86) 154.

<sup>94</sup>Listiningrum (n 73) 129-130.

this principle.<sup>95</sup> Furthermore, it is important to emphasise that it is more likely to achieve this procedural human right through (i) the right to a fair trial and other provisions of human rights instruments and (ii) a deeper integration between environmental law and human rights.<sup>96</sup> In sum, access to environmental justice involves a variety of rights, such as the right to bring proceedings before courts, the rights of merits and judicial review, and the right to enforce breaches of environmental laws.<sup>97</sup>

### ***C. Access to justice in Vedanta***

Access to justice was a crucial consideration in the Supreme Court's reasoning to decide the 'proper place' issue in *Vedanta*.<sup>98</sup> When the Court decided whether England was the *forum conveniens* for litigation, it evaluated a variety of factors, such as the risk of irreconcilable judgments and where the polluting activities happened. However, in determining whether there was a real risk that substantial justice would not be achieved in Zambia, the decisive factors were the following: (i) cost of litigation which claimants cannot afford; (ii) lack of technical expertise; and (iii) civil procedural arrangements which are more favourable in the parent company's home country.

It could be argued that the Supreme Court's approach was based mainly on the narrowest definition of access to justice. The Court, for instance, did not recognise corruption risks or the tribunal's lack of independence and impartiality in the plaintiffs' home state.<sup>99</sup> Instead, the Court concluded that claimants do not have access to justice because both legal and technical aids in Zambia are only available to those with sufficient financial resources.<sup>100</sup> In this regard, since *Vedanta*<sup>101</sup> offers the claimants access to judicial proceeding and an effective remedy to protect their rights, it could also be argued that the Court's decision confirms the third pillar of access to environmental justice, namely the right to effective access to justice regarding environmental issues.

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<sup>95</sup>*ibid* 130.

<sup>96</sup>Redgwell (n 86) 155.

<sup>97</sup>Millner (n 5) 196-197.

<sup>98</sup>*Vedanta* (n 12).

<sup>99</sup>*ibid* [89].

<sup>100</sup>*ibid* [95].

<sup>101</sup>*ibid*.

As it has been explained, the right of access to justice is not a self-standing individual right since it arises as a consequence of the breach of another substantive enforceable right.<sup>102</sup> In this sense, despite the Supreme Court's recognition of effective access to justice for environmental matters, it would be interesting to examine which 'substantive right' was violated in the current case.

Human rights law only gives limited recognition of substantive rights to the environment. This can be found at a regional level,<sup>103</sup> where in some cases it has been recognised that environmental justice is based on the right to a healthy and safe environment.<sup>104</sup> For instance, article 11 of the 1988 Protocol to the American Convention on Human Rights (ACHR) establishes that everybody 'shall have the right to live in a healthy environment'.<sup>105</sup> Also, the African Charter on Human and People's Rights states that every person 'shall have the right to a general satisfactory environment favourable to their development'.<sup>106</sup>

However, it remains difficult to find any direct rights to enjoy a clean and healthy environment.<sup>107</sup> Instead, it is more common to find indirect recognition of environmental rights. In *Yanomami*,<sup>108</sup> for instance, the Inter-American Commission on Human Rights alleged a right to life and to the preservation of health and well-being.<sup>109</sup> Likewise, the European Court of Human Rights has indirectly recognised environmental rights through existing rights, i.e. the right to private, home, and family life.<sup>110</sup> In this regard, the question of the substantive right to be enforced will remain unanswered for now until a court renders a final decision regarding liability for environmental pollution. Still, it could be argued that the UK Supreme Court leans towards indirect recognition of environmental rights through insisting that the parent company could owe a duty of care.

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<sup>102</sup>Francioni (n 67) 30.

<sup>103</sup>John Merrills, 'Environmental Rights' in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (2007).

<sup>104</sup>Eghosa O. Ekhaton, 'Improving access to environmental justice under the African Charter on Human and Peoples' rights: the roles of NGOs in Nigeria' [2014], 22(1) *African Journal of International and Comparative Law*, Edinburgh University Press 65.

<sup>105</sup>American Convention on Human Rights (ACHR) art 11.

<sup>106</sup>African Charter on Human and People's Rights, art 24.

<sup>107</sup>Redgwell (n 86) 157.

<sup>108</sup>Comunidad Yanomami. Caso N° 7615. Resolución N° 12/85.

<sup>109</sup>*ibid.*

<sup>110</sup>European Convention on Human Rights, art 8.

The Supreme Court's decision in *Vedanta* is important because,<sup>111</sup> for the first time, a domestic court agreed to hear claims against parent companies that could be liable for their subsidiaries' activities abroad. Unlike other forums, such as the United States which limits the jurisdiction of its country when dealing with transnational claims brought under the Alien Tort Statute (ATS), *Vedanta*<sup>112</sup> reflects a rising tendency among the tribunals of parent companies' home states in agreeing to have jurisdiction to hear such cases. Furthermore, in some cases, domestic courts, following this global trend, have found the parent companies liable. For instance, less than a month after *Vedanta* was rendered,<sup>113</sup> a Dutch court ruled in *Kiobel v. Shell*<sup>114</sup> that it has jurisdiction to hear a case against a parent company incorporated in the Netherlands and its Nigerian subsidiary for alleged human rights violations.

Even if the Supreme Court concluded that a foreign court could be a more appropriate place for the proceedings, it is worth noting that *Vedanta*<sup>115</sup> expanded the premises for claimants to seek and pursue substantial justice.<sup>116</sup> Nevertheless, the Supreme Court stated that when deciding access to substantial justice, not only is lack of funding considered difficult to analyse, but also the lack of technical expertise is an issue that needs to be carefully examined. In other words, to prevent creating a blanket precedent, the Supreme Court highlighted a need to evidence particular circumstances in each case.<sup>117</sup>

### III. DOWNSIDES OF THE 'NEW APPROACH'

Since *Vedanta*'s judgment was rendered in 2019,<sup>118</sup> it has been argued that the decision has become a 'steppingstone'<sup>119</sup> on the way to access justice and claim damages for environmental damage committed by private polluting entities. Since the Supreme Court's decision established that plaintiffs are capable of starting

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<sup>111</sup>*Vedanta* (n 12).

<sup>112</sup>*ibid.*

<sup>113</sup>*ibid.*

<sup>114</sup>*Esiter Kiobel v Royal Dutch Shell PLC* [2019] ECLI:NL:RBDHA:2019:4233.

<sup>115</sup>*Vedanta* (n 12).

<sup>116</sup>Varvastian (n 2) 329.

<sup>117</sup>*ibid* 330.

<sup>118</sup>*Vedanta* (n 12).

<sup>119</sup>Redgwell (n 86) 145.

proceedings against parent companies before British courts, there almost appears to be the presumption that the adoption of the ‘new approach’ must be a positive development.<sup>120</sup> As explained in the previous section, *Vedanta*<sup>121</sup> recognises more grounds for claimants to bring lawsuits against parent companies in England. Nevertheless, it is still hard to evaluate if all affected communities in similar circumstances would have an equal opportunity to do so.

In this regard, the Supreme Court’s decision still leaves some questions unanswered: How likely is it that this approach would fulfil the objective of providing justice to the claimants? Will this judgment create incentives for parent companies to be liable for polluting operations of their subsidiaries? Which are the downsides of the ‘new approach’? This section’s purpose is to address these questions. In particular, it seeks to explore and criticize the assumption that the Supreme Court’s decision will ‘open the door’<sup>122</sup> and ‘give an impetus’<sup>123</sup> to future claims for environmental harm to be brought to English domestic courts.

This article argues that the Supreme Court’s decision does not provide an effective legal remedy to vulnerable communities as a general rule. First, since the Court established limits on jurisdiction based on the plaintiffs’ specific characteristics in this particular case, it is questionable whether other claimants would have similar outcomes in future cases. Second, provided that control and direction of subsidiaries prevails on a voluntary basis, the Supreme Court’s judgement may lead parent companies to reconsider such practices, and eventually withdraw them. Consequently, the Court’s ruling could lead parent companies to assume less responsibility and be less transparent regarding operations carried out by their foreign subsidiaries. Such reasoning of voluntary responsibility assumption for the maintenance of proper environmental standards over subsidiaries’ operations might not help claimants against corporate groups in future cases. It is thus questionable whether the adoption of the ‘new approach’ would encourage parent companies to maintain or adopt measures oriented towards compliance with international environmental standards.

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<sup>120</sup>Vivian Grosswald Curran, ‘Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations’ [2016] 17(2) Chicago Journal of International Law 406.

<sup>121</sup>*Vedanta* (n 12).

<sup>122</sup>Bradshaw (n 1) 141.

<sup>123</sup>Varvastian (n 2) 330.

### ***A. Regarding jurisdiction***

A universally accepted principle of corporate law states that companies have separate personalities and a shareholder's liability is limited.<sup>124</sup> Therefore, under this principle, known as the Salomon principle,<sup>125</sup> a corporation can be sued in its own name, as a different legal entity, separately from its shareholders, directors, and employees. Thus, this principle creates the 'corporate veil' which separates actions of an organisation from those of its shareholders, which can also be applied to corporate groups.<sup>126</sup>

In this sense, a parent company, as the owner of (up to) several other corporations, is not normally held legally responsible for its subsidiaries' operations,<sup>127</sup> and for their illegal actions or omissions. However, this principle, which represent economic benefits, also contribute to externalising both environmental harm and corporate irresponsibility.<sup>128</sup> In fact, it has been argued that the way a corporate legal form is constituted is not an economic necessity but a structure that institutionalises irresponsibility.<sup>129</sup> Indeed, in a corporate group context, parent companies are generally able to obtain the economic benefits of the subsidiaries they own and, at the same time, be protected from their liability.<sup>130</sup>

Nevertheless, although as a general rule, parent companies are not liable for their subsidiaries' actions, some exceptions apply to the general principles of corporate separateness.<sup>131</sup> Under certain circumstances, the corporate veil may be

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<sup>124</sup>Matrin Petrin and Barnali Choudhury, 'Group Company Liability' [2018] European Business Organization Law Review 772.

<sup>125</sup>*Salomon v Salomon & Co Ltd* (1897) AC 22.

<sup>126</sup>For the purposes of this article a company group 'is comprised of several companies related hierarchically through controlling shareholdings, which can manifest itself in the form of majority as well as indirect and minority shareholdings'. See Petrin (n 124) 772-773.

<sup>127</sup>John F. Sherman, 'Should a Parent Company Take a Hands-off Approach to the Human Rights Risks of its Subsidiaries?' [2018] 19(1) Business Law International 28.

<sup>128</sup>Bradshaw (n 1) 139.

<sup>129</sup>Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' [2010] 34 Cambridge Journal of Economics 837-838.

<sup>130</sup>Bradshaw (n 1) 140.

<sup>131</sup>Meinhard Doelle and Sara Seck, 'Loss & damage from climate change: from concept to remedy?' [2020] 20(6) Climate Policy 675.

pierced;<sup>132</sup> examples of such being when the subsidiary is just a mere alter ego of its parent company,<sup>133</sup> when the subsidiary is used for unlawful purposes,<sup>134</sup> or when the parent company is directly controlling its subsidiary.<sup>135</sup>

As veil piercing has become increasingly strict, some courts have developed a new approach to hold parent companies responsible for their subsidiaries' operations. For instance, courts have recognised that a duty of parent companies is related to the supervision of subsidiaries.<sup>136</sup> Thus, it has been argued that this approach could lead parent companies to be directly responsible for the harm created by their subsidiaries.

Some scholars have argued that because *Vedanta* recognised parent company liability,<sup>137</sup> it might be easier to bring a lawsuit against parent companies domiciled in the UK for actions made by their foreign subsidiaries.<sup>138</sup> However, nothing in the ruling supports the idea that piercing the veil within corporate groups would be easier in the future. Even though the plaintiffs had a favourable outcome in *Vedanta*,<sup>139</sup> it is yet unclear that other claimants would have an equally favourable result in the future.

In fact, even if the Supreme Court's decision permitted affected people to bring future claims in England against both the parent companies and their subsidiaries, it would be interesting to examine whether this ruling's approach responds only to particular characteristics of *Vedanta*.<sup>140</sup> This would thus allow

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<sup>132</sup>Curran (n 120) 408.

<sup>133</sup>Sherman (n 127) 28.

<sup>134</sup>Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' [2015] 72 Wash & Lee L Rev 1769, 1773.

<sup>135</sup>*Chandler v Cape plc* [2012] WLR 3111.

<sup>136</sup>Sherman (n 127) 28.

<sup>137</sup>*Vedanta* (n 12).

<sup>138</sup>Petrin (n 124) 777.

<sup>139</sup>*Vedanta* (n 12).

<sup>140</sup>*ibid.*

for an analysis of whether *Vedanta*<sup>141</sup> has placed the threshold to substantial justice excessively high.<sup>142</sup>

In this sense, although *Vedanta*<sup>143</sup> could be held accountable as a parent company when the case proceeds to trial, one could argue that this is because the Supreme Court took into account the economic situation of the host country and the financial resources of the claimants. Indeed, not only did the Supreme Court conclude that Zambia is one of the poorest countries in the world,<sup>144</sup> but also that the claimants did not have enough resources to pay for lawyers and start proceedings in their home country. In this regard, if the claimants were to be from a more economically advantaged jurisdiction in which legal aid and technical expertise were available, the Court might have adopted a different decision, as access to justice would not be an issue.

Furthermore, although the Supreme Court concluded that there is a high risk of corruption in Zambia and that the Zambian government holds a large minority stake in the Copper Mine,<sup>145</sup> the Court's decision was not based on either lack of independence in Zambia's judiciary nor lack of fair procedure.<sup>146</sup> Hence, this reasoning confirms that the Supreme Court was focused mainly on the economic situation of the claimants. Additionally, by concluding that the risk of irreconcilable judgments is no longer a decisive factor, the Supreme Court reintroduced *forum non conveniens*.<sup>147</sup> In this sense, the supposed doors that would allow claimants to start a trial before English courts are not fully opened, and the analysis might shift to analysing the limits of substantial justice.<sup>148</sup>

### ***B. Regarding the parent company's duty of care***

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<sup>141</sup>*ibid.*

<sup>142</sup>Bradshaw (n 1) 141.

<sup>143</sup>*Vedanta* (n 12).

<sup>144</sup>*ibid* [90].

<sup>145</sup>*ibid* [2].

<sup>146</sup>*ibid* [89].

<sup>147</sup>Bradshaw (n 1) 145.

<sup>148</sup>*ibid* 146.

Regarding the parent company's duty of care, some have suggested that the judgment extended this obligation beyond the court's previous findings.<sup>149</sup> Likewise, it has been argued that the concept of this duty was even extended outside the reach of corporate groups.<sup>150</sup> Unlike in previous cases, such as *Chandler v Cape Plc*,<sup>151</sup> in which an English court recognised a duty to employees of a parent's subsidiary for asbestos exposure, the Supreme Court concluded in *Vedanta*<sup>152</sup> that the duty of care also involves neighbours and communities affected by environmental pollution.<sup>153</sup> Interestingly, under general tort law principles governing third parties, the Supreme Court did not find much of a difference between the condition of the mentioned employees and neighbours.<sup>154</sup>

Indeed, instead of extending the boundaries of parent companies' duties, *Vedanta*'s ruling<sup>155</sup> only confirmed those boundaries to an extended group of stakeholders.<sup>156</sup> Furthermore, *Vedanta* has established a straight forward reading of liability,<sup>157</sup> where a parent company has assumed responsibility voluntarily in writing.<sup>158</sup> If we take into consideration that, as explained before, corporate law aims to restrict each company's liabilities within a corporate group, then it becomes challenging to explain how responsibility can be said to have been deliberately assumed.

Furthermore, if the purpose of the claimants is to pierce the corporate veil, the Supreme Court's reasoning regarding the responsibility analysis may not be convenient.<sup>159</sup> In fact, as a result of the Supreme Court's decision in *Vedanta*,<sup>160</sup> parent companies might adopt different strategies to address environmental issues

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<sup>149</sup>Samantha Hopkins 'Vedanta Resources Plc and Another v Lungowe and Others' [2019] 70 Northern Ireland Legal Quarterly 371.

<sup>150</sup>Sanger (n 13) 488; Hopkins (n 149) 371.

<sup>151</sup>*Chandler v Cape plc* [2012] EWCA Civ 525.

<sup>152</sup>*Vedanta* (n 12).

<sup>153</sup>*ibid* [52].

<sup>154</sup>*ibid* [50]-[52].

<sup>155</sup>*Vedanta* (n 12).

<sup>156</sup>Charlotte Villiers, 'Collective Responsibility and the Limits of Disclosure in Regulating Global Supply Chains' [2018] 23 Deakin Law Review 143; Ekaterina Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction' [2018] 14(2) Utrecht Law Review 13.

<sup>157</sup>*Vedanta* (n 12).

<sup>158</sup>Hopkins (n 149) 371.

<sup>159</sup>Bradshaw (n 1) 147.

<sup>160</sup>*Vedanta* (n 12).

and avoid environmental lawsuits, especially in poor countries. For instance, parent companies could withdraw themselves from group-wide disclosure and management of their subsidiaries. Likewise, parent companies could take a 'hands-off' strategy and become less involved in their subsidiaries' activities.<sup>161</sup> In this sense, *Vedanta*<sup>162</sup> may encourage corporate retreats from publishing company-wide management protocols. Companies running business operations worldwide may review their available tools to evaluate and supervise matters of international law involving their subsidiaries.<sup>163</sup> This would include an in-depth examination of corporate social responsibility policies, including the risks such policies could represent, such as the probable exposure for publicly outlining group-wide management, training and practices.<sup>164</sup>

Up until now, challenging jurisdiction was the main strategy of parent companies involved in transnational claims. However, as the Supreme Court assessed the parent company's public materials and information, this strategy could change. Consequently, *Vedanta's* ruling<sup>165</sup> could create an incentive for parent companies located in developed countries to avoid publishing information about their relationship with their overseas subsidiaries, or avoid close supervision of their subsidiaries, therefore, making future cases harder for claimants.

## CONCLUSION

Litigation related to environmental pollution and human rights has been increasing at an unprecedented pace on a global level. Corporate groups' activities sometimes generate adverse impacts on local communities in developing countries, creating challenges for the law and its traditional methods.<sup>166</sup> In order to guarantee that communities' rights are respected, states are enforcing environmental laws with greater attention. However, not all countries can enforce such laws, leaving vulnerable communities without effective remedies to protect their rights.

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<sup>161</sup>Sherman (n 113) 23.

<sup>162</sup>*Vedanta* (n 12).

<sup>163</sup>Swan (n 10) 5.

<sup>164</sup>*ibid.*

<sup>165</sup>*Vedanta* (n 12).

<sup>166</sup>Danielle Anne Pamplona and Franz Christian Ebert, 'Business and Human Rights: Taking Stock of Trends in International Governance and Domestic Litigation' [2019] 16 *Braz J Int'l L* 2, 1.

In this regard, *Vedanta* has become a relevant ruling for allowing lawsuits to proceed in the parent company's home state,<sup>167</sup> based on the possible duty of care it could owe to foreign claimants affected by its subsidiaries' operations abroad. This decision, which represents a 'new approach', will have a considerable impact on the reasoning of domestic courts worldwide as it has provided access to justice for foreign claimants in transnational corporate litigation.

However, this article demonstrated that, although *Vedanta* has given access to environmental justice to a particular community harmed by environmental pollution,<sup>168</sup> it is questionable whether the adoption of a 'new approach' will provide a generally effective legal remedy to vulnerable groups. This article argued that there are two main difficulties associated with the reasoning behind the Supreme Court's decision. First, the judgment placed some limits to jurisdiction, focusing mainly on specific characteristics of the case, such as the economic situation of the host country and the financial resources of the claimants. Additionally, regardless of what some scholars argue, the Supreme Court did not extend the parent company's duty of care. The success of each proceeding will be determined by particular facts, connecting factors towards another jurisdiction, and the level of control established by the parent company over the subsidiary.

Likewise, the Supreme Court's decision may have implications concerning parent companies' willingness to establish and carry out environmental policies centrally, which results in them taking a 'hands-off' strategy towards their subsidiaries' activities. Thus, the Supreme Court's ruling could encourage parent companies to be less transparent and to assume less responsibility about activities carried out by their subsidiaries abroad. Furthermore, while this judgment aims to provide access to justice to affected people who are not able to access justice in their home countries' tribunals, by taking this 'new approach', judicial systems in host countries would remain inadequate forums to give effective legal remedies to vulnerable communities. This is especially true if the harmed people were affected by subsidiaries owned by parent companies incorporated in countries not keen to adopt this approach. These difficulties might weaken the legitimacy of the

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<sup>167</sup>*Vedanta* (n 12).

<sup>168</sup>*ibid.*

judgment and could have potentially negative effects for vulnerable communities in developing countries.

In sum, this article attempted to demonstrate the downsides of the *Vedanta* judgment.<sup>169</sup> Although the liability of parent companies for environmental damage caused by their foreign subsidiaries could provide access to justice for foreign claimants in transnational corporate liability litigation, it has potentially harmful consequences to affected communities. In this sense, unless legal reforms are introduced to establish clear responsibilities for parent companies and their subsidiaries, vulnerable groups will not have effective legal remedies.

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<sup>169</sup>*Vedanta* (n 12).