Private International Law, Global Value Chains and the externalities of transnational production: towards alignment?

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ABSTRACT
Global value chains (‘GVCs’) have become a basic operative unit of economic production. Their development over the twentieth and twenty-first centuries has resulted in immense creation of wealth while linking together individuals, companies and economies across the world. But GVCs are also a major cause for environmental degradation, carbon emissions and human rights abuses—the ‘externalities’ of global production that are not captured by existing regulatory frameworks. This paper examines the role of private international law (‘PIL’) in mapping GVCs into specific jurisdictions. The analysis suggests that PIL, focused on individual entities, does not allow a systematic legal approach to GVCs, which are collective entities. This lack of a systematic approach exacerbates the externalities of global production. However, the budding legal operationalisation of GVCs provides a functional-analytical lens to understand, systematise, critique and develop the role of PIL as a fundamental transnational constituent in ordering global production in relation to GVCs and beyond.

KEYWORDS Global Value Chains; sustainability; transnational litigation; Private International Law; organisational economics

1. Introduction

Global value chains (‘GVCs’) have become a basic operative unit of economic organisation. GVCs are centrally governed but organisationally and geographically fragmented production networks.1 Their rise, spread and development over the late twentieth and early twenty-first century is a modern wonder of developing the efficiency of collective production entities. It has
resulted in immense wealth creation while linking together individuals, companies and economies across the world. But by outsourcing manufacturing and resource use to regions and organisations without adequate infrastructure for dealing with them, GVCs are also a major cause for environmental degradation, excessive carbon emissions and labour or human rights abuses—the externalities of global production.

The role of law on the emergence and dynamics of GVCs is increasingly recognised. From a legal perspective, GVCs are a mixture of structurally separate entities that are constituted through equity ownership (eg corporate groups) or contractual relationships (eg supply chains) but centrally governed by lead firms. Under GVCs, these collective entities are often scattered over several jurisdictions, resulting in not only corporate and contractual but also jurisdictional boundaries insulating lead firms from their production structures. In this article, it is suggested that by understanding the seemingly independent entities that make up GVCs as a collective governed by the lead firm across jurisdictions, it is possible to internalise some of the most pressing externalities of GVC capitalism.

The analysis is deployed from the perspective of private international law (‘PIL’), a field of law that delineates the rules and doctrines for dealing with transnational legal disputes. By examining the role of PIL in forming the legal landscape of GVCs, it is argued that the technical rules determining applicable forum, applicable law and the enforceability of judgments are essential in linking together the manifold actors and jurisdictions underpinning global production networks. PIL gives GVCs much of their transnational legal structure. This constitutive process has, however, been mostly

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2 Gary Gereffi, ‘Global Value Chains in a Post-Washington Consensus World’ (2014) 21 Review of International Political Economy 9.
3 IGLP Law and Global Production Working Group, ‘The Role of Law in Global Value Chains: A Research Manifesto’ (2016) 4 London Review of International Law 57.
4 Generally, Kevin B Sobel-Read, ‘Global Value Chains: A Framework for Analysis’ (2014) 5 Transnational Legal Theory 364. Our focus is specifically on lead firms as a central locus for GVC organisation and governance. For alternative readings focusing on relations between GVC actors or institutional practices within GVCs, see Mark Dallas, Stefano Ponte and Timothy Sturgeon, ‘Power in Global Value Chains’ (2019) 26 Review of International Political Economy 666; Liena Kano, Eric Tsang and Henry Wai-chung Yeung, ‘Global Value Chains: A Review of the Multi-Disciplinary Literature’ (2020) 51 Journal of International Business Studies 577.
5 In addition to this technical conception, there are more analytical and theoretical ways of envisaging PIL as a complex socio-legal phenomenon, including historicism, legal pluralism and as analytical technique. See eg Harold Berman, ‘Is Conflict of Laws Becoming Passé? An Historical Response’ in Hans-Eric Rasmussen-Bonne and others (eds), Balancing of Interests: Liber Amicorum Peter Hay zum 70. Geburtstag (Verlag Recht und Wirtschaft 2005); Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law beyond Borders (Cambridge University Press 2012); and Karen Knop, Ralf Michaels and Annelise Riles, ‘From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style’ (2012) 64 Stanford Law Review 589. ‘Transnational’ is similarly a many-faceted concept. For some alternative readings, see Thomas Dietz, ‘Contract Law, Relational Contracts, and Reputational Networks in International Trade: An Empirical Investigation into Cross-Border Contracts in the Software Industry’ (2012) 37 Law and Social Inquiry 25.
neglected both in GVC theory development and in the burgeoning legal commentary.

To illustrate this claim, recent high-profile transnational tort litigations against lead firms in the Global North over the adverse social and environmental impacts of their subsidiaries or suppliers in the Global South will be reviewed. Drawing heavily on the European Union’s (EU) harmonised PIL framework and contrasting this with the broad contours of common law approaches, the limits of transnational lead firm liability are analysed, and the ways in which the operation of PIL informs the design of GVCs is explored. Even though much of this is due to controlling lead firm liabilities, the cases also indicate that intrinsic to PIL are possibilities for addressing new organisational structures, such as GVCs, and their adverse social and environmental impacts.

This article is structured as follows; Section 2 introduces the structure and legal constitution of GVCs. Section 3 presents an overview of the primary contact points between GVCs and PIL, underscoring the substantive and procedural challenges that PIL imposes on transnational GVC litigation and outlining the key interface problems between GVCs and PIL. In Section 4 some opportunities to address these challenges are discussed. Section 5 concludes by arguing for a need to develop a reflexive approach to the relationship of PIL and new forms of production, such as GVCs but also beyond them.

2. The constitution of Global Value Chains

2.1. The structure of Global Value Chains

GVCs, understood as complex and dynamic economic networks in which production crosses at least one border, have become a basic operative unit of economic organisation. GVCs are characterised, on the one hand, by an unprecedented global specialisation, and, on the other hand, by equally unprecedented coordination of the ensuing fragmented entities in order to ensure the stability of supply and distribution, product quality, compliance with target market standards, just-in-time production, cost-management, and research and development throughout the production lifecycle. GVCs are thus best understood as a highly fragmented but nonetheless centrally coordinated production structure.

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6 For an overview, see Gereffi (in 2). For a recent analysis on the significance of GVCs, see WTO, ‘Global Value Chain Report 2019: Technological Innovation, Supply Chain Trade, and Workers in a Globalized World’ (2019).
7 Virginia Hernández and Torben Pedersen, ‘Global Value Chain Configuration: A Review and Research Agenda’ (2017) 20 BRQ Business Research Quarterly 137.
8 Pol Antrás and David Chor, ‘Organizing the Global Value Chain’ (2013) 81 Econometrica 2127.
In practice, GVCs consist of several independent entities connected through equity ownership or contractual relationships. These independent entities are linked together by the variety of governance techniques that a lead firm has at its disposal and which it uses to fuse together the value chain for its own purposes. The governance techniques range from market-price mechanisms, standardisation and auditing to value-chain-wide capability building through dedicated governance contracts enabled by advanced communication and monitoring technologies. The outcome is that a GVC, consisting of seemingly independent entities located in different jurisdictions, may from a lead firm’s perspective be viewed as a single coherent entity.

The coordinated operation of GVCs stands in stark contrast to their current legal conceptualisation. Economic organisation and production have traditionally been conceived as being built on individual entities such as a corporation, a supply agreement or a labour contract. The legal constitution of these individual entities, as well as regulation of the social and environmental effects of the ensuing model of economic organisation, has been handled locally. Production networks have, by and large, been understood as collectives consisting of individual corporate and contractual relationships. Under GVCs, however, focus is on collectives of interconnected entities structured and enabled by the governance of a lead firm.

2.2. Law and the externalities of Global Value Chains

The discrepancy between the functional and legal structure of a GVC becomes evident when viewed from the perspective of social and environmental externalities attributable to coordinated global production. An actor within the GVC that causes an externality can, on the one hand, be conceived merely as an individual entity causing damage. On the other hand, the lead firm can be seen as responsible for organising and governing the GVC in a way that allows other GVC actors to cause damage in the form of externalities.

9 Gereffi, Humphrey and Sturgeon (n 1).
10 Peter Kajüter and Harri Kulmala, ‘Open-Book Accounting in Networks: Potential Achievements and Reasons for Failures’ (2005) 16 Management Accounting Research 179.
11 See eg Sobel-Read (n 4) and Klaas Hendrik Eller, ‘Private Governance of Global Value Chains from within: Lessons from and for Transnational Law’ (2017) 8 Transnational Legal Theory 296.
12 While alternative conceptualizations of GVCs exist (see footnote 4), our lead firm centric perspective is informed by its growing legal operationalization, for example through adoption and proliferation in recent regulatory initiatives, for which see Jaakko Salminen and Mikko Rajavuori, ‘Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis’ (2019) 26 Maastricht Journal of European and Comparative Law 602. For critique, see Anna Beckers, ‘The Invisible Networks of Global Production: Re-imagining the Global Value Chain in Legal Research’ (2020) 16 European Review of Contract Law 95.
13 Jaakko Salminen, ‘From Product Liability to Production Liability: Modelling a Response to the Liability Deficit of Global Value Chains on Historical Transformations of Production’ (2019) 23 Competition & Change 420.
This paradox of attributing responsibility for externalities in GVCs is both a reason for the rise of GVCs and a source of their adverse social and environmental impacts, as the efficiency gains of fragmented but highly co-ordinated GVCs are, to an extent, founded on regulatory arbitrage. While organisational fragmentation through contract or corporate form has, historically, been utilised by companies to control their liabilities and externalise their social and environmental costs domestically, these tendencies are exacerbated when outsourcing production to jurisdictions with even less regulation or lacking enforcement.

But the winds are changing. Just as GVCs can be designed around maximum efficiency, they can also be effectively managed towards sustainable outcomes if lead firms so wish. Advanced private governance mechanisms focused on, for example, labour safety or reducing carbon emissions, are used by lead firms to a gain competitive advantage. The expectation that lead firms can and should govern their value chains sustainably is also increasingly internalised by legislators, and formulated into novel legal conceptualizations of GVCs. The crop of transnational sustainability laws enacted across the world over the past decade, for instance, relies on operationalising a legal conception of the GVC focusing on the governance relationship between lead firms and the other actors in their supply chains, often through reporting obligations. Similarly in courts, paradigmatic cases such as the English *Chandler v Cape*, which develops lead firm liability for the inadequate governance of its subsidiaries, push private law towards reconceptualising fragmented production as centrally governed entities. The onus of the legal operationalisation of GVCs, and thus also regulation and doctrinal development, indicates an expectation that lead firms govern their subsidiaries and suppliers adequately.

Due to the expansive geographical fragmentation of GVCs, their legal conceptualisation is increasingly tested in transnational legal contexts, where a substantial body of litigation on the limits of lead firm liability for adverse social and environmental impacts has emerged. Many of these proceedings are lodged in the home forums of lead firms over the actions or omissions of their subsidiaries or suppliers in the Global South. This
transnational setting both augments evolving substantive law and exposes a host of legal techniques relevant for developing legal operationalisations of GVCs that would match their practical form in general and the close relationship between a lead firm’s governance and the operation of the rest of the value chain in particular. One of the key legal components in this case law is PIL, a field of law that delineates the rules and doctrines for dealing with transnational legal disputes. With the remainder of this article, we seek to identify how PIL currently reflects the new reality of GVC-driven global production and, more importantly, how it might do so in the future.

3. Global Value Chains under Private International Law

3.1. Introduction

PIL is a field of law that consists of a wide array of national, transnational and international rules and procedures that determine the applicable forum, the applicable law and the enforceability of judgments in a dispute involving parties from, or subject to laws of, multiple jurisdictions. In doing so, PIL can be seen as a technique that links actors involved in transnational disputes to specific jurisdictions and laws and, thus, gives GVCs much of their legal shape and structure. There are three elements to this constitutive process. First, PIL calibrates the litigation in relation to applicable forum related procedural parameters, such as evidentiary proceedings, the availability of funding and costs allocation. Second, by assigning a substantive law (or laws) to the subject matter of the litigation, PIL similarly determines applicable parameters such as duties of care, prescription periods and the quantum of damages. Third, PIL determines how and where decisions, judgments and awards can be enforced. Accordingly, the rules and doctrines of PIL affect the procedural, substantive and practical aspects of transnational commerce, and thus greatly impact how any current or future liability standards play out in transnational litigation. Following this, PIL is key in informing the organisation and governance of GVCs, whether it is used to enable effective value-chain-spanning contractual design or, as discussed in this article, to control liabilities stemming from social or environmental externalities.

These constitutive elements notwithstanding, conceptualising GVCs under PIL is difficult. While the impact of PIL for transnational economic organisation and global production has, historically, been acknowledged, PIL remains calibrated to individual entities, and not to collective and centrally-governed entities such as GVCs. To illustrate the current operative

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21 For an early overview, see Upendra Baxi, ‘Mass Torts, Multinational Enterprise Liability and Private International Law’ (1999) 276 Recueil des cours 301.
setting of GVCs in PIL, we overview recent lead-firm focused transnational tort litigations from the perspective of two key PIL frameworks.

### 3.2. Constitution of Global Value Chains under Private International Law: the transnational tort litigation perspective

A complex regulatory apparatus on national, transnational and international levels governs the rules and doctrines of PIL.\(^{22}\) One of the most prominent PIL frameworks is the EU system that is built around the rigidly harmonised Brussels regime on applicable forum\(^ {23}\) and the Rome regime on applicable law.\(^ {24}\) Under the current Brussels regime for applicable forum, the primary rule is that defendants are sued in their home jurisdictions. Under the current Rome regime for applicable law, the primary rule for tort claims is the applicability of *lex loci damni*, the law of the place where damage occurred.\(^ {25}\)

Several common law jurisdictions utilise a more flexible framework of rules than that in place in the EU. The applicable forum is generally one seized by the claimant when servicing a claim, but this can be altered through the *forum non conveniens* doctrine if a more appropriate forum is available elsewhere.\(^ {26}\) Similarly, for example the US Restatement (Second) of Conflict of Laws proposes the ‘most significant relationship’ test when identifying the law applicable to tort claims.\(^ {27}\) At the same time, choice of law is not harmonised in the United States and each US jurisdiction has its own approach, even if the majority adhere to the ‘most significant relationship’ doctrine.\(^ {28}\)

The impact of these PIL frameworks, in giving legal shape to GVCs, comes across clearly in transnational tort litigation arising from the inadequate governance of value chains by lead firms. Cases have covered a wide array of equity and contract-based governance relationships. For a few examples,

\[^{22}\text{For a concise introduction, see Paul Torreman and others (eds), Cheshire, North & Fawcett: Private International Law (15th edn, Oxford University Press 2017).}\]
\[^{23}\text{Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).}\]
\[^{24}\text{Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).}\]
\[^{25}\text{See eg Geert van Calster, European Private International Law (2nd edn, Hart 2016); Symeon C Symeonides, ‘Rome II and Tort Conflicts: A Missed Opportunity’ (2008) 56 The American Journal of Comparative Law 173.}\]
\[^{26}\text{Torreman and others (n 22).}\]
\[^{27}\text{Restatement (Second) Conflict of Laws (American Law Institute 1971). Generally, Symeon Symeonides, Choice of Law (Oxford University Press 2016).}\]
\[^{28}\text{Roger Alford, ‘Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation’ (2014) 63 Emory Law Journal 1089.}\]
in *Doe v Walmart*, employees of Walmart’s foreign suppliers sued Walmart in California for its alleged responsibility to protect them from economic and physical harm caused by the suppliers, while in *Begum v Maran (UK) Ltd* a deceased employee’s relative sued a UK shipbroker that had outsourced ship-breaking, via a middle-man, to a dangerous Bangladeshi shipbreaking yard. In *Das v George Weston* and *Jabir v KiK*, supplier employees from Bangladesh and Pakistan, respectively, sued buyers in Canada and Germany on grounds that the buyers had not adequately governed work safety in supplier factories. In *Arica v Boliden* and *Trafigura*, Chilean and Cote d’Ivoirian citizens, respectively, sued companies in Sweden and England for inadequate governance of outsourced toxic waste management. In *Milieudefensie v Shell*, *Okpabi v Shell* and *Lungowe v Vedanta*, Nigerian and Zambian citizens sued parent companies in the Netherlands and England on grounds of environmental damage caused by inadequate governance of their subsidiaries.

Four key trends relevant for GVCs are discernible from the emerging transnational case law. First, each case highlights a tendency to direct litigation towards lead firms for the inadequate governance, and subsequent adverse social or environmental impacts, of their value chains. This is in line with the structural properties of GVCs, as it is the lead firm that has made the decision on how and where to organise production. Following this, each case focuses on the role of the lead firm as an actor either inadequately governing its value chain or choosing to outsource production in an inherently dangerous way. This does not, however, rule out further defendants in the form of subsidiaries or suppliers. On the contrary, in several cases litigation is commenced simultaneously towards both the lead firm and the subsidiary or supplier more directly connected to the harm.

Second, with regard to applicable jurisdiction, claimants face a choice between the GVC lead firm’s ‘home state’ jurisdiction and the subsidiary

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29 *Doe v Wal-Mart Stores, Inc*, No. 08-55706 (9th Circuit Court of Appeals, 2009).
30 *Begum v Maran (UK) Ltd*, [2021] EWCA Civ 326.
31 *Das v George Weston Limited*, 2018 ONCA 1053 (Court of Appeal for Ontario, 2018).
32 *Jabir and others v KIK Textilien und Non-Food GmbH*, 7 O 95/15 (Landgericht Dortmund, 2019).
33 *Arica Victims KB v Boliden Mineral AB*, T 294-18.
34 The case was filed in the English High Court of Justice but was settled before judgment. See Liesbeth Enneking, ‘The Future of Foreign Direct Liability: Exploring the International Relevance of the Dutch Shell Nigeria Case’ (2014) 10 Utrecht Law Review 44.
35 *Milieudefensie v Shell*, ECLI:NL:RBDHA:2021:5339, (Gerechtshof Den Haag, 2021).
36 *Okpabi v Royal Dutch Shell*, [2021] UKSC 3.
37 *Vedanta Resources PLC v Lungowe* [2019] UKSC 20. The case has since been settled.
38 Eg *Lungowe* and *Okpabi*, where courts argued that the respective lead firms may have given an impression of governance in their published materials.
39 Eg *Trafigura* and *Begum v Maran*, which deal less with established supply relations than with one-time outsourcing to suspect actors.
40 Eg *Milieudefensie* and *Lungowe*. 
or supplier’s ‘host state’ jurisdiction. Under the EU’s Brussels regime a lead firm cannot refuse to be tried in its home forum, but this has not stopped lead firms from contesting jurisdiction, for example by alleging that claimants are suing the lead firm merely to divert the case against the ‘real’ defendant, the local subsidiary or supplier, from the host state fora. 41

Under the common law approach lead firms have freedom to argue that the host state forum would be more appropriate and thus pursuing proceedings against a lead firm in its home state may require considerations of substantive justice. 42

Third, the rules of determining the applicable law may alter the outcome of GVC litigation by privileging either the home state or host state law. Under the EU’s Rome regime, the general rule of lex loci damni leads to cases being assessed under the substantive law of the host jurisdiction. 43

While open for more diverse arguments, in individual cases common law rules may lead to similar results. 44 The application of host state law may alter focal parameters of a case to the detriment of claimants, for example through unexpectedly strict host state statutes of limitations leading to dismissals of claims. 45 On the other hand, cases may also be successful under host state laws, as shown by Milieudefensie and, arguably, the settlement of Lungowe.

Fourth and finally, it seems that some fora and substantive laws are more recognisant of value chain governance related claims than others. In the past, the US Federal Alien Tort Claims Act was seen as such a possibility, resulting in several litigations that had only weak connections to the US being steered to its Federal fora. 46 Regulatory developments, such as the French loi vigilance, or doctrinal signals, such as the active debate on introducing mandatory overriding provisions in forthcoming sustainability laws or the apparent openness of certain courts, such as Dutch ones, towards transnational claims, might make claimants steer litigation towards specific jurisdictions. 47

41 In Lungowe and Milieudefensie claims against both defendants could proceed. Generally, van Calster (n 25) 367–69.
42 The discussion in relation to the second defendant in Lungowe on ‘the proper place of bringing a claim’ and whether ‘substantive justice’ is available in Zambia is reflective of this. Generally, Richard Meeran, ‘Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States’ (2011) 3 City University of Hong Kong Law Review 1.
43 See Jabir, Milieudefensie, Lungowe and Okpabi.
44 See Das and the similarly Rana Plaza related Delaware litigation Rahaman v J.C.Penney Corporation, The Children’s Place and Wal-mart Stores, C.A. No. N15C-07-174 MMJ (Delaware Superior Court, 2016) available online at: <www.courts.delaware.gov/Opinions/Download.aspx?id=240380>.
45 Eg Jabir and Das. Home state laws may of course be similarly problematic, as seen in Arica.
46 This tendency was finally cut by the US Supreme Court developing a more stringent approach to standing, see Ingrid Wuerth, ‘Kiobel v Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute’ (2013) 107 American Journal of International Law 601.
47 Liesbeth Enneking, ‘Transnational Human Rights and Environmental Litigation: A Study of Case Law Relating to Shell in Nigeria’ in Isabel Feichtner, Markus Krajewski and Ricardo Roesch (eds), Human Rights in the Extractive Industries: Transparency, Participation, Resistance (Springer 2019).
Following this, suing lead firms in their home jurisdictions under host state laws has become something of a default approach in contemporary litigation. However, PIL contains several alternative techniques impinging on the structure and operation of GVCs. For example, under Article 7 of the EU’s Rome II Regulation, in cases of environmental damage the law of the place where damage was caused (lex loci delicti commissi) may be used by claimants as an alternative to the law of the place where damage arises (lex loci damni). The alternative rule is motivated by situations in which emissions produced in one state cross borders and cause damage in another. It is justified through environmental policy (‘polluter pays’) and may afford claimants greater protection than the default place of damage rule. In effect, claimants can choose which of the two potentially applicable laws would suit them best. In a GVC context, however, instead of the place from where damage is caused and the place where damage arises pointing to different states’ laws, courts may well identify both of the rules as pointing towards the host state law as damage arises in the host state, and can be seen to be caused by the host state supplier or subsidiary. However, an alternative reading might also be possible; one that understands the place where damage is caused as pointing to the actions of the lead firm and thus to home state law instead of the actions of the subsidiary and host state law.

One example is provided by Arica v Boliden, a case involving environmental damage resulting from a Swedish company outsourcing toxic waste processing to a Chilean company. The Swedish appeals court found that home state, ie Swedish, law applied because the incident had been directed from Sweden. This resulted in the time-barring of the claim due to a stringent Swedish prescription rule. A similar prescription rule would not have applied if, as argued by the trial court, lex loci damni, Chilean law, had applied. This underscores the fact that home state laws are not necessarily beneficial to claimants. However, while the claim precedes the EU Rome regime and thus the claimant’s did not have the benefit of choice granted by Article 7 Rome II, the case shows how under the EU Rome regime a GVC-conscious reading of lex loci delicti commissi might make it possible to pursue environmental claims against lead firms, if claimants so choose, under home state laws. From a broader GVC-perspective, the case hints

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48 Torreman and others (n 22).
49 Ole Aldag, ‘Due Diligence and Environmental Damages Under Rome II’ (2020) 28 European Review of Private Law 1231.
50 This reading, however, requires alignment with established doctrinal interpretation of Article 7 Rome II, which construes narrowly both environmental damage and the sequencing of lex loci delicti commissi. Compare Katia Fach Gómez, ‘Environmental Liability’ in Jürgen Basedow and others (eds), Encyclopedia of Private International Law, vol 45 (Edward Elgar Publishing 2017); Carmen Otero García-Castrillón, ‘International Litigation Trends in Environmental Liability: A European Union–United States Comparative Perspective’ (2011) 7 Journal of Private International Law 551, 571–72.
at possibilities for anchoring litigation to the actions of the lead firm; instead of emissions crossing jurisdictional boundaries, it would be value chain governance emanating from lead firms that does so.

Contract provides another alternative. In particular, a focus on contract as the anchor in litigation flows naturally from the realities of GVCs and a lead firm’s choice to organise, structure and govern production through contract.\(^5\) Existing PIL frameworks may already enable a turn to contract, as is the case with the EU Rome regime, which allows contract or related considerations to affect choice of law under tort.\(^5\) But while this might allow claimants to switch from lex loci damni to home state law, the end result might not automatically be better for them. An example is provided by *Doe v Walmart*, where US Federal courts found that claims by supplier employees founded on contractual third-party beneficiary doctrines may fall under the law applicable to the buyer-supplier contract. Ultimately, the courts found that both of the laws potentially applicable to the contractual claims would lead to dismissal. Regardless, adopting contract as the linchpin for GVC litigation also highlights the possibility for drafting governance contracts so that they specifically are enforceable (or unenforceable) by third parties.\(^5\)

In sum, the recent transnational tort litigations condense the complex dynamics of applicable forum and law in the on-going juridification of GVCs. Accordingly, the current parameters of PIL may highlight the role of the lead firm or the subsidiary or supplier most closely connected to harm; they may situate the dispute to a home state forum or a host state forum; and they may lead to the application of home state law or host state law. As seen above, except for individual cases, it is not certain that any particular combination of these parameters is generally better than another. There are cases where home state laws would seem to fail claimants and host state laws give them justice, and vice versa. Thus, there is little certainty in litigation and the current rules of PIL seem to provide at best an unsatisfactory approach to the realities of GVC-driven global production and the externalities that flow from it.

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51 Jaakko Salminen, ‘Towards a Genealogy and Typology of Governance Through Contract Beyond Privity’ (2020) 16 European Review of Contract Law 25.

52 Eg Rome II generally allows deviation from lex loci damni in case of a manifestly closer connection with another country based ‘in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question’. See Article 4(3) (and similarly 5(2), 10 (1), 11(1) and 12(1)), for which Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford University Press 2008); van Calster (n 25).

53 Sarah Dadush, ‘Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses’ (2019) 68 American University Law Review 1519; Jaakko Salminen, ‘The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers’ Liability in Global Supply Chains?’ (2018) 66 American Journal of Comparative Law 411.
3.3. Inadequate conceptualisation of Global Value Chains under Private International Law

The root cause for the mismatch between PIL and GVCs is that current PIL frameworks are calibrated to individual and not collective entities: the structure of PIL distinguishes between multiple (in reality) connected defendants according to their ‘home country’ and analyses jurisdiction and applicable law against each of them separately. GVCs, however, are by definition collective entities governed by lead firms. In transnational disputes, this discrepancy is exacerbated by removing the centrally-governed GVC from the sole domain of national legislators and embedding it in the much more fragile domain of comity.54 From the perspective of transnational tort litigation arising from value chain externalities, this has often meant barring victims the opportunity to challenge lead firms’ inadequate value chain governance practices.

The underlying discrepancy between the collective entity to be regulated and the regulatory framework that is designed towards non-collective entities gives rise to several doctrinal, but also more fundamental, questions. One doctrinal question is related to applicable jurisdiction. If a collective entity, such as a GVC, is formed of several independent entities but the harm is best ascribable to multiple actors in the collective, which entity’s jurisdiction should be chosen? Another is related to the applicable law. If a collective entity, such as a GVC, is formed of several independent entities but the harm is imputable to the collective, the law applicable to which entity should be chosen to govern the whole? A third question is related to the separateness of applicable jurisdiction and applicable law. In case of collective entities spread over several jurisdictions, should applicable jurisdiction and applicable law coincide? Finally, it is debatable whether the substantive laws of certain key jurisdictions, such as the common law tort of negligence as developed by English courts, play an outsize role in defining the contours of GVC liability across legal systems.

To some extent, there is nothing new in this discrepancy. Private actors are generally adept at navigating the PIL framework to their advantage. The impact of PIL in enabling the private ordering of global production has already been acknowledged, and the emergence of GVCs can merely be seen to replicate earlier developments.55 But scale matters. Given the economic weight of GVC capitalism, the underdeveloped legal conceptualisation of GVCs hampers our understanding of this new form of economic organisation as well as the mitigation of social and environmental externalities of global production. While this issue is not unique to

54 Joel Paul, ‘The Transformation of International Comity’ (2008) 71 Law and Contemporary Problems 463.
55 Horatia Muir Watt, ‘Private International Law Beyond the Schism’ (2011) 2 Transnational Legal Theory 347.
PIL as such, the practical importance of the discipline in linking together various parts of the value chain across jurisdictions makes it a key driver in any attempt to fully understand the operational logic of GVCs and control their externalities. For this reason, recalibrating PIL to reflect new forms of economic organisation, such as GVCs, is crucial for any future effort towards sustainable production. In the following section, we chart the possibilities intrinsic to PIL for addressing GVCs.

4. Calibrating private international law with global value chain governance

There are several potential techniques that can be used to better align the current PIL, focused on individual entities, and GVCs, centrally coordinated collective production units. One option would be to regulate GVCs as a single entity. Despite the increasing use of value chain-based concepts in national and regional legislation, however, it is probably not possible to govern GVCs as independent legal entities in PIL. Contract and corporation are universally recognised legal constructs, but any collective entity formed of multiple contracts and corporations will not easily be as universally recognisable. Instead, highlighting the de facto possibilities for and use of control undertaken by lead firms may offer an overarching frame for a renewed focus on lead firm governance as the crux for determining applicable forum and applicable law. Generally, the current framework of PIL drives GVCs by making it difficult to focus squarely on lead firms and their governance through their home state’s fora and applicable law. At the same time, it is exactly the lead firms coordinating GVCs across organisational and jurisdictional boundaries that are the actors ultimately responsible for organising and governing (or un-governing) global production. Recognising this crucial aspect of GVCs, lead firm governance, enables us to consider some approaches to recalibrating PIL accordingly without resorting to the development of new organisational forms such as networks.

56 Salminen and Rajavuori (n 12).
57 Compare with Klaas Hendrik Eller, ‘Is “Global Value Chain” a Legal Concept?’ (2020) 16 European Review of Contract Law 3.
58 Generally on PIL and networks, see Horatia Muir Watt, ‘Governing Networks: A Global Challenge for Private International Law’ (2015) 22 Maastricht Journal of European and Comparative Law 352; Uglješa Grušić, ‘Contractual Networks in European Private International Law’ (2016) 65 International and Comparative Law Quarterly 581; Poomintr Sooksripaisarnkit and Ifeoma Obi, ‘Complex Contractual Relationships—Is There a Need for Special Private International Law Rules on Contractual Chains and Networks?’ in Thomas John, Rishi Gulati and Ben Koehler (eds), The Elgar Companion to the Hague Conference on Private International Law (Edward Elgar 2020).
59 Earlier work on networks and PIL, focusing on the PIL calibration of collective entities but typically without an explicit lead-firm-centric perspective, may nonetheless provide relevant perspectives. See Ibid.
In relation to applicable jurisdiction, there are several well-known arguments for focusing on lead firms at their home fora, such as the better enforceability of decisions against them, procedural advantages related to their home fora, or corruption in the host state fora. From a GVC perspective, however, the operative logic of lead firm-driven structure, organisation and governance seems more central than considerations of whether, for example, substantive justice is or is not available at one or the other forum. If the lead firm’s governance practices are the root cause of externalities that emanate throughout the lead firm’s value chain in multiple jurisdictions, then contesting the effects of these practices in one subsidiary’s or supplier’s jurisdiction may divert focus away from the root cause. Similarly, if inadequate governance practices are not corrected, the lead firm can freely use regulatory arbitrage to overcome regulatory challenges it faces in one jurisdiction and continue operations in others.

Out of current PIL regimes on applicable jurisdiction, the EU Brussels regime clearly allows suing an EU-based lead firm in its home jurisdiction while under common law rules focus is more on identifying a proper forum based on a diversity of parameters. In neither case are the underlying motives for choice of forum based on the practical reality of lead firm governance but other arguments. Thus, for example, whether the common law considerations of proper court and substantive justice are a reasonable way of dealing with the issue of identifying a proper jurisdiction for collective production entities is beyond the point—what is clear is that such arguments do not currently account for the structural and organisational principles underlying centrally-governed GVCs. Similarly, the EU Brussels regime, which allows lead firms to be sued in their home fora on grounds of legal certainty and protecting defendants, is from a lead-firm centric GVC perspective adequate by chance, not by design.

In relation to applicable law the situation is also tricky. A classic question of PIL is which of several potentially applicable laws should govern actors.

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60 Cees van Dam, ‘Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights’ (2011) 2 Journal of European Tort Law 221; Meeran (n 42).
61 For example, after the Rana Plaza disaster some lead firms considered moving or moved production out of Bangladesh. See, eg, Steven Greenhouse, New York Times, ‘Bangladesh Fears an Exodus of Apparel Firms’ (May 2, 2013), online: <www.nytimes.com/2013/05/03/business/factory-owners-in-bangladesh-fear-firms-will-exit.html>. An arguably better solution would be to change lead firm practices, as was done by other lead firms for example through the Accord on Fire and Building Safety in Bangladesh. A further problem, however, is that these changed practices are focused on one limited geographical area, Bangladesh. See Salminen (n 53).
62 As discussed for example in Lungowe.
63 The proper court seems to tend towards host state fora, but in several cases the perceived unavailability of substantive justice would seem to sway the onus back to home state. Meeran (n 42). The treatment of KCM in Lungowe provides a recent example, though in relation to a host state defendant.
64 The Brussels Regime aims to be ‘highly predictable’ while focusing on the defendant’s domicile, see recital 15 Brussels I Recast, but fragmented entities are not explicitly considered in the equation. Furthermore, this predictability extends to the lead firm, not foreign subsidiaries, for which van Calster (n 25) 366–69.
Many of the different approaches to that question are visible in the current common law patchwork of rules for identifying applicable law in the US. Alternatives include identifying the ‘most significant relationship’ to a dispute, *lex loci delicti commissi*, the ‘governmental interests’ theory, the ‘better law’ approach, or some combination of these.\(^{65}\) Each approach has its respective merits and problems as, too, does the EU’s focus on *lex loci damni*. What is clear from GVC related cases is that in choosing between the home and the host state, putting individual cases aside, it seems that no automatically better law can be generalised. In several cases, utilising the host state law, for example on the basis of *lex loci damni*, has had a deleterious effect on claims. In other cases, the host state law has led to success for claimants. Applying the lead firm’s home state law has also proven problematic to claimants in some cases.

From a GVC perspective, the home state law would be the one most closely connected to the lead firm’s governance efforts. Such an approach might be reflected, for example, in the EU Rome regime’s contractual exceptions to the main rule of *lex loci damni*.\(^{66}\) However, there is also a strong tradition in PIL in focusing on host state laws as the proper law for determining the legal effects of damage caused within the host state. This is exemplified in both the EU Rome regime’s main rule of *lex loci damni* and, for example, the American Restatement (Second) of conflict of laws’ territorial presumption.\(^{67}\) A third alternative accounting for both home and host state law is reflected in ‘ubiquity’, free choice between home state and host state law for claimants as present in the EU Rome regime’s Article 7 on environmental damages, and in approaches giving claimants’ the benefit of the ‘better law’.\(^{68}\)

Thus, while from a lead-firm centric GVC perspective there are strong reasons for choosing the home state law, there are also strong justifications for applying host state law. A reflective balancing between the two would seem appropriate. If host state regulation would be on par with adequate social, environmental and other standards, then current approaches giving precedence to the laws of the jurisdiction where damage occurs, ie *lex loci damni* or the US territorial presumption, would work as they are now. However, there are also good reasons to account for home state regulations as the standard of operation closest to the lead firm. The question then becomes how these alternatives could be managed; through ubiquity, ie free choice for claimants, an automatic focus on the better law for claimants, or some other approach?

In some recent European proposals this has led to a ‘safety valve’ approach to regulating applicable law by maintaining host state regulation as the

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\(^{65}\) Alford (n 28).

\(^{66}\) See (n 52).

\(^{67}\) For the territorial presumption, see Alford (n 28).

\(^{68}\) For the better law approach, see *ibid*. 
starting point while establishing the lead firm’s home state regulation as a fall-back option in the form of a mandatory overriding regulation. The recent European Parliament resolution on corporate accountability, for instance, follows this model. In particular, Article 20 of the proposed directive states that ‘Member States shall ensure that relevant provisions of this Directive are considered overriding mandatory provisions in line with Article 16 of [the Rome II Regulation]’. Article 19 of the proposed directive would further require member states to ensure that lead firms can in practice be held liable and that limitation periods are adequate in this regard. While not changing the starting point of lex loci damni, such mandatory overriding rules would ensure a minimum standard that the lex loci damni could not avoid. This is reminiscent of the ‘better law’ and ubiquitous approaches, while maintaining at least an idea of comity as there is no need to make an explicit choice against the host state law.

There is no easy answer to the questions of jurisdiction and applicable law in relation to GVCs. Each of the above approaches can be criticised, and so too attempts at developing PIL towards an explicitly GVC aware approach. The locus of GVC governance is in the lead firm’s home state. From a structural perspective, a PIL focus on the lead firm’s home state forum and applicable law would seem logical. However, such an approach would project the home state’s power beyond its borders along the lines of the lead firm’s GVCs. To counter this, balancing the home and host state laws bound together by the organisational reality of GVCs seems necessary. But the European Parliament’s resolution, even while striving to balance the home and host state laws, may still be criticised for extending home state law, however limited by the notion of mandatory overriding rules, along the lines of GVCs emanating from the home state.

Despite inherent critique, a GVC explicit approach would be a step forward. The main problem of the current system of PIL is that it is calibrated to individual entities. This results in widely diverging approaches being applied in different fora in GVC related cases. The lack of alignment between PIL and GVCs means that there is currently little foreseeability, making systematic responses to the liability deficits of GVCs challenging. Ultimately, though, this is not a problem specifically related to GVCs but, more broadly, to the current lack of reflexivity in PIL theory-building towards new forms of production.

69 European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).
5. Conclusion: towards a societally reflexive Private International Law?

In this article, we have analysed PIL from the perspective of global production organised as GVCs. By documenting the operation of PIL rules, principles and doctrines in transnational tort litigations over the adverse social or environmental impacts of GVCs, we have highlighted the fundamental incongruences between the current PIL framework, which is focused on individual entities, and GVCs as centrally coordinated collective production units. While GVCs are increasingly registered and legally re-conceptualised both in national regulation and private law doctrine, PIL has remained mostly immune to conceptualising GVCs in their economic and practical reality.

But potential changes are in sight. As the contours of GVC capitalism become more pronounced and the sophisticated techniques through which lead firms govern their value chain better known, the rules and principles of PIL may also evolve to better capture the operative logic of GVCs. To some extent, existing PIL frameworks, such as the EU’s Brussels regime that allows lead firms to be sued in their home jurisdictions, already enable focusing on the modalities of lead firm governance. Similarly, recent regulatory initiatives by the EU, for example, propose a much more nuanced understanding of GVCs in terms of substantive law and also explicitly acknowledge and recalibrate the role of PIL in GVC governance. Finally, a stronger reliance on contractual private governance may provide openings to structuring GVCs in the current framework of PIL. If successful, such recalibrations can both alleviate very practical GVC-related issues and also transform the doctrinal underpinnings of PIL more generally. By fixing the analytical lens on lead firm governance, GVC-calibrated PIL can also contribute to internalising at least some of the presently rampant externalities of global production that lie at the heart of the transnational tort litigations discussed in this article.

Naturally, however, recalibrating PIL with GVCs entails a disruption of the present, parochial system, and thus, faces challenges related to the political apportionment of jurisdictions and regulations. Reliance on national regulation, such as the increasing use of mandatory overriding provisions, also entails regulatory capture of both the private sphere and host states by lead firm home states. Novel forms for structuring GVCs through private governance, such as the Bangladesh Accord, similarly render the most vulnerable participants to GVCs susceptible to outsized influence by corporate architects.

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70 As discussed above in Sections 3 and 4.
71 European Parliament (n 69).
72 Salminen, ‘The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers’ Liability in Global Supply Chains?’ (n 53).
Recalibrations of PIL, therefore, evoke fundamental questions of legitimacy, participation and legal imperialism leading to an unprecedented need for balancing and sensitivity to the needs of the countless stakeholders of GVC capitalism. In our view, however, such recalibration is unavoidable as the alternative would be to let transnational production and its multiple social, environmental, cultural and economic externalities reign unchallenged.

Finally, any approach to updating PIL specifically in face of GVC capitalism by fixing the lens on lead firm governance falls short of a more pressing need for theory-building that would account for societal developments. The current modalities of PIL stem from a world were contract and corporation were seen as the primary forms of organising production. Local regulations developed over decades to counter the sustainability deficits of locally embedded production, and PIL simply served to attach individual contracts and corporations to specific jurisdictions. Now, new forms of production transcend organisational and jurisdictional boundaries by way of lead firms extending governance over collective entities spread over several jurisdictions. These developments are not limited to GVCs but entail a broader reliance on the current of private ordering interpreted into our paradigms of private law.

If the social and environmental externalities of global production are to be effectively addressed, PIL theory needs to be made reflexive of and sensitive to changes in production also beyond the reality of GVCs.\(^\text{73}\) Doing otherwise would lead only to incremental patches correcting well-established excesses, while a broader approach that can tackle future challenges, such as the emergence of the platform and circular economies, is necessary for reaching truly global sustainability. For example, the EU seems focused on regulating GVCs on the assumption that lead firms are within its jurisdiction, making a focus on home state jurisdiction and law reasonable. Consumers, however, are turning to sourcing from digital platforms outside the EU, thus overriding the EU’s current approach to regulating GVCs. The possibilities for recalibrating PIL in response to GVCs presented in this article thus provide just one piece of a larger puzzle.

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\(^{73}\) Compare with Muir Watt (n 55).
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