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Trans-National Environmental Disputes: Are Civil Remedies more Effective for Victims of Environmental Harm?

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Abstract

Environmental protection legislation is usually the preserve of public international law regulation. Yet, trans-national environmental disputes pose a particular problem for governments constrained by the sovereignty of nation-states. A body of jurisprudence is emerging in relation to trans-national environmental torts that may complement the efforts of governments to address the harmful effects of environmental degradation. This jurisprudence focuses on providing redress to victims who have suffered harm as a result of trans-national environmental damage. Under private international law, a State's jurisdiction to hear civil claims is remarkably flexible and not subject to many of the usual forms of diplomatic protest. In contrast, extra-territorial criminal jurisdiction applies only in exceptional circumstances where there is a strong connection between the State and the defendant. Despite the relative ease with which civil actions may be initiated, national courts are often ill-equipped to deal with the realities of complex trans-national disputes. Some members of the judiciary are even reluctant to develop the common law as a mechanism for environmental protection in the face of increasing public regulation. These issues have been debated internationally, particularly in the United States as a result of the Alien Tort Claims Act. This article argues that increasing attention should be paid to the issue of trans-national civil justice in Australia.

Key words

Trans-national environmental disputes, public and private international law, civil remedies

Introduction

Trans-national environmental damage represents a disjuncture for regulatory bodies in accountability and jurisdictional control. It is commonplace to find multi-national corporations exploiting the natural resources of foreign countries where domestic environmental law is weak. These endeavours often result in local communities suffering the harmful effects of pollution and the destruction of subsistence economies with minimal recourse to the law. Environmental disputes are not limited to multinational corporations. They frequently involve neighbouring states that share natural resources such as water and air and are mutually affected by each others' decision-making processes.

New scientific knowledge about the inter-relatedness of ecological systems has increased the demand for cross-jurisdictional justice. Until recently international environmental regulation has largely been the domain of public international law. A multitude of treaties purport to strengthen practices of sustainable development and resolve environmental disputes arising between states. Key treaties have formalised domestic regulatory support and provided frameworks for institutions to achieve environmental goals. Notwithstanding these advances, public international law has not provided effective remedies for victims who have suffered harm as a result of trans-national environmental pollution or degradation. The central organ of the United Nations, the International Court of Justice is limited to determining disputes between sovereign states that have voluntarily submitted to its jurisdiction. Determination of these disputes is largely unenforceable. As a result, multinational corporations often escape regulatory control entirely, as no single national or international legal body exercises jurisdiction over all components of their business.

The failure of public international law to address corporate environmental behaviour increases the need for national systems to respond to trans-national environmental damage through domestic legal doctrines of civil liability.[1] A number of trans-border environmental disputes involving private litigants have been brought in municipal courts where there is far greater opportunity to achieve enforceable remedies. Multinational corporations, in particular, are being called to account for their actions in foreign countries. In the United States, the *Alien Tort Claims Act* [2] has been used as a mechanism for foreign residents to bring claims to enforce human rights against United States companies. Australian courts have recognised the right of a local community to a safe environment where it is under threat by an Australian

1 A comprehensive discussion on this topic is provided by Michael Anderson "Transnational Corporations and Environmental Damage: Is Tort Law the Answer?" (2002) 41 *Washburn Law Journal* 404.

2 28 U.S.C, s 1350 (1994).

multinational corporation.[3] These claims are made possible because under private international law a State's jurisdiction to hear civil claims is remarkably flexible and rarely provokes diplomatic protest.[4]

As a result of this litigation, a body of jurisprudence relating to civil liability for trans-national environmental torts is emerging. This jurisprudence is extremely promising for environmental conservation and may complement developments in public international law. Yet, national courts are often ill-equipped to deal with the realities of complex trans-national environmental disputes. Some members of the judiciary are even reluctant to develop the common law as a mechanism for environmental protection in the face of increasing public law regulation.[5] Barriers to reform are also caused by cases being settled before completion when it is apparent that the outcome will favour victims of pollution. This prevents the development of jurisprudence which may deal with modern environmental disputes.

This article argues that it is critical to strengthen private international law mechanisms because national courts are an important legal recourse for victims of trans-national environmental pollution. Three theses will be advanced: (1) Environmental regulation should not remain the preserve of public law as governments are constrained by the sovereignty of nation-states; (2) Private international law provides an important avenue of redress for victims of environmental degradation; and (3) National courts should endeavour to develop jurisprudence in ways that enable victims to bring claims for trans-national environmental damage. This is particularly the case in Australia where mechanisms for the extra-territorial exercise of jurisdiction are strong, but are often restricted by conservative interpretations of the common law. The survival and extension of the Mozambique Rule in the *Ok Tedi* dispute by the Supreme Court of Victoria, discussed later, is an example of a judiciary hesitant to develop private law doctrine in order to facilitate environmental claims in foreign lands.

The first section of this paper examines the seriousness of contemporary environmental issues. It explores developments in international law which indicate support for principles of sustainable development. Most nations have committed themselves to treaties promoting environmental protection, and many have made serious attempts to translate those commitments into domestic legislation. This section then discusses the rise of multinational corporations and the serious

3 *Dagi and Others v The Broken Hill Proprietary Company Ltd (BHP) and Another (No.2)* [1997] 1 VR 428.

4 M. Akehurst "Jurisdiction in International Law," (1972–73) 46 *BYIL* 145 at 170.

5 This trend is identified in the United Kingdom in the recent case *Cambridge Water Co. v Eastern Counties Leather plc* [1994] 2 AC 264; See Stuart Bell and Donald McGillivray *Environmental Law* (6th edn, Oxford University Press, Oxford: 2006) 386–387.

challenge this poses for regulatory authorities. This is particularly the case in developing nations where economic development is often given a higher priority than environmental sustainability.

The second section examines diverging legal approaches to the regulation of trans-national environmental damage. This section evaluates the effectiveness of public and private international law to respond to environmental disputes. The flexibility of civil jurisdiction makes it possible to circumvent political and diplomatic barriers which often prevent the resolution of disputes between States. Predominantly, private law actions including public and private nuisance, trespass and negligence have been used in Australia to bring actions for environmental damage which has occurred overseas.

The final section examines private international law in Australian courts. It focuses on the *Ok Tedi* dispute in *Dagi and Others v The Broken Hill Proprietary Company Ltd (BHP) and Another (No.2)*.[6] Although the *Ok Tedi* dispute ended in settlement, it is heralded as one of the most successful examples of a foreign tort claim being made on environmental grounds against a multinational corporation.[7] An analysis of the case reveals the importance of developing private legal doctrines to effectively address trans-national environmental torts in the future. The case also illustrates the capacity of civil litigation to express social condemnation of environmentally harmful behaviour.

A Note on Civil Litigation

In many ways civil litigation is an imperfect solution for environmental disputes. The financial costs of litigation are high and may be prohibitive for many victims of environmental degradation. Many analysts argue that litigation has only a compensatory and not a preventative effect. In doing so, they contend that it is determined in accordance with private rather than public interests.[8]

It is necessary to view environmental civil litigation in light of the growing role of international organisations, particularly non-governmental organisations as participants in governance.[9] In recent years there has been a dramatic rise in the

6 [1997] 1 VR 428.

7 Stuart Kircsh "An Incomplete Victory at Ok Tedi" Carnegie Council on Ethics and International Affairs, 2006 at 1 <http://www.google.com.au/search?hl=en&q=%27An+incomplete+victory+at+Ok+Tedi%27&meta=>

8 Bell and McGillivray, note 5 at 385.

number of non-governmental organisations (NGOs) in the 'conceptualising, planning, delivery and administration' of the governance of developing countries.[10] At the 1992 United Nations Conference on the Environment and Development in Rio de Janeiro, 20,000 participants representing 9,000 organisations attended the parallel Global Forum.[11]

The rise in NGOs represents various forms of state incapacity and collapse. As Martin Chanock argues, 'in the face of the States' 'resource and capacity constraints' and 'lack of political will' NGOs often assume the role of 'helping communities to become more aware of their rights' and 'determining how best to demand and defend them.'[12] Making sure there are legal avenues available for individuals to pursue these rights, with support from organisations such as NGOs, is a powerful way of bringing about changes in environmental policy. Promoting private liability regimes recognises the relative powerlessness of governments to intervene in the sovereignty of other nation states.

Perhaps one of the most important reasons for viewing civil litigation as a legitimate and important environmental protection mechanism is that it encourages multinational corporations to improve their business practice. The prospect of trans-national litigation is a major motivation for corporations to increase voluntary regulation and strengthen environmental standards in their business overseas. In considering civil liability regimes it is useful to contemplate the range of functions that may overlap with the objectives of public regulation. These are: (1) to prevent harm by raising awareness of environmental issues; (2) to internalise costs by promoting the 'polluter pays' principle; (3) to provide an incentive to improve environmental performance; and (4) to express social condemnation of environmentally harmful behaviour.[13] The most important point is that private law remedies have a powerful role to play in conjunction with public law regulation.

9 Martin Chanock "Customary Law, Sustainable Development and the Failing State" in Peter Orebech, Fred Bosselman, Jes Bjarup, David Callies, Martin Chanock, and Hanne Petersen (eds) *The Role of Customary Law in Sustainable Development* (Cambridge University Press: 2005) 338.

10 Id at 360.

11 Ibid.

12 Id at 361.

13 Bell and McGillivray, note 5 at 356–357.

State of the Environment and the Rise of Multinational Corporations

Overview

Environmental protection is a high priority for the 21st century. Rapid industrialisation has taken its toll on the natural environment. Climate change, ozone depletion, de-forestation, pollution and declining biodiversity are only a few of the issues facing most countries. Recently, the full effects of environmental degradation are being realised as governments face the prospect of declining population health and the long term effects of major ecological disasters. Scientific research has increased public awareness about the inter-relatedness of the environment to human health. In response, *sustainable development* has become the cornerstone of the environmental movement. Many countries have committed their support for sustainable development and have sought to reform domestic legislation to this effect, albeit with varying success.

International Law, Sustainable Development and Civil Liability

The development of civil liability doctrines for trans-national disputes is frequently emphasised in international agreements relating to sustainable development, although it is rarely the focus of domestic legislative reform. The intellectual origins of 'sustainable development' reside in the idea of conservation.[14] The United Nations Stockholm Conference in 1972 attended by 113 nations produced two significant instruments: *The Declaration on the Human Environment* and *The Action Plan for the Human Environment*, as well as establishing *UNEP*.[15] It recognised that the world's natural resources were significantly depleted and exploitation was occurring at an unsustainable rate.

Conservation became an official part of the framework for resource management after the United Nations Conference on Environment and Development in 1992, which established the *Rio Declaration* and *Agenda 21*.[16] Four key principles have become integral to sustainable development as a result: (1) *The Precautionary Principle* – where there is a threat of serious or irreversible damage, lack of complete scientific

14 DE Fisher "Markets, Water Rights and Sustainable Development" (2006) 23 *EPLJ* 101.

15 Brian Preston "The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific" (2005) 9:2 & 3, *Asia Pacific Journal of Environmental Law* 114.

16 Fisher, note 14 at 101.

information should not be a reason for postponing measures to prevent degradation; (2) *Intergenerational Equity* — the right to development must be fulfilled so as to equitably meet the needs and aspirations of current and future generations; (3) *Conservation of Biological Diversity and Ecological Integrity* — biodiversity and healthy ecosystems are critical to human well-being;[17] and (4) *Internalisation of Environmental Costs* — those who inflict harm on the environment should also account for the financial cost of that harm. This principle is also said to involve 'the creation of economic environments so that social and private views of economic efficiency coincide.'[18]

The promotion of *civil liability* in international agreements, in particular, is rarely emphasised when these agreements are implemented domestically. The Stockholm Declaration and the Rio Declaration call upon states to develop law regarding civil liability and compensation for victims of pollution. Principle 22 of the Stockholm Declaration states that:

> States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.[19]

Principle 13 of the Rio Declaration on the Environment and Development, adopted by the United Nations Conference on the Environment and Development states that:

> States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.[20]

17 Ben Boer "Institutionalising Ecologically Sustainable Development: The Roles of National, State, and Local Governments in Translating Grand Strategy into Action" (1995) 31 *Willamette Law Review* 319–322.

18 Boer, note 17 at 323.

19 Christophe Bernasconi, *Civil Liability Resulting From Transfrontier Environmental Damage: A Case for the Hague Conference?* Preliminary Document, No.8 April 2000 at 81 <http://www.hcch.net/upload/wop/gen_pd8e.pdf>.

20 Ibid. The importance of developing trans-national civil remedies has also been the focus of the activities of the United Nations Environment Program (UNEP) including the Montevideo Programme III, as well as the European Parliament and Council Directive 2004/35/CE of 21 April 2004.

National Law: Implementing Environmental Protection Legislation

Overwhelmingly, nations have focused on incorporating sustainable development into a general framework of regulation rather than developing the law relating to extra-territorial civil liability. This has certainly been the focus in Australia.[21] In response to the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, the Australian government prepared the *Intergovernmental Agreement on the Environment* whereby state and territory governments agreed that the principles of ecologically sustainable development should guide policy-making at every level of decision-making.[22] A range of legislation has been reformed in accordance with principles of sustainable development. Legal mechanisms relating to civil liability at a domestic level have also been strengthened. For example the *Protection of the Environment Operations Act 1997* empowers members of the public to take action to enforce the law. In New South Wales, any person may commence civil proceedings in the Land and Environment Court to restrain a breach or threatened breach of the *Protection of the Environment Operations Act*.[23]

These developments are significant for resolving environmental disputes within national borders. More complex is the issue of environmental damage which is cross-jurisdictional.

Challenging Legal Systems: The Rise of Multinational Corporations

The rise of multinational corporations makes the issue of cross-jurisdictional environmental regulation acute. Multinational corporations have increased dramatically since 1970 when there were 7,000 operating worldwide,[24] Indeed, 51 of the world's 100 largest economies are corporations, and only 49 are countries. The combined sales of the world's top 200 corporations are greater than a quarter of the world's economic activity.[25]

As Michael Anderson notes, it is difficult to write about multinational corporations without 'yielding to stereotype'.[26] On the one hand multinational corporations are responsible for the development of new technology and the improvement of physical well-being. Alternatively, they are also responsible for a great deal of environmental degradation, particularly in developing nations. In recent

21 DE Fisher "Sustainability – The Principle, Its Implementation and Its Enforcement" (2001) 18:4 *EPLJ* 362.
22 Preston, note 15 at 118.
23 s252, *Protection of the Environment Operations Act 1997*.
24 David Hunter, James Salzman, and Durwood Zaelke *International Environmental Law and Policy* (2nd edn, Foundation Press, New York: 2002) 1367.
25 Ibid.
26 Anderson, note 1 at 400.

years, multinational corporations have been frequently accused of environmental damage committed by their subsidiaries in foreign countries. In some cases, environmentally hazardous activities have been deliberately moved offshore to avoid strict regulation in the home country.[27]

The greatest problem posed by multinational corporations is that they enjoy a degree of regulatory autonomy 'unique in the global order.'[28] Anderson argues that multinational corporations 'operate an integrated command and control system though dis-aggregated institutional structures.'[29] The first feature of these structures is the fragmentation of legal responsibility that occurs with the separation of parent, subsidiary, sister and cousin companies. The second is the separate nation-states in which corporate entities are registered, despite often operating as a coherent body. As the entities are legally distinct they are subject to separate inspection and regulation procedures and no single court exercises jurisdiction over multinational corporations doing business in a number of countries.[30] As discussed in the next section, this deficit of regulatory control makes public international law a very weak mechanism to resolve trans-national environmental disputes.

Diverging Approaches to Environmental Protection and Redress

Public and private international law offer diverging approaches for the resolution of trans-national environmental disputes. The International Court of Justice (ICJ) is an important judicial body for dispute resolution between nation-states, particularly where a treaty is in force. Although it has an important moral and political role to play as a facilitator of peace, it has limited capacity to address serious trans-border environmental damage. Parties must voluntarily submit to its jurisdiction and its decisions are not legally binding. Private international law remedies, where national courts are able to exercise extra-territorial jurisdiction, do have the potential to bind parties and provide remedies to victims of environmental pollution. The essential argument is not that private international law is preferential to public international law mechanisms, rather that private remedies are often under-valued by environmentalists. Public and private remedies have the potential to complement each other particularly where non-state actors are involved.

27 Id at 403.
28 Id at 402.
29 Id at 401.
30 Ibid.

Public International Law

The mechanisms available to resolve disputes peacefully under public international law include negotiation, mediation, conciliation, inquiry, arbitration and judicial settlement. The ICJ is competent to hear disputes between consenting sovereign states.[31] The Court has heard very few decisions relating to international environmental law. As Hunter et al identify, in practice, formal dispute mechanisms are rarely used to resolve disputes arising from environmental treaties and the rules of decision making in this area are not well developed.[32]

Nevertheless, the ICJ has made significant statements regarding international environmental law. The case concerning the *Gabcikovo-Nagymaros Project (Hungary/ Slovakia)* heard by the ICJ in September 1997, is an important environmental decision in its validation of sustainable development as a legal norm and in its analysis of how to treat changing environmental expectations in the interpretation of treaties. Although its decision was not binding on the parties it did enable them to begin negotiations on an equal footing.[33]

The dispute arose out of a treaty entered into in 1977 between the Hungarian People's Republic and Czechoslovakian People's Republic concerning the construction and operation of the Gabcikovo-Nagymaros dam.[34] Following the partition of Czechoslovakia in 1993, Slovakia took the position of Czechoslovakia under the Treaty. The purpose of the Treaty was to regulate the joint management of natural resources from the Danube River between the contracting parties. It was a joint investment to produce hydro-electricity, improve navigation and prevent flooding. Due to domestic criticism in relation to the economic and environmental implications of the project, Hungary suspended the works at Nagymaros in May 1989. By this time work on the Gabcikovo sector in Slovakia was well advanced. In response to Hungary's withdrawal, Slovakia began investigating alternative measures under the Treaty. This led to it appropriating between 80 and 90% of the waters of the Danube for its own use before returning it to the main bed of the river, despite the Danube being a shared international watercourse and also an international boundary river.[35] In 1993, the parties agreed to submit the dispute to the ICJ.

31 Sam Blay, Ryszard Piotrowicz, Martin Tsamenyi *Public International Law: An Australian Perspective* (2nd edn, Oxford University Press: 2005) 142.

32 Hunter, Salzman, Zaelke, note 24 at 488.

33 UNEP "Compendium of Judicial Decisions on Matters Relating to the Environment" *International Decisions*,Volume 1, December 1998, at xviii.

34 Case concerning *Gabcikovo-Nagymaros Project (Hungary/Slovakia),* International Court of Justice, Summary of the Judgement of 25 September 1997 at 1.

35 UNEP, note 33 at xvi.

The Court accepted Hungary's reservations as to the effects of the project on its natural environment, noting that safeguarding the environment has come to be considered an essential interest of all states in recent decades.[36] It held, however, that 'Hungary's uncertainties as to the ecological impact of the project could not, alone, establish the objective existence of a peril that could justify invoking state of necessity.'[37] Hungary should have looked to mitigatory measures and its withdrawal did not have the legal effect of terminating the Treaty. The Court also found that Slovakia had committed an internationally wrongful act in implementing the new plan and expropriating large quantities of the Danube River. By 'unilaterally assuming control of a shared resource, thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube' Slovakia 'failed to respect the proportionality which is required by international law.'[38] In equating Hungary's act with Slovakia's expropriation of water, the Court created a forum for the two states to negotiate a resolution on equal terms.[39]

The Court took the opportunity to address important issues of public environmental law. It analysed the significance of new peremptory norms of environmental law and held that they were relevant to the interpretation of the treaty.[40] Changing environmental norms included the obligation to ensure the quality of the water in the Danube was not impaired and to take precautionary environmental measures. As the Court noted, by inserting these evolving provisions in the treaty – the parties recognise the treaty is not static.[41] In a separate opinion delivered by Justice Weeramantry, the concept of sustainable development was described as a principle of normative value which is 'not merely a principle of modern international law' but one of 'the most ancient of ideas in the human heritage.'[42] He described the 'protection of the environment as a 'vital part of the human rights doctrine'... for it is a sine qua non for numerous human rights such as the right to health and the right to life itself.'[43] These comments are significant in the resounding effects they have, directly and indirectly, on the development of international environmental law.

36 Ibid.
37 Ibid.
38 Id at xvii.
39 Id at xviii.
40 Case concerning *Gabcikovo-Nagymaros Project (Hungary/Slovakia),* International Court of Justice, Summary of the Judgement of 25 September 1997 at 6.
41 Ibid.
42 Id at 16.
43 Case concerning *Gabcikovo-Nagymaros Project (Hungary/Slovakia),* International Court of Justice, Separate Opinion of Vice-President Weeramantry, 25 September 1997 at 3.

Another important environmental case currently before the ICJ is the dispute between Argentina and Uruguay relating to pulp mills on the River Uruguay.[44] On May 4, 2006, Argentina instituted proceedings before the ICJ against its neighbour Uruguay. Its claim was that Uruguay breached a bilateral treaty obligation to consult with Argentina before taking action on a pulp mill project affecting the River Uruguay, which constitutes the partial boundary between the two countries.[45] Argentina is concerned that the paper mills will release toxic air and liquid emissions damaging the eco-system of the river and the health of 300,000 nearby residents.[46] The key issue is whether the paper mills will comply with international norms regarding effluent emission from pulps. These cases demonstrate that the ICJ has an important role to play in facilitating dispute resolution where states freely consent to its jurisdiction.

Legal Personality in Public International Law

In order to appreciate the uncertain position of corporations in public international law it is critical to understand the concept of legal personality. Parties must have 'legal personality' to participate in proceedings before the ICJ. Evident in the above cases is that the ICJ determines decisions between nation-states as they have full legal personality and have traditionally been the sole subject of international law.[47] Personality bestows rights and duties, the ability to initiate proceedings, and the obligation to be accountable for internationally wrongful acts.[48]

The responsibility of other international organisations is underdeveloped in public international law.[49] As Triggs identifies, international organisations are liable under domestic law for tortious acts and breaches of contracts but not under international law.[50] Contemporary international law has recognised, to a limited extent, the legal personality of other international 'persons' such as international organisations, NGOs and trans-national corporations. For example, the United Nations has full legal personality in international law.[51] The question of responsibility for breaches of international law by international organisations is

44 *Pulp Mills on the River Uruguay, Argentina v Uruguay*, ICJ, 9 June 2006. Decision still pending at the time of writing.

45 Peiter H.F. Bekker "Argentina-Uraguay Environmental Border Dispute Before the World Court" (2006) 10:11 *The American Society of International Law* 1.

46 Ibid.

47 Gillian D. Triggs *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Australia: 2006) 144.

48 Ibid.

49 Id at 179.

50 Ibid.

51 *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1CJ Reports, 1949.

currently being examined by the International Law Commission (ILC) as it is an issue is of growing significance.[52]

Private corporations have gained limited legal personality. The rights and responsibilities of this personality are largely determined by treaty. Corporations may bring claims against states under the Convention on the Settlement of Investment Disputes between States and the Nationals of Other States of 1965.[53] Concession contracts between states and trans-national corporations for petroleum may also be subject to public international law.[54] Corporations that contract with states may similarly fall within the reach of public international law, but only to the extent of the terms of the contract.[55] The evolving status of trans-national corporations was discussed in *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic.*[56] The arbitrator, Professor Dupuy noted that:

> [S]tating that a contract between a State and a private person falls within the international legal order means that for the purposes of interpretation and performance of the contract, it should be recognised that a private contracting party has specific international capacities.[57]

Outside of the specific international capacities mentioned, corporations do not have legal personality. They cannot be called to account directly for their environmental behaviour in foreign countries before the ICJ. Many corporations have accepted a number of voluntary obligations under international law, for example the UN Global Compact for Human Rights, Environmental Protection and Labour Law, and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multilateral Enterprises.[58] Once again, these commitments are not binding although they may be persuasive evidence of normative standards in customary international law.[59]

52 Triggs, note 47 at 179.

53 Id at 183.

54 *Amoco International Finance Corp v Iran* (1987) 15 Iran-US CTR 189; See Triggs, above n47 at 183.

55 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* (1977) 53 ILR 389 at 457–8.

56 (1977) 53 ILR 389 at 457–8.

57 *Texaco v Libyan Arab Republic* at 457–8.

58 Triggs, note 47 at 184.

59 Ibid.

Trial Smelter Arbitration

As discussed above, corporations almost invariably do not have legal personality subjecting them to public international law jurisdiction. In the past, nation-states have represented corporations in international legal proceedings. This process is illustrated in the seminal international environmental decision, the 1941 *Trial Smelter Arbitration*. Writers often return to this case for it captures many of the complexities of modern environmental disputes. The subject matter of the dispute did not directly involve the Canadian or United States Governments, nor did it involve claims made by United States citizens against the Canadian government. It consisted of claims based on nuisance against a Canadian corporation causing damage to United States citizens and property.[60] The case involved a Canadian smelter emanating sulphur dioxide emissions across the United States border damaging the apple farms of residents living within Washington State.

The defining principle to emerge from this arbitration is that 'one State should not allow activities under its jurisdiction to harm the environment of a neighbouring State.'[61] This rule was later embodied in Principle 21 of the Stockholm Declaration:

> States have...the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[62]

The Trial Smelter Arbitration demonstrates the tenuous position of corporations under public international law. While it is heralded for its successful resolution of the dispute, it also reveals the failure of public international law to deal directly with corporations. The barrier to such engagement is also the principle which is so highly valued in public international law — the sovereign equality of States.[63] Public international law adjudication requires the participation and support of national governments. It is not a forum for individuals to achieve or initiate remedies.

60 Hunter, Salzman, and Zaelke, note 24 at 505.
61 Id at 498.
62 Id at 511. This is also Principle 2 of the *Rio Declaration on the Environment and Development* 1992.
63 *The Parlement Belge* (1879) 4 PD 129.

Private International Law

Private law actions including public and private nuisance, trespass and negligence are important remedies for victims of environmental degradation. This section discusses the extraterritorial exercise of civil jurisdiction before briefly examining tort actions relevant to environmental protection. It is interesting to note the increasing relevance of tort actions to human rights discourses. In particular, the interface between public and private law is manifested in the United States *Alien Tort Claims Act* (*ATCA*).[64] Under the Act, plaintiffs may initiate tort actions in the United States for serious breaches of public international law.

In Australia and other countries, traditional tort actions have been at the centre of important trans-national environmental law cases such as *Dagi and Others v The Broken Hill Proprietary Company Ltd (BHP) and Another (No.2)*,[65] often referred to as the *Ok Tedi* dispute. An analysis of the Ok Tedi dispute forms the body of a detailed case study in the next section, examining the limitations of using private law mechanisms. The significance of cases such as *Ok Tedi*, however, lies in the potential for litigants to utilise national courts for international disputes. Initiating proceedings in national courts against corporations circumvents the issue of legal personality. Remarking on domestic actions for environmental claims, Triggs states:

> The international legal personality of the corporation is...not usually the relevant issue. Rather, national courts will determine their jurisdictional reach over acts that have occurred outside the territory under the relevant 'conflicts' rules. [66]

Legal personality is not a concern for private actions in national courts; rather the capacity to bring the claim lies in the exercise of extraterritorial jurisdiction.

Civil Jurisdiction

Private international law creates very few limitations on State jurisdiction to hear extra-territorial civil trials. Akehurst argues that State civil jurisdiction, in contrast to criminal jurisdiction, is extremely flexible and subject to minimal restrictions such as foreign state and diplomatic immunities.[67] He cites John Bassett Moore's comments on the different conceptual basis of each doctrine:

64 28 U.S.C, s 1350 (1994).
65 [1997] 1 VR 428.
66 Triggs, note 47 at 184.
67 Akehurst, note 4 at 170. For a good discussion of civil jurisdiction see Andrew Bell *Forum Shopping and Venue in Trans-national Litigation* (Oxford University Press, Oxford: 2003).

> [T]he rules governing the jurisdiction in civil and criminal cases are founded in many respects on radically different principles... An assumption over an alien in the one case is not to be made a precedent for a like assumption in the other.[68]

In Australia, State jurisdiction to hear criminal matters is limited to a number of established principles, namely the Territoriality, Nationality, Protective (Security), Universality and Passive Personality principles. The details of these principles will not be examined here; suffice to say that they aim to respect the sovereignty of nation-states except in extreme criminal situations where a strong link between the State and the defendant exists. Alternatively, civil jurisdiction extends over a whole range of actions and parties with very little connection to the State. Interestingly, the exercise of extraterritorial jurisdiction in civil matters is rarely confronted by diplomatic protest from other States.[69]

In New South Wales, for example, civil jurisdiction in relation to actions in tort is provided for under Pt 11 of the *Uniform Civil Procedure Rules (NSW)* 2005 (formerly Pt 10 of the *Supreme Court Rules (NSW)* 1970). The most flexible conditions in which an originating process may be served on a defendant outside Australia include:

> R11.2, Sch 6 (e) Damage suffered in New South Wales;

The common law only requires the plaintiff to have suffered some of the relevant damage in NSW, including medical treatment or suffering.[70]

> R11.2, Sch 6 (g) The defendant is domiciled or ordinary resident in New South Wales;

> R11.2, Sch 6 (j) where the subject matter of the proceedings, so far as the person to be served, is property in the State.

In relation to individuals, common law jurisdiction may exist if the defendant is temporarily present in the jurisdiction. If an originating process is initiated while the potential defendant is in the area, they will be amenable to jurisdiction even if they depart before the process is served.[71]

Akehurst's analysis considers how jurisdiction based on the temporary presence of a defendant means that, 'in theory a visit lasting a few seconds is sufficient'.[72]

68 John Bassett Moore cited in Akehurst, note 4 at 170.

69 Ibid.

70 *Brix-Neilson v. Oceaneering Australia* [1982] 2 NSWLR 173; *Oceanic Sun Line Special Shipping Co Inc v. Fay* (1988) 165 CLR 197; *McGregor v Three Counties Equine Hospital* [2004] NSWSC 1203; *Regie Nationale des Usines Renault v. Zhang* (2002) 187 ALR 1.

71 *Laurie v Carroll* (1958) 98 CLR 310; *Gosper v Sawyer* (1985) 160 CLR 548.

72 Akehurst, note 4 at 171.

Many countries, including the United States, Netherlands and South Africa, claim jurisdiction based on *Forum Patrimonii,* where the defendant has assets within the State concerned.[73] In Germany, Austria, Belgium, Denmark, Scotland, Sweden, and Japan, claims are not limited to the value of the assets. The expansive potential of civil jurisdiction is illustrated by Akehurst's example of a 'tourist who left his slippers behind in a hotel bedroom might find the local court claiming jurisdiction over all sorts of unrelated claims against him, running into millions of pounds.'[74] In NSW, common law jurisdiction over corporations exists when they are considered 'present' in the territory of NSW. Presence is determined by whether the corporation is 'carrying out business' in the State, for example if it is based in the State or has an office operating in the State.[75] This basis of jurisdiction was invoked in the *Ok Tedi* dispute by a Victorian court to extend jurisdiction over Broken Hill Proprietary (BHP), the headquarters of which were based in Victoria. Papua New Guinean villagers living near the Ok Tedi River were able to bring a suit in a Victorian Court claiming damages for pollution of the river from a collapsed copper mine.

The extraterritorial exercise of jurisdiction over parties with very little significant connection to the State may appear tenuous or even harsh in certain circumstances. It should be remembered that courts retain power to set aside an originating process on the basis of *forum non conveniens.*[76] The Australian doctrine requires the defendant to establish that the court is 'clearly inappropriate' in the sense that proceedings are 'oppressive' and 'vexatious'.[77] Other countries such as the United States exercise a more flexible interpretation of the rule, only requiring the defendant to establish that there is a 'more appropriate' forum. Australia's *forum non conveniens* principle is the more positive doctrine for environmental claims as it reduces the likelihood of defendants evading jurisdiction. In this way, the extraterritorial use of jurisdiction, however tenuous, can be critical in bringing corporations to account for environmental damage.

73 Ibid.
74 Id at 172.
75 *National Commercial Bank v. Wimbourne* (1979) 11 NSWLR 156 per Holland J at 165.
76 Bell, note 5 at 149.
77 *Oceanic Sun Line Special Shipping Co Inc v. Fay* (1988) 165 CLR 197; *Voth v. Manildra Flour Mills* (1990) 171 CLR 538.

Civil Jurisdiction in the United States

Civil jurisdiction legislation in the United States is worthy of special mention in the context of environmental disputes. The United States has civil procedure rules similar to most common law countries, except in relation to the *Alien Tort Claims Act (ATCA)*.[78] The *ATCA* represents the interface between public and private international law. It enables foreign plaintiffs to bring actions for breaches of public international law in American courts.[79]

Developed in 1789, the *ATCA* was originally part of the *Judiciary Act*, although it remained idle for almost two hundred years.[80] In the 1980s, human rights activists looked to the Act for its potential remedies. Section 1350 of the Act confers power on district courts to have "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Claims have been made by residents of foreign countries against subsidiaries of United States' corporations for human rights abuses committed abroad. The *ATCA* is usually restricted to serious human rights abuses under international law. The requirement that the torts claimed must violate the 'law of nations' has necessarily made customary international law a focus of *ATCA* litigation.

In the recent case, *Doe v Unocal* [81] the *ATCA* enabled 15 Burmese villagers to file a class action in a Federal District Court against Unocal, a United States' corporation. The claims related to the use of slave labour, sexual assault, murder and torture inflicted during the building of a natural gas pipeline in Burma. The plaintiffs alleged they had been abused by military officials during the construction of the pipeline with the acquiescence of the corporation. The case settled before the completion of the trial. The decision by the Court of Appeals to extend jurisdiction over the actions of Unocal in a foreign country is a major development in private international law and human rights law. It is particularly significant because Unocal did not directly commit the acts in question.

A number of environmental claims have also been brought under the *ATCA*, with varying success. In *Jota v Texaco Inc*[82] Ecuadorian villagers alleged that the Texaco corporation 'polluted the rain forests and rivers of Ecuador and Peru' by dumping toxic by-products of oil drilling into local rivers and spreading them on local roads.[83] Although the District Court dismissed the case on the basis of *forum*

78 28 U.S.C, s 1350 (1994).
79 Anderson, note 1 at 407.
80 Hunter, Salzman, and Zaelke, note 24 at 1338.
81 110 F.Supp 2d 1294, 1310 (C.D Cal 2000).
82 157 F 3d 153 (2nd Cir. 1998).
83 Hunter, Salzman, and Zaelke, note 24 at 1344.

non conveniens, it did so on the requirement that Texaco voluntarily submit to jurisdiction in Ecuador.

A particularly interesting environmental claim has recently reached the Court of Appeals for the Second Circuit under the provisions of the *ATCA*. In *Flores v Southern Peru Copper Corporation*,[84] the plaintiffs alleged that the defendants violated customary international law by infringing the plaintiffs' 'right to life', 'right to health' and 'right to sustainable development'.[85] The claims related to the toxic effects of smelting facilities in Peru which emitted large quantities of sulphur dioxide and particles of heavy metals into the air and water, causing lung disease in many of the plaintiffs and their deceased relatives. The case was dismissed by the Court on the grounds that the plaintiffs failed to establish that the rights breached were recognisable norms of customary international law. The plaintiffs submitted international instruments, such as the Stockholm Convention discussed earlier, as evidence of these rights. The Court held that rights to 'life', 'health' and 'sustainable development' were 'boundless and indeterminate, stating that they 'express virtual goals understandably expressed at the level of abstraction'.[86]

It is unfortunate that the Court did not recognise the rights claimed by the plaintiffs as fundamental norms of customary international law. Nonetheless, the case indicates the impact of changing environmental norms on human rights law. The Courts may recognise rights to 'sustainable development', 'life' and 'health' when these rights become more clearly defined and widely accepted. Richard Herz sums up the significance of actions under the *ATCA* in that they:

> challenge the impunity with which TNCs [Trans-national Corporations] have heretofore destroyed the environments of unwilling communities. Indeed the very existence of ATC suits may cause at least some TNCs to re-evaluate the way they do business abroad in order to avoid potential liability.[87]

The *ATCA* is a revolutionary legal instrument, but it is the exception in civil jurisdiction legislation. Plaintiffs without recourse to the *ATCA* must rely on existing private law doctrines in other nation states and the willingness of the judiciary to hear foreign claims. Before turning to discuss some of the key limitations in private legal doctrine operating to restrict trans-national environmental actions, I will briefly examine the private law remedies relevant to environmental disputes.

84 43 ILM 196 (2004).

85 *Flores v Southern Peru Copper Corporation*,43 ILM 196 (2004) at 1.

86 Id at 30.

87 Richard Herz cited in Hunter, Salzman, and Zaelke, note 24 at 1338.

Private Law Remedies

Plaintiffs bringing a claim under the *ATCA* in United States' courts must frame their actions in international law. In contrast, plaintiffs bringing claims in other common law jurisdictions, such as Australia, need to frame their actions in domestic law. Most often private actions for environmental damage are brought in tort law, particularly nuisance, trespass and negligence.

Nuisance

Actions in private nuisance are concerned with the unlawful interference with a person's use or enjoyment of land.[88] The law of nuisance varies across different legal systems and may be abrogated by statute. The essential requirement is that the action must relate to an interest in property. This may include the effective use of property for residential, agricultural, commercial or industrial purposes, or personal use such as pleasure, comfort and enjoyment of land.[89] In the context of environmental actions, the law of nuisance often concerns air, water and noise pollution or the contamination of land.[90] The nuisance must be excessive and unreasonable to the plaintiff when weighed against the reasonableness of the defendant's behaviour.[91] Public nuisance relates to interests in land that are common to the public or community. As such, it is usually the local government that has standing to sue.

Trespass

Trespass is the direct interference or encroachment on a person's exclusive proprietary rights without lawful excuse. The tort of trespass may only be invoked in response to the direct physical interference of property or possession, unlike nuisance which may be actionable if a person's enjoyment of land is affected. Nuisance is more suited to the indirect effects of pollution whereas trespass is relevant to immediate interference through leakage or contamination. Actions for trespass do not require the plaintiff to establish the existence of damage to property as trespass is actionable *per se*.[92] The requirement of directness can be difficult to establish in environmental claims. For example, in *Esso Petroleum v Southport*

88 John G Fleming *The Law of Torts* (9th edn, LBC Information Services, Sydney: 1998) 464.
89 Bernasconi, note 19 at 16.
90 Ibid.
91 Id at 17.
92 Ibid; see also Bell and McGillivray, note 5 at 369.

Corporation,[93] trespass was not argued in relation to an ocean oil spill. Pollution of the foreshore was not inevitable as it depended on tides, wind and waves.[94] It is common for plaintiffs to bring an action in both nuisance and trespass.

The Rule in Rylands v Fletcher

In Australia, the rule in Rylands v Fletcher[95] has been absorbed into the general law of negligence as a result of *Burnie Port Authority v General Jones Pty Limited.*[96] Nevertheless, the general principle remains relevant to environmental torts. It creates strict liability for the non-natural use of land for persons who allow the use of their land to damage neighbouring property.[97] The House of Lords expressed the rule as affecting any person who:

> brings onto his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is a natural consequence of its escape.

The rule is often applied to persons who bring dangerous, high risk substances or toxic waste onto their land.

Negligence

The traditional tort of negligence is more flexible and is rapidly evolving. It is particularly suitable where a person has not demonstrated due diligence in preventing reasonably foreseeable environmental damage.[98] The plaintiff must establish that: (a) a duty of care is owed by the defendant to the plaintiff; (b) that the defendant has breached that duty; (c) damage has occurred; and (d) there is necessary causation between the breach and the damage. The damage must be actual, physical or psychological damage or damage to property. There are limitations to the tort of negligence. It is a fault based system in that it is necessary to establish a breach on behalf of the defendant. It also requires proof of damage.

Plaintiffs often combine actions for nuisance, trespass and negligence. Examples of these actions can be drawn from a range of countries. From 1982-1994 villagers in

93 [1956] AC 218.
94 Bell and McGillivray, note 5 at 370.
95 [1868] LR 3 HL 330.
96 (1994) 179 CLR
97 Bernasconi, note 19 at 18.
98 See generally Fleming, note 88 at 464; Bernasconi, note 19 at 18.

Malaysia were exposed to radioactive activities from the Asian Rare Earth Corporation, a joint Malaysian–Japanese venture partly owned by Mitsubishi. Although the villagers' actions in tort law were dismissed, the publicity surrounding the litigation still caused the installation to close.[99] In 2000, 4,000 South African workers won the right to sue Cape Industries in the United Kingdom for asbestosis and mesothelioma resulting from exposure to asbestos in South Africa.[100] In the Trial Smelter Arbitration discussed above, the action for nuisance related to the effects of toxic emissions interfering with the property of United States residents.

Review

Public and private international remedies for trans-border disputes vary substantially. This section has argued that while public international law is effective in bringing about policy change, private international law may result in more effective redress for victims. These diverging approaches are most effective when they operate simultaneously. In the following section, the limitations of private law doctrines in municipal law are examined in relation to the case study of *Dagi and Others v The Broken Hill Proprietary Company Ltd (BHP) and Another (No.2)*.[101]

Limitations in Private Legal Doctrine

Limitations exist in private legal doctrines which prevent trans-national environmental claims from occurring more frequently. In his review of civil liability law, Bernasconi takes the position that, 'environmental law has long remained the exclusive preserve of public international law' because private international law has not offered a 'sufficiently relevant regime.'[102] Jurisdiction exists to extend private remedies to victims of environmental torts overseas, but is often limited by a reluctance to develop the common law. Indeed, most private law regimes have not developed in the context of modern environmental disputes. An examination of the Australian case *Dagi and Others v The Broken Hill Proprietary Company Ltd (BHP) and Another (No.2)*[103] reveals both the potential of trans-national actions and the limitations of bringing claims under municipal law.

99 *Woon Tan Kan v Asian Rare Earth*, [1992] 4 CLJ 2207; Anderson, note 1 at 405.
100 *Lubbe v Cape Plc Afrika*, [2000] 2 Lolyd's Rep 383; Anderson, note 1 at 405.
101 [1997] 1 VR 428.
102 Bernasconi, note 19 at 82.
103 [1997] 1 VR 428.

The Ok Tedi Dispute

In *Dagi and Others v The Broken Hill Proprietary Company Ltd (BHP) and Another (No.2)*[104] four proceedings were initiated against BHP and Ok Tedi Mining Ltd (OTML) by Papua New Guinean villagers who lived near the Ok Tedi River. The plaintiffs alleged that they had been injuriously affected by the discharge of by-products from the copper mine into the Ok Tedi River. Their claims included actions of trespass, nuisance, and negligence. They also made claims based on agreements between the defendants and the State of Papua New Guinea which had been given statutory force.[105] The plaintiffs argued that the State of Papua New Guinea held on trust for the plaintiffs certain rights pursuant to the agreements and statutes and that the plaintiffs were entitled to sue to enforce those rights as beneficiaries or in accordance with the principle in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*.[106] [Perhaps state in the footnote what the Trident principle is?]

The plaintiffs in all four of the proceedings alleged that OTML since 1987 and BHP since 1994, 'intentionally or otherwise discharged or caused to be discharged' substances into the Ok Tedi River which consequently polluted the water and affected the river flow. The plaintiffs in the *Dagi*, *Maun* and *Ambetu* proceedings, who live on the flood plains adjacent to the river, alleged that the land had been polluted and was 'less usable for their purposes'.[107] Eight actions were pleaded against the defendants: Intentional and unlawful damage under the principle in *Beaudesert Shire Council v Smith*;[108] nuisance; trespass; and strict liability under the principle in *Rylands v Fletcher*.[109] It was also alleged that BHP aided and abetted OTML and was responsible for its tortious acts. The remaining actions were based on the agreement made between the defendants and the State, discussed above, that obliged OTML to:

> compensate any persons for loss suffered as a result of its operations resulting from any damage (whether to land, anything on land, water or otherwise) or interference with any right to sue land or water.[110]

104 Ibid.
105 Ibid.
106 (1998) 165 CLR 107. This case held that where there is an intention when the contract is formed that the benefit be for a third party, that benefit is held on trust by the promisee for the third parties.
107 *Dagi and Others v The Broken Hill Proprietary Company Ltd (BHP) and Another (No.2)* [1997] 1 VR 428 at 430.
108 (1966) 120 CLR 145 at 431.
109 (1868) LR 3 HL 330.
110 *Dagi and Others v The Broken Hill Proprietary Company Ltd (BHP) and Another (No.2)* [1997] 1 VR 428 at 431.

It was alleged that OTML was in breach because it did not provide compensation and had not constructed a tailing or dam system to mitigate the damage. Justice Byrne summed up the unusual nature of the claims by stating that:

> I am here concerned with a different type of negligence and a different type of damage. Here, the damage is not to the waters of the river or to the soil; nor is it damage to property of the plaintiffs nor damage to their physical health. It is more accurately described as damage to the environment in which the plaintiffs live and from which they derive their subsistence.[111]

BHP and OTML responded to the proceedings in two principal ways. Firstly, they attempted to restrain the proceedings by organising an agreement with the State of Papua New Guinea preventing either 'a non-citizen of Papua New Guinea or any other person' to commence or maintain compensation proceedings or 'assist any person to commence or maintain proceedings' in relation to the mine.[112] This effectively outlawed any the residents from bringing compensation claims under Papua New Guinean law. The move provoked an application for contempt of court which was granted by the Supreme Court of Victoria. On appeal to the Victorian Court of Appeal, the contempt of court issue was overshadowed by the question of whether the Papua New Guinean residents had standing to apply for contempt proceedings against BHP.[113] The contempt of court application was dismissed on this basis. The incident reveals that standing is critical in environmental claims, where the connection between victims and degradation is difficult to establish.

The second primary response of BHP and OTML was to challenge the jurisdiction of the Court to hear claims relating to land rights in Papua New Guinea. This challenge was based on the principle set out in *British South Africa Co v Companhia de Mocambique* (The Mozambique Rule).[114] Controversy exists as to the ambit of the Mozambique Rule. An often quoted definition is contained in *Dicey's Conflict of Laws*:

> the Court has no jurisdiction to entertain an action for (1) the determination of the title to or right to the possession of any immovable situate out of England (foreign land); or (2) the recovery of damages for trespass to such immovable.[115]

111 Id at 428.

112 Ross Ramsay "Transnational Environmental Litigation: Transnational Environmental Disputes" *Continuing Legal Education*, University of Sydney, 1996 at 4–5.

113 Id at 4.

114 (1983) AC 602.

115 *Dicey's Conflict of Laws* (5th Edition) cited in Ramsay, note 112 at 5.

The historical development of the Mozambique Rule is founded on the idea that juries should be taken from the exact locality where the 'chose of action' arose.[116] Increasing inconvenience has led courts to distinguish between local and transitory actions. Byrne J adopted the distinction between transitory and local actions to address the controversy regarding the connection between the cause of action and the ownership of foreign land. He came to the position that:

> the court will refuse to entertain a claim where it essentially concerns rights, whether possessory or proprietary to or over foreign land, for these rights arise under the law of the place where the land is situate and can be litigated only in the courts of that place. The claim must, not merely concern those rights: it must essentially concern them. This is because the rights must be the foundation or gravamen of the claim.[117]

On this basis, Byrne J disallowed the actions for trespass. In an unusual move, he also extended the rule so as to disallow the actions for nuisance as they were similarly based upon possessory rights. In relation to the negligence claim, the Dagi proceedings were not justiciable as they were framed as damage to land. Byrne J described the 'inescapable and intimate relationship' that existed with the Ok Tedi River, the floodplains and the land occupied by Dagi.[118] The remaining proceedings for negligence brought by Shackles, Ambetu and Maun were justiciable as they related to the loss of amenity and enjoyment of the area and were not based on possessory rights.[119]

Analysis of Municipal Law

Similar to many trans-national environmental cases, the *Ok Tedi* Dispute settled before the trial was completed. $500 million in compensation was to be divided between the 30,000 Papua New Guinean landowners. BHP also made a commitment to build tailings containment.[120] The delivery of the settlement monies has been complicated by a range of factors, including whether the mine will still operate at Ok Tedi and how the local economy will survive if it closes. Separate from the continuing environmental, economic and political issues faced by residents along the Ok Tedi River, the case is significant because it recognised the potential for

116 NSW Law Reform Commission, Report LRC 63, *Jurisdiction of Local Courts over Foreign Land*, 1988, 32.
117 *Dagi and Others v The Broken Hill Proprietary Company Ltd (BHP) and Another (No.2)* [1997] 1 VR 428 at 441.
118 Ramsay, note 112 at 6.
119 Ibid.
120 Kircsh, note 7.

foreign litigants to enforce rights to a safe environment in Australian courts.[121] It was also a major public relations disaster for BHP.

Had the case continued to completion, the opportunity to develop legal doctrine may have been possible. In the initial proceedings, important issues relating to private law jurisprudence were raised. Byrne J's decision to affirm the Mozambique Rule and extend it to actions of nuisance has been criticised. As Davis argues, had the Dagi litigation been argued differently, then Byrne J might have been able to take over proceedings in all four actions.[122] His reasoning has been criticised as purporting to 'provide a logical basis for discriminating between those claims over which there is jurisdiction and those where there is not', essentially upholding 'jurisdiction by semantic devices.'[123] Davis argues that the common law rules relating to jurisdiction over foreign land are no longer relevant to superior courts in Australia.[124] The doctrine of *forum non conveniens*, where it can be established that Australian courts are a 'clearly inappropriate forum' satisfies any conditions where jurisdiction should not be extended over foreign lands. Indeed the plaintiffs submitted that the Mozambique rule had no place in Australian law where *forum non conveniens* exists, yet Byrne J dismissed the submissions.[125] Davis also argues that there has been widespread disenchantment with the Mozambique Rule, and many states including New South Wales, have abolished or abrogated it by statute.[126]

In the *Ok Tedi* dispute the court declined the opportunity to abolish the application of the Mozambique Rule. This would have had the dual effect of bringing Australian jurisprudence in line with other common law countries and improving legal doctrine that may relate effectively to trans-national environmental law.

Review

As a result of the *Ok Tedi* dispute it is concluded that the Australian judiciary are only partially inclined to develop private law doctrines in response to modern trans-national environmental problems. The decision to apply the Mozambique Rule to prevent actions in trespass as well as nuisance is an indication of tension in the judiciary about the appropriateness of foreign claims in Australian courts. It is important that these doctrines develop as it is frequently the case that victims of

121 Ibid.

122 JLR Davis "The Ok Tedi River and the Local Actions Rule: A Solution" (1998) 72 *Australian Law Journal*, 786.

123 Stephen Lee cited in Davis, note 122 at 787.

124 Ibid.

125 *Dagi and Others v The Broken Hill Proprietary Company Ltd (BHP) and Another (No.2)* [1997] 1 VR 428 at 434.

126 For example, see the Jurisdiction of Foreign Courts (Foreign Land) Act 1989 (NSW); Davis, note 122 at 787.

environmental degradation have no other legal recourse. They cannot make a claim under public international law, and they also cannot rely on the support of their own governments to bring companies such as BHP to account. This is evident in the decision by the Papua New Guinean government to outlaw proceedings for compensation as a result of the action taken in Australia.

Conclusion

Modern environmental problems are not restricted by political borders. Circumstances where trans-national corporations are being called to account for their actions in domestic courts raise issues of municipal law, private and public international law. Trans-national corporations which engage in environmentally harmful behaviour in States that have weak domestic environmental protection legislation represent an anomaly for regulatory regimes. Decisions made in one State often have dramatic effects on the quality of life in other States. In many nations, governments are less concerned with the effects of pollution on the health of residents than on attracting foreign investment.

It is important to draw on a range of legal doctrines to improve trans-national environmental justice. This article promotes the use of private environmental law in dispute resolution. Private remedies are often undervalued by environmentalists. Indeed, in the domestic context, public regulation is preferable. In the international context however, public international law operates to encourage the development of standards and frameworks for environmental protection and dispute resolution between States. It is not a forum for individuals to directly pursue remedies against non-state actors.

Private international law offers the potential to provide redress for victims of environmental damage without the direct participation of national governments. Although the draw-backs of civil litigation are many, in that it is slow, unpredictable and often unsatisfactory, it is a powerful mechanism influencing the development of better business practice of corporations operating overseas. Unlike public international law, it is possible to achieve enforceable results. It also encourages the internalisation of environmental costs. In this way, private international law functions to promote environmental standards developed under public international law.

At present, the jurisprudence relating to international civil liability for environmental torts is increasing. Highlighted in this article is the need for national courts to be receptive to current environmental problems and to factor these

problems into the interpretation of private law doctrines. In Australia, there is a willingness to hear foreign environmental claims in national courts. Australia's *forum non conveniens* rule makes it difficult for defendants to avoid jurisdiction. Further development of the common law will assist the capacity of individuals to initiate proceedings. The role of NGOs in supporting individuals gain recourse to the law provides an incentive to improve private law remedies. In this context the role of NGOs and other international organisations is invaluable. They are often able to fund public interest litigation as a means of influencing the development of public and business policy decisions in the future. Governments should also respond to these opportunities by legislating to facilitate the law in relation to civil liability in cross-jurisdictional circumstances.