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**Environmental Harm in Developing Countries
Caused by Subsidiaries of Canadian Mining
Corporations: The Interface of Public and Private
International Law**

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INTRODUCTION

CANADIAN MINING COMPANIES are becoming well known for the environmental disasters that all too often flow from their activities abroad, particularly in the developing world.¹ Accidents at Canadian-owned mines in just the last five years have resulted in massive toxic waste spills in Kyrgystan, the Philippines, Guyana, and Spain.² In Kyrgystan, over 2,000 people needed hospital treatment and thousands of fish died after a truck carrying mine waste

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¹ Mark Bourrie, "Environment: Overseas Canadian Mines Fail to Clean Up Their Act," *Inter Press Service* [Ottawa] (December 29, 1998) [Lexis]. See also Gary Gallon, "Mine Spills Give Canada a Black Eye," *Toronto Star* (April 30, 1998) [Lexis]. Further information about the environmental troubles of Canadian mining companies overseas may be found online at CBC TV's *The National* website: <<http://tv.cbc.ca/national/pgminfo/ugly/index.html>>, including links to related sites and the online documentary "The Ugly Canadian."

Even the United States is not immune to problems created by Canadian mining companies. In 1991, Vancouver-based Galactic Resources Limited gave the United States one of its largest tailings pond disasters in history at the Summitville Mine in Colorado. Nearly seventeen miles of the nearby Alamosa River was polluted. When victims of the pollution and state governments went after Galactic for damages, the company declared bankruptcy. See *infra* notes 129 and 224. Pegasus Gold Incorporated., an American-owned company registered in Canada, reported nine cyanide spills in nineteen years in Montana. In January 1998, the company sought bankruptcy protection while denying liability for the spills.

² Bourrie, *supra* note 1; and Gallon, *supra* note 1.

from the Kumtor mine that was heavily laced with cyanide rolled into the Barksuan River on May 20, 1998. The Kumtor mine was one-third owned by Cameco Corporation, which is based in Saskatoon, with the remaining two-thirds owned by the government of Kyrgyzstan.³ The month before, the rupture of a dam at the Los Frailes mine in Spain flooded the Guadalquivir River with toxic waste, which spread over 6,000 hectares of farmland. Boliden Limited, the Toronto-based owners, blamed the accident on heavy rains.⁴ A tailings spill in 1996 at the Marcopper Copper Mine in the Philippines polluted the Boac River of Marinduque Island, south of Manila. Marcopper was 40 per cent owned and operated by Placer Dome Incorporated of Vancouver.⁵ One of the worst mining spills occurred in Guyana in August 1995, when a four-day breach in a tailings pond dam allowed 3.2 million cubic metres of cyanide-laced effluent to leak into the Omai and Essequibo rivers, devastating the ecology of a 1,000-kilometre stretch of river. Cambior Incorporated of Montreal owns 65 per cent of the shares in Omai Gold Mines Limited, with 5 per cent owned by the Guyanese government.⁶

³ Bourrie, *supra* note 1. See also Paul Simao, "Canadian Mine Denies Reported Kyrgyzstan Cyanide Poisonings" (28 May 1998) *Journal of Commerce* 8A [Lexis]. The government was rumoured to be preparing an \$8 million lawsuit against Cameco Corporation.

⁴ Bourrie, *supra* note 1; and Gallon, *supra* note 1. The damage caused by the sludge from the zinc, copper, lead, and silver mine was initially estimated at \$113 million. In addition, it threatened Spain's Donana National Park, a United Nations World Heritage Site.

⁵ Gallon, *supra* note 1; Keith Damsell, "Filipino Judge Says Placer Still Owns Troubled Mine," *National Post* [Toronto] (April 17, 1999) C1. The four-month continuous spill of mine tailings led to criminal charges being filed by the Philippines government against three Marcopper Copper Mine executives. The four million tonnes of toxic sludge were found by a subsequent United Nations assessment mission to have led to a total loss of the use of the rivers for livestock, fishing, laundry, bathing, and agriculture for the villages along the river. According to the *National Post*, the mine has been mothballed since the spill, and Placer Dome has spent US \$80 million so far cleaning up the river system and compensating the local community. In March 1997, Placer Dome reported it had divested its 40 per cent interest in Marcopper Copper Mine, with MR Holdings, a Cayman Islands company that has used the same Vancouver address as Placer Dome and which was created to transfer ownership and cleanup responsibilities to the Marcopper Copper Mine's debt. According to the news report, MR Holdings was then sold to an "unidentified" company.

⁶ Bourrie, *supra* note 1. The remaining 30 per cent are owned by the Denver-based Golden Star Resources Limited. Cambior appoints four of six members of Omai's board. See also Mark Jacobson, "Guyana's Gold Standard: Gold-Mining

Many of these spills were the result of the collapse of tailings dams, which allowed mud that was rich in cyanide, arsenic, and other heavy metals to spill into waterways. Similar accidents used to occur frequently in Canada earlier in this century until the government imposed strict rules on the construction of tailings dams.⁷ However, these rules are not applied to Canadian operations abroad, which are, in theory, governed by the laws of the countries in which they operate, where host governments are often given a

Boom" (September 1998) 107 *Natural History* 7 at 46 [Lexis]; and *Cambior*, *infra* note 38, para. 18, item 7.

⁷ Bourrie, *supra* note 1. Canadian environmental legislation is found at both federal and provincial levels of government. The discharge of contaminants and the construction of works or other such activities without a permit from the appropriate regulatory authority provide the "backbone" of this regulation. "The development of a mine, along with its associated mill or concentrator, tailings impoundment, waste rock dump, and so forth, invariably require permitting with respect to land use, diversion and consumption of water, discharges to water and discharges to air. Toxic hazardous substances, such as the sodium cyanide, commonly used in gold extraction are also closely regulated." See Barry J. Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993) at 14, 13-22.

Examples of federal legislation include the Canadian Environmental Protection Act, R.S.C. 1988, c.16 (4th Supp.), c. 22 [hereinafter CEPA, 1988]; the Fisheries Act, R.S.C. 1985, c. F-14 [hereinafter Fisheries Act]; the Metal Mining Liquid Effluent Regulations, C.R.C. 1978, c. 819. See also the Alice Arm Tailings Deposit Regulations, SOR/79-345. A new and improved Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33 (formerly Bill C-32) received Royal Assent on September 14, 1999 [hereinafter CEPA, 1999]. It came into force on March 31, 2000, repealing CEPA, 1988. According to Environment Canada, CEPA, 1999, is designed with a pollution prevention focus, providing "significant new powers" of enforcement for Environment Canada officers and providing a private right-to-sue if the federal government fails to enforce the act. All substances currently in use in Canada will be categorized to determine if they are toxic, and strict deadlines will be imposed to control toxic substances. In addition, the act meets Canada's international obligations in connection with, among others, the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, and provides authority to regulate or require pollution prevention plans for Canadian sources of international air and water pollution where another Canadian government is unwilling or unable to deal with the pollution source. See Environment Canada Press Release, "New Funding to Implement the New Canadian Environment Protection Act" (September 14, 1999) and Environment Canada Press Release, "The Canadian Environment Protection Act: A Strengthened Act for the New Millennium" (September 14, 1999), available online at <http://www.ec.gc.ca/press/cepagg_n_e.htm>. In Ontario, see the Ontario Environmental Protection Act, R.S.O. 1990, c. E.19 [hereinafter OEPA], and the Environment Approvals Improvement Act, 1997, R.S.O. 1997, Ch. 7.

percentage of the mine ownership.⁸ In an ideal world, institutional development would lead to the establishment of comprehensive regulatory regimes for environmental protection in all developing countries. However, in the real world, many pressures contribute to the inadequacies, and even to the non-existence, of domestic environmental protection in many countries.

These illustrations raise the question of whether, and of what responsibility, Canada should take in addressing the standard of environmental care taken by its transnational mining corporations. Concerns of sovereignty are often raised to dampen any discussion of extraterritorial regulatory action by a home state, yet, at the same time, tort actions are being launched increasingly in the courts of the home state by victims of environmental catastrophe, who are alleging responsibility on the part of the parent corporation for the actions (or lack thereof) of a subsidiary under its control. Indeed, in some of these suits, it is the host state itself that is a party in the courts of the home state, acting as a representative for the victims.⁹ This fact would suggest that a role may exist for a state such as Canada to take a principled position with respect to the minimum environmental standards that its corporate entities must meet both at home and abroad.

This article will address such a possibility after an exploration of the underlying issues. I will begin with a discussion of the principles that govern parent company liability for the harm of a subsidiary according to domestic law. Second, I will examine the problems that face a country that has suffered environmental harm in bringing a tort action against a parent company in Canadian courts. The alternative scenario of regulatory action by the host state will then be addressed in light of the problems that arise in the recognition and enforcement of foreign judgments by Canadian courts. Next, I will examine the implications of the conflicting interests that, in reality, face many developing countries as they negotiate with transnational corporations over the exploitation of natural resources, and which often lead to inadequate or unenforceable environmental standards. The potential for the extraterritorial application of Canadian law will then be explored in the context of the seemingly conflicting public international law considerations of international comity and state responsibility. The importance of

⁸ Bourrie, *supra* note 1.

⁹ See *Bhopal*, *infra* note 23. Note, however, that not all host states are as eager to support litigation abroad. See *Aguinda*, *infra* notes 71, 99, and 128; and *Dagi*, *infra* note 40.

international human rights norms, including access to justice and political processes, in ensuring that mining agreements take into account the concerns of local populations will comprise the final section. In conclusion, I will argue that, in light of the principles of comity and fairness, a role does exist for Canada to promote the regulation of foreign mining subsidiaries under the control of Canadian parents.

LIABILITY PRINCIPLES

The corporate structure that will be the focus of this article is that of the transnational corporation (TNC), which is defined in the United Nations Draft Code of Conduct on Transnational Corporations as

an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.¹⁰

¹⁰ See Shinya Murase, "Perspectives from International Economic Law on Transnational Environmental Issues" (1995) 253 *Receuil des Cours* 287 at 374, citing a tentative definition from Daniel B. Magraw, "United Nations ECOSOC Draft Code of Conduct on Transnational Corporations," in Stephen Zamora and Ronald A. Brand, eds., *Basic Documents of International Economic Law*, vol. 1 (Chicago: CCH International, 1990) at 533-40. According to Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell Publishers, 1995) at 13, the term transnational is used by the United Nations, while the term multinational is more common in economic parlance. The origins of the United Nations Draft Code of Conduct on Transnational Corporations lie in claims of the newly independent and less developed member states of the UN for a new international economic order for, among other things, the legal recognition of the right of a state to control the activities of the transnational corporations [hereinafter TNCs] operating within its borders. From the outset, major disagreements existed as to the nature and contents of the code, with the capital exporting countries primarily concerned to use the code as a means of protecting TNCs against discriminatory treatment contrary to the international minimum standards accepted by these states. The "Group of 77," who were supported by the former socialist countries, were concerned to use the code as a means of subjecting the activities of TNCs to greater regulation, in line with the contents of the UN Charter of Economic Rights and Duties of States in order to avoid the adverse effects of TNC activities on national economic objectives and political independence (Muchlinski at 592-4). The last version of the code dates from May 31, 1990. Negotiations were suspended in July 1992.

The typical structure of a TNC involves a parent company, which is the centre of decision-making. It is located in its "home" country, from which it exercises significant influence and control over its subsidiaries located in "host" countries. While these subsidiaries may be controlled by the parent through ownership, managerial control, or otherwise, they are often incorporated in the host country. Thus, from a legal perspective, each subsidiary is an independent juridical person under the law of the host state, and its relationship to the parent is often difficult to discern. However, from an economic and managerial perspective, a TNC may be regarded as the totality of the relationships between parent company and subsidiaries located in various countries, where subsidiaries are directed to implement strategies drawn up by the parent company that are designed to maximize profits of the entity as a whole.¹¹

Under traditional tort law principles, there are two ways in which a parent company could be held legally responsible as a result of acts or omissions by its subsidiary: direct liability or vicarious liability.¹² Direct liability may be imposed by reason of the participation in, the direction of, or the approval of the violations by the parent company.¹³ Thus, liability is imposed for acts committed by the parent itself, including, for example, the selection of someone to perform an act, where the parent company is under a duty to exercise reasonable care towards the ultimately injured plaintiff.¹⁴

¹¹ Murase, *supra* note 10 at 374.

¹² For reasons of simplicity, the following discussion will not distinguish between Canadian and American doctrines, although reference will be made to sources from both jurisdictions. As will become evident from the extensive footnotes that follow, the principles that govern corporate liability are complex, and there is no clear consensus as to how liability should be dealt with in even the simplest of corporate structures. Relationships between parent companies and their subsidiaries are inevitably even more complex.

¹³ Philip I. Blumberg, *The Law of Corporate Groups: Problems of Parent and Subsidiary Corporations under Statutory Laws of General Application* (Boston: Little Brown and Company, 1989) at 611. For an extensive list of recent academic writings on the liability of parent companies for environmental harm of their subsidiaries, see Blumberg, *The Law of Corporate Groups: Problems of Parent and Subsidiary Corporations under Statutory Laws of General Application*, 1997 Supplement (Boston: Little Brown and Company, 1997) at 253-56. See also Muchlinski, *supra* note 10 at 323-25.

¹⁴ G.H.L. Fridman, *The Law of Torts in Canada*, vol. 2 (Toronto: Carswell, 1990) at 311. The basis of this idea is that some duties cannot be delegated, such that the failure to perform or satisfy them will be attributed to the party on whom the law places the duty, even if its breach was as a result of someone else's act or

Conceptually, it is necessary to view the action of the parent company entity as being accomplished by various human participants who are "moving parts in an intricate corporate mechanism."¹⁵ For example, if the activities are a series of meetings of the board of directors of the parent company, the legal analysis would see these meetings not as acts of the agents on behalf of the corporate principal but rather as "the physical manifestation of corporate commitments. As such, they are acts *by* the corporate entity." This conception of the corporate personality parallels the "identification" theory of corporate activity that is well-established in Canadian corporate criminal law and that may have evolved as a means of circumventing the limitations of vicarious liability in attributing criminal law's requisite *mens rea* to the corporate person.¹⁶ Traditionally, liability for corporate torts has tended to focus on the vicarious liability approach since it is generally easier to establish. However, in cases of parent company liability involving issues of jurisdiction, a focus on the principles of direct liability may serve to clarify the underlying allegations.¹⁷

omission. The placing of the legal duty upon the parent corporation would be governed by the usual tort law principles, requiring a consideration of whether it would reasonably be within the contemplation of the parent corporation that the act or omissions would likely cause harm to the plaintiffs. It would then be necessary for the plaintiff to prove on the balance of probabilities that her damage or loss was caused by the defendant's negligence, bringing in issues of causation and remoteness. See Fridman, *The Law of Torts in Canada*, vol. 1 (Toronto: Carswell, 1989) at 233-41; 320-29.

¹⁵ Bruce L. Welling, *Corporate Law in Canada: The Governing Principles*, 2nd ed. (Toronto: Butterworths, 1991) at 109. This view of corporate personality presented is based upon the one advocated by Welling in a chapter entitled "The Scope of Corporate Personality in Modern Canadian Law" at 99-119. The application of Welling's view of corporate personality to the parent-subsidiary relationship is my own.

¹⁶ *Ibid.* at 152-58, where Welling explores the relationship between principles of corporate liability in criminal law and tort. See also all three cases referred to in note 28, which concern the discussion of "directing mind and will" theory in Canadian law.

¹⁷ A striking example of this focus can be found in the English jurisdictional case *Lubbe v. Cape Plc.* (July 30, 1998) Eng. C.A., Civil Division (unreported) [hereinafter *Lubbe*]. *Lubbe* concerned the liability of Cape London, the defendant (English) parent company, for the injuries suffered by individuals in South Africa as a result of exposure to asbestos from asbestos mines and mills at wholly owned subsidiaries. The wording of the original statement of claim alleged that the defendant company "operated and/or had responsibility [through its subsidiaries] for the mines and mills" in South Africa. The trial judge then stated

the issues as including "Is Cape London liable in law for the breaches of duty by the South African companies?" At the Court of Appeal, the plaintiffs submitted that the trial judge had misunderstood the nature of the allegations, confusing them with some form of vicarious liability for the acts of agents or subsidiaries in South Africa rather than accepting that the injuries were caused by negligence of the defendant company itself through its directors and officers. The statement of claim re-formulated the central allegation as follows: "Whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?" It was accepted at the Court of Appeal that the plaintiffs did not rely upon a form of vicarious liability and, moreover, that the difference was important, "because the alleged breaches of an independent duty of care owed by the defendant took place in England rather than in South Africa." Ultimately, the Court of Appeal decided that South Africa was not clearly and distinctly a more appropriate forum for the litigation and allowed the appeal so that the litigation could take place in England. (A second significant factor in this decision was the fact that the South African forum was unavailable to the plaintiffs until the defendant offered undertakings to submit to that jurisdiction.) The defendant's petition to the House of Lords was refused on December 16, 1998. However, the jurisdictional question was revisited after several thousand South Africans brought a group action against Cape London.

In *Group Action Afrika v. Cape Plc.* (July 30, 1999) Eng. Q.B. (unreported) [hereinafter *Group Action Afrika*], Buckley J. claimed that the fact that there could be three thousand plaintiffs as opposed to the five individuals in the original *Lubbe* action added dramatically to the South Africa weighting. This fact was in part due to the fact that causation would have to be investigated, as parts of South Africa were "awash" with asbestos at the time, and Cape London was not the only operator in the relevant areas. As a result, Buckley J. held that the change in circumstances since the Court of Appeal decision was such that he should reconsider the *Lubbe* action. Significantly, the plaintiffs argued that the "central" issue to be determined was the relationship between the defendant and the South African operations (essentially, the duty of care), the documentation of which would be in England, while South African documentation would go more towards foreseeability of risk, breach, and causation. Buckley, J. ultimately held that South Africa was the main source of relevant documentation since it was necessary to look at the tort as a whole and in the context of the group action. He concluded that South Africa was clearly and distinctly the more appropriate forum after a consideration of the availability of legal aid and the fact that the defendant had submitted to the South African jurisdiction. This decision was upheld on appeal. See "DAC Wins Appeal Case for Asbestos Company," Lawyer Online (October 10, 1999) at <<http://www.the-lawyer.co.uk>>. However, a further appeal to the House of Lords was allowed, and the stay upheld at the Court of Appeal was removed. See *Schalk Willem Burger Lubbe (Suing as Administrator of the Estate of Rachel Jacoba Lubbe) and 4 Others v. Cape Plc.* (July 20, 2000).

According to principles of vicarious liability, the parent company would be held liable for a tort committed by the subsidiary, as long as the tortfeasor and the defendant were connected by some relevant juridical relationship.¹⁸ This is the point at which the doctrine of piercing the corporate veil comes into play.¹⁹ Piercing the

¹⁸ Fridman, *supra* note 14 at 314.

¹⁹ Blumberg, *supra* note 13 at 612. See also Richard S. Farmer, "Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard" (1994) 19 *Journal of Corporation Law* 769. Farmer examines the common law doctrine of piercing the corporate veil in US jurisprudence, noting that three elements must generally be shown before the two entities will be considered as one for legal purposes: (1) control — not just through stock ownership but the complete domination of the policy, practices, and will of the subsidiary; (2) the control was used to commit fraud or wrong by the parent through the subsidiary, that is, to avoid legal obligations or statutory duties, or simply to limit the plaintiff's rights; and (3) the fraud or wrong resulted in injury to the plaintiff. Farmer presents a long list of factors that may be considered by courts in deciding whether the parent corporation has exercised the requisite control, noting that, ultimately, there is a great deal of inconsistency and unpredictability in the application of the common law doctrine of corporate veil piercing (Farmer at 773-75 and 778).

For the Canadian perspective on the circumstances in which a court will pierce the corporate veil, see G. Phillips, *Personal Remedies for Corporate Injuries* (Toronto: Carswell, 1992) at ch. 7. Phillips first notes: "The law about piercing the corporate veil reflects badly on the legal system, on the legal profession, and on the judiciary. No one knows why the veil should be pierced, when the veil will be pierced, or what it means for the veil to be pierced. Writers have been expressing dismay about the unprincipled nature of the law in this area for decades. Many of the decisions are irreconcilable. Most cannot be justified on any acceptable basis" (Phillips at 133). Phillips then divides the circumstances for veil piercing into six doctrines: "fairness" or "justice"; agency; trust; group enterprise; "fraud"; and, "most importantly," the "alter ego" or "instrumentality" doctrine (Phillips at 133). He summarizes the present state of Commonwealth law on piercing the corporate veil as follows:

- 1 a company will be equated with the collection of its shareholders if the shareholders are using it to effect a purpose, or to carry on an activity, that they could not properly effect or carry out themselves;
- 2 a company will also be equated with the collection of its shareholders if they are using it as their "alter ego";
- 3 it is difficult if not impossible to predict in advance when a company will be characterized as the "alter ego" of its shareholders, and it seems that this characterization can be made whenever there would be something opprobrious in the shareholders' taking advantage of the company's separate legal personality;
- 4 a company and its parent or sisters will sometimes be equated under the "group enterprise doctrine"; and
- 5 none of these doctrines has any rational basis (Phillips at 172-73).

corporate veil to get to the corporate parent's assets represents an exception to the general presumption that the corporations are formally and functionally independent. Thus, it will only be available where it has been established that the parent corporation has exercised the requisite degree of control over its subsidiary.²⁰

A third possibility has emerged under the doctrine of lifting the corporate veil: "an emergent norm of international law" that holds TNCs "strictly liable for accidents from hazardous activities conducted by their subsidiaries."²¹ The "enterprise entity" doctrine replaces an approach that is based on exceptions to the otherwise inviolable corporate separation between parent and subsidiary with one that deduces parent company liability from the fact of

²⁰ Farmer, *supra* note 19; and Blumberg, *supra* note 13.

²¹ Murase, *supra* note 10 at 382 and 375-82 (absolute liability in Canadian parlance). This emergent norm is said to have been strengthened by the settlement made by Union Carbide Corporation [hereinafter UCC] after the Bhopal disaster, which occurred at a chemical plant owned and operated by Union Carbide India Limited [hereinafter UCIL], a subsidiary of UCC. UCIL was incorporated under the law of India and had apparently been fairly independent for fifty years. Despite UCC having contended before an Indian court that it had nothing to do with UCIL, UCC reached a settlement by way of order of the Supreme Court of India under which UCC agreed to pay US \$470 million to India in full settlement of all claims, rights, and liabilities related to, and arising out of, the disaster. While UCC denied any role in the day-to-day operations of the plant, the general design of the Bhopal plant was sold to the subsidiary by the parent company, which was then developed and subsequently modified by UCIL locally, receiving the approval of various regulatory agencies of the government of India. See Sudhir K. Chopra, "Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity" (1994) 29 *Valparaiso Law Review* 235 at 236 and 242; U. Baxi and A. Dhanda, *Valient Victims and Lethal Litigation: The Bhopal Case* (Bombay: N.M. Tripathi, 1990). Further evidence of this norm may be found in the millions of dollars routinely expended by Canadian parent mining companies in efforts to clean-up toxic spills. While these efforts are often inadequate, and the compensation paid to victims negligible, the involvement of the parent may acknowledge the existence of legal responsibility. See Damsell, *supra* note 5 at 251. See also Muchlinksi, *supra* note 10 at 325-30. On the other hand, the involvement of parent companies in these clean-up operations may be attributed to a sense of moral responsibility, distinct from the acknowledgment of legal responsibility, or, as is more likely, it may simply reflect extra-legal incentives, such as reputational concerns.

For an analysis of the group enterprise doctrine in Canadian law, see Phillips, *supra* note 19 at 140-42, who notes at 140 that the theory has been accepted in some decisions and rejected in others. See also Welling, *supra* note 15 at 113.

economic integration between itself and the subsidiary.²² Whether a court will perceive a parent company as exercising sufficient control over the decision-making of a subsidiary or whether the TNC entity as a whole will be perceived as sufficiently integrated to be liable for the resulting negligence is a complex question that will depend on the facts of the individual case.²³ It is clearly more

²² Muchlinski, *supra* note 10 at 328, who states: "This recognizes the corporate group as a distinct form of business association, thereby opening the way for the evolution of a specialized legal regime going beyond the paradigm of the single unit limited liability joint stock company." An interesting variant on this idea is a proposal by Farmer, *supra* note 19, that a standard be established requiring a parent corporation to exercise due care to ensure the financial viability of the subsidiary, with the focus on the risks of environmental liability presented by the subsidiary's activities and the presence of sufficient assets, including liability insurance, in light of these risks. This approach would provide a more effective and principled approach to determining whether a parent corporation must pay for the environmental obligations of its subsidiary (Farmer at 806-7). For Canadian support for the principle of shareholder liability for an undercapitalized corporation's tort liability, see Welling, *supra* note 15 at 143-49. For a critique, see Phillips, *supra* note 19 at 161-65.

²³ Murase, *supra* note 10 at 375-82; Muchlinski, *supra* note 10 at 324-27. For a sample of US jurisprudence, see *In re Oil Spill by the Amoco Cadiz off the Coast of France on 16 March 1978*, 699 F. 2d 909 (7th Cir. 1983) [hereinafter *Amoco Cadiz*], where US jurisdiction was taken, and 954 F. 2d 1279 (7th Cir. 1992), where Standard Oil was found liable for negligence due to its extended capacity for decision-making and control over subsidiaries, causing a supertanker to go aground in the territorial waters off France and a massive spill of crude oil (liability thus being attributed on both direct and vicarious liability grounds: its own active involvement through decision-making and the close control over the subsidiaries); *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F.Supp. 842 (S.D.N.Y. 1985) [hereinafter *Bhopal*], where US jurisdiction was dismissed conditionally on *forum non conveniens* grounds, provided that Union Carbide consent to submit to the jurisdiction of the courts of India — this condition (but not others) was upheld on appeal 809 F. 2d 195 (2nd Cir. 1987). The plaintiffs in the *Bhopal* case attempted to present a tort claim on the basis of the theory of multinational enterprise strict liability (absolute).

For a Canadian perspective on issues of corporate control in parent-subsidary relations, see Neil C. Sargent, "Corporate Groups and the Corporate Veil in Canada: A Penetrating Look at Parent-Subsidiary Relations in the Modern Corporate Enterprise" (1987-8) 17 Man. L.J. 156. Sargent focuses here not on establishing which principles should govern liability in parent-subsidary relations but rather on exploring the reality of the nature of corporate group organization. He notes, among other things, that research disclosed that the traditional legal model of responsibilities of directors did not correspond to the *de facto* allocation of managerial responsibility within the sample group. This finding is particularly evident in the case of boards of directors of subsidiary corporations, especially where the parent corporation is foreign owned. Thus,

significant to determine whether a subsidiary is “effectively controlled” by a parent company than whether it is “substantially owned,” particularly in light of the maximum levels of foreign investment that may be set by the host country.²⁴

It is instructive at this point to examine briefly the similar liability principles that have emerged in the application of environmental regulatory schemes.²⁵ For example, environmental offences in Canada are traditionally classified as public welfare offences and, thus, are presumed to be offences of strict liability within the classification system adopted by the Supreme Court of Canada in *R. v. Sault Ste. Marie (City)*.²⁶ A due diligence defence, which is often specifically incorporated into legislation,²⁷ is available if the accused took all reasonable steps to avoid the event. In the context of corporate liability, this defence requires those individuals who are “the directing mind and will of the corporation, whose acts

while two-thirds of independent or parent corporation boards exercise some degree of control over corporate decision-making, only 25 per cent of the boards of subsidiaries exercise the same degree of control. Instead, the tendency for corporate control within a parent-subsidiary context is for it to be exercised through managerial links rather than through the corporation's board (Sargant at 164).

²⁴ Murase, *supra* note 10 at 383-84, citing the case of Asian Rare Earth Company [hereinafter ARE], a Malaysian subsidiary of the Japanese company, Mitsubishi Chemicals, of which Mitsubishi owned only 35 per cent of ARE stock. By “effectively controlled,” I mean to refer to the potential for effective control.

²⁵ For an examination of the various interpretive principles applied to parent corporation liability in the US under the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC, s. 9607(a) [hereinafter CERCLA] (see discussion of CERCLA later in the article under the heading “Recognition and Enforcement of Judgments”) Farmer, *supra* note 19 at 779-85; Blumberg, *supra* note 13 at 613-28, and Blumberg, *supra* note 13, 1997 Supplement, at 257-311. The CERCLA legislation makes no specific reference to parent corporations or other shareholders. Instead it makes use of four classifications of potentially responsible persons including the current owner and operator of the facility, the former owner and operator, generators of hazardous waste, and transporters of hazardous waste. Courts have filled in the gap by articulating three different liability standards, which Farmer categorizes as the capacity to control standard; the actual participation standard; and the traditional corporate veil piercing standard. Again, as these tests are not uniform across jurisdictions, parent corporation liability under CERCLA is as unpredictable as it is for torts or other obligations.

²⁶ *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 at 1325-26 [hereinafter *Sault Ste. Marie*].

²⁷ See, for example, s. 78.6 of the Fisheries Act, *supra* note 7; s. 283 of the CEPA, 1999, *supra* note 7.

are therefore in law the acts of the corporation itself” to have established a proper system to prevent the commission of the offence as well as to have taken reasonable steps to ensure the effective operation of such a system.²⁸ The language of “directing mind and will” is drawn from principles of corporate criminal liability and is in accordance with the principles of direct tort liability discussed earlier in this article. While it is clear that a parent corporation, exercising effective control over the decision-making of its subsidiary, could be held to be the directing mind of the subsidiary, it is still necessary for the act of the subsidiary to be imputed to the corporation for liability to be found.²⁹

In the context of transnational environmental litigation, the distinction between different types of corporate liability principles becomes critical. However, it is often not portrayed as being critical in the judgments that address jurisdictional issues. Where litigation is commenced in the home state, arguments are often made that the host state forum would be a more appropriate forum, based on the location of elements of proof. Yet, the question of which elements must be proven will depend on the form of liability being argued. For example, allegations of direct liability will focus attention on the acts of the parent company in the home state, whereas allegations of vicarious liability should focus more

²⁸ *Sault Ste. Marie*, *supra* note 26 at 185. The question in the *Sault Ste. Marie* litigation was whether a municipality could be held liable under s. 32(1) of the Ontario Water Resources Act, R.S.O. 1970, c. 332, for the acts of a waste disposal company with which it had entered into an agreement for the disposal of all refuse originating in the city. The Supreme Court ordered a new trial to allow the municipality to lead evidence related to the due diligence defence. The language of “directing mind and will” was drawn from the United Kingdom case *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153 (H.L.), which was also applied by the Supreme Court of Canada in the leading case on corporate criminal liability, *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662. Liability under this approach is considered to be primary, or direct, rather than secondary or vicarious.

²⁹ See Dianne Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora: Canada Law Book, 1990); J. Swaigen, *Regulatory Offences in Canada: Liability and Defences* (Toronto: Carswell, 1992). While corporate liability for harm caused by a subsidiary is not directly addressed in legislation, deeming provisions do exist in many statutes whereby an “act or thing done or omitted to be done by an officer, official, employee or agent of a corporation in the course or performance of his or her employment or in the exercise of his or her powers or the performance of his or her duties shall be deemed to be also an act or thing done or omitted to be done by the corporation. See s. 192 of the OEPA, *supra* note 7; s. 124 of the CEPA, 1988, *supra* note 7; and s. 282(1) of the CEPA, 1999, *supra* note 7.

upon the actions of the subsidiary in the host state. The doctrine of "enterprise liability" would also likely focus more upon decisions made at the parent company than at the subsidiary level. Thus, misunderstandings are bound to arise if liability principles are not clearly articulated in arguments before the court. Problems of this sort are just the beginning of those that face plaintiffs in negligence actions in the forum of the corporate parent.

TORT LITIGATION IN THE HOME STATE

JURISDICTION

Introduction

The "basic constitutional doctrine" of the law of nations is said to be represented by the sovereignty and equality of states.³⁰ Jurisdiction, whether legislative, administrative, or judicial, is an aspect of this sovereign equality.³¹ In order to be in conformity with public international law, there is a presumption that the assumption of jurisdiction will be territorial,³² yet, by maintaining a system of courts that are empowered to decide civil cases, states must be prepared to apply private international law when it is appropriate to cases involving foreign elements. Understandably, municipal courts are often reluctant to assume jurisdiction in cases involving a foreign element since "excessive and abusive" assertion of jurisdiction could lead to "international responsibility or protests at *ultra vires* acts."³³

Public international law does, however, allow for prescriptive jurisdiction to be "extraterritorial" as long as it is grounded in acceptable principles. The Supreme Court of Canada has articulated

³⁰ Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 289.

³¹ *Ibid.* at 301.

³² For the most recent pronouncement of this underlying presumption by the Supreme Court of Canada, see *R. v. Cook* (1998), 164 D.L.R. (4th) (S.C.C.) at 17 (per Cory and Iacobucci JJ.), and at 55-57 (per Bastarache J.) [hereinafter *Cook*].

³³ Brownlie, *supra* note 30 at 302-3. Brownlie notes that "as civil jurisdiction is ultimately reinforced by procedures of enforcement involving criminal sanctions, there is in principle no great difference between the problems created by an assertion of civil and criminal jurisdiction over aliens. In either case, the prescriptive jurisdiction is involved, and, in any case, anti-trust legislation often involves a process that, though formally 'civil,' is in substance coercive and penal."

its own principles in the context of prescriptive jurisdiction of criminal law, according to which a Canadian court may take jurisdiction over acts that take place in another state if a sufficient portion of the activities constituting the offence have taken place in Canada, thereby establishing a “real and substantial” link between the offence and this country.³⁴ The requirement for a “real and substantial” connection is also found in the private international law sphere of Supreme Court jurisprudence, arising both in the context of the assumption of jurisdiction and in the enforcement of foreign judgments.³⁵ The territorial jurisdiction of the courts of a province enables them to exercise jurisdiction over defendants who reside, or are present, in the province. However, the requirement of “a real and substantial connection” has become the absolute constitutional limit on the power of each province to confer jurisdiction on its courts.³⁶ Although this constitutional standard was articulated in the context of the interprovincial conflict of laws, it may be interpreted based on a presumption of conformity with international law. Indeed “[i]nternational comity demands no less than interprovincial comity.”³⁷ As a result, a constitutional analysis of “real and substantial connection” is simultaneously a public international law “extraterritoriality” analysis.

The first claim that is likely to arise upon litigation commencing in Canada against a parent company for environmental harm caused by a subsidiary overseas is that a Canadian court does not have jurisdiction to hear the action. This jurisdictional question

³⁴ See *Libman v. The Queen*, [1985] 2 S.C.R. 178, 21 C.C.C. (3d) 206 at 232 [hereinafter *Libman*]; *Cook*, *supra* note 32 at 51-52. The possibility and implications of the “extraterritorial” application of Canadian criminal and regulatory environmental law will be explored in greater detail later in this article.

³⁵ See *Morguard Investments v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 (S.C.C.) [hereinafter *Morguard Investments*]; *Hunt v. T. & N. PLC*, [1993] 4 S.C.R. 289 (S.C.C.) [hereinafter *Hunt*]. See also J.G. Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997) at 51-56.

³⁶ Castel, *supra* note 35. See *Hunt*, *supra* note 35, which gives constitutional status to principles expounded in *Morguard Investments*, *supra* note 35, according to which the exercise of jurisdiction must conform to the demands of territoriality and the principles of order and fairness. Thus, to be constitutionally valid, statutory or judicial conflict of laws rules in interprovincial situations must conform to the demands of territoriality and the principles of order and fairness. As a result, the requirement of “a real and substantial connection” has become the absolute constitutional limit on the power of each province to confer judicial jurisdiction on its courts.

³⁷ Castel, *supra* note 35 at 66.

was examined in the context of a tort action that was brought against the Cambior parent company in the 1998 Québec Superior Court case *Recherches Internationales Québec v. Cambior Inc.*³⁸ as a result of the 1995 gold mining disaster in Guyana. Described by Judge Maughan as “[o]ne of the worst environmental disasters in gold mining history,” the spill led to the institution of class action proceedings in Québec on behalf of the 23,000 Guyanese victims, many of whose “very existence” depended on the integrity of the Essequibo River. Recherches Internationales Québec (RIQ), a Québec company, was formed in order to assist the Guyanese by filing the class action proceedings, claiming a total of \$69 million in damages from the Québec corporation, Cambior Incorporated. Cambior owned 65 per cent of its Guyanese subsidiary Omai Gold Mines Limited,³⁹ whose operations resulted in the spill.

The *Cambior* case, which is the only Canadian litigation to date to flow from a mining disaster in a developing country, will form the basis for the discussion of jurisdictional principles in Canadian law. However, one jurisdictional problem that may arise in this context was not addressed in *Cambior*. According to the *Moçambique* principle, which is explained later in this article, jurisdiction may not be taken where the subject matter of the litigation is foreign land. This issue will be addressed in a discussion of the Australian case *Dagi v. B.H.P. (No. 2)*,⁴⁰ which arose as a result of a mining disaster in Papua New Guinea.

Threshold Jurisdiction

At common law, courts are entitled to assume jurisdiction over any person present in the jurisdiction upon whom a writ can be served.⁴¹ Thus, in a common law province, such as Ontario, *in juris* service of a corporation involves leaving a copy of the document being served with an officer, director, or agent of the corporation or with any person at any place of business of the corporation who appears to be in control or management of the place of

³⁸ *Recherches Internationales Québec v. Cambior Inc.*, [1998] Q.J. No. 2554 (Q.L.) [hereinafter *Cambior*].

³⁹ *Ibid.* at para. 1-5.

⁴⁰ *Dagi v. B.H.P. (No. 2)*, [1997] 1 V.R. 428 (S.C. Vic.) [hereinafter *Dagi*]. Further analysis of the *Moçambique* principle will be found later in the article.

⁴¹ M. Baer et al., *Private International Law in Common Law Canada: Cases, Texts, and Materials* (Toronto: Emond Montgomery Publications, 1997) at 183.

business.⁴² However, additional principles that were recently enunciated by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*⁴³ in the context of the recognition and enforcement of foreign judgments suggest that *in juris* service alone may not be enough to satisfy the legitimate exercise of jurisdiction.⁴⁴ Accordingly, a threshold real and substantial connection must be found to exist between the court that took jurisdiction and the parties to the action before a Canadian court will enforce a judgment.⁴⁵

Since the *Cambior* case arose in a civil jurisdiction,⁴⁶ the civil law jurisdictional basis of domicile, rather than the common law rules

⁴² See Ontario Rules of Civil Procedure, R.R.O. 1990, Regulation 194, r. 16.02 (1) (c). For the Ontario rules concerning service outside Ontario (*ex juris*), see r. 17. Also note that for the purpose of service, an extraprovincial or foreign company that has registered in a province pursuant to provincial company legislation is clearly present in that province for jurisdictional purposes. See *ibid.* at 185.

⁴³ *Morguard Investments*, *supra* note 35. With respect to the text in note 36, it should be noted that the principles expounded in *Morguard* were given constitutional status in *Hunt*, *supra* note 35. See Castel, *supra* note 35; Edinger, "The Constitutionalization of the Conflict of Laws" (1995) 25 Can. Bus. J. 38. This constitutional prohibition is of extra-provincial over-reaching vis-à-vis federal authority over both regulation with interprovincial and international dimensions.

⁴⁴ This principle is most often of concern in cases involving the *ex juris* service of defendants but could arise even if service was *in juris* upon a corporate resident. See Castel, *supra* note 35 at 54-56 and 65-67. See also Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" (1993) 2 Can. Bus. L.J. 4; V. Black and J. Swan, "New Rules for the Enforcement of Foreign Judgments: *Morguard Investments Ltd. v. De Savoye*" (1991) 12 Advocates' Q. 489.

⁴⁵ While perceived as a background concern for courts in the determination of jurisdiction, the question of a sufficient real and substantial connection inevitably also arises in discussions of *forum non conveniens*. It should be noted that in a developing country of common law jurisdiction, an *ex juris* service of the parent corporation on the basis of a real and substantial connection to the litigation linked perhaps to issues of effective control would be treated as a sufficient basis for an assertion of jurisdiction and thus lead to the enforcement of judgments rendered by the foreign jurisdiction in a Canadian court. This will be discussed later in the article under the heading "Recognition and Enforcement of Judgments."

⁴⁶ Indeed, Recherches Internationales Québec [hereinafter RIQ] suggested in June 1998 that the only province in which a Canadian-based company can be sued in its home country for the damage that a mining activity has done to the environment, health, and livelihood of the inhabitants of another country is Québec, due to the governing civil code. See Paul Weinberg, "Canada-Environment: Canadian Mining Company Taken to Court" *Inter Press Service* [Toronto] (June 22, 1998) [Lexis]. While it may be easier to sue in Québec, this claim is without merit.

of *in juris* service, were applicable. According to the Québec Civil Code, Québec authorities have jurisdiction where the defendant is domiciled in Québec, and, in personal actions of a patrimonial nature, either where the defendant is domiciled in Québec, or, if not domiciled, where a fault was committed or injurious act occurred in Québec.⁴⁷ It was clear that the domicile of Cambior was in Québec, which in itself was enough to found jurisdiction.⁴⁸ Maughan J. also noted: “[I]f it is the case that Cambior made certain decisions relating to the construction and operation of the mine which resulted in the failure of the tailings dam, those decisions would have been made in Quebec.”⁴⁹ While this characterization serves to bolster the “domicile” link that is used to ground jurisdiction, it may also be significant for common law jurisdictions

⁴⁷ Civil Code of Québec, Art. 3134, 3148(1) and 3148(3) [hereinafter CCQ].

⁴⁸ Cambior Incorporated initially argued that the court lacked jurisdiction by reason of subject matter, alleging that it had committed no fault that could give rise to an action against it, as it was not responsible for any acts of negligence Omai Gold Mines Limited may have committed. See *Cambior*, *supra* note 38 at para. 16 and 17. Maughan J., however, noted that Cambior’s claim amounted to asking the court to decide the issue of personal liability itself, which could not be raised in the context of a jurisdictional question (*Cambior* at para. 23 and 24). This conclusion would be consistent with an understanding that the substantive issues surrounding liability, whether direct or vicarious and including the piercing of the corporate veil, could and should be dealt with in the parent corporation’s forum court.

Among the facts contained in Cambior’s submissions were that: Cambior, unlike Omai, was not a party to the contracts entered into with consultants and contractors for the design and construction of the mine and, in particular, the tailings pond; the services furnished by Cambior to Omai were minimal and billed to Omai, amounting to no more than \$300,000 per annum; of the 1,000 employees of Omai, only ten were once employed by Cambior; since Omai’s incorporation on August 15, 1991, no Cambior employees had been involved in any aspect of the design or construction of the tailings dam; and, even though Cambior appointed four of the six members of Omai’s Board of Directors, each was required by the law of Guyana to act in Omai’s best interests, not those of the appointing shareholder (*Cambior* at para. 18, items 5, 7, 8, 9, and 10).

Maughan J., on the other hand, noted that while Cambior made proof that it did not act as Omai’s directing mind so as to be the corporate entity responsible, RIQ made proof to the contrary. According to RIQ, Cambior financed the study that determined that the mining project would be economically feasible, which also contained a basic design concept for the tailings pond later built in accordance with this concept. Furthermore, Mr. Gignac, president and chairman of the Board of Directors of both Cambior and Omai, made all strategic decisions relating to Omai’s operations (*Cambior* at para. 25).

⁴⁹ *Cambior*, *supra* note 38 at 22.

since it acknowledges what could be described as a “real and substantial connection,” linking Québec to the action on the basis of the location of decision-making.⁵⁰

Forum Non Conveniens

In the alternative, Cambior alleged that the court should refrain from exercising its jurisdiction on the basis of *forum non conveniens*. Since the common law doctrine of *forum non conveniens* was incorporated into the Québec Civil Code (CCQ) in 1994,⁵¹ the analysis by the Québec court would be similar to what one would expect to find in a common law province. Maughan J. drew upon relevant principles from the Supreme Court of Canada’s decision in *Amchem Products Inc. v. B.C.(W.C.B.)*,⁵² including several principles derived from the judgment of the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.*⁵³ According to these judgments, the existence of a more appropriate forum must be “clearly established” in order to displace the forum selected by the plaintiff, with the

⁵⁰ The significance of this characterization could arise in a situation where, for example, a corporation was served *in juris* in Ontario, then argued that no real and substantial connection to the jurisdiction existed as decision-making took place in another province or country. Arguably, this situation could also provide the basis for a judge to exercise a residual discretion over a non-domiciled corporation served *ex juris*, where the locus of the decision-making was in the forum. The idea that the location of decision-making may be significant as a consideration is consistent with jurisdictional considerations articulated in the Supreme Court of Canada’s products liability case, *Moran v. Pyle National (Canada) Ltd.* (1973), 43 D.L.R. (3d) 239 (S.C.C.) [hereinafter *Moran*], which acknowledged that it is possible for a tort to have more than one locus in the jurisdictional context.

⁵¹ CCQ, *supra* note 47 at Art. 3135, states: “Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.”

⁵² *Amchem Products Inc. v. B.C.(W.C.B.)*, [1993] 1 S.C.R. 897 at 916-21 [hereinafter *Amchem*]. The analysis in *Amchem* was in the context of an application for an anti-suit injunction.

⁵³ *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460 at 476-78 [hereinafter *Spiliada*]. Maughan J. also drew upon guidelines set forth by the Québec minister of justice to determine whether exceptional circumstances exist that would permit a Québec court to decline jurisdiction in favour of a foreign authority, including the availability of witnesses, the absence of familiarity of the seized tribunal with the applicable law, the weakness of the connection between the litigation and the tribunal, and whether the litigation was more closely connected to another state’s tribunal. See *Cambior*, *supra* note 38 at para. 30.

“natural forum” being the one with which the action and the parties have the “most real and substantial connection.” As forum shopping is not to be encouraged, Sopinka J. in *Amchem Products* noted that the factors to be considered in this evaluation should not be designed to secure a judicial advantage to one of the litigants at the expense of other individuals in a jurisdiction that is otherwise inappropriate. As such, the mere loss of a judicial advantage to the plaintiff will not amount to an injustice unless the court is satisfied that substantial injustice will occur in the otherwise appropriate forum. According to *Spiliada*, this argument will only be given weight once the plaintiffs establish, “objectively by cogent evidence,” that they will not obtain justice in the foreign jurisdiction.⁵⁴

The *Cambior* court proceeded with an analysis of eight factors that were relevant to *forum non conveniens*, which are divided in this article into two stages: “more appropriate forum” and “substantial injustice.”⁵⁵ Despite Sopinka J.’s insistence that the analysis proceed in one stage — an approach that was technically adopted by Maughan J. — the *forum non conveniens* analysis more easily falls into two stages. First, an assessment must be made as to whether another forum would be more appropriate for the exercise of jurisdiction. Second, an evaluation is made of whether a loss of juridical advantage or other factors, such as the competence of the alternate forum’s judicial system, would result in substantial injustice to the plaintiff.⁵⁶ However, as Maughan J. pointed out, the exercise of

⁵⁴ *Cambior*, *supra* note 38 at para. 31-35. Maughan J. also examined principles found in jurisprudence of the United States Federal Courts according to which the plaintiff’s choice of forum was lessened since their home forum was not selected, and little weight was given to the fact that plaintiffs would lose juridical advantages should an action not be allowed to proceed in the United States (see *Cambior* at para. 36, citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) [hereinafter *Piper*]). However, these principles were not explicitly endorsed by Maughan J.

⁵⁵ These factors are: (1) the residence of the parties and the witnesses; (2) the location of the elements of proof; (3) the place where the fault occurred; (4) the state of pending litigation in the foreign jurisdiction; (5) the location of the defendant’s assets; (6) the law applicable to the litigation; (7) the advantages to the plaintiffs of suing in their chosen forum; and (8) the interests of justice. *Cambior*, *supra* note 38 at 38 and 39.

⁵⁶ The test in *Spiliada*, *supra* note 53, follows these stages, although it begins with a threshold question of whether the court is satisfied that there is some other available forum having competent jurisdiction where the action may be tried. While I have merged this question with the substantial injustice analysis, it would also be possible to follow the approach laid out in the United States in *Piper*, *supra* note 54, which was applied in *Bhopal*, *supra* note 23. In *Bhopal*, the question of whether there is an adequate (competent) forum in which a remedy

discretion to assume or decline jurisdiction must be made according to the over-arching requirements of order and fairness, as articulated by the Supreme Court of Canada in *Hunt v. T. & N. PLC*,⁵⁷ rather than by “adding up on a scorecard the factors which weigh in favour of or against each party.” I will examine Maughan J.’s analysis in some detail, as it is the only Canadian case illustrating the *forum non conveniens* issues raised in tort litigation against a Canadian parent company of a foreign mining subsidiary for environmental harm.⁵⁸

would be available is addressed in stage one, along with the requirement that the defendant be amenable to process in the alternate jurisdiction. The analysis in stage two of *Bhopal* involved a balancing of public and private interest factors to determine whether to accept or dismiss jurisdiction. It is interesting to note that in *Cambior*, *supra* note 38 at para. 29, a brief initial discussion that was reminiscent of the threshold question in *Spiliada* notes that Guyanese courts do have jurisdiction to try the issues, as the High Court of Guyana tries in first instance actions founded on torts committed within the jurisdiction and has jurisdiction over foreign parties, whether plaintiffs or defendants.

⁵⁷ *Hunt*, *supra* note 35 at 326.

⁵⁸ Indeed, *Cambior* is a virtual model of the problems. It has not been appealed, due to a lack of funding. However, while *Cambior* is the only case dealing with environmental harm, there are, interestingly, two cases in which Canadian jurisdiction has been taken in relation to a parent company of a mining subsidiary, both of which relate to a helicopter crash in Kyrgyzstan in October 1995, in which nine Canadians were killed. Eight of them were from Saskatchewan, and their next-of-kin filed a negligence suit against the parent company Cameco Corporation and various subsidiaries established in Kyrgyzstan, among others. (The subsidiaries involved were the same as those operating the mine in the accident described in note 3 and in the accompanying text.) In *Garrett Estate v. Cameco Corp.* (1996), 151 Sask. R. 86, [1997] 10 W.W.R. 393 (Sask. Q.B.) [hereinafter *Garrett Estate*], the plaintiffs made an application arguing that Saskatchewan was the appropriate forum to try the action, and the court agreed. In *Hermann v. Kilborn Engineering Pacific Ltd.* (1995), 55 B.C.L.R. (3d) 319 (B.C.S.C.) [hereinafter *Hermann*], Cameco Corporation applied for a stay against the single plaintiff, on the basis of *forum non conveniens* (the alternate forum argued was Saskatchewan in light of the ongoing action there.) The court dismissed the application and held not only that BC was the appropriate forum but that BC law would apply. Both courts were clearly influenced by the fact that the victims and plaintiffs were Canadian and also by the fact that a representative of the Canadian Transportation Safety Board had participated in the investigation in Kyrgyzstan, who would presumably be available in Canada to act as a witness. In addition, the fact that the victims of the crash were employees appears to have been significant, as the allegations of negligence arose with respect to the upkeep and operation of the helicopter transport service provided to the employees. There were also complaints that the employer had failed to place life insurance on the lives of the deceased, which it had contracted to do, and flight insurance obtained was rendered invalid since the aircraft in question had not been validly licensed.

A More Appropriate Forum

The analysis in *Cambior* begins with a consideration of the residence of the parties and the witnesses. Maughan J. acknowledged the intention of RIQ to call many of Cambior's board members and executive officers as witnesses in an attempt to "pierce the corporate veil" and establish that Cambior is responsible for any fault that Omai Gold Mine committed. However, he was adamant that the defendant's domicile not be treated as determinative in the analysis but rather be treated as a factor of equal weight to all other factors.⁵⁹ This method suggests a somewhat formalistic approach, undermining the principles of "order and fairness" that Maughan J. acknowledged should drive the exercise of discretion, and leaves no room for an evaluation of relative weight. In this light, Justice Maughan pointed out that while RIQ is also a Québec corporation with its head office and principal place of business in Québec, the primary, if not sole, purpose of its incorporation was to bring class action proceedings in Québec on behalf of the victims of the spill who were resident in Guyana. In an apparently unintentional paternalistic twist, Maughan J. then stated: "The inconvenience to the victims of having to litigate in Quebec is far greater than that of Cambior's Board members and executive officers who would be called upon to testify in Guyana."⁶⁰ This notion that the court understands the best interests of the plaintiff better than the plaintiff itself corresponds with a shift in focus from what the defendants may have done wrong to a purportedly omniscient perspective on the harm suffered by the victims — a focus that ultimately undermines the arguments of the plaintiff.⁶¹

⁵⁹ *Cambior*, *supra* note 38 at para. 43-45. Maughan J. notes at para. 42 that Cambior's head office and executive offices are in Québec as are the minutes of Board meetings and corporate records. It should also be noted, however, that RIQ added Cambior's insurer, Home Insurance, and Golder Associates, a geo-technical consultant invoked in the construction of the Omai Gold Mine's effluent treatment plan, as co-respondents. Neither had filed a declinatory exception as had Cambior, but they reserved the right to do so (para. 15). While these two parties both had places of business in Québec, the representatives of Golder Associates who would be called by RIQ were from the Toronto head office (para. 46).

⁶⁰ *Ibid.* at para. 47.

⁶¹ This paternalistic approach and resultant shift in focus is also found in the *Bhopal* case, *supra* note 23 at 862-66, where even the presence of the Indian government as plaintiff in a US court was not enough to dampen Keenan J.'s contention that India had a stronger public interest in taking jurisdiction over the

Maughan J.'s examination of the role that witnesses other than the parties would play in the litigation illustrates the complexity of litigation of this nature. The forty witnesses to be called by RIQ to give evidence⁶² were located in Vancouver, Ottawa, Montreal, Edmonton, the United States, and the United Kingdom. Thus, even though only ten of these witnesses would be compellable by a Québec court, this was ten more than were compellable in Guyana.⁶³ Maughan J. noted that absent from RIQ's list were witnesses whom RIQ would be required to call in order to prove damages and causality, many of whom would no doubt be members of the class of victims residing in Guyana.⁶⁴ However, it is not at all clear that these witnesses would in fact have been required to be present, given the use of a representative plaintiff in class action proceedings and given that, in any case, causality in the context of the breach of a tailings dam should be relatively easy to prove. Once again, Maughan J. appears to have been adding up numbers rather than evaluating the relative weight that should be given to different types of witnesses. As a result, the focus of inquiry shifted from the actions of the defendants to the locus of the damage suffered by the plaintiffs. As an additional consideration, Maughan J. pointed out that all six members of the Commission of Inquiry, which had already investigated and reported much of the evidence that would undoubtedly be heard at trial, were Guyanese.⁶⁵ Thus,

litigation than the United States. See critique of the judgment in U. Baxi, "Introduction: Towards the Revictimization of the Bhopal Victims," in Indian Law Institute, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (Bombay: Tripathi Bombay, 1986) at 1-34.

⁶² The evidence would consist of, among other things, engineering relating to the construction and design of the tailings dam, mine construction, management and supervision, and the management of events during and after the spill.

⁶³ Only those individuals residing in Ottawa and Montreal would have been compellable by a Québec court.

⁶⁴ *Cambior*, *supra* note 38 at para. 51-54. Maughan J. goes on to outline the allegations put forward by RIQ of physical damage caused by long-term health risks as a result of the contamination of the river as well as of psychological damage, economic damage, and environmental damage.

⁶⁵ Maughan J. also noted that of the twenty members of three specialized committees that the government of Guyana appointed to investigate specific areas of concern, fourteen are residents of Guyana. He noted that it would be logical to assume that a number of these experts would be examined and cross-examined on the facts and opinions on which they had already reported. See *Cambior*, *supra* note 38 at para. 55. While the Commission of Inquiry did not attribute blame for the spill, it did find Omai liable "for all the foreseeable loss and damage" along the Essequibo River. See Weinberg, *supra* note 46.

the court concluded that the location of the parties and the witness clearly favoured Guyana.⁶⁶

In evaluating the location of the elements of proof, Maughan J. was influenced by the seemingly inevitable need for the Guyanese plaintiffs to produce evidence located primarily in Guyana: plans and documentary evidence relating to the construction of the mine and the tailings dam; medical records of the victims; government records relating to the mine, the spill, and the effects of the spill; statistical and other back-up documentation upon which the Commission of Inquiry relied; and business records to prove economic loss.⁶⁷ While these documents could be transported to Québec, other evidence cited by the court would not be so transportable: the rivers into which the effluent spilled and the mine itself. Despite the fact that the tailings dam had been repaired, suggesting that a viewing would be of limited value, Maughan J. claimed that should a viewing be called for, a Guyanese judge would be much better able to assess the impact of the discharge, in the same way that "a Quebec judge would have a greater appreciation . . . of the social and economic consequences of a spill contaminating the St. Lawrence River."⁶⁸ There may be some truth in this assertion, at least as far as the measure of damages. However, the focus is again upon the location of the damage and not upon the location of the decision-making, which arguably could and should be assessed in Canada.

This discussion corresponds with the misunderstanding that is evident in Maughan J.'s examination of the place where the fault occurred. While RIQ asserted that one or more faults and injurious acts had occurred in Québec within the meaning of Article 3148(3) of the CCQ, Maughan J. appears unable to grasp this argument.⁶⁹ RIQ referred in particular to various decisions that

⁶⁶ *Cambior*, *supra* note 38 at para. 47 and 55-56. Note that in *Hermann*, *supra* note 58, the new capacity of the BC Supreme Court to hear witness testimony by video link was considered worthy of some weight.

⁶⁷ It is interesting to note that in *Garrett Estate*, *supra* note 58, the fact that Kyrgyzstan is not a party to the 1970 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters was viewed as adding some merit to the respondents argument that there would be difficulty in getting evidence as to the cause of the crash were the trial to take place in Canada, as all those individuals with knowledge were outside Canada. This consideration, however, was not determinative.

⁶⁸ *Cambior*, *supra* note 38 at 57-59.

⁶⁹ Similar conceptual difficulties have arisen in other litigation against parent corporations, as is evident in *Bhopal*, *supra* note 23, in particular at 852-60, and the discussion of private interest concerns.

Cambior made with respect to the design, construction, management, and operation of the mine and the tailings pond, which were made in Québec. Maughan J. countered that "it is a fact" that Omai Gold Mines Limited managed and operated the mine on a daily basis in Guyana; Guyana is where the mine was built; and the erosion of the core of the dam occurred in Guyana. Then he stated: "Any act of negligence in the construction, management and operation of the mine which Omai committed and for which Cambior, as principal, could be held liable would have occurred in Guyana."⁷⁰ Clearly, however, RIQ was arguing that the decisions themselves were the negligent conduct. Indeed, the very use of the term "principal" suggests a profound misunderstanding of the allegations. It is evident that Maughan J. viewed Cambior's liability as being vicarious for the acts of its "agent" Omai, rather than direct liability for decisions made by Cambior itself.⁷¹ This fact serves to illustrate the significance of the different approaches to parent company liability in cases of contested jurisdiction.

The discussion of pending litigation makes it evident that Maughan J. was not actually confusing litigation against Omai with litigation against Cambior, for he distinguishes the claims filed in Guyana on this basis.⁷² However, the consideration of the availability of assets in either jurisdiction was treated dismissively by

⁷⁰ *Cambior*, *supra* note 38 at 60-62. By way of contrast, note the language used in *Garrett Estate*, *supra* note 58: "Notwithstanding the creation of the subsidiary and related companies and the joint venture company, it is quite clear that Cameco Corporation, a firm with its head office in this Province would ultimately be the *directing mind* of those various firms. The evidence indicates that a number of senior executives attached to the Cameco companies are located in this Province" (emphasis added).

⁷¹ See the discussion earlier in this article under the heading "Liability Principles" for a discussion of these principles and, in particular, the English Court of Appeal decision in *Lubbe*, *supra* note 17. The focus upon decisions made by a corporate parent within the jurisdiction of the home state has also been addressed in at least one appeal court in the United States. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2nd Cir. 1998) [hereinafter *Jota*], involved consolidated appeals from two actions filed against Texaco for environmental and personal injuries resulting from Texaco's exploitation of oil fields in Ecuador: *Aguinda v. Texaco, Inc.* 945 F. Supp. 625 (S.D.N.Y. 1996) [hereinafter *Aguinda*] and *Ashang v. Texaco*, S.D.N.Y. Dkt. No. 94 Civ. 9266 (13 August 1997). The court in *Jota* noted that the District Court should, upon reconsideration of the *forum non conveniens* issue, consider the plaintiff's argument that they are only challenging decisions made by Texaco within the United States and that the necessary documentation and witnesses would be more readily accessible in a US forum (*Jota* at 159).

⁷² *Cambior*, *supra* note 38 at para. 63-64.

Maughan J., who claimed that victims would have little difficulty in executing a successful judgment in either jurisdiction.⁷³ Should the Guyana mine have been shut down as a result of the disaster, it is possible that this factor would have been given more weight, particularly in light of possible bankruptcy issues.⁷⁴

The next factor that was considered by Maughan J. was the law applicable to the litigation. RIQ did not contest that the law of Guyana was the applicable law, perhaps because of Article 3126 of the CCQ, which reads in part: "The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur."⁷⁵ Thus, even if it were proven that Cambior had made decisions in Québec that had caused injury in Guyana, Cambior knew that that was where the injury would occur.⁷⁶ The court then found that the relevant Guyanese law was the common law on mass torts as there was little or no Guyanese environmental legislation in force at the time of the spill.⁷⁷ Maughan J. noted, however, that it might be argued that the common law on mass torts would permit the victims who were not parties to a mineral agreement entered into by the three Omai shareholders before the Omai mine was built⁷⁸ to invoke a breach

⁷³ According to Maughan J., Cambior's assets in Guyana consist of common and preferred shares in the Omai Gold Mines Limited and its rights as a creditor under loan facilities extended to Omai, the value of which would be sufficient to satisfy any adverse judgment against Cambior in Guyana. See *Cambior*, *supra* note 38 at para. 65-66.

⁷⁴ Canadian cases have held that the mere presence of funds unrelated to an action, despite creating a juridical advantage for a foreign party, is not by itself a legitimate means to found jurisdiction. However, these cases also note that jurisdiction might be assumed where it is shown that without the security provided by the presence of the asset in the forum, any judgment the plaintiff might obtain elsewhere would likely remain unsatisfied. See *Tortel Communications Inc. et al v. Suntel, Inc.* (1994), 120 D.L.R. (4th) 100 (Man. C.A.); *Antares Shipping Corp. v. The Ship "Capricorn"* (1976), 65 D.L.R. (3d) 105, [1977] 2 S.C.R. 422 (S.C.C.).

⁷⁵ *Cambior*, *supra* note 38 at para. 67.

⁷⁶ In a common law jurisdiction, it may not have been so clear that the applicable law would be that of Guyana — a possibility that will be canvassed later in this article under the heading "Choice of Law."

⁷⁷ *Cambior*, *supra* note 38 at para. 68.

⁷⁸ *Cambior*, *supra* note 38 at para. 18. The agreement apparently stipulated that Omai Gold Mines Limited would operate as a distinct corporate entity and provided that Omai is bound by the environmental standards set fourth in the

of the environmental standards in the agreement in support of the action against Cambior. While Maughan J. acknowledged that a Québec court would be able to determine this issue, he nevertheless concluded without further explanation that a Guyanese court would be in a better position to apply Guyanese law.⁷⁹

Juridical Advantage and Substantial Injustice

Although the Supreme Court of Canada in *Amchem Products* treated the loss of juridical advantage as a factor to be weighed with others in the *forum non conveniens* analysis, the *Cambior* court's analysis suggests that an evaluation of whether or not a plaintiff is entitled to the benefits a forum has to offer is dependent upon the result of the connecting factors analysis itself. Thus, where the connecting factors lead clearly to a dismissal of jurisdiction by the forum court, the consideration of juridical advantages available in the forum will be more akin to a consideration of whether a denial of jurisdiction would result in substantial injustice being done to the plaintiff. In this light, despite Maughan J.'s conclusion that the Québec class action would be a clearly more advantageous vehicle for the plaintiffs than the Guyanese representative action, he held that it would not be available to the Guyanese victims since the six connecting factors taken together pointed to Guyana as the natural forum for the litigation.⁸⁰ Integral to this conclusion was the

environmental impact statement prepared by an independent consultant. The statement established standards that Omai was required to respect and describes the anticipated impact of the mining project on various aspects of the Guyanese environment (*Cambior* at para. 69-70). On the other hand, the Australian court in *Dagi*, *supra* note 40, refused to accept jurisdiction for the claims based on agreements to which the plaintiffs were not parties, as they called into question the acts of the government of Papua New Guinea and were therefore not justiciable due to the Act of State doctrine. See discussion later in the article under the heading "Agreements, Act of State, and Non-Justiciability."

⁷⁹ In this light, it is interesting to note his further acknowledgment that the "very essence of provisions of the Quebec Civil Code on private international law is that Quebec courts will apply foreign law in many varying circumstances." (*Cambior*, *supra* note 38 at para. 70.) A similar inference was drawn from the choice of law discussion in *Bhopal*, *supra* note 23.

⁸⁰ *Cambior*, *supra* note 38 at para. 71-79. One advantage of the class action related to the limitation of the Guyanese representative action to persons having the "same interest" in the litigation, while the class action allowed recourse to people with "identical, similar or related questions." A second difference related to the manner in which the victims would be required to prove their damages, as the class action would not require each plaintiff to prove damages individually, instead allowing for recovery if evidence enabled the court to establish with

understanding that the victims would not be left without an adequate recourse in Guyana. Even if the representative action was not open to all of the plaintiffs, Maughan J. was convinced that the right to institute individual actions against Cambior before the High Court of Guyana would be adequate, noting that many jurisdictions have chosen not to enact such legislation.⁸¹ Indeed, to ignore the traditional connecting factors and give conclusive or substantial weight to the differences between the laws of Guyana and Québec would have been, from Maughan's perspective, to embark on a comparative law study of the substantive laws and rules of proof and procedure in both jurisdictions. He concluded that this pursuit would have been inappropriate, reflecting neither the intent nor the purpose of the *forum non conveniens* legislation.⁸² However, it is arguable on the basis of a recent House of Lords decision that, given the prohibitive costs of complex litigation of this type, a denial of access to the class action procedure would have essentially rendered the alternate forum no alternative at all.⁸³

The final argument in *Cambior* concerned the claim by the victims that they would be denied justice if the case was heard in Guyana. A Québec law professor and international human rights scholar provided testimony on behalf of RIQ to the effect that a refusal by

sufficient accuracy the total amount of the claims of the members of the class for collective recovery. This method of recovery makes the class action a particularly useful remedy in cases of environmental damage where harm done to each individual may be relatively small

⁸¹ *Ibid.* at para. 77. The fact that only two other Canadian provinces have instituted class action vehicles appears influential to his evaluation.

⁸² *Ibid.* at para. 80-81.

⁸³ See *Connelly v. RTZ Corp plc and another*, [1997] 4 All ER 335 (H.L.), in which jurisdiction was taken due to a lack of access to legal aid in the alternate forum. The rationale was that the plaintiff would be caused substantial injustice if jurisdiction were not taken. This finding was regardless of whether the procedure was found in all sophisticated legal systems, on a basis of absolute access, not simply better access. It is not clear, however, whether the fact that the plaintiff in this case had resumed his domicile of origin in Scotland was influential in reaching this decision. But note that the access to legal aid was not viewed as a problem in *Group Action Afrika*, *supra* note 17. Note that in *Hermann*, *supra* note 58, the fact that the plaintiff would not be able to afford her share of the disbursements in the Saskatchewan action but, rather, intended to take advantage of the summary trial procedures available only in British Columbia was given some weight despite the fact that the result of taking jurisdiction was that two similar actions would proceed in different jurisdictions. The fact that the plaintiff had a legitimate connection to British Columbia was significant with regard to fears of forum shopping.

the Québec court to hear the case would result in a violation of the victim's human rights and a denial of justice. Meanwhile, long-time members of the legal profession in Guyana provided Cambior with evidence, which was held by the court to be superior to that of RIQ's expert, testifying to the quality of the lawyers and judges in Guyana and to the integrity and independence of the judiciary. According to the court, RIQ failed to produce any conclusive evidence to substantiate its belief that Guyana was an inadequate forum due to either a corrupt judiciary or to the procedural deficiencies plaguing its justice system.⁸⁴

The incapacity of a legal system due to corruption may be distinguished from incapacity due to procedural problems; however, there is no fine line between these two issues.⁸⁵ Litigants harmed by mining disasters who choose to appear in Canadian courts will likely come from a wide range of countries, some of which will be democratic and others will not be.⁸⁶ Some of these countries will be supportive of the action and others will not be.⁸⁷ However, no

⁸⁴ *Cambior*, *supra* note 38 at para. 82-99. The court concluded that the procedural deficiencies were reasonable when compared with Québec, despite evidence from a US State Department *Country Report on Human Rights*, which stated that the inefficiency of the judicial system in Guyana was so great as to undermine due process. However, it should be noted that the Omai Gold Mines Limited was served with a representative action in August 1998, which was filed in Guyana. The action represents 23,000 individuals in Guyana seeking US \$100 million as compensation for damages as a result of the tailings spill. See the press release of August 19, 1999 on Cambior's website at <http://www.cambior.com/com-muniqu/cambior/1999/anglais/13_99e.htm>.

⁸⁵ Note that allegations were made as threshold question of the analysis in *Bhopal*, *supra* note 23, that India, a longtime democratic country, did not offer an adequate forum for the litigation, due to procedural deficiencies. This may be contrasted with the allegations of both corruption and procedural deficiencies in *Cambior*, *supra* note 38, given that 1992 marked for Guyana the first un-fixed election since independence in 1966. See Jacobson, *supra* note 6.

⁸⁶ In this light, it is interesting to note that the plaintiffs in the *Amoco Cadiz* litigation, *supra* note 23, included France as well as various French departments, enterprises, associations, and individuals, who brought the action against an American company with its headquarters in Chicago. The reason that the French plaintiffs flocked to the American courts was because France, but not the United States, had ratified the International Convention on Civil Liability for Pollution Damage, which would have severely limited the polluters' liability. See Juenger, *infra* note 250 at 205, note 23.

⁸⁷ That "democracy" provides no guarantee that plaintiffs will receive a fair hearing is evident from the discussion of the *Dagi* litigation later in this article under the heading "The Reality of Host State Participation," where the difficulties that face developing countries in this context will be examined.

matter what the evidence is, the use of arguments that attack the integrity of the host state's judicial system may ultimately distract from a critical aspect of the *forum non conveniens* argument in the context of transnational corporate torts. The argument that the home state should take responsibility for the harms caused by its corporate entities abroad, at least by taking jurisdiction over these actions, is bolstered by a focus upon decision-making that takes place at parent company headquarters. Thus, it is arguable that if properly understood, the theories of direct parent company liability in particular, as well as vicarious liability through the lifting of the corporate veil, would be far more advantageous to plaintiffs than the potentially distracting claims that attack the integrity of a sovereign state. This approach would be consistent with the attitude expressed by Justice Gerard La Forest in the leading jurisprudence on choice of law in tort, which was taken in the Supreme Court of Canada's decision in *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*.⁸⁸ According to La Forest J., in order to promote the accommodation of the movement of people, wealth, and skills across state lines — a by-product of modern civilization — states will “open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state.”⁸⁹ The content of the phrase “interests and internal values of the forum state” in this context would clearly be the subject of much debate.

The Moçambique Principle

While the *Moçambique* principle was not raised in the *Cambior* case, it is possible that it could be raised in a similar situation. This general rule for jurisdiction over foreign immovables is found in the 1893 House of Lords decision in *British South Africa Co. v. Companhia de Moçambique*.⁹⁰ Moçambique, the Portuguese plaintiff company, argued that British South Africa, the defendant company, had seized its African lands and mining rights. Both companies were agents of colonial expansion at a time when there were no courts in South Africa, so the effect of the British court not taking jurisdiction was that British colonization could continue

⁸⁸ *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022 [hereinafter *Tolofson*].

⁸⁹ *Ibid.* at 1047.

⁹⁰ *British South Africa Co. v. Companhia de Moçambique*, [1893] AC 602 (HL) [hereinafter *Moçambique*].

unhindered. According to the principle enunciated in *Moçambique*, an action in respect of trespass on land situated abroad is no right of action, "for an alleged right which the courts would neither recognize nor enforce [does] not constitute any right at all in point of law."⁹¹ This principle is rooted in the characterization of trespass as a local action as opposed to a transitory one.⁹²

The *Moçambique* rule was soon codified in A.V. Dicey and J.H.C. Morris in the following language: "Subject to the exception⁹³ hereinafter mentioned, the court has no jurisdiction to entertain an action for (a) the determination of the title to, or the right of possession of, any immovable situate out of England (foreign land); or (2) the recovery of damages for trespass to such immovable."⁹⁴ In this formulation, it was upheld by the House of Lords in 1979 in *Hesperides Hotels Ltd. v. Muftizade*.⁹⁵ Until recently, this rule was thought to apply to nuisance or negligence actions involving foreign land, with the result that in a situation such as *Cambior* the action would be barred outright.

The *Moçambique* principle was applied by the New Brunswick Supreme Court in 1936 in *Albert v. Fraser Companies Ltd.*,⁹⁶ where it was held that the New Brunswick forum court had no jurisdiction to adjudicate upon a claim for damages either to real or personal property situated in Québec as a result of negligent acts in New Brunswick that obstructed the flow of a river running through

⁹¹ *Ibid.* at 629 (per Lord Herschell L.C.).

⁹² The origin is found in an ancient procedural requirement that the plaintiff in its declaration accurately specify the neighbourhood where the alleged facts had taken place, so that the trial might take place in that neighbourhood. See *Dagi*, *supra* note 40 at 436.

⁹³ According to *Dagi*, *supra* note 40 at 433-34, these exceptions are: (1) the conscience of the defendant is affected by some contract trust or breach of fiduciary duty (that is, personal obligations that in the view of equity would be unconscionable and do not depend for their existence on the law of the locus of the immovable property); (2) the issue as to title arises incidentally; and (3) the issue arises in the Admiralty jurisdiction.

⁹⁴ A.V. Dicey and J.H.C. Morris, *The Conflict of Laws*, 9th ed. (London: Stevens, 1973), as quoted in *Hesperides Hotels Ltd. v. Muftizades*, [1979] AC 508 (HL) [hereinafter *Hesperides*].

⁹⁵ The facts of *Hesperides*, *supra* note 94, concerned the ownership of hotels in Cyprus following Turkey's invasion of Cyprus and the expropriation, and then transfer, of ownership of the hotels. The original owners of the hotels sued the new owners for trespass and conspiracy. Neither action was allowed in respect of the immovables.

⁹⁶ *Albert v. Fraser Companies Ltd.*, [1937] 1 D.L.R. 39 (NBSC).

both provinces. Title to the land was not at issue. However, the plaintiff did seek an injunction. While the majority found the issuing of an injunction to be problematic, as it would require the New Brunswick court to investigate facts outside its jurisdiction in order to determine whether there had been a breach, the dissent by Harrison J. pointed out that all the acts of interference were alleged to have taken place in New Brunswick. Thus, it would be more problematic for a Québec court to issue an injunction restraining the foreign defendant (located in New Brunswick) from committing acts in the foreign country.⁹⁷ Harrison J. also viewed the *Moçambique* principle as being inapplicable to the facts, stating that while it would apply to an action of trespass on the case to foreign land where both the tortious acts and the damage caused arose in the foreign country, in his opinion, it did not directly apply to an action for damages to land in one province caused by tortious acts in an adjacent province.⁹⁸

If one were to take Harrison J.'s perspective seriously, a characterization of the tortious behaviour in cases such as *Cambior* as the making of decisions by the parent company in Canada would be reason enough to suggest that Canadian jurisdiction should not be barred. On the other hand, as problems may arise with regard to the enforcement of orders relating to the clean-up of contaminated land, or of injunctions preventing further contamination, taking jurisdiction in the forum court may be unwise.⁹⁹ In this

⁹⁷ *Ibid.* at 55.

⁹⁸ *Ibid.* at 51-52.

⁹⁹ It is interesting to note that in the *Aguinda* decision, *supra* note 71, the court concluded that a sufficient independent reason to dismiss the action was the plaintiff's failure to join indispensable parties, Petroecuador and the Republic of Ecuador. The extensive equitable relief sought by the parties ranged from total environmental clean-up of the affected lands in Ecuador to a major alteration of the consortium's pipeline. These actions could not possibly be taken in the absence of Petroecuador, now the 100 per owner of both consortium and pipeline, or the Republic of Ecuador, which helped supervise the consortium's activities and owns much if not all of the affected lands. However, the court further noted, while they were both subject to service, they were both immune due to sovereign immunity, which alone would be sufficient to warrant dismissal of the action. In reality, any equitable relief granted without them, would be unenforceable, thus, while it was disputable whether or not the courts of Ecuador could provide adequate remedy, Rakoff J. concluded that the courts of the United States could not. On appeal in *Jota*, *supra* note 71, the failure to join an indispensable party was considered not to be sufficient grounds for dismissing the action, as the court should have allowed the legal claims and any remaining equitable claims to stand. The denial of Ecuador's post-judgment motion

light, it is interesting to note that the Supreme Court of Canada in *Duke v. Andler*¹⁰⁰ refused to recognize a conveyancing order issued by a California court that had taken jurisdiction over a contractual dispute between two Californians over property situated in British Columbia. It is arguable, however, that this distinction between money judgments and specific-performance type orders is illusory, as the California court could just as easily have awarded the compensation as a money judgment reflecting the loss of value in land, which would then have been enforceable in Canada.¹⁰¹

Additional jurisprudence suggests that it may not be necessary to apply the *Moçambique* principle to negligence actions involving damage to foreign land where title is not at issue. Thus, in *Godley v. Cole*,¹⁰² the District Court took jurisdiction over a negligence action for damages to a condominium unit in Florida, holding that the *Moçambique* principle should not be taken as authority for the proposition that wherever damage to foreign land is included in the statement of claim, an action for negligence to recover damages would be precluded from being brought in Ontario. Carnwath J. emphasized that in *Godley*, title to the property was not at issue. Interestingly, the fact that both the plaintiff and the defendant were residents of Ontario was not referred to as a significant consideration.

The question of whether title is at issue or is simply incidental may be significant in negligence actions where indigenous peoples are asserting harm done to their way of life and lands, especially when their title to the lands has not been officially recognized. The 1995 Australian decision in *Dagi v. B.H.P.(No. 2)* provides an interesting, although not entirely convincing, analysis of this problem.¹⁰³

In *Dagi*, four proceedings were brought in the Supreme Court of Victoria against the defendants Broken Hill Proprietary Company Limited (BHP), an Australian company, and its subsidiary, Ok Tedi Mining Limited (OTML) of Papua New Guinea, alleging

to intervene was also reconsidered in *Jota*. While Ecuador had initially filed papers repeatedly with the District Court contesting the court's jurisdiction and seeking a dismissal, it changed its mind after the entry of the judgment. The *Jota* court held that Ecuador's motion to intervene could also be reconsidered at the District Court, provided Ecuador elected to fully relinquish its sovereign immunity.

¹⁰⁰ *Duke v. Andler*, [1932] 4 D.L.R. 529 (SCC).

¹⁰¹ Such a money judgment might in fact force the sale of the land.

¹⁰² *Godley v. Cole* (1988), 39 CPC (2d) 162 (Ont. D.C.).

¹⁰³ *Dagi*, *supra* note 40.

that substances discharged into the Ok Tedi River by the mining operation polluted the waters of the river.¹⁰⁴ The essence of the claims were that the plaintiffs were injuriously affected through their use of the water of the river and of the flood plains and through their use and enjoyment of the land adjacent to the river.¹⁰⁵ Eight causes of action were pleaded against the defendants, including nuisance, trespass, negligence, and strict liability.¹⁰⁶ The *Dagi* court held that the *Moçambique* principle was applicable, stating that a common law court would refuse to entertain a claim essentially concerning the rights, whether possessory or proprietary, to or over foreign land, in the sense that the rights were the foundation or gravamen of the claim.¹⁰⁷ As a result, the trespass and nuisance claims were found not to be justiciable, as were negligence claims based upon proprietary or possessory rights to the land and waters. However, the negligence claims that were framed as the loss of the plaintiff's amenity or enjoyment of the land and waters were justiciable.¹⁰⁸

The distinction drawn by Byrne J. between the claims based upon an assertion of rights as owners or possessors and those that allege a duty of care, a breach of that duty, and consequent damage is somewhat illusory. The *Dagi* plaintiffs were viewed by Byrne J. as

¹⁰⁴ The style of cause for the proceedings are: *Dagi v. B.H.P. (No. 2)*; *Shackles v. B.H.P. (No. 2)* [hereinafter *Shackles*]; *Ambetu v. B.H.P. (No. 2)*; and *Maun v. B.H.P. (No. 2)*. The Ok Tedi Mine was owned 52 per cent by BHP, 18 per cent by Toronto-based Metall Mining Corporation, and 30 per cent by the national government of Papua New Guinea. See Heather G. White, "Including Local Communities in the Negotiation of Mining Agreements: The Ok Tedi Example" (1995) 8 *Transnat'l Law* 303 at 308.

¹⁰⁵ Plaintiffs in three of the proceedings were representatives of clans, which were said to be the possessors and occupiers of certain land adjacent to the Ok Tedi River, each of whom is a riparian proprietor by custom or is entitled to the beneficial use of the water in its ordinary state. The *Shackles* proceeding, *supra* note 104, was initiated on behalf of a fishing company.

¹⁰⁶ In addition, three causes of action were based on rights and obligations imposed on Ok Tedi Mining Limited [hereinafter OTML] under two agreements made between the company and the government of Papua New Guinea, which had been enacted by the Papua New Guinea Parliament. The dismissal of the causes of action relating to these agreements will be discussed later in this article under the heading "The Reality of Host State Participation."

¹⁰⁷ Implicitly, a claim "essentially" concerning the possessory or proprietary rights over foreign land would require a court to judge who has title to the land in order to assess whether any liability would attach for negligent harm to that property.

¹⁰⁸ *Dagi*, *supra* note 40 at 441-52.

having pleaded a cause of action that was intimately connected with their interests in the river, land, and floodplains, which as such "could not arise elsewhere but in the Western Province of P.N.G. [Papua New Guinea]. It is founded in that place. It is not justiciable in this court."¹⁰⁹ On the other hand, while the plaintiffs in the *Maun v. B.H.P. (No. 2)* and *Ambetu v. B.H.P. (No. 2)* proceedings were said to be "living on" the land, and "accustomed to use" the water in its ordinary state, Byrne J. did not view this condition as a claim to a customary right to use the waters but rather as no more than a descriptive statement that the plaintiffs habitually use the waters.¹¹⁰ The characterization of the harmed interests as usage rather than property led Byrne J. to conclude that, as the "proprietary" rights may arise incidentally, rather than as the gravamen of the plaintiff's causes of action, the *Moçambique* principle would not require the court to decline jurisdiction.¹¹¹ Byrne J. further noted that "it is not at all improbable to suppose that the law imposes a duty of care in favour of persons who may use the water downstream as a food source or for a livelihood. The magnitude of the potential danger to the environment which may be caused by such conduct imposes a heavy responsibility on the defendant in such a case."¹¹²

The issue of injunctive relief was briefly referred to in *Dagi*, but not as an element of the *Moçambique* analysis. The plaintiffs maintained that, ultimately, an injunction might need to be awarded to stop the defendants from continuing their negligent acts and omissions. No submissions were made on this point, but Byrne J. noted that there was authority against granting a mandatory injunction that required the performance of acts upon land out of the jurisdiction of the court, and, furthermore, where the magnitude and nature of the work must involve the government of a foreign land, the court may decline to make such an order on the

¹⁰⁹ *Ibid.* at 447.

¹¹⁰ *Ibid.* at 448.

¹¹¹ *Ibid.* at 451. It should be noted that the jurisdictional analysis of the court did not stop here, as it was felt necessary to satisfy the two requirements laid out in *Phillips v. Eyre* (1870), L.R. 6 Q.B. [hereinafter *Phillips*]. While some uncertainty was expressed over the problem of proof of principles of Papua New Guinea law, Byrne J. held that this would not prevent the court from exercising jurisdiction under *Phillips*. He noted, however, that this consideration might be different in the context of a *forum non conveniens* argument, which was not argued in this case.

¹¹² *Dagi*, *supra* note 40 at 457.

ground that it involves an inappropriate intrusion upon the sovereignty of that state. Whether these matters would affect jurisdiction, *forum non conveniens*, or the discretion to grant or not to grant the injunctive order requested by the plaintiffs was not decided. Byrne J. stated, however, that it would be very regrettable if the parties were put to the considerable trouble and expense of preparing and presenting evidence in support of a claim for relief that had no prospect of success, strongly suggesting that the plaintiffs, who were given an opportunity to prepare new statements of claim, reconsider this aspect of their claim.¹¹³ It could be argued that this part of the claim should simply be re-cast as a request for declaratory relief.

CHOICE OF LAW

Should a Canadian court decide to exercise jurisdiction in a case such as *Cambior* or *Dagi*, the question could arise of whether Canadian or foreign law would be applied. This issue has already been alluded to in the foregoing discussion of jurisdictional principles, where owing to provisions of the Québec Civil Code, the choice of law in *Cambior* would have been Guyanese law.¹¹⁴ However, it is not entirely clear that the result would necessarily have been the same in Canadian common law jurisdictions.

¹¹³ *Ibid.* at 458. Byrne J. stated: "Whether this relief will continue to be sought by the plaintiffs may depend upon the ultimate disposition of the justiciability issues and I propose therefore that it be deferred until the plaintiffs have had the opportunity of preparing new statements of claim in response to this judgment." It should be noted in this context that the basis of the *Dagi* claims were rooted in the fact that the mine had *no* tailings dam, unlike the Guyana situation in which a breach of the dam caused several days of damage. In this case, the lack of injunctive relief would severely hamper the relief sought by the plaintiffs. In the end, the claim settled, with Broken Hill Proprietary Company Limited (BHP) agreeing to pay up to Aus. \$150 million as compensation for environmental damage as well as paying for the construction of a tailings containment system. See *The Australian* (March 25, 1997), as cited in Peter Prince, "Bhopal, Bougainville and Ok Tedi: Why Australia's *Forum Non Conveniens* Approach is Better" (1998) 47 I.C.L.Q. 573 at 595, note 120. Prince argues that the Australian courts approach to *forum non conveniens*, which was not argued in *Dagi*, encouraged the settlement, in particular by retaining harassment as the standard against which to judge the inconvenience to the defendant. As a result, the real prospect of armed conflict in Papua New Guinea, like that in Bougainville, was avoided, and the settlement applied Australian environmental standards to determine appropriate remedial action and other compensation (Prince at 574 and 593-95).

¹¹⁴ For information on the discussion of the choice of law, please see the text accompanying notes 75-77.

The leading common law jurisprudence on the choice of law in tort is the Supreme Court of Canada's decision in *Tolofson*,¹¹⁵ which is generally regarded as having established that the choice of law rule in tort is that of the *lex loci delicti* or the law of the place of the wrong. However, several elements remain unclear after *Tolofson*. First, *Tolofson* was concerned with the choice of law between two Canadian provinces, and veiled references to other considerations that might arise in an international context weaken the assertion that the *lex loci delicti* will always be the applicable law should transnational concerns arise.¹¹⁶ Second, the reasoning in *Tolofson* focused greatly on the particular context at issue — that of automobile accidents involving residents of different jurisdictions. It may be arguable, therefore, in the context of the specific allegations of a tort action against a parent mining company premised upon wrongful decisions made in Canada that would foreseeably result in harm in another country, that the law of the place of the decisions could be applicable.¹¹⁷ Finally, the issue of characterization arises: *lex loci delicti* refers to the law of the place of the wrong, which is often assumed to refer to the law of the place where the harm occurred. However, if the wrong is viewed to have taken place in Canada, in that the wrongful decisions were made there resulting in environmental harm overseas, then a *lex loci delicti* rule would in fact point to the applicability of Canadian law. In this context, some support may be found in the discussion of jurisdictional considerations in the Supreme Court of Canada's products liability case, *Moran v. Pyle National (Canada) Ltd.*¹¹⁸ However, while the court

¹¹⁵ *Tolofson*, *supra* note 88.

¹¹⁶ For example, in *Tolofson*, *ibid.* at 1054, La Forest J. notes that he is not averse to retaining a discretion where a rigid *lex loci delicti* rule at the international level would give rise to injustice in circumstances where the double actionability rule of *Chaplin v. Boys* might be relevant. More significantly, at 1047, he indicates that while states as a matter of comity will ordinarily respect the jurisdiction of another state to make and apply law within its territorial limit, this would not necessarily be the case given a breach of an "overriding norm."

¹¹⁷ La Forest J., in *Tolofson*, *ibid.* at 1050, leaves open this question, noting that while the general rule to apply is *lex loci delicti*, "there are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. These territorial considerations may become muted; they may conflict and other considerations may play a determining role."

¹¹⁸ *Moran*, *supra* note 50.

in *Moran* held that it is possible for a tort to have more than one locus in the jurisdictional context, this decision was not meant to apply to the choice of law question.¹¹⁹ Indeed, the basis of the decision would more easily support a Guyanese court taking jurisdiction despite the characterization of the “acts” of the Canadian defendant as having taken place in Canada.¹²⁰

There are other complications that may arise in the transnational mining company tort cases. While I have argued that it would not be inconceivable to apply the personal law of the parent corporation, it should be noted that this argument has been based on a characterization of the issue as one of tort. Another question would be under which system of law is the evidence of “control” to

¹¹⁹ *Ibid.* at 250-51, where a purely jurisdictional test is formulated. The notion that a tort may have more than one locus finds its parallel in La Forest J.’s analysis of the extraterritorial application of Canadian criminal law in the Supreme Court of Canada’s decision in *Libman*, *supra* note 34. In *Libman*, the accused was alleged to have operated a telephone sales solicitation room in Toronto, from which calls were made to residents of the United States in order to induce the purchase of shares in two companies purportedly engaged in gold mining in Costa Rica. Money for the shares was sent to the accused’s associates in Central America. For La Forest J., traditional approaches, such as the “gist of the offence” test or the “completion of the offence” test, both of which establish a single locus for the offence, involved “a large measure of unreality.” He noted that there was a presumption against the application of laws beyond the realm, tied to the territoriality principle, for a country generally has little direct concern in the actions of malefactors abroad, and other States may legitimately take umbrage if a country attempts to regulate matters taking place wholly or substantially within their territories. However, a transnational offence may be subject to the jurisdiction of the Canadian courts where a significant portion of the activities constituting the offence took place in Canada, establishing a “real and substantial link” between the offence and Canada. This test, La Forest J. noted, was well known in public and private international law, and its’ outer links “may well be” coterminous with the requirements of international comity. La Forest J. pointed out that a transnational offence of this kind may occasionally be subject to prosecution in more than one country, but any injustice that might result could be avoided by resort to pleas of *autrefois acquit* and *autrefois convict* (*Libman* at 232-34), and the discussion of prescriptive jurisdiction later in this article under the heading “The Extraterritorial Application of Canadian Regulatory Law.”

¹²⁰ *Moran*, *supra* note 50. *Moran* concerned the alleged negligent manufacture of a light bulb in Ontario that electrocuted an electrician in Saskatchewan. The Saskatchewan court was allowed to take jurisdiction, on the basis that a manufacturer who tenders his products in the market place “ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods” (at 250-51).

be determined.¹²¹ If the litigation raised issues that related to the terms and standards contained in a mining agreement between the host state and the parent or subsidiary corporation, the choice of law question might then be governed by the proper law of the contract,¹²² which is most likely that of the host state.

The “proper law of the contract” illustrates the adoption of a conflict of laws rule that, in protecting the justifiable expectations of the parties by focusing on their intention, is very much in keeping with the underlying premises of contract law itself. It is not at all clear that such a search for the single-intended governing law should be the driving choice of law analysis in other areas, in particular, in tort, where there is presumably no intention to behave in a tortious manner or to have tortious consequences inflicted upon oneself. It may be arguable that in mining disasters, the inherently risky nature of the activities and the foreseeability of the victims is such that an “intended” law, based upon reasonable expectations, must be found in order to provide certainty for mining operators who must know in advance the potential extent of their liability in order to determine the feasibility of the mining venture itself. However, to assume that the law of the host state must be that law is not necessarily the logical extension of this argument — while the mining companies may intend that the law of the host state be the applicable law, it is not entirely clear that the victims, were they asked in advance, would have been so agreeable. While it could be argued that victims would reasonably expect their damages to be governed by the law of the state in which they reside, this is not at all the same as an intention to be governed by that law, especially if one has little or no access to participation in the political process

¹²¹ In addition, is the issue of control one of substance, or procedure? See P.T. Muchlinski, “The *Bhopal Case*” (1987) 50 M.L.R. 578 at 580. It should be noted that the potential clearly exists for more than one choice of law to govern these types of disputes. This idea was the subject of comment by the English Court of Appeal in *Lubbe*, *supra* note 17, where the court stated: “[T]he issue of whether a duty of care was owed by the defendant, may be governed by English law, even if the other factors making up the alleged tort of negligence are governed by South African law: the kind of hybrid situation envisaged by Dicey and Morris’ Rule 203(2).”

¹²² See, for example, *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (P.C.); *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.* [1984] A.C. 50 (H.L.). Note that in *Hermann*, *supra* note 58, British Columbian law was held to apply to both the tort and contract claims arising out of an accident in Kyrgyzstan, likely due to the fact that a relevant contract of employment was made in BC.

that makes the decision to engage in such a potentially hazardous activity. This argument relates directly to the crucial need for the views of the local populations to be fully represented at the bargaining stage in mining ventures — a concern that will be explored later in this article.

RECOGNITION AND ENFORCEMENT OF JUDGMENTS

Should a Canadian court assume jurisdiction in a case such as *Cambior*, it would be a simple matter to satisfy any resulting money judgment against Cambior since it is a Canadian corporation with assets in the jurisdiction. However, should an injunction be required, for example, obliging a company to clean up the contaminated area, the question would arise as to whether an injunction emanating from a Canadian court could be said to have extraterritorial effect as a substantive intrusion into Guyanese interests.¹²³ This difficulty has already been addressed as a factor to consider in the jurisdictional context.

The reverse situation must also be considered. If a judgment emanating from a foreign court were not enforceable in Canada, it could provide a reason for the Canadian court to take jurisdiction in the first place. At common law, foreign judgments *in personam* are to be recognized and given effect if the original court legitimately exercised jurisdiction over the defendant. This legitimate exercise of jurisdiction could be based on the fact that the defendant was ordinarily resident or carrying on business in the territory; that the defendant submitted to the court's jurisdiction; or that there was a real and substantial connection between the territory over which the court exercised jurisdiction and the subject matter of the proceedings.¹²⁴ Thus, if the cause of action heard in the foreign jurisdiction were one in tort, with monetary damages awarded against a Canadian parent company with assets in Canada, enforcement of the judgment in Canada would be unproblematic as long as the defendant had submitted to the jurisdiction or a real and substantial connection was found, which would presumably be

¹²³ Indeed, Cambior claimed in its submissions that as RIQ had requested an injunction obliging Cambior to restore the Guyanese environment to its original state, as well as to pay damages, the court should decline to take jurisdiction over this aspect of the case. This argument was not addressed by the court. *Cambior*, *supra* note 38 at para. 18, item 11.

¹²⁴ See Castel, *supra* note 35 at 320; *Morguard Investments*, *supra* note 35.

based upon either a direct liability or some form of lifting of the corporate veil.¹²⁵ However, foreign decrees granting injunctions, whether final, interim, or interlocutory, are not entitled to enforcement in Canada.¹²⁶

A different set of problems would arise if the foreign court decided to apply its own state's environmental regulatory scheme to the actions of the Canadian parent company. As many developing countries lack adequate environmental legislation, this scenario may not arise frequently. However, it is sometimes argued that countries should take the responsibility to formulate their own laws rather than looking to foreign courts after disaster has

¹²⁵ In this context, it is interesting to note that Cambior had undertaken not to invoke in Guyana any ground based upon *forum non conveniens* if the Québec Court decided not to take jurisdiction and the victims of the spill instituted suit in Guyana. See *Cambior*, *supra* note 38 at para. 8. A condition to this effect was imposed in *Bhopal*, *supra* note 23, requiring Union Carbide to submit to the jurisdiction of the court of India and continue to waive defences based upon the statute of limitations.

Interestingly, two other conditions imposed by the lower court as conditions for not taking jurisdiction in the United States were later rejected by the appeal court. These were that Union Carbide agree to satisfy any judgment rendered by an Indian court, where such judgment comport with the minimal requirements of due process; and that the Union Carbide submit to the US rules of discovery. See *Murase*, *supra* note 10 at 380; and *In Re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2nd Cir., 1987). This aspect of the *Bhopal* decision was followed in *Jota*, *supra* note 71 at 159, where it was stated that dismissal for *forum non conveniens* was not appropriate in the absence of a commitment from Texaco to submit to the jurisdiction of the Ecuadorian courts for the purposes of this action.

There are essentially two options for creditors seeking to enforce a foreign judgment in Canada: they can file a common law action using *Morguard Investments*, *supra* note 35, or take advantage of registration procedures pursuant to the applicable provincial Reciprocal Enforcement of Judgments Act, if they come from a reciprocating state. However, in Ontario, for example, the Reciprocal Enforcement of Judgments Act, R.S.O. 1990, Chap. R.5, applies only to other provinces. See O. Reg. 322/92. In other provinces it includes foreign jurisdictions. Registration may also be achieved pursuant to the conventions in place between Canada and the United Kingdom, or between Canada and France, if a UK or French judgment is sought to be enforced. In cases of oil pollution, the 1969 International Convention on Civil Liability for Oil Pollution Damage, as amended, may apply, enabling the judgment creditor to apply to the Federal Court for registration. See *Castel*, *supra* note 35 at 301, 317, 321, or generally at Chapter 15, "Recognition and Enforcement of Foreign Judgment."

¹²⁶ *Castel*, *supra* note 35 at 296, see text accompanying note 99 for discussion of *Duke v. Andler*.

struck.¹²⁷ In addition, developing countries have argued that they should not be subject to international minimum environmental standards but should instead be able to establish their own standards.¹²⁸ This argument raises the question of whether any or all judgments that are reached in satisfaction of such legislation would be enforceable in Canada.

The most significant Canadian case concerning the recognition and enforcement of foreign judgments in the context of regulatory offences is *United States of America v. Ivey*.¹²⁹ In *Ivey*, the United

¹²⁷ See *Bhopal*, *supra* note 23 at 862-66, where Keenan J. alleged in the context of balancing private and public interest factors that India has a very serious interest in developing environmental standards, while the United States has no interest in regulating technologies of subsidiaries abroad. This argument may have more merit than it would seem to on the surface, as Union Carbide's preference was for the importation to India of pesticides manufactured in West Virginia, while the Indian government's policy was for self-sufficiency in pesticide production. Consequently, Union Carbide agreed to the building of the plant. See Muchlinski, *supra* note 121 at 578. In these circumstances, the Indian government may be said to have encouraged the introduction of hazardous technologies into its country and so, according to Muchlinski, ought to bear some strict liability for its failure. However, this situation does not necessarily mean that a US court could not take jurisdiction to apportion liability.

¹²⁸ See Rio Declaration, Report of the United Nations Conference on Environment and Development, Distr. General, A/CONF.151/26 (1992), Principle 11. Indeed, interests of comity in this regard are sometimes raised to defeat arguments that a home state should take jurisdiction over this type of litigation. The *Texaco* cases provide an interesting example of this argument. In *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994), the court refused to take jurisdiction on the ground of comity of nations due to the fact that the challenged conduct was regulated by the Republic of Ecuador, and the exercise of jurisdiction by a US court would interfere with Ecuador's sovereign right to control its own environment and resources. This argument was strengthened by the strenuous objection to the exercise of jurisdiction expressed by the Republic of Ecuador at that time. However, by the time of the *Jota* appeal, *supra* note 71 at 159-161, the government of Ecuador was supporting the litigation in the United States, and contended that as a result dismissal on the ground of comity would not be warranted. The court did not have to decide whether or in what circumstances a case might be remanded solely because of a sovereign state's altered litigating position, as other grounds warranted the remand. However, it noted that the comity issue could be reconsidered in light of Ecuador's current position.

¹²⁹ *United States of America v. Ivey* (1995), 26 O.R. 533; 130 D.L.R. (4th) 674 (Ont. Gen. Div.); affirmed (1996), 139 D.L.R. (4th) (Ont. C.A.), leave to appeal to S.C.C. refused, [1997] 2 S.C.R. x (S.C.C.) [hereinafter *Ivey*]. Another case of interest, which also involved Justice Sharpe and CERCLA, *supra* note 25, is *United States of America v. Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.) [hereinafter *Friedland*, 1996]. The *Friedland* litigation concerned a motion by

States government sought to enforce two money judgments that it had obtained in a United States District Court, ordering the defendants to pay the cost of remedial measures undertaken by the United States Environmental Protection Agency in relation to a waste disposal operation in Michigan that was conducted by Liquid Disposal Incorporated (LDI), a Michigan corporation, between

the US seeking a Mareva injunction freezing US \$152 million worth of the individual defendant's assets in the form of INCO shares. The US government had instituted proceedings against Friedland in the US courts for restitution of cleanup costs in connection with environmental damage at the open-pit heap leach gold mine in Summitville, Colorado. The focus of the claim was upon Friedland's activities as a director and at times president or CEO in connection with three companies, Summitville Consolidated Mining Company, and its parent Galactic Resources Incorporated, and its parent Galactic Resources Limited., a Canadian company. The companies had declared bankruptcy. The key issue to be established was whether the United States had a strong *prima facie* case that Friedland had operated the facility within the meaning of the CERCLA statute, which was a high standard to meet given the extraordinary nature of the *ex parte* injunction relief sought. Previous applications for the order had been brought in both a BC court and in Ontario, which granted the injunction on the basis that Friedland was the directing mind of the companies and was aware that the construction and operation of the mine threatened the environment (see *USA v. Friedland*, [1996] B.C.J. No. 2845 — the BC order was discontinued when it was realized that the shares were all physically located in an Ontario bank account. The Ontario judgment of August 21, 1996, by Judge Borins adopts the reasoning of Judge Spencer in BC.) However, Sharpe J. held that the plaintiff had failed to make the full and frank disclosure required of a party seeking the extraordinary relief, and the *ex parte* order was set aside. Among his criticisms were that the plaintiff gave the court a less stringent test for finding liability under CERCLA than was previously used in the Tenth Circuit jurisdiction. Among the facts he found to be significant in Friedland's favour were that Galactic Resources was a publicly traded company with the usual governing structure — not a one-man operation, and further, that at the relevant times of bankruptcy and abandonment of the site, he was not involved with the companies.

The *Friedland* case should be distinguished from *Ivey* on the basis that it concerned the liability of an individual, rather than a corporate parent, and in light of the context as an *ex parte* injunction. This litigation has spawned more litigation, as Friedland filed a statement of defence and counterclaim seeking damages from the US in tort in light of an undertaking the US had made to pay any damages to Friedland should the injunction have turned out to be wrongly given. Friedland's allegations include the fact that the US had approved all of the Summitville's operations, including the heap-leaching pad blamed for the problems. In *Friedland v. United States of America et al.* (1998), 40 O.R. (3d) 747, the US arguments of *forum non conveniens* and sovereign immunity were dismissed. This decision was overturned on appeal: (1999) 46 O.R. (3d) 321. See also Paul Wade, "Friedland Sues U.S. in Pollution Feud," *Globe and Mail* (April 10, 1999) B3. See Bourrie, *supra* note 1 and note 224 for further discussion of the surrounding issues.

1969 and 1982.¹³⁰ The judgments were obtained under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),¹³¹ which authorizes the recovery of environmental clean-up costs through civil proceedings in the US district courts.¹³² Liability is imposed under CERCLA on a variety of parties that are deemed to be responsible for contamination, including the owner or operator of the facility as well as those persons who arranged for the disposal of hazardous substances at the facility. The words "owner or operator" have been interpreted by the US courts to include individuals or corporations who exercise control even if title to the site is held by a distinct corporation.¹³³ The defendants included two Ontario corporations, each of which was at different times the parent company of LDI.¹³⁴

The Ontario defendants were served *ex juris* and did not defend

¹³⁰ These proceedings were the culmination of a lengthy history of proceedings involving Liquid Disposal Incorporated [hereinafter LDI] following a serious accident at its site in 1982. The Michigan Department of Natural Resources issued an order severely restricting operations, a nuisance action was commenced claiming injunctive relief, and a temporary restraining order was issued requiring LDI to cease all operations except those necessary for a safe and orderly shut-down. Following this action, LDI went into bankruptcy. Thus, when the Environmental Protection Agency [hereinafter EPA] notified Ivey and LDI's trustee in bankruptcy of the environmental problems, the trustee indicated that LDI had insufficient funds to respond. See *Ivey, supra* note 129 at 677-79. This outcome would explain the significance of attaching responsibility to the parent company in a bankruptcy situation, which frequently arises in environmental liability cases. Note however the problems in *Friedland, 1996, supra* note 129, where both parent and subsidiary companies declare bankruptcy.

¹³¹ CERCLA, *supra* note 25.

¹³² *Ivey, supra* note 129 at 678-79. Defences to CERCLA, *supra* note 25, are limited to acts of God, acts of war, or omissions of third parties in narrowly defined circumstances. The EPA has the power to issue orders requiring clean-up action, and, if the parties are unwilling or unable to undertake clean-up action, the EPA can initiate clean-up using the Hazardous Substances Superfund.

¹³³ See Farmer, *supra* note 19; and Blumberg, *supra* note 13.

¹³⁴ The defendant Ivey, an individual resident in Ontario, had a controlling interest in LDI and oversaw its management and operations between 1974 and 1982. The defendant Maziv, an Ontario corporation, was the parent of LDI and held 80 per cent of LDI's shares. The defendant Ineco, also an Ontario corporation, acquired the shares Maziv held in LDI in December 1986 — a term of the transfer being that Ineco assumed the liabilities of Maziv. Ivey was the president and chief executive officer of Ineco and was the president, general manager, and a director of Maziv from 1961 to 1986. See *Ivey, supra* note 129 at 677.

the CERCLA actions on the merits. However, in the proceedings in Ontario, which were held to enforce the default and summary judgments that were obtained against the defendants, both individuals pleaded various defences. The defendants first argued that the US District Court lacked sufficient personal jurisdiction over the defendants to support the enforcement of its judgments in Ontario. Sharpe J. concluded with little difficulty that the defendants' ownership and active engagement in the waste disposal business in Michigan, and the fact that the locus of the CERCLA action arose in Michigan, constituted a sufficient "real and substantial connection" to support the exercise of personal jurisdiction over the Ontario defendants under *Morguard Investments*.¹³⁵ There was no discussion of whether it would or would not be appropriate to lift the corporate veil in this case given the transnational context. This consideration would presumably be due to the fact that the nature of liability at issue was a question of statutory interpretation. In this light, it is interesting to note that the Court of Appeal judgment affirming Sharpe J.'s decision stated that it was "no extension of the U.S. sovereign jurisdiction to enforce its domestic judgments against those legally accountable for an environmental mess in the United States by reason of their ownership or operation of American waste disposal sites."¹³⁶

The second defence raised by the defendants was that since the judgments were based on the "penal, revenue or other public law" of a foreign state, they would be unenforceable in Canada. The basis for this assertion lies in the common law doctrine that a forum court may not enforce penal laws of a foreign jurisdiction, which was derived from the Privy Council decision in *Huntington v. Attrill*.¹³⁷ According to Sharpe J., the CERCLA provisions could not be classified as penal in nature, for the imposition of liability is

¹³⁵ *Morguard Investments*, *supra* note 35. Sharpe J. pointed to the fact that Maziv and Ivey had a direct ownership interest in LDI, and Ivey was a principal officer of both corporations, that Ivey was regularly present in Michigan to make decisions concerning the environmental issues that gave rise to the claims that Ivey dealt with, and appeared before, the environmental regulatory agencies on behalf of LDI and that Ineco acquired its interest in the shares on the express understanding that it would assume any liability of Maziv. *Ivey*, *supra* note 129 at 683-84.

¹³⁶ *Ibid.* at 573.

¹³⁷ *Huntington v. Attrill*, [1893] A.C. 150 at 157. Sharpe J. cited the definition of "penal laws" from *Huntington*: "[A]ll suits in favour of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments of such penalties."

restitutionary in nature, directly tied to the cost of the required clean-up, and not imposed with a view to the punishment of the party responsible.¹³⁸ However, this distinction between restitution and punishment is arguably illusory since much environmental legislation includes “criminal” sanctions against which mitigating factors, such as defendant-instituted clean-ups, are often considered.¹³⁹ According to the reasoning in *Ivey*, these laws would be subject to a characterization as “penal,” and thus judgments rendered under them would be unenforceable in a foreign jurisdiction. This fact creates the perverse situation of privileging private law characterizations in transnational contexts, which is at odds with the hierarchical nature of much environmental legislation that is arranged

¹³⁸ *Ivey*, *supra* note 129 at 684. For confirmation of this view, Sharpe J. cited *US v. Monsanto*, 858 F2d 160 (4th Cir. 1988) at 174-5: “CERCLA does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of cleanup costs was not intended to operate, nor does it operate in fact, as a criminal penalty or a punitive deterrent.” The argument that liability imposed under CERCLA, *supra* note 25, is a revenue law or in the form of a tax was quickly dismissed by Sharpe J., who noted that according to *Huntington* the characterization of the nature of CERCLA is up to the court, and the suggestion that CERCLA is a tax “might appropriately be described as ungrounded rhetoric completely inconsistent with [the assertion] that the effect of the law is to require those who have created a hazard to bear the cost of cleanup.”

¹³⁹ See, for example, *R. v. United Keno Mines Ltd.* (1980), 10 C.E.L.R. 43 (Y. Terr. Ct.), in which Stewart J. articulated a list of special considerations to be applied in the sentencing of environmental offences, including remorse, as evidenced by the speed and efficiency of corporate action to rectify the problem or clean up, voluntary reporting of the violation to authorities, and the personal appearance of corporate executives in Court. Fines may in some cases be disposed of to complainants or prosecutors. See, for example, the Fishery (General) Regulations, SOR/93-53 to the Fisheries Act, *supra* note 7. The new CEPA, 1999, *supra* note 7, also contains a list of factors to be considered on imposing a sentence in s. 287. These include: (b) an estimate of the total costs to remedy or reduce any damages caused by the commission of the offence; (c) whether any remedial or preventive action has been taken or proposed by or on behalf of the offender, including having in place an environmental management system that meets a recognized Canadian or international standard or a pollution prevention plan; (d) whether any reporting requirements under the Act or the regulations were complied with by the offender; (e) whether the offender was found to have committed the offence intentionally, recklessly, or inadvertently; (f) whether the offender was found by the court to have been negligent or incompetent or to have shown a lack of concern with respect to the commission of the offence; and (g) any property, benefit or advantage received or receivable by the offender which, but for the commission of the offence, the offender would not have been entitled.

along a continuum from heavy sticks and "criminal" sanctions through civil restitution to voluntary compliance initiatives.¹⁴⁰

The defendants also alleged that even if it was accepted that the regulation was not characterized as penal law, the court had no jurisdiction to enforce the "other public law" of a foreign state.¹⁴¹ This doctrine, as described by J.G. Castel, holds that "laws that are enforced by a foreign state as an assertion of sovereign power . . . may not always be recognized and enforced by Canadian courts if they are political in nature." According to Sharpe J., while Canadian authority on point is sparse, Canadian courts have frequently enforced claims where the exception could have been applied if it were broad enough.¹⁴² Thus, he ultimately rejected the argument, first on the basis that the cases applying the doctrine were distinguishable since the claim in *Ivey* could not fairly be characterized as an attempt by a foreign state to assert its sovereignty within the territory of Ontario.¹⁴³ The second basis upon which Sharpe J. rejected the "public law" argument was tied to his understanding of environmental law as an area where the traditional remedies of the common law have been supplanted by detailed statutory and regulatory regimes. He noted that issues of liability for cleanup and remedial costs are dealt with "awkwardly, if at all, in litigation between private parties" and that jurisdictions including Ontario have established regulatory regimes that encompass the imposition of civil liability for such costs. In this light, there could be no

¹⁴⁰ See, for example, Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993); and Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1995).

¹⁴¹ This argument is based upon Dicey and Morris, *supra* note 94 at 97, stating that English courts have no jurisdiction to entertain an action for the enforcement of "other public law" of a foreign state. Sharpe J. also cited several cases that he found to be distinguishable on this issue. See *Attorney-General of New Zealand v. Ortiz*, [1984] 1 A.C. 1; *Attorney-General (United Kingdom) v. Heinemann Publishers Australia Pty. Ltd.* (1988), 165 C.L.R. 30.

¹⁴² See *Secretary of State of Canada and Custodian v. Alien Property Custodian for the United States*, [1931] SCR 170; *Union of India v. Bumper Development Corp.*, [1995] 7 WWR 80 (AB Q.B.), *aff'd* (Dec. 4, 1995) (AB. C.A.), leave to appeal refused, [1996] 9 W.W.R. xlvii (note).

¹⁴³ According to Sharpe J., "CERCLA represents the judgment of Congress as to an appropriate regime of civil liability for environmentally hazardous substances in certain circumstances. The defendants chose to engage in the disposal business in the United States and the judgments at issue here go no further than holding them to account for the cost of remedying the harm their activity caused." See *Ivey*, *supra* note 129 at 689.

basis for not enforcing a civil judgment in favour of the foreign state. Again, no reference was made to the ease with which the corporate veil was lifted.¹⁴⁴

A further ground in support of enforcing this type of judgment was found in the principle of comity that has underpinned much recent Supreme Court jurisprudence.¹⁴⁵ In this light, Sharpe J. noted the prevalence of regulatory schemes aimed at environmental protection and control in North America, suggesting that in an area of law dealing with such obvious and significant transborder issues, it is particularly appropriate for the forum court to give full faith and credit to the laws and judgments of neighbouring states. To the extent that the comity principle entails elements of reciprocity, Sharpe J. noted that the courts of the United States enforce foreign judgments for environmental clean-up costs similar to those at issue in the case at bar.¹⁴⁶

This exploration of recognition and enforcement is enlightening in a variety of ways. One significant aspect of the *Ivey* judgment

¹⁴⁴ The defendants third argument was based on the assertion that the order violated principles of natural justice, as CERCLA was lacking in procedural protections. In particular, it was alleged that while liability was assumed on the basis of the presumed control test, they were denied the ability to assert defences due to the bankruptcy of LDI. According to Sharpe J., however, this submission did not establish a defence, especially in light of the fact that the defendants failed to avail themselves of the procedural protections actually afforded by CERCLA. He further stated: "Acceptance of the argument that the imposition of strict liability or a relaxed burden of proof should render American judgments unenforceable in Canada would have far reaching consequences. Rules of liability and the burden of proof are preeminently matters for the law of the foreign jurisdiction. I am aware of no authority for the proposition that a judgment rendered on the basis of a strict form of statutory liability will not be enforced. Moreover, as will be seen below, the OEPA, *supra* note 7, imposes similarly strict liability in certain situations." See *Ivey*, *supra* note 129 at 690-93.

¹⁴⁵ See *Morguard Investments*, *supra* note 35; *Tolofson*, *supra* note 88; and *Amchem*, *supra* note 52.

¹⁴⁶ *Ivey*, *supra* note 129 at 689-90; 693-94. The defendants' fourth argument was based upon the application of the public policy doctrine. Sharpe J. noted that while the public policy defence exists in theory it is rarely applied. As Castel puts it, "[i]t is not enough that the local law on the same point differs from the foreign law. Fundamental values must be at stake." Sharpe J. held that the comparison between CERCLA and the OEPA did not advance the case of the defendants, as the similarities between the regimes were more striking than the differences, with, if anything, the comparison with the OEPA significantly strengthening the case for enforcement. "It demonstrates that the Ontario legislature has deemed it necessary to depart from the traditional common law and establish a statutory regime which includes drastic powers and the imposition of statutory liability on those responsible for the creation of environmental hazards. These measures include personal liability of corporate officers and

in the context of transnational corporation environmental liability is its implicit understanding that the requirement for imposing liability upon a parent corporation, either by lifting the corporate veil or through some form of direct liability, is not more burdensome in the transnational context than in the domestic context. Since recognition and enforcement of foreign judgments are based upon the existence of a threshold real and substantial connection between the action and the jurisdiction, the *ex juris* service of a foreign parent by a host state should generally be acceptable. In addition, the "extraterritorial" application of the regulatory law to the Canadian parent corporation was not considered troubling, which suggests that a foreign state could apply its law to the parent corporation, either as a public law or a tort law applied in the foreign state that is seeking recognition in Canada or after a choice of law analysis in a Canadian court that has taken jurisdiction in a tort action. Further, these principles of public policy, reciprocity, and comity could enlighten an interpretation of the "interests and internal values" enunciated in *Tolofson*,¹⁴⁷ which would support the claim that Canada should take jurisdiction when so called upon by litigants in transnational torts.

REGULATORY REGIMES

THE REALITY OF HOST STATE PARTICIPATION

State Ownership and Agreements

It is often alleged that efforts to encourage investment by multinational corporations result in a lax system of laws, regulations, and enforcement of environmental standards.¹⁴⁸ The problem of maintaining high regulatory standards is made more difficult in many developing countries by the high levels of dependency on

directors, Ministry sponsored cleanup and liability for costs of cleanup. While the measures chosen by our legislature do not correspond precisely with those chosen by the Congress of the United States, they are sufficiently similar in nature to defeat the application of the public policy defence."

¹⁴⁷ See *Tolofson*, *supra* note 88.

¹⁴⁸ See report of the non-governmental organization, Mineral Policy Center [hereinafter MPC], entitled "Golden Dreams, Poisoned Streams" as discussed in Danielle Knight, "Environment: Lust for Gold Leaves Toxic Legacy," *Inter Press Service* [Washington] (September 16, 1997). While the MPC report focused largely on the United States, it underlined that water damage due to mines is worse in developing countries. The MPC has studied the large-scale devastation of water resources, harm to aquatic life, and the impact on local communities of mining operations in Africa, Asia, and the Americas.

foreign exchange earnings from mining. In addition, where governments of developing countries become business partners in mining ventures, a confusing and conflicting role is set up for the government as both mine investor and regulator.¹⁴⁹

The Guyanese government, which was a 5 per cent shareholder of the Omai Gold Mine, is an example of this problem. As Guyana had no national environmental protection statute nor any adequate mining regulations in place, the mining operation was governed by a mineral agreement entered into by the three Omai shareholders before the mine was built.¹⁵⁰ The agreement provided, among other things, that Omai would be bound by environmental standards set forth in the environmental impact statement that was prepared by an independent consultant.¹⁵¹ Despite environmental problems with the mine, the nation's heavy economic dependency upon it created an incentive for the government to keep the mine operating.¹⁵² Soon after the disaster, the mine was allowed to reopen with a new, three-times-as-large, \$60 million tailings dam, prompting charges that Cambior was holding the government hostage by threatening to pack up and leave unless its demands for a quick return to production were met. With 1,000 workers, the Omai mine is the largest private employer in the country and also accounts for a full quarter of the Guyanese gross national product.¹⁵³ It is unclear how much choice Guyana would have had in the matter, even without pressure from Cambior, for,

¹⁴⁹ *Ibid.* See also Madeline Cohen, "A New Menu for the Hard-Rock Cafe: International Mining Ventures and Environmental Cooperation in Developing Countries" (1996) 15 *Stan. Envtl. L.J.* 130.

¹⁵⁰ *Cambior*, *supra* note 38 at para. 18, items 2, 3. The agreement stipulated that Omai Gold Mines Limited would operate as a distinct corporate entity, yet Cambior Incorporated acquired extensive powers and duties as "managing member." Cambior's duties included assisting Omai in the daily operations of the mine; causing Omai to prepare work programmes relating to the development and operations of the mine under Cambior's direction; the preparation of budgets; and directing Omai in the execution of all decisions of the Board of Directors.

¹⁵¹ The statement established standards that Omai was required to respect and describes the anticipated impact of the mining project on various aspects of the Guyanese environment. The Guyanese government relied on Cambior for most of its information and technical expertise, and Cambior maintained that the tailings dam was designed and constructed to meet "North American standards." See Knight, *supra* note 148. There is no indication in the judgment of what the "standards" set in the agreement were.

¹⁵² *Ibid.*

¹⁵³ Jacobson, *supra* note 6.

with one of the highest debts per capita in the Americas, it is “handed its marching orders” from the structural adjustment portfolio of the World Bank, as are many other developing countries.¹⁵⁴

A more severe example of this problem is the Ok Tedi Mine in Papua New Guinea, where the government, which holds only a 30 per cent share in the mine, ultimately permitted the Australian multinational BHP to dump massive amounts of raw tailings into a major river.¹⁵⁵ The initial agreement between BHP and the government of Papua New Guinea in 1976 provided that BHP would spend no more than 150,000 kina on environmental impact studies — a clearly inadequate amount — yet the scope of the required assessment was, at the time, the most comprehensive ever applied to a mining project in a developing country.¹⁵⁶ The spending limit

¹⁵⁴ *Ibid.* However, Jacobson points out that while entering into agreements with multinational gold mining companies may seem “Faustian,” the situation is in fact far more complicated, as serious environmental damage is also perpetuated by freelance miners, who in 1997 produced 70,000 ounces of gold, compared to the Omai Gold Mine’s 340,000 ounces. The real question is whether Omai is safer or more easily regulated. The question may go without answer in Guyana since the government has granted a large exploratory concession in the area where the Mahdia freelance miners work, to Golden Star, a company that helped to develop the Omai Gold Mine.

An additional question to ask in the Guyana context, is whether or not the tailings dam construction did in fact measure up to the standards set in North America — it must not be forgotten that Canadian mines have caused tailings disasters in various parts of the United States, see, for example, Bourrie, *supra* note 1, and the discussion of the resulting *Friedland* litigation in note 128. See also Cohen, *supra* note 149 at 141-44, for a discussion of the severe problems that arise in artisanal mining — mineral extraction by independent or very small-scale operators, which “plagues” the developing world. Cohen also cites R. Craig Johnson, senior attorney at Cyprus Amax Minerals Corporation, as stating: “Use of North American-type standards has become customary for mining companies in Latin America due to the well-founded belief that such standards will minimize the need of the company to play “catch-up” as the local standards are tightened. Designing for [tougher] standards at the outset is often far less expensive than having to retrofit an operation later” (at 139, note 31).

¹⁵⁵ Knight, *supra* note 148. The result was the destruction of aquatic life, riverside flooding of agricultural land, and the displacement of the local indigenous population whose livelihood depended upon the river. See White, *supra* note 104 at 308.

¹⁵⁶ White, *supra* note 104 at 323. Indeed, in 1981, a United Nations Conference on Trade and Development-sponsored study of environmental provisions in mining agreements involving developing countries described the Ok Tedi Agreement as the only current mineral development agreement containing an environmental protection clause that attempted to create a comprehensive

remained intact in the 1980 Supplemental Agreement, and, following its signing, a more extensive environmental impact assessment (EIA) was done, which resulted in a series of recommendations on environmental management and on monitoring programs.¹⁵⁷ However, OTML agreements are exempt from Papua New Guinea's environmental law, and government supervision of the mine is alleged to have been inadequate.¹⁵⁸ This fact may be due in part to a lack of governmental resources as well as to the fact that the supervisory scheme was, until 1991, under the control of the Department of Mining and Petroleum, whose function is to promote mining.

The 1980 Supplemental Agreement did call for the construction of a tailings dam, and construction of one began in 1983. However, before its completion, the tailings dam was destroyed by an earthquake in 1984.¹⁵⁹ The government then approved the temporary operation of the mine without a tailings dam.¹⁶⁰ The fifth Supplemental Agreement of 1985 included a Permanent Tailings License, which would impose penalties should the tailings

enforcement framework. See Knight, *supra* note 148 at 323, citing Stephen A. Zorn, *Environmental Provisions in Developing Country Mining Agreements*, UNCTAD/LDC/15 (1981) at 5.

¹⁵⁷ White, *supra* note 104 at 324. According to White, citing William S. Pintz, *Ok Tedi: Evolution of a Third World Mining Project* (London: Mining Journal Books, 1984), the government undertook extensive and expensive field studies in 1979 and used computer models based upon the environmental effects of another Papua New Guinea mine at Bougainville (at 80 and 89). The government studies cost four times as much as OTML paid for the original environmental impact study and "raised substantial questions about the effects of mine waste dumping in the Ok Tedi River on downstream residents and subsistence life-styles."

¹⁵⁸ White, *supra* note 104 at 324. The agreements provide that the agreements "have the force of law as if contained in the respective Act, and shall apply notwithstanding anything to the contrary in any other law in force in PNG." The agreements preceded Papua New Guinea's environmental legislation.

¹⁵⁹ *Ibid.* at 326. The destruction of the dam by the earthquake was attributed in part to the fact that no intensive geological tests were carried out before the work got underway.

¹⁶⁰ *Ibid.* At the time, it was decided that it was impractical to build a new tailings dam because of the expense involved, which would have threatened the mine's financial future, and because of the heavy rainfall and frequency of earthquakes in the area. A tailings dam at risk of collapse may be more environmentally damaging than gradually depositing tailings directly into the river system. *Ibid.* at 313.

dam not be built on schedule.¹⁶¹ However, the sixth Supplemental Agreement of 1986 permitted OTML to operate without a tailings dam until 1990, and, as of 1988, the government has allowed OTML to discharge all tailings into the river system.¹⁶²

The sixth Supplemental Agreement also required the OTML to conduct an environmental study of the mine's current and predicted impacts, which resulted in the setting of acceptable particulate levels that were to be met by OTML. Thus, OTML itself was required to monitor the river system for pollution, and, if levels were to become too high, the government would have to consider demanding that a tailings dam be built. Serious deficiencies have been alleged regarding this monitoring program, which was undertaken without the scrutiny of the Papua New Guinea government. A government proposal to establish an independent environmental monitoring agency was rejected by the OTML, and the idea was later dropped by the government.¹⁶³

The pressures upon the democratic government in Papua New Guinea to maintain good relations with mining ventures such as BHP are strong. Despite the mineral wealth of Papua New Guinea, the level of development remains low,¹⁶⁴ and the country is dependant upon the mining industry for future development.¹⁶⁵ The Ok

¹⁶¹ *Ibid.* at 326. The penalties would take the form of a reduced rate at which OTML could extract minerals from the mine.

¹⁶² *Ibid.* The temporary scheme for the operation of the mine without a tailings dam found in an "Interim Tailings Scheme" in 1984, was abandoned in 1988, with formal approval for the continued operations without a tailings dam allegedly granted by the government in 1989. It should be noted, however, that the operations of the mine changed during this time as well: from 1984 to 1986, gold was extracted; from 1986 to 1988 both gold and copper were extracted; and as of 1988, only copper has been extracted, which is expected to continue until 2008. *Ibid.* at 309. The difference is not significant, however, as the lawsuits filed against BHP did not allege environmental damage caused by cyanide as is often the case in gold mining. The tailings that are dumped into the river system as a result of the copper mining process contain 15 per cent of their original copper content as well as the heavy metals zinc, cadmium, and lead, and the environmental damages that has resulted has been widely condemned by environmental groups. *Ibid.* at 311.

¹⁶³ *Ibid.* at 325.

¹⁶⁴ *Ibid.* at 307. Up to 70 per cent of Papua New Guineans are illiterate, and life expectancy levels are five years below the average for middle-income countries. Economic instability has plagued the country as well, given the serious underlying structural imbalances, such as a lack of physical and social infrastructure.

¹⁶⁵ *Ibid.* at 308. In the early 1990s, copper comprised 62 per cent of the total exports from Papua New Guinea.

Tedi Mine itself has 1,850 direct employees, of whom 88 per cent are Papua New Guineans. Medical and health services have been provided to 10,000 villagers in the vicinity of the mine, with a resultant drop in infant mortality and an increase in life expectancy in the region. Local landowners have received royalties and lease payments from the project, and OTML has contributed substantial amounts of money to a trust fund to identify and develop commercial ventures as well as providing facilities and amenities to those villages outside the mine lease area who do not receive royalties or land lease payments.¹⁶⁶ In 1993, the Ok Tedi Mine provided 16 per cent of Papua New Guinea's total merchandise export earnings and, in addition, contributed 76.2 million kina indirectly to the national economy by purchasing 58 per cent of its supplies from local sources.¹⁶⁷

The impact of these economic pressures upon the democratic government of Papua New Guinea was exacerbated by the commencement of the *Dagi* litigation, which led to some disturbing developments. The government expressed concern about the effect of the lawsuits upon investor confidence, and then Prime Minister Wingti announced plans to compel the lawsuit to be brought forward in Papua New Guinea and to limit the damages that could be awarded to landowners. Legislation was drafted to give effect to an agreement between the government and BHP that would have provided compensation of 100 million kina over fifteen years plus a 10 per cent share of the mine, while also imposing criminal sanctions on any person involved in a lawsuit against BHP on behalf of the local communities in Papua New Guinea anywhere in the world. However, the day before Parliament was scheduled to vote upon this legislation, the Supreme Court of Victoria found BHP in contempt of court for its part in drafting the legislation. After BHP informed the government that it could no longer support the legislation, no vote was held.¹⁶⁸

¹⁶⁶ *Ibid.* at 309. The various projects funded by OTML have included the construction of twenty classrooms, the provision of equipment to encourage commercial fishing in the area (ironically!), the provision of support for the development of a rubber processing factory, and a vegetable-growing project providing food for mine workers.

¹⁶⁷ *Ibid.* at 310.

¹⁶⁸ *Ibid.* at 322. See *B.H.P. v. Dagi*, [1996] 2 V.R. 117 (Sup Ct Vic).

Agreements, Act of State, and Non-Justiciability

Given that the existence of agreements or regulations setting forth minimum environmental standards for mining operations does not necessarily lead to state enforcement of these standards, the question arises as to whether there is any action that citizens may take in order to obtain relief under these agreements. This issue arose in both the *Cambior* and *Dagi* litigations, where allegations that agreed-upon standards had not been met were used to ground damage claims. In *Cambior*, the Québec court suggested that if it took jurisdiction, it would be able to determine whether under Guyanese law, the common law on mass torts would permit the victims, who were not parties to the mineral agreement, to invoke a breach by the Omai Gold Mine of environmental standards in support of its action against Cambior.¹⁶⁹ However, the court made no mention of potential problems that might arise given the role of the Guyanese government as a shareholder of the Omai Gold Mine, for whom responsibility could be said to arise from the breach, nor did it mention the significance of the role of the government as a party to the agreement in question. These issues were canvassed in the OTML litigation.

The mineral agreements entered into between OTML and Papua New Guinea, which were subsequently enacted by Parliament, formed the basis of three causes of action in the *Dagi* litigation. Under the first agreement, it was alleged that OTML was obliged to compensate any person for loss suffered as a result of its operations that damaged or interfered with any pre-existing right to use land or water.¹⁷⁰ Under the second agreement, it was alleged that OTML was obliged to construct a permanent tailings dam or system.¹⁷¹ The plaintiffs claimed that OTML was in breach of these agreements and asserted an entitlement arising because the state of Papua New Guinea had failed to enforce the rights that it held in trust for the plaintiffs as covenantee under the agreements.

¹⁶⁹ *Cambior*, *supra* note 38 at para. 69-70.

¹⁷⁰ See cl. 29.12 of the Ok Tedi Agreement, stating that OTML is obliged to compensate any person for loss suffered "as a result of its operation resulting from any damage (whether to land, anything on land, water or otherwise) or interference with any right to use land or water existing prior to the date hereof caused by disposal by OTML of the overburden, tailings or other waste." *Dagi*, *supra* note 40 at 431.

¹⁷¹ See cl. 5 of the Ok Tedi Fifth Supplemental Agreement.

According to Byrne J., it was implicit in the pleadings that the plaintiffs viewed themselves as being entitled to enforce the statutory obligations of OTML.¹⁷²

The defendants argued that, according to the Act of State doctrine,¹⁷³ the Australian court was without jurisdiction to entertain a cause of action requiring it to determine whether the government of a sovereign state had committed a breach of trust within its territory. Byrne J. agreed, noting that while the right of a beneficiary to enforce a contractual obligation that is held in trust for it arises where the trustee refuses to sue, the gist of the claim is the trustee's breach of its equitable obligation to the beneficiaries, which the Court of Equity is enforcing for their benefit.¹⁷⁴ Thus, according to Byrne J., "where the beneficiaries are residents of a foreign State with whose interests it may be supposed the sovereign of that State is concerned qua sovereign, it is in my opinion an area where this court should abstain from entering upon."¹⁷⁵

In the second claim, the plaintiffs alleged that, since they fell within the class of persons to whom OTML was to render performance under the contract, they were entitled to enforce the contract, despite the fact that the second party to the contract was the state of Papua New Guinea. However, Byrne J. felt that this claim was also not justiciable, for it was impossible to treat the Ok Tedi Agreements as simply imposing contractual obligations: "[A]n examination of the whole of the documents makes it clear that the role of the State has the hallmarks of an act of government, and it is not for a court of a foreign State to intrude into this activity."¹⁷⁶

¹⁷² *Dagi*, *supra* note 40 at 341.

¹⁷³ The Act of State doctrine is often used to refer to two different principles that may arise where acts of sovereign states are at issue. According to one version, the doctrine is a conflict of laws rule, and the recognition of a foreign act of state is understood as an application of foreign law, thereby resurrecting various exceptions such as the public policy doctrine. The second version, which is found in *Dagi*, *supra* note 40, is a non-justiciability principle, according to which a court refuses to inquire at all into the legality of the act of the foreign state under the foreign law. For the history and an elaboration of these doctrines, see Anne-Marie Burley, "Law among Liberal States: Liberal Internationalism and the Act of State Doctrine" (1992) 92 Columbia L.Rev. 1907.

¹⁷⁴ *Dagi*, *supra* note 40 at 453.

¹⁷⁵ *Ibid.* at 453.

¹⁷⁶ *Ibid.* at 454. Even if this claim was justiciable, it is not entirely clear that the plaintiffs, at least in a Canadian jurisdiction, would be able to enforce the contractual obligation, due to considerations of privity of contract and the requirement of consideration. According to the third party beneficiary rule of

The third claim asserted by the plaintiffs was the right to enforce the obligations imposed by the agreements as statutes of the Papua New Guinea Parliament. Byrne J. again refused to entertain this claim, stating:

Such rights as the plaintiffs may have under these local statutes of the P.N.G. Parliament are conferred, not by the law of Victoria, but by a legislative Act of a foreign sovereign State. This court is not given the power to enforce these foreign statutes and it would, to my mind, not be proper for it to assume that right. Whether this be because the court will decline to enforce the sumptuary law of a foreign State . . . or because the claim is essentially a local one . . . or because it would be arrogating to itself the power reserved to the State of P.N.G. which it, and it alone might choose to exercise; or, as I am inclined to think, for all of those reasons, this court will not entertain these claims.¹⁷⁷

It is evident from the above discussion that there are no guarantees that agreed-upon environmental standards will be enforced by the host state nor that the corresponding provision of compensation for breach of these standards will be readily forthcoming either in the host state itself or through the court system of the home state.¹⁷⁸ This uncertainty leads to the question of whether

contract law, only parties to the contract may sue to enforce it. See generally S.M. Waddams, *The Law of Contracts*, 3rd ed. (Toronto: Canada Law Book, 1993) at 181-93. It should be noted that some Commonwealth jurisdictions have abolished or modified this rule. In *Dagi*, *supra* note 40, Byrne J. indicated that reliance was placed on an exception of commercial convenience according to the principle of *Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd.* (1988), 165 C.L.R. 107 (Aust. H.C.).

¹⁷⁷ *Dagi*, *supra* note 40 at 454. It should be noted that a line of cases in the United States presents the possibility of a different approach to environmental violations that can be characterized as violating the law of nations. The Alien Tort Claims Act, 28 U.S.C. 1350 (1994) [hereinafter ATCA], has been invoked in several cases, including *Beneal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D.La. 1997), in which it was alleged that Freeport's mining operations, including the discharge of tailings drainage, violated the law of nations. However, the court held that neither the "polluter pays" principle, the "precautionary" principle, nor the "proximity" principle could be said to rise to the level of an international tort and that Beneal had failed to allege an international environmental tort as required under the ATCA. See also Anastaria Khokhryakova, "Beneal v. Freeport-McMoran, Inc.: Liability of a Private Actor for an International Environmental Tort under the Alien Tort Claims Act" (1998) 9 Colorado J. Int'l Env't L. & Policy 463.

¹⁷⁸ The economic pressures described here in the context of developing countries lead to a sense that regulation of environmental standards by the host state is difficult if not impossible. The argument may also be made that in the world of globalization, where government regulatory policy is the subject of competition

there may be a role for home states, such as Canada, to become involved in some form of "extraterritorial" regulation over the activities of mining subsidiaries in a foreign country.

EXTRATERRITORIAL APPLICATION OF CANADIAN REGULATORY LAW

Theoretical Basis

As discussed earlier in this article, there is an underlying presumption that domestic law must be interpreted in conformity with the principles of international law.¹⁷⁹ Public international law recognizes several principles by which a state may exercise jurisdiction with respect to acts that are "criminal" under forum law.¹⁸⁰ The primary basis is that of territoriality, according to which the courts of the place where the crime is committed may exercise jurisdiction. There are two versions of this principle, which take into account the reality of transnational crimes as potentially having more than one "locus," depending on one's perspective. Thus, according to the subjective territoriality principle, a state may take jurisdiction over crimes commenced within the state but completed elsewhere. On the other hand, the objective territorial principle, applied by the Permanent Court of International Justice in the

between jurisdictions that results not only in the relocation of firms to other jurisdictions but also in the threat of exit being used to extract regulatory benefits, the reality is that increasingly standards are set internationally — all too often as a result of a mutually destructive race-to-the-bottom in the international marketplace. In this light, the role of public international law standard-setting institutions becomes crucial to both developed and developing countries. For a discussion of these issues in the context of labour standards, see Brian Langille, "General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade's Destiny)," in J.N. Bhagwati and R.E. Hudec, eds. *Fair Trade and Harmonization, Prerequisites for Free Trade?* (Cambridge, MA: MIT Press, 1996) at 231-66.

¹⁷⁹ For a recent pronouncement of this principle, see La Forest J. in *Tolofson*, *supra* note 88 at 1047, who states: "[T]he underlying postulate of public international law is that each state has jurisdiction to make and apply law within its territorial limit, which other states would ordinarily respect, absent a breach of some overriding norm."

¹⁸⁰ See Brownlie, *supra* note 30 at 303-9. This discussion of prescriptive jurisdiction is derived from Brownlie, and the traditional Anglo-Canadian bases of jurisdiction. Brownlie notes (at 313) that in the case of substantive or legislative jurisdiction, there is no major distinction between the types of jurisdiction (that is, criminal, civil, or fiscal). The word "criminal" will be used loosely, including a reference to regulatory measures.

Lotus case,¹⁸¹ finds jurisdiction when any essential constituent element of a crime is consummated on state territory.¹⁸²

The Supreme Court of Canada adopted the objective territoriality principle from *Lotus* in the white collar crime case *Libman v. The Queen*,¹⁸³ holding that a Canadian court may take jurisdiction over acts taking place in another state if a sufficient portion of the activities constituting the offence took place in Canada. Thus, a "real and substantial" link must be established between the offence and the country under question.¹⁸⁴ However, La Forest J. noted that there may be a danger of, in essence, punishing acts that take place wholly in another country that are not criminal there.¹⁸⁵ This possibility is also clearly at the forefront of Bastarache J.'s judgment in the more recent Supreme Court case of *R. v. Cook*¹⁸⁶ for he states:

In the case of laws which require or forbid particular behaviour, there is a danger of conflict between two legal systems. If one legal system requires a person to do a certain thing, and another legal system requires a person not to do that thing, then there is a clear conflict and the possibility of extraterritorial application of domestic law is significant. Criminal sanctions are of such a type and, therefore, international law requires that concurrent claims to jurisdiction be carefully circumscribed to ensure that

¹⁸¹ Brownlie, *supra* note 30. See also *Lotus* case (1927), PCIJ, Ser. A, no. 10, p.23.

¹⁸² Brownlie, *supra* note 30 at 306. Other commonly recognized principles include the nationality principle, according to which jurisdiction may be exercised over criminal acts of a national abroad; the passive personality principle, which allows aliens to be punished for acts abroad which are harmful to nationals of the forum; the protective principle, which permits jurisdiction over aliens for acts committed abroad which effect the security of the state, and universality, which is often associated with punishment for a breach of international law. Note that Brownlie considers the universality principle to allow jurisdiction over acts of non-nationals as a matter of international public policy where international law has not itself declared criminal the acts, but gives liberty to all states to punish them, as opposed to the separate principle of crimes under international law that may be punished by any person that obtains custody of persons suspected of responsibility.

¹⁸³ *Libman*, *supra* note 34 at 210.

¹⁸⁴ *Ibid.* at 232. La Forest J. dismisses concerns regarding the possibility of concurrent jurisdiction of different states over the same acts, finding that Canadian courts may use the principles of *autrefois acquit* and *autrefois convict* to take cognizance of the decisions of other countries. A parallel concern in the context of civil jurisdiction for tort actions could be met by the anti-suit injunction.

¹⁸⁵ *Ibid.* at 233. These principles and concerns accord with Brownlie, *supra* note 30 at 313, who states that extra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed.

¹⁸⁶ *Cook*, *supra* note 32 at 51-52.

a state purporting to assume jurisdiction over events occurring abroad has a significant connection, or in the case of conflict with another jurisdiction, the *most significant* connection to the events in question.”¹⁸⁷

These principles could be applied to Canadian prescriptive jurisdiction over mining ventures where Canadian parent companies exercise control in a number of different ways. If a direct analogy were made to *Libman*, it would be arguable that various “criminal” provisions found in Canadian environmental legislation could be applied to the Canadian parent company as long as the requisite elements were met. In *Libman*, the accused was charged with fraud and conspiracy to commit fraud arising out of a scheme in which telephone sales people in Toronto made material misrepresentations to residents of the United States in order to induce them to buy shares in Central American mining companies. La Forest J. found that a real and substantial link existed between the offence and Canada and, furthermore, noted that as no issue of comity was concerned, “we should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brothers’ keepers.”¹⁸⁸ In this light, it is clearly arguable that, where a significant portion of the planning activities of a mining venture are carried out in Canada, criminal jurisdiction could be asserted as long as the interests of comity are met and the company is not required to comply with two different laws that are in conflict. Of course, the question of just what “conflict” means in the context of environmental regulation over mining would be subject to much debate, as a developing country’s decision not to legislate mandatory standards is as much a legislative decision as the implementation of the standards themselves.¹⁸⁹

¹⁸⁷ *Ibid.* at 60. Bastarache J. notes (at 59) that while the objective principle is unimpeachable as a matter of principle, it is recognized that when the interest of the forum state is less significant than the interest of the state in which “the events” take place, the objective principle no longer authorizes asserting jurisdiction, and the forum state engages in an impermissible extraterritorial application of its laws.

¹⁸⁸ *Libman*, *supra* note 34 at 233.

¹⁸⁹ I will leave aside for the moment the reality that there would be no political will for the assertion of this type of extraterritorial prescriptive jurisdiction, given the desire for Canadian corporations to be economically “successful” abroad, rather than hampered by regulatory requirements that are in reality less and less enforced even in Canada. See Martin Mittelstaedt, “Criminal Polluters Finding Canada the Promised Land,” *Globe and Mail* (March 23, 1999) A7; Martin Mittelstaedt, “Group Flays Ontario’s Record on Pollution,” *Globe and Mail* (April 12, 1999) A4.

A wide variety of environmental legislation exists in Canada, with actual performance requirements established by regulation and administrative guidelines, including standard setting, permits, licensing, and approvals. Encouraging compliance with these administrative mechanisms involves a range of measures to monitor environmental performance, such as reporting obligations in the terms and conditions applicable to the licenses, which include provisions for routine inspections. Administrative orders to control sources of existing pollution, to terminate specified activities, or to impose preventive or remedial obligations are also common in Canadian legislation.¹⁹⁰ In addition, numerous offence provisions exist.¹⁹¹ While it would be theoretically possible to apply some of these offence provisions to environmental harm occurring abroad,¹⁹² it may be more difficult to argue that Canada should be directly involved in licensing, monitoring, or permitting activities with respect to land use, diversion, and consumption of water, or discharges into water or air that take place in a foreign country.¹⁹³ Even if it were arguable that it would not represent an intrusion into the territorial sovereignty of another nation, the lack of political and financial will for such a venture would be overwhelming. On the other hand, developing countries could receive substantial

¹⁹⁰ Jamie Benidickson, *Environmental Law* (Concord: Irwin Law, 1997) at 83-109.

¹⁹¹ See Swaigen, *supra* note 29.

¹⁹² For example, the CEPA, 1988, *supra* note 7, contains some rather interesting *mens rea* provisions in s. 115, which provide for criminal prosecution for someone who “(1) (a) intentionally or recklessly causes a disaster that results in a loss of the use of the environment, or (b) shows wanton or reckless disregard for the lives or safety of other persons and thereby causes a risk of death or harm to another person.” Section 115(2) provides that criminal negligence may be prosecuted under the Criminal Code. A version of a due diligence defence is granted in s. 125(2). There have to date been no prosecutions under either of these sections. However, in theory, they could be applied to criminally irresponsible decisions taken in Canada with regard to mining operations in another country. The comparable provision in the CEPA, 1999, *supra* note 7, is s. 274, although the due diligence defence in s. 283 is no longer available to the *mens rea* provisions, representing a clear improvement over the CEPA, 1988.

¹⁹³ Note that in the context of interprovincial environmental legislation, *Interprovincial Co-operatives Ltd. v. The Queen* (1975), 53 D.L.R. (3d) 321, held that a provincial statute that imposed liability for contamination of fish by discharge of pollutants into waters that were then carried into waters in Manitoba was constitutionally *ultra vires*, as it purported to have extra-territorial effect by being directed to acts done outside the province.

assistance from a country such as Canada through consultations over the formulation of environmental regulations of this kind.¹⁹⁴

Another type of environmental regulation that holds more promise is that of EIAs. While most environmental laws in the United States do not apply to private mining activity abroad, whenever United States firms receive financing from any federal agency, the funded project is subject to the Environmental Impact Statement requirement of the National Environmental Policy Act.¹⁹⁵ The Canadian Environmental Assessment Act is applicable under similar circumstances.¹⁹⁶ Another approach of this nature would be to require that firms, which are operating subsidiaries abroad that are engaged in dangerous activities, must ensure that the subsidiaries carry enough insurance to cover liabilities that might arise.¹⁹⁷ While legislation of this nature clearly disregards the legal

¹⁹⁴ Cohen, *supra* note 149 at 173, note 187, points out that Indonesia has consulted Canada in the drafting of new environmental laws. See Simon Hobson, "The 1990s: The Environmental Decade" (1993) *Eng. & Mining J.* at 60.

¹⁹⁵ See Cohen, *supra* note 149 at 150; National Environmental Policy Act, 42 U.S.C. 4321-4347.

¹⁹⁶ Canadian Environmental Assessment Act, R.S.C. 1992, c. 37 [hereinafter CEAA]. The act applies where a federal authority issues a permit or license or grants an approval under federal legislation or where federal lands or federal financial assistance are involved. Regulations to the CEAA specifically contemplate their application to projects outside Canada. See *Projects outside Canada Environmental Assessment Regulations*, SOR/96-491, in force Nov. 7, 1996. Note also ss. 46-53 "Transboundary and Related Environmental Effects." The process of assessment includes public scrutiny and input through a review panel. See Michael I. Jeffrey, *Environmental Approvals in Canada: Practice and Procedure* (Toronto: Butterworths, 1989) at para. 1.12.2.

It is interesting to note in this context the development of voluntary environmental measures by the Mining Association of Canada [hereinafter MAC]. The MAC unveiled *A Guide to Management of Tailings Facilities* on November 25, 1998; it is available online at <<http://www.mining.ca/english/publications/tailingsguide.pdf>>. It was designed to give mining companies the tools to consistently integrate environmental and safety considerations into tailings operations, from beginning to end. It covers site selection, design, construction, operation, decommissioning, and closure. According to the president and CEO of the MAC, the guide covers global issues and working to improve mining both at home and abroad. See Press Release, "Canadian Mining Industry Seeks to Improve Safe Environmental Management of Mine Waste Storage Facilities," on the MAC website at <<http://www.mining.ca>>.

¹⁹⁷ An example of Canadian legislation that disregards the legal independence of the parent and subsidiary are provisions in the Income Tax Act, R.S.C. 1985 (5th Supp.), which provides incentives for adequately capitalizing subsidiaries. See the thin capitalization provisions in s. 18(4)-(8).

nationality of the subsidiaries, it is not unheard of, as is evident from much antitrust legislation, as well as, for example, the 1977 Foreign Corrupt Practices Act of the United States.¹⁹⁸

Parent-State Responsibility in Public International Law

It has been suggested that not only is it permissible for the home state to regulate the environmental behaviour of the subsidiary but that it may also be obligatory to do so in international law. Various principles have emerged in public international environmental law to address concerns of transnational environmental pollution.

¹⁹⁸ Foreign Corrupt Practices Act, U.S.C. paras. 78a, 78dd-1, 78dd-2, 78ff (1994). See Muchlinksi, *supra* note 10 at 108; Murase, *supra* note 10 at 391; see also H. Lowell Brown, "Parent-Subsidiary Liability under the Foreign Corrupt Practices Act" (1998) 50 Baylor L. Rev. 1. Canada has recently implemented a weaker version of the anti-bribery part of this legislation in order to implement the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions. The Canadian legislation is known as the Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, and was brought into force February 14, 1999 by SI/99-13 (Can. Gaz., Part II, March 3, 1999). The basic offence provision in the Canadian legislation provides: "Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or function; or (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions." Breach of this provision is an indictable offence, however, there are various savings provisions (s. 3(1)).

The American legislation includes accounting and controls provisions as well as the anti-bribery provisions, and an interesting circularity arises in the context of the parent-subsidiary relationship. As explained by Brown (at 18-19): "[T]he FCPA, particularly the accounting and controls provisions, mandates a degree of parental involvement in the subsidiary's operations that may be viewed as being antithetical to the corporate separateness necessary to insulate the parent from liability arising from the crimes of the subsidiary. Not only may the parent be directly responsible for the subsidiary's compliance with the accounting and controls provisions, but the knowledge that may also be attributed to the parent by virtue of the accounting provisions, together with the intent of its 'agents' that may be attributed to the parent, may serve as the predicate for parental liability under the anti-bribery provisions, as well. As a result, a parent corporation may be compelled to relinquish the protection afforded by the separate incorporation of a subsidiary in order to take the steps reasonably necessary to avoid liability under the FCPA." There is no comparable requirement in the Canadian legislation.

For example, a principle of non-discrimination has emerged from a 1974 recommendation of the Organization for Economic Cooperation and Development concerning transfrontier pollution,¹⁹⁹ which would require that polluters who cause transfrontier pollution be subject to legal standards no less severe than would apply to pollution with only domestic effects. This principle may offer an important guideline in the context of regulating activities of transnational corporations. However, other conflicting principles have emerged from such international environmental conferences as the 1972 United Nations Conference on the Human Environment²⁰⁰ and the 1992 United Nations Conference on Environment and Development,²⁰¹ which reflected a principle of differentiated responsibilities that accepts that different standards may be applied to developing countries. As such, it would be premature to deem the principle of non-discrimination a binding norm for general application.²⁰² While the idea of international minimum standards are accepted at least as a theoretical possibility for certain abnormally hazardous activities, such as occur in the field of nuclear facilities and technologies, they are not yet established in anything other than specifically confined areas.²⁰³

As Shinya Murase points out, if these principles of non-discrimination and international minimum standards were to be considered as being established in customary international law, extraterritorial application of the home state's domestic environmental law would be regarded as not only permissible, but obligatory,

¹⁹⁹ Murase, *supra* note 10 at 384, citing the Organization for Economic Cooperation and Development's Recommendation of the Council on Principles concerning Transfrontier Pollution of 14 November 1974, Title C (Principle of Non-Discrimination), 14 I.L.M. (1975), 242 at para. 4: "Countries should initially base their action on the principle of non-discrimination, whereby: (a) polluters causing transfrontier pollution should be subject to legal or statutory provisions no less severe than those which would apply for any equivalent pollution occurring within their country under comparable conditions and in comparable zones, taking into account, when appropriate, the special nature and environmental needs of the zone affected."

²⁰⁰ See Stockholm Declaration on the Human Environment, *Report of the United Nations Conference on the Human Environment*, UN Doc. A/Conf. 48/14/Rev.1 (1972), Principle 23 [hereinafter Stockholm Declaration].

²⁰¹ See Rio Declaration, *Report of the United Nations Conference on Environment and Development*, Distr. General, A/CONF.151/26 (1992), Principle 11. The last sentence reads: "Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."

²⁰² Murase, *supra* note 10 at 385.

²⁰³ *Ibid.* at 385.

with the state's failure to take appropriate measures being a violation of international law entailing state responsibility. While admitting this to be a hasty conclusion, Murase points out that attributing civil liability to the company in private law litigation does not always guarantee a sufficient remedy in cases of large-scale environmental damage. Thus, state responsibility for the home state of the parent corporation could be sought on the basis of the state's extraterritorial "control" over the foreign subsidiary.²⁰⁴

In support of this approach, Murase notes that in several cases involving environmental damage caused by TNCs, although the host states did not formally file international complaints claiming state responsibility vis-à-vis the home states, the host states were compelled to file suit on behalf of, or in the place of, the victims.²⁰⁵ In addition, various treaty arrangements charge states with the function of regulating and supervising some private activities that are potentially hazardous as well as requiring their involvement in responsibility and liability regimes. While these conventions range from ones that merely recognize the need to develop a liability regime to those that provide for a civil liability regime with residual state liability or participation in a compensation scheme and even with absolute state liability, Murase suggests that as a general trend, "it appears that the more severe the potential hazard is deemed, the more States are expected to intervene in, and to assume corresponding responsibility for, the activities of the enterprises, many of which are TNCs."²⁰⁶

²⁰⁴ *Ibid.* at 386. This point raises the question of the forum in which this state responsibility could be vindicated. One possibility would see transnational public law plaintiffs using domestic courts to enunciate a public international norm of state responsibility over environmental decisions within the parent company's control. Such a judgment would empower the plaintiff by creating a bargaining chip to use in the home state forum where negotiations over environmental standards may be in progress. See Harold Honju Koh, "Transnational Public Law Litigation" (1991) 100 Yale L.J. 2347.

²⁰⁵ This was either due to the fact that the host state had already granted them provisional compensation or had assumed the role of a *parens patriae* for its injured citizens. See Murase, *supra* note 10 at 386, in reference to *Bhopal*, *supra* note 23, and *Amoco Cadiz*, *supra* note 23, and citing Tullio Scovazzi, "Industrial Accidents and the Veil of Transnational Corporations," in Francesco Francioni and Tullio Scovazzi, eds., *International Responsibility for Environmental Harm* (London: Graham and Trotman, 1991) at 421.

²⁰⁶ Murase, *supra* note 10 at 387-89, citing, among others, Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, March 22, 1974, 13 I.L.M. (1974) 546, Article 17; 1982 United Nations Convention on the Law of the Sea, 21 I.L.M. (1982) 1261, Article 235, para. 3; Convention on the Liability of Operators of Nuclear Ships, Brussels, May 25, 1962, not in

Murase draws from the work of Francesco Francioni for a new basic thesis on the law of state responsibility that involves corporate activities. While the obligation of the state to regulate and supervise the conduct of a domestic enterprise under the traditional doctrine was based on the territoriality principle, the new thesis would suggest that "[s]tate responsibility for the activities of TNCs, if such responsibility is recognized at all, should be based on a non-territorial, that is, a functional principle of effective control by the home State."²⁰⁷

Murase then grapples with the question of how this kind of functional link between the home state and foreign subsidiaries can be recognized in international law. The "genuine link" theory was adopted by the International Court of Justice (ICJ) in the *Nottebohm (Liechtenstein v. Guatemala)* case with respect to the nationality of a natural person, such that the link between the individual and his country of nationality must be effective and substantial in order for his nationality to be opposable vis-à-vis a third country.²⁰⁸ In the *Barcelona Traction, Light and Power Company, Limited* case, the ICJ rejected the application of the genuine link theory so as to lift the corporate veil and instead adopted the formal criteria of law of incorporation. However, while the court refused to lift the

force; Convention on International Liability for Damage Caused by Space Objects, March 29, 1972, 661 U.N.T.S. 187. Murase further suggests that attempts by international bodies, such as the United Nations and the Organization for Economic Cooperation and Development, to elaborate codes of conduct for TNCs from the perspective of providing environmental protection would have indirect influence on changing the law of state responsibility (at 389). Efforts to make these into binding instruments of international law have not been successful. See, for example, the United Nations ECOSOC Draft Code of Conduct on Transnational Corporations, which provides for "environmental protection" in paragraphs 41 to 43 (UN Doc. E/C.10/1984/S/5), reprinted in 23 I.L.M. (1984) 626.

²⁰⁷ Murase, *supra* note 10 at 389, referring to the work of Francesco Francioni, "Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin Be Held Responsible?" in F. Francioni and T. Scovazzi, eds., *International Responsibility for Environmental Harm* (London: Graham and Trotman, 1991) at 275-98. This traditional view is exemplified in the *Trail Smelter (United States v. Canada)* arbitration, April 16, 1938 (11 March 1941) 3 Reports of International Arbitral Awards 1905 at 1907f [hereinafter *Trail Smelter*]. Murase points out that states have come to assert their authority to "control" TNCs even in the absence of "jurisdiction" over their activities in such fields as antitrust and export control (at 390). See text accompanying note 193.

²⁰⁸ Murase, *supra* note 10 at 391. See *Nottebohm (Liechtenstein v. Guatemala)*, Merits (1955) I.C.J. Reports 4 at 23.

corporate veil for the protection of the company's shareholders in the absence of exceptional circumstances, the court did state that the doctrine would be applicable externally to protect the interests of third persons dealing with the corporate entity, including, for example, victims claiming compensation for tortious acts.²⁰⁹ Thus, the *Barcelona Traction* judgment can be interpreted so that it does not necessarily preclude the application of the genuine-link/effective-link theory when corporate liability vis-à-vis third parties is at issue.

Assuming the link of effective control between the home state and the foreign subsidiary is juridically admitted and assuming that the government of the home state has the means and resources to exercise control over the activities of the overseas subsidiaries, Murase then asks whether the home state could be held responsible under international law on the basis of such a non-territorial link of effective control. He cites the ICJ's advisory opinion on Namibia in 1971, according to which "physical control of a territory, not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."²¹⁰ By analogy, Murase concludes that "effective" control retained by the state over the foreign subsidiaries could serve as the basis of the responsibility of that very state.²¹¹ This conclusion would require the notion of environmental harm to include not only physical harm but also harm of a functional character. Murase expresses some reservation about this theory, as he considers it necessary that there be a clear and direct link between the physical damage and the TNC's managerial medium, such as the export of hazardous substances, the transfer of high-risk technology, or production processes and production methods that are proven to have caused the actual damage.²¹²

There is an element of circularity in Murase's analogy, for the "retention" of effective control by the state over the subsidiary suggests that the state may choose to relinquish this control. Another way to look at this "effective" control would be to view it as a double

²⁰⁹ Murase, *supra* note 10 at 392-93. See *Barcelona Traction, Light and Power Company, Limited* (1970) I.C.J. Reports 3 at 42-44, paras. 56-58; 70. The International Court of Justice determined that the domestic law principle of lifting the corporate veil could play a similar role in international law.

²¹⁰ Murase, *supra* note 10 at 393, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), I.C.J. Reports 1971 at para 118.

²¹¹ Murase, *supra* note 10 at 393.

²¹² *Ibid.* at 393-94.

link that is rooted in the potential for effective control by both parent company and state. Thus, where the potential exists for the parent company to exert effective control over the subsidiary, and, likewise, the potential exists for the state to exercise effective control over the parent, a duty will exist for the state to exercise its control vis-à-vis the subsidiary. Murase's reservations about the need for a direct link between physical damage and the managerial medium are also questionable, given that a parent corporation may be directly liable for its own acts, including decision-making that results in harm, as well as vicariously liable for the acts of its subsidiary.²¹³

Finally, Murase questions whether the transformation from the territoriality principle to the non-territoriality, functional principle of state responsibility, which is outlined earlier in this article, can yet be recognized in positive international law. He points to Principle 21 of the Stockholm Declaration, which provides: "States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction."²¹⁴ While "control" was originally understood to refer to the control over ships and aircraft subject to the personal jurisdiction of the flag-state, in recent years it has been treated as an independent basis from the "legal" ties encompassed by "jurisdiction," which now refers to the factual capacity of effective control over the actors outside the territorial jurisdiction of the state.²¹⁵ However, Murase concludes that at the present stage of development of

²¹³ See the heading "Liability Principles" earlier in this article for a discussion of the principles. Note also the theory of enterprise liability as a solution to this dilemma.

²¹⁴ Murase, *supra* note 10 at 394, citing Stockholm Declaration, *supra* note 200.

²¹⁵ Murase, *supra* note 10 at 394-95, citing the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, 610 U.N.T.S. 205 and the 1988 Permanently Manned Civil Space Station Agreement, reprinted in K.-H. Böckstiegel/M. Benkō, eds., *Space Law: Basic Legal Documents*, vol. II, D.II.4.2. as well as the 1982 UN Convention on the Law of the Sea, *supra* note 206 (see Article 194, para. 2; and Article 139, paras. 1 and 2) and the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, reprinted in A.D. Watts, *International Law and the Antarctic Treaty System* (Cambridge, UK: Grotius, 1992) at 344. In addition, Murase points to the work of the International Law Commission on "International liability for acts not prohibited by international law," for the notion of effective control found in draft articles — the whole exercise of the Commission on this topic is described by Murase as "a disaster."

international law, the proposed new principle of state responsibility based on non-territorial, functional control over corporate activities is not supported by positive rules and state practice.²¹⁶ It is arguable that his view may be too pessimistic.²¹⁷

OTHER PUBLIC INTERNATIONAL LAW CONCERNS: HUMAN RIGHTS

The need for basic human rights protection is exemplified by allegations that Canadian companies "strong-arm" poorer countries into giving them concessions. For example, it is alleged that in August 1998, the gold mining company Greenstone Resources forcibly relocated the Honduran village of San Andreas.²¹⁸ Indeed, RIQ alleged that Cambior has a bad human rights record in Suriname, in so far as it forcibly resettled Maroon communities in Nieuwkoffiekamp.²¹⁹ However, less blatant abuses of human rights, such as the lack of adequate access to justice and the political process, may result in governments making decisions to encourage mining ventures that are not truly reflective of the wishes of the local population.

It is interesting in this context to explore some of the reactions to the use of cyanide in mining production found in countries with

²¹⁶ Murase, *supra* note 10 at 399. Thus, according to Murase, Stockholm Principle 21 may be recognized as established and applicable to the *Trail Smelter* situation, *supra* note 207, but it remains unsettled whether the principle can be applied to situations involving TNCs. He concludes: "We can finally characterize the content of Principle 21 as imposing 'more than an obligation, but short of responsibility.'" Murase suggests that the French text of Principle 21 indicates more of an ethical commitment than a legal obligation through use of the word "devoir." Thus "As Principle 22 has declared, the question of establishing responsibility, or liability, beyond the mere recognition of an obligation has been left to 'further developments of international law' (Murase at 399, note 246).

²¹⁷ For a more detailed examination of the principles of state liability in this context, see René Lefebvre, *Transboundary Environmental Interference and the Origin of State Liability*, volume 24 of *Developments in International Law* (The Hague: Kluwer Law International, 1996), in particular, at 12 and 253-54. While I would argue against this position, Lefebvre claims that in the context of transnational corporations in developing countries any exercise of extraterritorial control by developed countries would likely be regarded as a form of neo-colonial interference in the domestic affairs of developing countries. In the context of the *Bhopal* litigation, *supra* note 23, Lefebvre states that parent state liability "has never been a realistic option in this case."

²¹⁸ Bourrie, *supra* note 1.

²¹⁹ Pratap Chatterjee, "Environment: Canadian Mining Company Tries to Muzzle Activists," *Inter Press Service* [San Francisco] (August 24, 1997).

more "competent" legal and political processes. For example, in 1996, Turkey's Environment Ministry approved the development of the Ovacik mine — a gold project operated by Eurogold Madencilik AS — a joint venture of Toronto-based Inmet, Australia's Normandy Mining Limited, and the French Bureau of Geological and Mineral Research.²²⁰ The decision sparked local environmentalists who feared that Eurogold's cyanide-leaching method of extracting gold would contaminate the region's harvests and wells. In order to block the project, about 700 villagers filed a lawsuit against the ministry. In October 1997, the Izmir Administrative Court banned the use of cyanide in gold mining, a decision that was upheld by a higher court in April 1998 and again on appeal in November 1998 by Turkey's Council of State. The basis of the decision was that "gold extraction by cyanide has no use to public interest"²²¹ and that it violates the Turkish constitutional guarantee to a healthy and intact environment.²²²

A second example comes from the United States. In mid-term congressional elections on November 3, 1998, citizens of Montana voted to approve an initiative forwarded by the Montana Environmental Information Center that would ban the use of cyanide for new gold mining operations, including the expansions of existing mines.²²³ The Montana Mining Association and two small mining companies promptly brought a lawsuit in federal courts, claiming that cyanide is not dangerous if handled properly. Interestingly, the result of the Montana vote may have been tied to problems already encountered in Montana with the Canadian gold mining

²²⁰ Keith Damsell, "Inmet Gold Project Hits Major Roadblock in Turkey: Cyanide Ban Upheld," *National Post* (December 30, 1998) at C6.

²²¹ *Ibid.* Cyanide heap leaching involves the sprinkling of a diluted cyanide solution on top of the ore, which dissolves the gold as it trickles through the rock. A man-made pond collects the solution and the gold is then separated - this is the same process which was used in the Cambior disaster, as well as that of Placer Dome in the Philippines. It is interesting to note, however, that the focus on cyanide as the evil in gold mining tailings dam spills is largely due to the other heavy metals associated with the gold-mining process, such as mercury, copper, and iron, which do not dissipate rapidly in sunlight as cyanide is alleged to do. See Jacobson, *supra* note 6.

²²² Chatterjee, *supra* note 219. According to Dale Curcher, project manager at Vancouver's Eldorado Gold Corp, mining firms receive mixed messages from Turkish authorities, with the government being a strong supporter, while the judiciary continues to discourage investment.

²²³ Pratap Chatterjee, "Environment: Montana Voters Nix the Use of Cyanide in Mining," *Inter Press Service* [San Francisco] (November 5, 1998).

company, Pegasus, which resisted claims from the indigenous Assiniboiné and Gros Ventre peoples who were attempting to force Pegasus to clean up cyanide waste on the Fort Belknap reservation in the Little Rocky Mountains. After the community finally won the lawsuit in 1996, the company declared bankruptcy the following year, thwarting clean-up efforts.²²⁴

These two examples illustrate the significance of access to political and judicial processes as a means of giving local populations a voice in mining decisions.²²⁵ By way of contrast, the situation at the Ok Tedi Mine in Papua New Guinea raises complex problems. A former territory of Australia, Papua New Guinea became independent in 1975 and has since that time been governed by a democratically elected government.²²⁶ However, as discussed previously, the pressures of development have led the government to make some questionable decisions. It has been argued that many of the problems that have arisen at the Ok Tedi Mine can be linked to the impact of the mine upon indigenous populations who were excluded from the negotiations and not provided with adequate information for informed participation in what consultations

²²⁴ *Ibid.* Indeed, the most expensive clean-up of cyanide pollution in the United States history was the US \$150 million clean-up of the Alamosa river in Colorado below the Summitville mine after Canadian owners Galactic Resources Incorporated declared bankruptcy in 1992. See note 129 for a discussion regarding the *Friedland* litigations. Similar battles to the Pegasus fiasco are being fought in South Dakota, where as of November 1998, the Wioux tribe was suing Homestake Mining Company for waste from gold mining operations. In Nevada, the Western Shoshone tribe had brought a number of complaints against companies for dumping cyanide waste, and, in Washington state, the Colville tribe was trying to prevent the arrival of a gold mining company.

²²⁵ A third example of access to public participation processes could be found in Canada in the form of the Intervenor Funding Project Act, R.S.O. 1990, c. I.13, which provides funding in proceedings before a Joint Board, the Ontario Energy Board, or the Environmental Assessment Board. The act was repealed in 1996, having been in effect for only a few years. See discussion in Jeffrey, *supra* note 196 at ch. 4, "Intervenor Funding, Costs and Public Participation."

²²⁶ White, *supra* note 104 at 306. Another example of a clearly problematic situation is to be found in connection with the Texaco litigation. While the constitution of Ecuador provides a right to an environment "free from contamination," this right lay dormant until actively seized by environmentalists and lawyers who challenged the government. The Constitutional Court initially agreed, then overturned itself without reasons. See Adriana Fabra, "Indigenous Peoples, Environmental Degradation and Human Rights," in Michael R. Anderson and Alan Boyle, eds., *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996) at 255, note 56.

there were.²²⁷ In this context, an evaluation of the adequacy of participation in political processes and access to justice must include a recognition of the rights of indigenous peoples who must be considered as part of the EIAs²²⁸ and who must be involved directly in the negotiation of mining agreements.²²⁹

While arguments are often made in the international environmental law context about the importance of substantive environmental rights and standards, it is also clear that a range of procedural or participatory rights are relevant to environmental protection.²³⁰ Indeed, both Principle 10 of the Rio Declaration and Agenda 21 explicitly recognize broad public participation in

²²⁷ White, *supra* note 104 at 317-20. The result at the Ok Tedi Mine Limited were protests, strikes, and violence, which at various times forced the closure of the mine. This violence is reminiscent of the civil war on the island of Bougainville, which ceded from Papua New Guinea in 1989. The civil war has been attributed in part to environmental damage caused by a copper mine on the island and the corresponding lack of compensation paid to landowners. The Bougainville mine was forced to close as a result, many lives were lost, and school, hospitals, or medical services are no longer available (White at 332-34); and Prince, *supra* note 113.

²²⁸ For an exploration of the significance of involving local Aboriginal peoples in environmental impact assessments, see Patricia Fry, "A Social Biosphere: Environmental Impact Assessment, the Innu, and Their Environment" (1998) 56 U.T.F.L.R. 177. According to this article, the Aboriginal community was able to nominate candidates for two of five federally appointed environmental impact assessment panel members. While the panel asserted that it would not determine the scope of "aboriginal rights" that would arise in relation to the project, the legal directive indicated that the panel should take the right to cultural integrity into account (at 180-81).

²²⁹ See White, *supra* note 104, who argues that the involvement of the local communities in the negotiation of the Ok Tedi Agreements might have avoided many of the disputes that followed and, more generally, argues that local communities in developing countries should be involved in the negotiation of mining agreements.

²³⁰ See Anderson and Boyle, *supra* note 226 at 9-10. These procedural rights would include the right to information, including the right to be informed in advance of environmental risks; the right to participate in decision-making on environmental issues at both the domestic and international level; the right to environmental impact assessment; the right to legal redress, including expanded *locus standi* to facilitate public interest litigation; and the right to effective remedies in case of environmental damage. Advocates for substantive rights, on the other hand, may not trust procedural rights alone as even if procedural rights are perfectly distributed throughout civil society, it is possible that "a participatory and accountable polity may opt for short-term affluence rather than long-term environmental protection."

decision-making as being fundamental to the concept of sustainable development.²³¹ Additionally, existing human rights in the form of civil and political rights may foster an environmentally friendly order, providing the preconditions for mobilizing individuals around environmental issues and producing effective claims to environmental protection.²³² Economic, social, and cultural rights contribute to environmental protection through substantive standards of human well-being.²³³ The importance of international human rights mechanisms must not be overlooked in the search for a solution to environmental harm.

SOLUTIONS AND THE INTERSECTION OF PUBLIC AND PRIVATE INTERNATIONAL LAW

The question remains of just what role Canada should play in encouraging mining companies to take an environmentally friendly approach to their activities in the developing world. Developments at the international level provide some insight. Despite the occasional attempt, the international mining community has failed to reach a multilateral agreement on the accepted practices for responsible mining.²³⁴ However, in 1991, a United Nations-sponsored round table in Berlin produced a set of guidelines for the mining industry, multilateral development banks, and the governments of mineral-rich developing countries. These "Berlin

²³¹ See James Cameron and Ruth Mackenzie, "Access of Justice and Rights," in Anderson and Boyle, *supra* note 226 at 129. These rights can be understood as a refinement of civil or political human rights or as novel rights. A significant example of public participation rights in the environmental context can be found in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) of the Economic Commission of Europe, which was adopted at the fourth Ministerial Conference "Environment for Europe" in Aarhus, Denmark, on June 25, 1998. Thirty-nine countries and the European Community have signed it. Further information is available online: <www.unece.org/env/pp>.

²³² For example, rights to life, association, expression, political participation, personal liberty, equality and legal redress, help to enable groups to voice their objection to environmental damage. See Anderson and Boyle, *supra* note 226 at 4.

²³³ For example, the right to health, education, and cultural life could assist in different contexts. *Ibid.* at 5-6.

²³⁴ Cohen, *supra* note 149 at 184-85

Guidelines” are aimed at improving the mining industry’s environmental performance and serve to prevent increased mining in developing countries from resulting in massive environmental degradation. The guidelines have produced little change in international mining, but they embody important principles for creating environmentally responsible mining ventures.²³⁵

Multilateral development banks, such as the World Bank, have begun to condition assistance for mining ventures on the adherence to various environmental criteria.²³⁶ For example, the World Bank now evaluates the potential environmental impacts of every project it considers funding. Under World Bank rules, mining projects almost always require full or partial EIAs.²³⁷ However, the World Bank has been extensively criticized for placing no substantive environmental restrictions on its investment decisions.²³⁸ Even where a project EIA raises environmental concerns, the bank rarely conditions its loan on the borrower’s implementation of environmental protection measures, and, no matter how detailed, EIAs do not prescribe specific methods for dealing with environmental problems.²³⁹

²³⁵ *Ibid.* at 133-34. See “Berlin Guidelines” (September 20, 1991) 317 Mining J. (Env’t. Supp.), at 2. The Mining Association of Canada’s *Guide to Management of Tailings Facilities* should be remembered at this point, as another voluntary initiative, see *supra* note 196. The guide adopts principles and approaches from, among other sources, the ISO 14000 essentials, the Canadian Dam Association draft Dam Safety Guidelines (September 1997), and “international guidelines and standards” (at preface).

²³⁶ Cohen, *supra* note 149 at 138, notes that multinational corporations have been forced by rising natural resource costs to take into account environmental aspects since they must rely on public and private lenders who impose stricter conditions — unlike some medium and small-scale mining — while artisanal mining, potentially the most destructive, is often illegal and uncontrolled.

²³⁷ These are prepared by the prospective borrower, often with World Bank staff assistance, and include a lengthy series of consultations, public comment periods, and reviews.

²³⁸ The World Bank has developed specific environmental standards that are used primarily for providing regulatory-development guidance to developing countries and for evaluating environmental impact reports. See Cohen, *supra* note 149 at 156.

²³⁹ *Ibid.* at 156. A more positive development at the World Bank is presented by James Cameron and Ruth Mackenzie, *supra* note 231 at 147-49, regarding the creation of the World Bank Inspection Panel in 1993, which opened the activities of an intergovernmental financial institution to scrutiny by non-governmental actors for the first time. The panel was established for the purpose of providing people directly, materially, and adversely affected by a bank-financed project with an independent forum through which they could request the bank act in accordance with its own policies and procedures.

Governmental and quasi-governmental agencies in industrialized countries (including Canada) also finance mining ventures in the developing world, subjecting the funding country's domestic mining sector to stricter environmental laws and regulations than those of either the target country or the World Bank. Once again, however, the EIA serves as the primary environmental condition that industrial countries attach to mining project financing abroad.²⁴⁰

In response to these factors, many developing countries are proposing tough environmental laws and seeking to harmonize their environmental standards with those of industrialized countries. As developing countries revise their mining codes and foreign investment laws to facilitate privatization and attract foreign mining investment, virtually all of them are incorporating environmental assessment criteria and general environmental standards for the mining industry into their new laws. However, few developing countries have translated these criteria into specific standards, and fewer still have implemented environmental enforcement to match these new rules. Without effective environmental controls, developing countries risk suffering serious environmental harm.²⁴¹

As commentator Madeline Cohen points out, even as developing countries, multilateral development banks, and industrialized countries express a commitment to ensuring that increased international mining activities incorporate environmental controls, they indicate a nearly unanimous reliance on EIAs for achieving this objective. Yet it is acknowledged that current EIA procedures may not adequately predict mining's actual environmental impacts, and, moreover, even the most meticulously prepared EIA will have no substantive effect on the environmental responsibility of a project's operations. Thus, despite developing countries increased environmental awareness and their efforts to meet lender-imposed environmental guidelines, most developing countries still lack strong environmental controls over mining activity.²⁴²

²⁴⁰ Cohen, *supra* note 149 at 157. See also Daniel Wagner, "A New World for Political Risk Investment Insurance" (October 1994) *Risk Mgmt.* 30-38, for a concise discussion of these agencies.

²⁴¹ Cohen, *supra* note 149 at 150-51. Development of domestic environmental law and the growing regime of international environmental agreements depend significantly on engaging developing countries' participation in addressing environmental problems. Partly driven by hopes of joining the North American Free Trade Agreement, at least half of the countries in Latin America are developing revised general environmental legislation. Indeed, many have embodied environmental protection in their constitutions (at 158).

²⁴² *Ibid.* at 158. Different approaches have been taken in developing environmental laws that affect mining activity in developing countries. Many developing

The enforcement difficulties that plague developing countries are the product of many factors. In part, the push for increased investment capital and the fear that stricter regimes will deter investment may be to blame. The importance of mining to many developing country growth strategies leaves environmental agencies with little power to control the mining industry.²⁴³ In addition, it must be remembered that environmental regulatory enforcement, as it is understood in the industrialized world, is an expensive proposition, with lax enforcement evident in Canada in times of fiscal restraint.²⁴⁴ Thus, there is a need to develop environmental standards that are within the technical and technological capacity of developing countries to enforce.

Madeline Cohen envisions the development of cooperative regimes for environmental partnerships between multinational mining companies and mineral-rich developing countries within individual mining projects. This cooperation would provide certainty to the mining industry, while offering developing countries the technology, training, and enforcement capacity building.²⁴⁵ Industrialized countries would participate in her proposals by continuing to assist developing countries in formulating new environmental regulations.²⁴⁶

Beyond these suggestions, what role is left for Canada? It is clear that Canada may exercise prescriptive jurisdiction with regard to EIAs for projects abroad to which it provides funding. This jurisdiction could be extended to requiring adequate insurance coverage for these ventures. The question becomes more complex in ventures that receive no Canadian government funding. However, as the foregoing analysis of public international law and state

countries have enacted framework laws that include environmental impact assessments. A few countries have incorporated stronger environmental provisions that acknowledge mining's potential to inflict enormous environmental damage, which typically impose liability on mining operators for damage to private property, surface areas, and water supplies. Few have gone so far as to adopt specific discharge standards or tailings disposal requirements, or to require that all mining operators post reclamation bonds. See *Ibid.* at 153-54.

²⁴³ *Ibid.* at 154-55. See the discussion earlier in this article under the heading "The Reality of Host State Participation."

²⁴⁴ See Mittelstaedt, *supra* note 189.

²⁴⁵ See Cohen, *supra* note 149 at 165-86, for a detailed look at her extensive proposals. Absent from Cohen's proposals is the important role non-governmental organizations could play in overseeing such an arrangement.

²⁴⁶ *Ibid.* at 173.

responsibility illustrates, it could be argued that Canada has a duty to apply its laws to a potentially harmful activity by a foreign subsidiary through a double link arising from the potential for effective control. It should be noted that this approach is much in line with emerging theories of multinational enterprise liability. The outer limits of this duty could fall in line with the reasoning of Bastarache J. in *R. v. Cook*, according to which concurrent claims to jurisdiction are "circumscribed to ensure that a state purporting to assume jurisdiction over events occurring abroad has a significant connection, or in the case of conflict with another jurisdiction, the *most significant* connection to the events in question."²⁴⁷ In this light, it should be noted that mining agreements often implement mining industry standards. Problems arise with the lax enforcement of these standards, which lead to environmental disasters and tort suits. Thus, questions of conflicting laws are less likely to arise.

What additional role therefore can Canada play in encouraging the enforcement of these agreed-to standards? Taking jurisdiction over transnational environmental torts that arise in Canadian courts would be one way. If the analysis underlying the acceptable limits of the extraterritorial prescriptive jurisdiction are applied to adjudicative jurisdiction in the context of transnational torts, it becomes clear that a sufficient connection exists to ground Canadian jurisdiction. Moreover, if the analysis of *forum non conveniens* were to properly take into account theories of parent company liability as direct, rather than vicarious, the alternate jurisdiction would be much more difficult to establish as "clearly more appropriate." Whether the parent would ultimately be found liable, and which choice of law would be applicable, are separate issues, which must not be confused with the initial assertion of jurisdiction over the action.²⁴⁸ Furthermore, the Act of State doctrine should not be interpreted so as to render these disputes non-justiciable.

If Canadian courts took jurisdiction in these cases, they would not be alone. For example, under the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and

²⁴⁷ *Cook*, *supra* note 32 at 60.

²⁴⁸ The result will inevitably be that the application of the foreign law will be informed by implicit premises of Canadian law, resulting perhaps in a hybrid or transnational law. While the results might differ from those that would arise were the litigation to take place in the foreign forum, this is a legitimate outcome given that Canada has a real and substantial interest in the action.

Commercial Matters,²⁴⁹ the heads of jurisdiction are set forth in clear and specific terms, with any ambiguities dispelled by the European Community's Court of Justice in a landmark case *Handelskwerkerij GJ Bier BV v. Mines de Potasse d'Alsace*.²⁵⁰ As a result, the victims of environmental degradation can sue the polluter at home (the defendant's domicile), at the place where he pollutes (the place of the acting), or at the place where the pollution causes injury (the place of the injury).²⁵¹ While arguments about forum shopping are often made to discourage the assertion of jurisdiction, it must be noted that there is nothing illegitimate about forum shopping where there is more than one legitimate jurisdiction from which to choose.²⁵²

Taking jurisdiction would provide various positive incentives to both developing countries and mining companies. While some developing countries might fear capital flight were they to properly enforce their environmental laws, the exercise of judicial

²⁴⁹ 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, O.J.C. 189, 28 July 1990, p. 2 [hereinafter Brussels Convention], as cited in Campbell McLachlin and Peter Nygh, *Transnational Tort Litigation* (Oxford: Clarendon Press, 1996) at 3.

²⁵⁰ *Handelskwerkerij GJ Bier BV v. Mines de Potasse d'Alsace*, [1976] E.C.R. 1735, cited in McLachlin and Nygh, *supra* note 249 at 209 in ch. 12, "Environmental Damage" by Friedrich K. Juenger.

²⁵¹ In terms of general jurisdiction, the Brussels Convention, *supra* note 249, essentially abolishes the *Moçambique* principle as it would apply to tort actions for negligence. See Juenger in McLachlin and Nygh, *supra* note 250 at 209-10. Article 16(1) of the convention limits exclusive jurisdiction for actions dealing with immovables to those proceedings that involve rights *in rem* or tenancies, thus it does not encompass tort actions brought against polluters. Pursuant to Article 2, polluters can be sued in the state of their domicile or, in the case of a corporation, in the state in which they have their principal place of business (see Article 53). Even countries that recognize the doctrine of *forum non conveniens* are barred from applying it in actions that fall within the convention. Thus, "the victims of transborder pollution can sue the polluter, without any ifs and buts, in his home country." Note that if the polluter is domiciled outside the Common Market, the plaintiff is not limited by these three "normal" bases of jurisdiction but may enhance his forum shopping opportunities by the exorbitant bases found in national laws, which the convention outlaws only against member states domiciliaries (Juenger at 213). See also the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, O.J.L. 319, 25 November 1988.

²⁵² McLachlin, "Transnational Tort Litigation: An Overview," in McLachlin and Nygh, *supra* note 250 at ch. 1, stating: "The law of jurisdiction in this sense operates as a matrix of options within which litigants' choices are exercised and where a number of states may potentially hold concurrent jurisdiction" (at 9).

jurisdiction is “country neutral” and cannot be seen as discouraging investment in any particular country. Indeed, “any disincentive caused by exercise of jurisdiction here would not be to investment [in the host State], which could offer as much protection to foreign investors as any other country, but to conduct likely to violate applicable legal norms regardless of the site of the property affected.”²⁵³

The need for action is illustrated by the warning signs in evidence prior to the accident at the Omai Gold Mine. According to Mark Fried of Oxfam Canada, the Amerindian People Organization had been monitoring the Omai Gold Mine operation prior to the spill and had held a press conference four months before the accident, predicting that a build-up of the tailings would breach the mine’s dam.²⁵⁴ Indeed, a representative from the United States Environmental Protection Agency concluded that the dam’s failure “could have been predicted if not prevented.”²⁵⁵

In time, the many different pressures brought to bear on Canadian mining companies may give rise to a new level of awareness and environmental responsibility. A sign of change may be found already in Cambior’s announcement in February 1999, which states that its environmental management system has been awarded the prestigious ISO 14001 certification — the first mining company in Canada and the first gold mining company in the

²⁵³ This observation is taken from a discussion of the significance of foreign investment to Ecuador of Broderick USDJ, in the memorandum order *Maria Aguinda v. Texaco*, 1994 U.S. Dist. 4718 (April 11, 1994) [Lexis]. He noted that a disincentive to invest would only arise if the court were to find that the country’s own courts were unqualified to adjudicate relevant matters. But see *Aguinda*, *supra* note 71, where submissions of the Congress of Ecuador asking the court to disregard the submissions of the government of Ecuador objecting to the court’s retention of jurisdiction, led to this remark: “[T]he litany of conflicting submissions from these representatives and officials further evidences the need for this Court to resist intruding on matters that are already subject of intense political debate in the affected foreign country.” However, see also the appeal in *Jota*, *supra* note 71, for a discussion of Ecuador’s change of heart in support of the U.S. litigation.

²⁵⁴ Weinberg, *supra* note 46.

²⁵⁵ Jacobson, *supra* note 6, citing a United Nations report that harshly criticized the Omai Gold Mine for failing to adequately monitor the operation of the dam, even though the design chosen was one that required “extremely careful construction and monitoring.” The report concluded that the mine operated “without proper evaluation of groundwater levels in and around the dam, without evaluation of discharges in creeks . . . and most important without capacity for oversight of the environmental monitoring program.”

world to achieve such certification for its environmental management systems.²⁵⁶ Developed by the International Organization for Standardization, based in Switzerland, the ISO 14001 provides the methodology for companies to develop or adapt an environmental management system to ensure that all operating procedures are consistent and effective, with certification also calling for continuous improvement. This certification was only awarded to Cambior's Canadian entities²⁵⁷ as of the end of 1998. According to the release, certification of the Omai Gold Mine was targeted for 1999. Cambior states that its objective will be to certify all future development projects and operations.²⁵⁸

The significance of this press release announcement does not lie with whether one believes fully that Cambior has reached this level of environmental compliance but rather with the fact that Cambior considers it important enough to be perceived by the investor community as having reached this level. While investor concern usually stems from self-interest with regard to share prices, accurate information concerning environmental liabilities plays a role in this marketplace. It is interesting to note in this context that share prices did fall for Biloden Limited, Cameco Corporation, and Cambior Incorporated after spills were reported, although

²⁵⁶ "Cambior Environmental Management System Awarded Prestigious ISO 14001 Certification," *Business Wire* [Montreal] (February 10, 1999) [Lexis]. According to this item, which is based upon a press release geared towards investors, the ISO 14001, referred to as "the green standard" is an outgrowth of ISO 9000, both of which were developed by the International Organization for Standardization, based in Switzerland.

²⁵⁷ With the exception of the Doyon mine acquired by Cambior in early 1998.

²⁵⁸ *Ibid.* Described as a company-wide process coordinated by the director of environment and research, the process of implementing the environmental management system involves "examining any process or procedure carried out by the company that has, or could have, an environmental impact, as well as all applicable laws and regulations. Once the risks are evaluated and a plan for minimizing or eliminating the risk is developed and implemented to ensure that the process can be tracked and improved on a continuous basis. Total employee involvement at each mine and office is a key to the success of the program, and training is a major component. An important element to the EMS is a series of on-going evaluations that examine not only compliance but also the systems and the technology used in the process." According to an Excerpt from Cambior Incorporated's 1999 Annual Report, Omai Gold Mines Limited has, over the past year, been in the process of implementing the ISO 14001 Environmental Management Standard for its Guyana operation, with certification anticipated in the 3rd quarter 2000. This excerpt is available online: <www.cambior.com/english/5_environment/frisco.htm>.

these declines were not significant nor did they last for long.²⁵⁹ This trend may be linked to the fact that these companies are unlikely to face high damage claims, as illustrated by the problematic doctrines and inadequate regulatory controls explored in this article.²⁶⁰

A second sign of hope may be the front-page business section profile given by the *National Post* on reports of Placer Dome's environmental problems in the Philippines, including details of court actions in Manila and reports of questionable environmental activities alleged by the Mineral Policy Center in Washington, DC, which go back twenty years. Significantly, the report that the disaster could have been prevented led to some "ethical" investors unloading Placer Dome shares, including Vancouver's Ethical Funds Incorporated.²⁶¹

²⁵⁹ Bourrie, *supra* note 1. Boliden Limited, the owner of the Spanish zinc mine that had a massive spill, lost 30 per cent of its value in the weeks after the accident, with the share prices since rising back to near their pre-pollution level. The stock of Kumtor, the company that caused the Kyrgyzstan spill, lost only 15 per cent of its value. While Cambior Incorporated's share price had dwindled from about Cdn. \$22 to about \$14 per share in the last two months (August 24, 1997), this may have been due more to the activities of the RIQ than the spill itself. These activities included writing letters to financial institutions that were considering giving loans to Cambior to develop the La Granja gold mine in northern Peru, stating that Cambior has demonstrated a serious disregard to the ecosystems in which it operates, as shown by the Guyana spill as well as by alleged violations in Alaska and Arizona. Travis of RIQ further warned that activists would seriously consider a full retail boycott of any financial institution that provided financing to Cambior unless the company settled the outstanding compensation claims in Guyana. Cambior hit back, unsuccessfully seeking a legal injunction to prevent Travis from talking to any financial institution because of "unlawful interference in its economic activities." See Chatterjee, *supra* note 219. In addition, Travis allegedly planned to chastise company officials at their annual meeting for having an insurance policy that provided only US \$1 million to cover Omai damage claims. See Peter Kennedy, "Engineering Firm Named in Lawsuit over Cambior's Guyana Spill," *Financial Post* (April 30, 1998). Travis phrased his question: "Is this the type of risk that shareholders want to be exposed to in a global economy?"

²⁶⁰ However, it is clear that mining disasters are costing mining companies some money: the spill in the Philippines cost Placer Dome Incorporated of Vancouver more than US \$43 million, while the Guyana spill cost Cambior about US \$21 million. See Damsell, *supra* note 220.

²⁶¹ Damsell, *supra* note 5. Cohen, *supra* note 149 at 174, notes that multinational corporations must meet (Securities Law) disclosure obligations and respond to public opinion at home. As public companies expand, their operations are more carefully scrutinized by more interested parties (institutional investors, for example). Thus, when environmental legislation of a developing country

These illustrations suggest another important element to consider in the decision to take jurisdiction over such actions — the interest of the Canadian public as investors. This interest may be read into the remarks of La Forest J. in *Tolofson* that states will “open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state.”²⁶² If these interests and values are also informed by emerging international norms on state responsibility, there can be no disagreement that adjudicative jurisdiction must be taken in litigation arising in Canada over mining disasters of foreign subsidiaries. The interests of comity demand no less.

Sommaire

La destruction de l'environnement dans les pays en développement provoquée par les filiales de sociétés d'exploitation minière canadiennes: Rapport entre le droit international privé et le droit international public

Cet article traite de la question de la responsabilité du Canada d'assurer que les activités des sociétés d'exploitation minière trans-nationales canadiennes n'entraînent pas la destruction de l'environnement dans d'autres pays. L'auteur explore la question de la responsabilité qu'ont les compagnies mères, selon le droit canadien, par rapport au comportement de leurs filiales à l'étranger. Il évalue les problèmes de compétence et de choix du droit applicable que soulèverait une poursuite civile devant une instance canadienne. L'auteur examine aussi les conséquences, selon le droit international public, d'une application du droit canadien à l'étranger.

lags behind, the mining company may find itself trying to compromise between the environmental wishes of its shareholders and the legislative authorities at home and government departments in developing countries.

²⁶² *Tolofson*, *supra* note 88.

Summary

Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law

This article addresses the responsibility of Canada for ensuring that Canadian transnational mining corporations do not cause environmental harm in other countries. The author discusses the liability of parent companies under Canadian law for the actions of their subsidiaries abroad and considers the jurisdictional and choice of law problems in bringing a tort action in Canadian courts. The author also considers the implications under international law of any extraterritorial application of Canadian law.