

GUIDE TO TRANSNATIONAL TORT LITIGATION
IN THE UNITED KINGDOM AND THE UNITED STATES
REGARDING THE SPOILIATION OF NATURAL RESOURCES

CLEAN TRADE PROJECT:
THE RESOURCE CURSE AND
CONSUMER DEMAND FOR OIL, GAS, AND MINERALS

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This Guide was written with generous support from The Leverhulme Trust.

With thanks to Cecily Rose for her assistance in researching and drafting this Guide.

Table of Contents

I. Introduction.....	4
II. The Right of Peoples to their Natural Resources	8
A. International Legal Instruments.....	8
B. The Right of Peoples to their Natural Resources Exists Beyond the Decolonisation Context	13
C. Peoples Exercise the Right through Political Participation	17
III. Transnational Tort Litigation in the United Kingdom and the United States	20
A. Choice of Law Rules	21
1. United States.....	21
2. United Kingdom	24
B. Transnational Negligence Claims in the United Kingdom	28
C. Transnational Tort Litigation in the United States	32
1. Background Information on the Alien Tort Statute.....	33
2. The Issue of Corporate Liability Under the Alien Tort Statute.....	35
3. Difficulty in Characterising Natural Resource Spoliation as an ATS Claim	39
4. Tort Claims under State Law.....	40
D. Cases Regarding Stolen National Antiquities.....	41
IV. The Pursuit of a Public Issue through Private Law	45
V. Potential Challenges that Plaintiffs May Face	48
E. Act of State Doctrine	48
1. The Scope of the Act of State Doctrine in the United Kingdom and the United States.....	48
2. Exceptions to the Act of State Doctrine	54
F. The Doctrine of Forum Non Conveniens.....	55
1. United States.....	55
a. First Step: Adequacy of Alternative Forum	56
b. Second Step: Balancing Public and Private Interests.....	58
2. United Kingdom	61
G. Repatriation of Funds	65
VI. Conclusion	66

**GUIDE TO TRANSNATIONAL TORT LITIGATION
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I. Introduction

The Clean Trade Project concerns the link between the ‘resource curse’ and consumer demand for oil, gas, and minerals. The Project aims to reduce the authoritarianism, conflict, corruption, and economic instability associated with the resource curse by developing mechanisms for improving international trade in natural resources.¹ The Project specifically focuses on how the policies of importing States, such as those in Europe and North America, contribute to the ‘resource curse’ in exporting States. The Clean Trade Project seeks to reduce or eliminate consumer demand in importing countries for natural resources exported from States where resources are controlled by unaccountable actors, such as authoritarian regimes.

This Guide is a component of the Clean Trade Project. The Guide is for lawyers and other advocates who have an interest in pursuing legal remedies that are in keeping with the Clean Trade Project, and in particular civil litigation. These civil actions would aim to vindicate the rights of peoples in exporting States to their natural resources. The actions would also seek to pressure multinational corporations in the extractive industries not to deal with such exporting States, and to pressure importing States to implement the Clean Trade framework, such as through the imposition of trade sanctions on resource-exporting authoritarian States.

The right that these civil actions would seek to vindicate has a basis in international human rights law. The international human rights Covenants provide that all peoples may freely dispose of their natural wealth and resources.² The governments of resource-exporting States violate this right when they dispose of the natural resource without accountability to the people of that State. The victims in such cases are the people of the State who exercise little or no control over the decisions that their governments make regarding natural resources. Governments and State-owned corporations generally dispose of such wealth in conjunction with

¹ Leif Wenar, *Clean Trade in Natural Resources*, 25 *Ethics & International Affairs* 27 (2011).

² Art. 1(2) common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

multinational corporations in the extractive industries, with whom they have complex concession and exploitation agreements. Civil actions would ideally target both States and State-owned corporations, as well as multinational corporations. Domestic laws on State immunity, however, pose a serious obstacle to suits against States and State-owned entities, and this Guide does not examine the possibility of civil actions against these actors.

Although these civil actions will be vindicating a right based in international human rights law, this body of law does not itself provide the tools for enforcing the right of peoples to dispose freely of natural resources. To enforce this right, litigants must turn instead to domestic legal systems, which represent the only viable fora. This Guide is not a comprehensive manual to domestic legal remedies for the natural resource curse, but instead focuses specifically on the possibility of transnational tort litigation in the United States and the United Kingdom. In many cases, it may be necessary or desirable for victims to pursue their claims in resource-importing States because the courts in resource-exporting States may be subject to less favourable substantive and procedural laws, and may also be corrupt or biased (unless a regime change has occurred). Courts in the United States and the United Kingdom are relatively open to litigation regarding torts that involve foreign actors and that occurred in foreign countries. This Guide explores how plaintiffs could bring such transnational tort cases against multinational corporations in these jurisdictions.

In pursuing litigation at the domestic level, plaintiffs will also be seeking to apply domestic rather than international law. The only exception would be litigation under the Alien Tort Statute ('ATS') in the United States, as this piece of legislation uniquely allows for the application of international law in domestic tort cases. As will be explained below, however, the ATS may not be a promising avenue for such litigation at this time. Thus, plaintiffs will, in all likelihood, be constructing arguments under domestic tort laws. Because of the rules concerning conflict of laws, the applicable laws will likely, although not necessarily, be those of the importing State, such as the United States and the United Kingdom, rather than the exporting State. The exact nature of the tort action would therefore vary, depending on the tort laws of the importing State. Nevertheless, transnational stolen antiquities cases in both the United States and the United Kingdom provide a useful model for potential litigants, and demonstrate how actions under the tort of conversion could potentially capture the type of harm occasioned by the spoliation of natural resources.

The strongest, most viable tort cases may be those in which the citizens of a resource-exporting State can point to a statute or a constitutional provision that grants the people, rather than the government, ownership or control over natural resources.³ The Constitution of Vietnam, for example, provides that ‘[t]he land, forests, rivers and lakes, water sources, underground natural resources, resources in the territorial waters, on the continental shelf and in the air space... fall under the ownership of the entire people.’⁴ There may be particularly strong potential for ‘Clean Trade’ litigation with respect to Vietnam, which is relatively rich in oil reserves, and performs quite poorly on governance indicators. Vietnam ranks as the third-largest oil producer in South Asia, and 35th in the world, just above Equatorial Guinea.⁵ In 2004, Vietnam began awarding exploration rights to companies from the United States, Canada, and India. ExxonMobil, which has a license from the Vietnamese government to explore certain blocks off the coast, recently discovered oil in one of those blocks.⁶ Meanwhile, Vietnam falls near the bottom of respected governance indices. Vietnam ranks as an ‘authoritarian regime’ in *The Economist Democracy Index 2011*,⁷ and as ‘Not Free,’ in Freedom House’s *Freedom in the World Index 2012*.⁸ Moreover, in the World Bank’s *Worldwide Governance Indicators*, Vietnam ranks in the bottom 10th percentile for ‘voice and accountability,’ meaning the extent to which Vietnamese citizens are able to participate in

³ Equatorial Guinea’s Hydrocarbons Law, for example, provides that ‘The fundamental law of the Republic of Equatorial Guinea consecrates and designates as the property of the people of Equatorial Guinea all resources found in our national territory, including the subsoil, continental shelf, islands and the Exclusive Economic Zone of our seas. It is by the mandate and delegation of the people, to whom these resources legitimately belong, that the Government undertakes to manage them.’ Hydrocarbons Law No. 8/2006, 3 November 2006, preliminary recital, para. 1. The Hydrocarbons Law is not entirely consistent, however, as it goes on to provide that ‘[a]ll hydrocarbons reservoirs that exist in the surface and subsoil areas of Equatorial Guinea, including its inland waters, territorial waters, exclusive economic zone and Continental Shelf are the exclusive property of the State and therefore public domain goods.’ *Id.* at Chapter 1, Art. 1. The Constitution of Equatorial Guinea is also somewhat contradictory, as it provides that ‘[t]he State shall fully exercise its sovereignty and shall be reserved the exclusive rights to explore and exploit all mineral resources and hydrocarbons.’ Art. 3, para. 2. Due to the contradictory language contained in Equatorial Guinea’s Hydrocarbons Law and Constitution, this section focuses instead on the example of Vietnam.

⁴ 1992 Constitution of the Socialist Republic of Vietnam, as amended 25 December 2001, Art. 17.

⁵ CIA World Factbook, Country Comparison: Oil Production, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2173rank.html>.

⁶ Isabel Ordóñez, *Exxon Makes Find off Vietnam*, *The Wall Street Journal*, 25 October 2011; Reuters, *ExxonMobil says finds hydrocarbons off Vietnam*, 27 October 2011.

⁷ Economist Intelligence Unit, *Democracy Index 2011: Democracy Under Stress*, p. 7.

⁸ Freedom House, *Freedom in the World 2012*, www.freedomhouse.org/template.cfm?page=22&year=2010&country=7949.

selecting their government and engage in freedom of expression, freedom of association, and free media.⁹

This Guide seeks to encourage citizens in States such as Vietnam to pursue transnational tort litigation against multinational corporations that extract natural resources in circumstances where the people have a right freely to dispose of those resources, but little or no reasonable means to influence governmental decisions about resource exploitation. In States where constitutional or statutory provisions indicate that the people own the natural resources of the State, the exploitation of those resources without the consent of the people constitutes theft or spoliation. Because theft is a criminal law concept, however, civil litigants will have to determine how the relevant tort laws capture such conduct. Tort laws in some jurisdictions would, for example, characterise both the sale by the State and the exportation by the corporation as a ‘conversion,’ meaning the interference with the people’s right to possession of the natural resources. The appropriate tort action in a given case will, however, depend on the exact nature of the conduct and the applicable tort laws. Finally, any individual citizen or group of citizens would be likely to have standing to bring such a case.

While courts in the United States and the United Kingdom are relatively open to such cases, plaintiffs pursuing this type of litigation may wish to bear in mind that they could encounter some challenges.¹⁰ On a conceptual level, transnational tort litigation could raise questions because it involves the pursuit of a public interest—ownership by the people over natural resources—through the tools of private law, i.e., tort litigation. With respect to possible legal challenges, defendants could raise the act of State doctrine, which precludes US and UK courts from adjudicating the validity of acts of foreign governments in their own territory. Defendants could also raise the doctrine of *forum non conveniens*, according to which the courts of another State may be more appropriate for the trial of a given action. Finally, on a practical level, the repatriation of funds derived from natural resources may raise challenges due to the difficulties involved in distributing large sums to a dispossessed population.

⁹ Worldwide Governance Indicators, Country Data Report for Vietnam, 1996-2010, info.worldbank.org/governance/wgi/pdf/c234.pdf.

¹⁰ Issues of service of process remain beyond the scope of this Guide. In addition, the Guide does not discuss issues of parent corporation liability, including the corporate veil. For a discussion of the latter, *see* Sarah Joseph, Corporations and Transnational Human Rights Litigation (Hart 2004).

This Guide seeks to chart a path through these potential challenges. Part II of this Guide explains how civil actions will relate to the right of peoples to their natural resources under international human rights law. Part III provides an overview of transnational tort litigation in the United Kingdom and the United States. This section examines choice of law issues and the types of tort cases that claimants have pursued, including claims for negligence and conversion, as well as claims under the Alien Tort Statute in the United States. Part IV briefly discusses the conceptual issues that could be raised by such transnational tort litigation, while Part V examines the legal and practical challenges that plaintiffs could face, including the Act of State doctrine, the doctrine of *forum non conveniens*, and the repatriation of funds.

II. The Right of Peoples to their Natural Resources

This Guide begins from the premise that international law provides a legal basis for the right of peoples to their natural resources.¹¹ The following examination of this premise will lay the foundation for the remainder of the Guide, and for Clean Trade actions in the future. This section begins by discussing the relevant international legal instruments regarding the right of peoples to their natural resources, before establishing that the right has persisted since decolonisation, and explaining how peoples may exercise this right today. In essence, the right of peoples to their natural resources comprises part of the right to ‘economic self-determination,’ which is a form of internal self-determination, meaning that peoples have a right to pursue their economic development within the constitutional framework of an existing State.

A. International Legal Instruments

The right of peoples to their natural resources emerged as a part of the principle of permanent sovereignty over natural resources. This principle developed during the early 1950s in an effort to secure the benefits from the exploitation of natural resources for peoples living under colonial rule, and to protect newly independent States from infringements on their sovereignty by foreign States or companies.¹² The principle of permanent sovereignty over natural resources thus has two strands: one is based on self-determination, and the other is based

¹¹ Cf Peter Schaber, *Property Rights and the Resource Curse*, 17 *Global Governance* 185 (2011).

¹² Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge 1997), 24.

on sovereignty.¹³ In the 1950s and early 1960s, during the decolonisation process, some General Assembly resolutions emphasised the self-determination of peoples under colonial rule, but following this period, the resolutions stressed sovereignty as a shield against claims by other States and foreign companies.¹⁴ General Assembly Resolution 626 (1952) noted that ‘the right of *peoples* freely to use and exploit their natural wealth and resources is inherent in their sovereignty.’¹⁵ In addition, Resolution 1803 (1962) provided that ‘[t]he right of *peoples* and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.’¹⁶ Subsequent General Assembly resolutions, however, referred not to the right of peoples, but to the right of States to natural resources, thereby emphasising the sovereignty strand of the principle of permanent sovereignty over natural resources.¹⁷

The self-determination strand of the principle of permanent sovereignty over natural resources was, however, eventually codified in the international human rights Covenants, though in a qualified manner. In 1952, when self-determination dominated discussions of permanent sovereignty over natural resources, Chile proposed the addition of a paragraph concerning self-determination and natural resources to the International Covenant on Civil and Political Rights (‘ICCPR’). Socialist and developing countries immediately supported this proposal, while Western countries generally opposed it either because of their colonial interests or the threat posed to foreign investments in developing countries.¹⁸ Western States, however, insisted that if the provision were included, then it should apply not only to colonial situations, but to any

¹³ The term self-determination encompasses both internal and external self-determination. Internal self-determination refers to ‘a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state.’ *Reference re Secession of Quebec* (Supreme Court of Canada) [1998] 2 SCR 217, para. 126. External self-determination refers to ‘[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people...’ Friendly Relations Declaration, General Assembly Resolution 2625 (XXV), 24 October 1970. Sovereignty is a complex, multifaceted concept, but it generally refers to the ‘supreme authority within a territory.’ In international law, sovereignty often refers to external sovereignty, meaning a State’s freedom from outside influence. Sovereignty, Stanford Encyclopedia of Philosophy, published on 31 May 2003, revised on 8 June 2010.

¹⁴ *Id.* at 8, 20, 369-371.

¹⁵ GA Res 626 (1952), preamble (emphasis added).

¹⁶ GA Res 1803 (1962), para. 1 (emphasis added); *see also* GA Res 837 (1954), GA Res 1314 (1958).

¹⁷ GA Res 3171 (1973); GA Res 3201 (1974).

¹⁸ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge 1995), 49-50.

people oppressed by their own government or a foreign government.¹⁹ By 1955, when the article on self-determination was adopted, only a few States still maintained that it should be limited to colonial situations.²⁰

The right of the peoples to their natural resources was thereby included in the ICCPR and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), both of which were concluded in 1966 and entered into force in 1976.²¹ Article 1(2), common to both of these Covenants, provides that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.²²

This provision encompasses both a right to control natural resources and a right to benefit from natural resources.²³ Within the first fifteen words of Article 1(2), the phrase 'freely dispose' indicates that peoples have a right to control natural resources, while the phrase 'for their own ends' captures the right to benefit from those resources. Antonio Cassese explained that this provision embodies a 'right to demand that the chosen central authorities exploit the territory's natural resources so as to benefit the people.'²⁴ This right entails a 'corresponding duty of the central government to use the resources in a manner which coincides with the interests of the people.'²⁵

It should be noted that the right of peoples to dispose freely of their natural wealth and resources for their own ends is not absolute. The right is subject to the qualification that it be exercised without prejudice to any obligations of States arising out of international economic co-operation. In other words, this right must not impair or conflict with treaties that promote

¹⁹ Antonio Cassese, *Self-Determination of Peoples* in *International Bill of Rights: The Covenant on Civil and Political Rights*, ed. Louis Henkin (Columbia 1981), 93.

²⁰ Cassese, *supra* note 18 at 51-52.

²¹ The ICCPR entered into force on 23 March 1976, and the ICESCR entered into force on 3 January 1976.

²² Art. 1(2).

²³ Cassese, *supra* note 18 at 55.

²⁴ Cassese, *supra* note 18 at 55.

²⁵ *Id.* at 55-56

international economic co-operation or with customary international law that protects the rights of foreign investors.²⁶ The effect of this qualification is, however, arguably overridden by identical articles which were later included in both the ICCPR and the ICESCR, such that nothing in these Covenants ‘shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.’²⁷

It should be noted that Article 1(2) establishes a right of peoples as such, rather than of individuals, which bears on its enforcement mechanism at the international level.²⁸ The ICCPR’s Human Rights Committee has determined that under the Optional Protocol to the ICCPR, only individuals can submit communications to the Committee.²⁹ According to the Committee, individuals cannot claim to be a victim of a violation of the right to self-determination because this is a right held not by individuals, but by peoples.³⁰ As a result, peoples may seek to vindicate this right indirectly by bringing communications as individuals regarding other provisions of the ICCPR. Alternatively, the inter-state complaints procedure established by Article 41 of the ICCPR could represent an avenue for enforcement of Article 1(2), although States have yet to utilise this mechanism.³¹ As this Guide discusses, peoples may also seek to pursue this right at the domestic rather than the international level.

Although the human rights Covenants will remain the focus of this analysis, as they have global application and a relatively large number of States Parties,³² the African Charter on Human and Peoples’ Rights (‘African Charter’) merits some attention because it contains a

²⁶ Industrialised States included this qualifier and the reference to ‘international law’ in Article 1(2) in part because of concerns about compensation for the expropriation or nationalization of foreign investments. *Id.* at 56. Cassese concluded that the clause ‘based upon the principle of mutual benefit, and international law’ means that ‘an international treaty or agreement may be terminated by a state if it is contrary to the right of its people over its natural wealth, but this unilateral act must not prejudice obligations flowing from international law, including the obligation to provide compensation.’ Cassese, *supra* note 19 at 104

²⁷ ICCPR Art. 47; ICESCR Art. 25.

²⁸ Cassese, *supra* note 18 at 64; Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (2004), 151-153.

²⁹ Art. 2, Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 302, *entered into force* 23 March 1976.

³⁰ *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), para. 6.3; *A.B. et. al. v. Italy*, Communication No. 413/1990, U.N. Doc. CCPR/C/40/D/413/1990 at 30 (1990), para. 3.2.

³¹ Anna Batalla, *The Right of Self-Determination – ICCPR and the Jurisprudence of the Human Rights Committee*, presented at a Symposium on the Right to Self-Determination in International Law, 29 September – 1 October 2006, p. 4.

³² There are currently 167 States Parties to the ICCPR, and 160 States Parties to the ICESCR.

similar right of peoples to natural resources. Article 21 of the African Charter, which was adopted in 1981 and entered into force in 1986, provides that:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.³³
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

Like Article 1(2) of the Covenants, Article 21 of the African Charter indicates that the ‘free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.’³⁴ In addition, however, Article 21 provides that the States Parties to the Charter ‘shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.’³⁵ This sub-paragraph arguably introduces some ambiguity as to whether peoples or States hold the right.³⁶ This provision, however, need not be interpreted as conflicting with sub-paragraphs (1) and (2) of Article 21: while peoples remain the ultimate right-holders, Article 21(4) provides that the State may exercise a right to free disposal which derives from the people.

Leaving aside for the time being the General Assembly Resolutions and the African Charter, the international human rights Covenants provide us with a firm legal basis for the existence of the right of peoples to their natural resources. Although the right set forth in the Covenants appears to be a qualified one, it is still a right clearly held by peoples. Thus, the critical legal issue is not whether the right exists, but rather how peoples would go about exercising this right. Commentators have devoted relatively little attention to these issues in recent years, thus leaving ample space for scholarly work and legal advocacy.³⁷

³³ Art. 21(1).

³⁴ Art. 21(3).

³⁵ Art. 21(4).

³⁶ Crawford in *The Right of Peoples*, ed. James Crawford (Oxford 1988), 170.

³⁷ The last serious scholarly work on this issue was undertaken in the 1980s and 1990s. See Crawford, *supra* note 36, Cassese, *supra* note 18, Schrijver, *supra* note 12. See also Alice Farmer, *Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-exporting Countries*, 39 N.Y.U. J. Int’l L. & Pol. 417 (2006), Emeka Duruigbo, *Permanent Sovereignty and Peoples’ Ownership of Natural Resources*, 38 Geo.

B. The Right of Peoples to their Natural Resources Exists Beyond the Decolonisation Context

A strong argument may be made that the right of peoples to their natural resources extends beyond the decolonisation context, as it is part of the right to economic self-determination, which is an aspect of internal self-determination. In fact, few today would argue the opposite. Jorge Viñuales, has, however, recently claimed that the right of peoples to their natural resources ends with the decolonisation process, when a sovereign State has emerged.³⁸ Viñuales has effectively concluded that while the people may have a political or ethical entitlement to natural resources, they have no ongoing legal right to them because this entitlement may only be exercised through the government.³⁹ According to this line of argument, the State, as represented by the government, owns the natural resources, not the people.⁴⁰ Viñuales appears, however, to have conflated the issue of whether the right of peoples to their natural resources extends beyond the decolonisation context, and whether this right is held by the people or by the government. That is to say, Viñuales has merged the issue of whether the right currently exists with the issue of how it may be exercised. The language and context of Article 1(2) work to defeat the argument that this right ends with independence, as do the *travaux préparatoires* and subsequent interpretations by the ICCPR's Human Rights Committee.⁴¹ The issue of how this right may be exercised will be addressed separately in the following sub-section.

First, nothing in the language of Article 1(2) indicates that the right of peoples to natural resources is applicable only in the decolonisation context.⁴² The term 'all peoples' is plainly all-encompassing and does not qualify the right by indicating that it only applies to peoples under

Wash. Int'l L. Rev. 33 (2006), Ndiva Kofele-Kale, *The International Law of Responsibility for Economic Crimes* (2006), Chapter 3.

³⁸ Jorge Viñuales, *The 'Resource Curse' – A Legal Perspective*, 17 *Global Governance* (forthcoming 2011), 10 ('Whereas from a political or an ethical perspective one may argue that such entitlement [of the people to natural resources] does not disappear after the "initial delegation" that occurs when a people exercises its right to self-determination, such contention would not find a firm ground under either international or domestic law.').

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Vienna Convention on the Law of Treaties, Arts 31-32.

⁴² James Crawford, *Some Conclusions in The Right of Peoples*, *supra* note 37 at 169; Cassese, *supra* note 19 at 103; Helen Quane, *The United Nations and the Evolving Right to Self-Determination*, 47 *International and Comparative Law Quarterly* 536, 559 (1998).

colonial domination. Second, the context of the term supports this interpretation. The following sub-paragraph specifically clarifies that the right of self-determination applies to colonial as well as other peoples. Article 1(3) provides that ‘[t]he States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.’ As argued by James Crawford with respect to sub-paragraphs two and three of Article 1, ‘[w]hen a text says that ‘all peoples’ have a right—the term ‘peoples’ having a general connotation—and then in another paragraph of the same Article, it says that the term ‘peoples’ includes the peoples of colonial territories, then it is perfectly clear that the term is being used in a general sense.’⁴³ Beyond Article 1, Article 47 of the ICCPR (which is identical to Article 25 of the ICESCR), refers to the right of peoples to their natural wealth and resources as ‘inherent,’ which also suggests that the right is essential or permanent, rather than contingent upon colonial subjugation. Third, as mentioned above, the *travaux préparatoires* of the Covenants reveal that while there was not complete agreement about Article 1(2) applying beyond colonial situations, this was the understanding of all but a few of the States. Thus, the *travaux préparatoires* further confirm the universal meaning of the word ‘peoples.’⁴⁴

Finally, relatively recent statements by the Human Rights Committee support the notion that economic self-determination extends beyond the decolonization context.⁴⁵ Although the observations of the Human Rights Committee do not necessarily qualify as subsequent agreement or practice regarding the ICCPR’s interpretation, as set forth in the Vienna Convention on the Law of Treaties, the Committee’s ‘concluding observations’ nonetheless constitute authoritative guidance for States Parties.⁴⁶ In its concluding observations with respect to Azerbaijan in 1994, the Human Rights Committee recalled that the principle of self-determination under Article 1 ‘applies to all peoples and not merely to colonized peoples.’⁴⁷ In

⁴³ James Crawford in *Peoples’ Rights*, ed. Philip Alston (Oxford 1999), 27.

⁴⁴ Vienna Convention on the Law of Treaties, Art. 32.

⁴⁵ (1999) UN doc. CCPR/C/79/Add.105, para. 8; (2002) UN doc. CCPR/CO/74/SWE, para. 15.

⁴⁶ The Committee produces these ‘concluding observations’ as a part of the reporting process through which it monitors the implementation of the Covenant by States Parties. *Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev.1)*, 22.

⁴⁷ (1994) UN doc. CCPR/C/79/Add.38, para. 4.

addition, within the past thirteen years, the Human Rights Committee has applied Article 1(2) of the ICCPR to situations involving indigenous peoples living in sovereign States. With respect to Canada, the Committee expressed concern about the situation of aboriginal peoples, whose institutions of self-government will fail without a greater share of lands and resources.⁴⁸ The Committee emphasized that ‘the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.’⁴⁹ The Committee endorsed the recommendations of the Royal Commission on Aboriginal Peoples with respect to land and resource allocation, and it also recommended ‘that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant.’⁵⁰

With respect to Sweden, the Committee similarly referenced Article 1 when expressing concern ‘at the limited extent to which the Sami Parliament can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the indigenous Sami people, such as projects in the fields of hydroelectricity, mining and forestry, as well as the privatization of land.’⁵¹ The Committee recommended that Sweden ‘take steps to involve the Sami by giving them greater influence in decision-making affecting their natural environment and their means of subsistence.’⁵² In supporting this conclusion, the Committee referenced not only Article 1, but also Article 25, which concerns the right to political participation. The importance of Article 25 with respect to the fulfilment of economic self-determination will be discussed below. Although the Committee made these recommendations to Canada and Sweden in the specific context of indigenous rights, this does not diminish the significance of the fact that the Committee applied Article 1(2) outside of the decolonisation context.

More recently, in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, the International Court of Justice determined that the principle of permanent sovereignty over natural resources is a part of customary international

⁴⁸ (1999) UN doc. CCPR/C/79/Add.105, para. 8.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ (2002) UN doc. CCPR/CO/74/SWE, para. 15.

⁵² *Id.*

law.⁵³ The Court reached this conclusion in the context of a case concerning the exploitation by Ugandan armed forces of natural resources in the eastern Democratic Republic of Congo ('DRC') during the armed conflict that took place there in the late 1990s and early 2000s. The Court, however, held that the General Assembly Resolutions that set forth this principle did not apply to the looting, pillage, and exploitation of natural resources by army members of one State which are militarily intervening in another State.⁵⁴ While the Court determined that the principle of permanent sovereignty over natural resources did not apply to this particular situation, it gave no indication that this concept could only apply in the context of decolonisation. It may be noted that in his declaration, Judge Koroma argued that the rights and interests of peoples in their natural resources 'remain in effect at all times, including during armed conflict and during occupation,' such that exploitation by a foreign military force violates the principle of permanent sovereignty over natural resources as well as the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949.⁵⁵ In support of this argument, Judge Koroma noted that in Resolution 1291 (2000), the Security Council had reaffirmed the DRC's sovereignty over its natural resources, and had expressed concern about the illegal exploitation of its assets.⁵⁶

It may also be noted that the African Commission on Human and Peoples' Rights has discussed the application of the right of peoples to natural resources outside of the decolonisation context, while at the same time acknowledging the right's colonial origins.⁵⁷ In the mid 1990s, the African Commission received a communication from two Nigerian civil society organisations alleging, in part, that the Nigerian government had violated Article 21 by not involving the Ogoni Communities in decisions regarding oil production in Ogoniland, which had not resulted in material benefits for the local population.⁵⁸ The Commission traced the origin of Article 21 to 'colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving

⁵³ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, para. 244.

⁵⁴ GA Res. 1803 (XVII) (1962), GA Res. 3281 (XXIX) (1974).

⁵⁵ Declaration of Judge Koroma, para. 11.

⁵⁶ *Id.*

⁵⁷ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human Rights and Peoples' Rights, Comm. No. 155/96 (2001), para. 58.

⁵⁸ *Id.* at para. 55.

them of their birthright and alienating them from the land.’⁵⁹ The Commission further explained that because such colonial exploitation had left African resources and people vulnerable to foreign misappropriation, the drafters of the Charter wanted to remind African governments of this legacy, and of the importance of co-operative economic development.⁶⁰ The Commission then determined, although without clearly articulating its reasoning, that the Nigerian government had violated Article 21 by facilitating the destruction of Ogoniland and by giving ‘the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis.’⁶¹

C. Peoples Exercise the Right through Political Participation

The critical issue for our purposes is not whether the right of peoples to their natural resources exists or whether it has persisted beyond colonial situations (both questions must be answered affirmatively), but rather how peoples may go about exercising their right. This Guide argues that peoples exercise this right through the exercise of other civil and political rights included in the ICCPR. In so arguing, the Guide neither questions the legitimacy or recognition of any government that is subject to Clean Trade policies, nor advocates for a general right to democratic governance. The Guide instead seeks to develop the idea that economic self-determination, or the right of peoples to freely dispose of their natural resources, entails the right to political participation in governmental decision-making regarding natural resources. Like political self-determination, economic self-determination under Article 1 of the ICCPR may be viewed as linked to the rights to political participation set forth in Article 25 of the ICCPR, which include, in part, the rights ‘to take part in the conduct of public affairs, directly or through chosen representatives’ and also to vote.⁶² Crawford has noted that self-determination may be viewed as a summary of the other rights in the ICCPR, as suggested by the positioning of Article 1 at the beginning of the Covenant, in its own separate section.⁶³ Under this view, Article 1 effectively encompasses Article 25, as self-determination is ‘the collective expression of

⁵⁹ *Id.* at para. 56

⁶⁰ *Id.*

⁶¹ *Id.* at para. 58.

⁶² Art. 25(1), (2).

⁶³ Crawford, *supra* note 43 at 25.

individual rights of the members of each political society.’⁶⁴ We may therefore argue that the rights set forth in Article 25 of the ICCPR are a part of the right to self-determination in Article 1. The same could be said of a number of other provisions in the ICCPR, including the rights to peaceful assembly and to freedom of association, under Articles 21 and 22, respectively.

Although the governments of States ultimately make the decisions regarding natural resources, the right to control and to benefit from natural resource wealth still vests with peoples. Control over natural resources by the people necessarily takes an indirect form, in that peoples may only do so through governmental mechanisms. Moreover, the ways in which political participation may affect governmental decisions about the exploitation of natural resources may not always be obvious or straightforward. The people may, of course elect representatives who share their views about natural resource wealth. They may also, for example, push for legislation that requires transparency in the extractive industries, so as to gain access to information about state decisions regarding resources and to pressure the government accordingly. Such transparency legislation represents an important legal approach to the issue of control over natural resources, although it remains beyond the scope of this Guide.⁶⁵

In arguing that an authoritarian government may legally sell or transfer natural resources to a foreign company, with the proceeds benefiting only the ruling class, Viñuales has ignored the continuing right of a people to participate in political decision-making about such natural resource exploitation. As Cassese has explained, Article 1(2) is clearly violated where ‘a government exploits natural resources in the exclusive interest of a small segment of the population... thereby disregarding the needs of the vast majority of its nationals.’⁶⁶ It is also violated where ‘a government has surrendered control over its natural resources to another State or to foreign private corporations without ensuring that the people will be the primary beneficiaries of such an arrangement.’⁶⁷ These scenarios would constitute violations of Article 1(2) because within them governments have made decisions which the people had neither the information nor the institutions to influence. While governmental decision-making about the

⁶⁴ *Id.*

⁶⁵ Transparency International and Revenue Watch Institute, Promoting Revenue Transparency: 2011 Report on Oil and Gas Companies, www.transparency.org/policy_research/surveys_indices/promoting_revenue_transparency#2011.

⁶⁶ Cassese, *supra* note 18 at 56.

⁶⁷ *Id.*

exploitation of natural resources may necessarily turn on complicated technical and economic factors, these types of outcomes would clearly violate Article 1(2).⁶⁸ In other words, it is no longer reasonable to presume that the State is acting on behalf of the people, because in such cases the State is violating the people's right to their natural resources. In these circumstances, the people should be able to vindicate their right vis-à-vis the State, as reflected in Article 21(2) of the African Charter, which provides that '[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.'

Finally, it may be argued that such governmental conduct constitutes the theft of natural resources owned by the people.⁶⁹ The people of a given State may be considered the owners of the natural resources of the State to the extent that they have a right freely to dispose of those resources. Arguably, theft occurs when governmental authorities prevent the people from exercising any control over what the Covenants call 'their natural wealth and resources.' The strongest arguments about natural resource theft may be made in cases where constitutional or statutory provisions state that the people are the owners.⁷⁰ Because theft is a concept of domestic criminal law, however, and this Guide concerns the enforcement of international human rights Covenants through domestic tort law, the broader term 'spoliation' will be used throughout the Guide.⁷¹

More could be done by international legal scholars to further develop these ideas by grounding them in theory and practice. For our purposes, however, uncertainty or debate about the content and application of the right of peoples to their natural resources does not mean that the right does not exist, but that work remains to be done by international lawyers regarding the articulation and enforcement of the right.⁷² Also, greater enforcement efforts are needed, given that States violate the right of peoples to their natural resources on a regular basis throughout the world. The governments of resource-exporting States, for example, reach agreements with

⁶⁸ *Id.*

⁶⁹ Leif Wenar, *Property Rights and the Resource Curse* 36 *Philosophy & Public Affairs* 2 (2008).

⁷⁰ See, e.g., Angola's Hydrocarbons Law No. 13/78, which provides that '[a]ll deposits of liquid and gaseous hydrocarbons which exist underground or on the continental shelf within the national territory belong to the Angolan People.'

⁷¹ The Oxford English Dictionary defines spoliation as '[t]he action of spoliating, despoiling, pillaging, or plundering; seizure of goods or property by violent means; depredation, robbery.' The word 'spoliate' means to 'rob or deprive of something.'

⁷² James Crawford, *Some Conclusions in The Right of Peoples*, *supra* note 37 at 162.

multinational corporations in the extractive industries for the exploration and extraction of natural resources, while the people in host States have little or no access to information about where the resources are going, and no ability to impact or participate in decision-making in this regard. Not only do the peoples in these States not exercise control over their natural resource wealth, but they typically do not benefit from it either, as natural resource revenues, for example, flow into off-shore bank accounts while living standards suffer.

III. Transnational Tort Litigation in the United Kingdom and the United States

This section undertakes a comparative legal analysis of transnational tort litigation in the United Kingdom and the United States. Courts in both States are relatively open to litigation regarding torts that have little or no connection with the forum, in that the alleged torts occurred in foreign countries and involved foreign nationals. Transnational tort litigation has served as an important method by which plaintiffs have sought to hold multinational corporations accountable for wrongful conduct in the developing countries where they operate. In general, however, multinational corporations in the extractive industries have been targeted not for the spoliation of natural resources, but for the other human rights violations and environmental damage that have accompanied the extraction of oil, gas, minerals, etc. In occasional cases, transnational tort litigation has also served as a method by which States have sought to recover antiquities allegedly stolen from them by art dealers and art galleries. Transnational tort litigation against States and State-owned companies is comparatively rare due to obstacles such as State immunity and the act of State doctrine.

In the United Kingdom, transnational tort actions against multinational corporations have centred on claims of negligence for personal injury and death. Some claims under the tort of conversion have also been brought against art dealers and art galleries in order to remedy stolen national antiquities. In the United States, litigation under the Alien Tort Statute ('ATS') has been the dominant approach for holding multinational corporations accountable for foreign wrongdoing. Perhaps because the ATS requires the application of international rather than domestic law, tort litigation under state laws in the United States has received less attention as a method for remedying the violation of international human rights norms. In some ATS cases, however, plaintiffs have simultaneously brought negligence claims under state laws. Such tort

claims under state law could represent the way forward in the United States, as ATS litigation against corporations may be foreclosed following the Supreme Court's ruling on the issue of corporate liability at the end of the current term. Finally, to a limited extent, stolen antiquities have also generated tort litigation in the United States. The following examines choice of law rules before turning to a discussion of tort litigation regarding claims of negligence and conversion in both of these jurisdictions.

D. Choice of Law Rules

A detailed discussion of laws that would be applicable in transnational litigation regarding natural resource spoliation lies beyond the scope of this Guide. Choice of law rules in the United States and the United Kingdom generally require the application of the tort laws of the host State rather than the forum State in transnational tort cases. Thus, the applicable law in such cases would most likely not be that of the United States or the United Kingdom, but rather the law of the State where the injury occurred. A discussion of applicable tort law would therefore not be a useful exercise because the laws of any State in the world could be applied in tort litigation in the United States and the United Kingdom.

1. United States

In the United States, the various jurisdictions have adopted a diverse range of approaches to the law applicable to torts, such that it is not possible to generalise about an American approach to choice of law rules for torts. A substantial group of jurisdictions in the United States has adopted the 'most significant relationship' standard set forth in the 1971 Restatement (Second) Conflict of Laws.⁷³ The general principle articulated in § 145 of the Second Restatement is that:

...the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the *most significant relationship* to the occurrence and the parties under the principles stated in § 6.⁷⁴

⁷³ Gary Born, *International Civil Litigation in United States Courts* (Kluwer 3rd Edition 1996), 635.

⁷⁴ § 145(1) (emphasis added).

Section 6 sets forth general principles on choice of law. When there is no statutory directive on choice of law, § 6 provides that the relevant factors for the choice of the applicable rule of law include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of a particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Section 145 further provides that with respect to issues in tort, the contacts to be taken into account in applying the principles in § 6 are:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centred.⁷⁵

Furthermore, a comment to this section clarifies that ‘subject to only rare exceptions,’ the applicable law is ‘the local law of the state where the conduct and injury occurred.’⁷⁶ In transnational tort litigation regarding the spoliation of natural resources, the Second Restatement’s ‘most significant relationship’ standard is likely to result in the application of the law of the host State. Although such tort cases could involve a corporation domiciled in the United States, the injury and the tortious conduct would most likely have occurred in the host State, thus resulting in the application of the host State’s laws. The choice of law analysis could, however, potentially tilt in favour of the application of US laws if plaintiffs target decisions made in corporate offices in the United States, in addition to the implementation of those decisions in host States.⁷⁷ Plaintiffs could argue that because conduct causing the injury

⁷⁵ § 145(2).

⁷⁶ Comment d to § 145.

⁷⁷ Joseph, *supra* note 10 at 74-76.

occurred in the United States, courts should exceptionally decline to apply the laws of the State where the injury occurred, in favour of the laws of the United States.

Several states, however, have not adopted the Second Restatement's 'most significant relationship' standard, but have instead continued to adhere to the 'place of wrong' rule set forth in the First Restatement of 1934.⁷⁸ According to the First Restatement, the applicable law is the place of the wrong, which is in the state where the last event necessary to make an actor liable for an alleged tort took place.⁷⁹ Like the 'most significant relationship' standard, the 'place of wrong' rule would also be very likely to result in the application of the laws of the host State. Yet another group of states has adopted the 'interest' approach, according to which a court will apply the forum's law if it has a genuine interest in the outcome of the case, while the forum's interest is negligible.⁸⁰ The *Doe VIII v. Exxon Mobil* case, which is discussed below, demonstrates how the outcome of the 'interest' approach may be less predictably in favour of the host State. Finally, some states, such as New York, have developed inconsistent or 'incoherent' choice of law rules applicable to torts, which results in case-by-case analyses.⁸¹

Choice of law issues were recently litigated in *Doe VIII v. Exxon Mobil*, which concerned the allegedly tortious conduct of Exxon Mobil's security forces in Indonesia. Writing for the District of Columbia Circuit, Judge Rogers explained that in this Circuit, courts blend a 'governmental interests analysis' with the 'most significant relationship' test. In this case, Judge Rogers held that Indonesian law applied to the appellant's tort claims because the District of Columbia choice of law rules follow the Second Restatement, which stresses the importance of the place of injury, and because the remaining factors weighed in favour of Indonesian law.⁸² Judge Rogers thereby overturned the lower court's decision that the United States has a stronger interest in applying its own law than Indonesia because of the United States has 'an overarching, vital interest in the safety, prosperity, and *consequences* of the behaviour of its citizens, particularly its super-corporations conducting business in one or more foreign countries.'⁸³ In

⁷⁸ Born, *supra* note 73 at 635.

⁷⁹ First Restatement, §§ 377-378.

⁸⁰ Joseph, *supra* note 10 at 74-75.

⁸¹ Born, *supra* note 73 at 363.

⁸² *Doe VIII v. Exxon Mobil Corp.*, 2011 WL 2652384, 45-47 (D.C. Cir.).

⁸³ *Doe I v. Exxon Mobil Corp.*, 2006 WL 516744, 1 (D.D.C.) (emphasis added).

addition, the lower court had found that U.S. law is favourable because it provides for punitive damages, the application of which is particularly appropriate where the question is ‘whether to sanction U.S. companies.’⁸⁴ This case demonstrates that while choice of law rules in the United States tend to favour the law of the host State in transnational tort litigation, an element of uncertainty remains, as different courts may reach divergent conclusions based on the same facts. Although the lower court’s ruling did not prevail in this particular case, it is possible that other Circuits might accept the argument that the United States has an overriding interest in applying its laws to US corporations. Clean Trade plaintiffs could therefore consider pursuing this argument in other Circuits.

2. United Kingdom

In the United Kingdom, the choice of law rules applicable to torts are less variable than in the United States. Until January 2009, choice of law rules were governed by the Private International Law (Miscellaneous Provisions) Act 1995.⁸⁵ According to this Act, ‘[t]he general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.’⁸⁶ In cases where elements of events occur in different countries, the applicable law is that of the country where the individual sustained injury or where property was when it was damaged.⁸⁷ In any other case, the applicable law is that of ‘the country in which the most significant element or elements of those events occurred.’⁸⁸ This general rule may be displaced in cases where there are significant links between the tort and another State, like the UK, such that it would be substantially more appropriate to apply the law of the other State.⁸⁹ In addition, an important exception is that English courts may not apply foreign laws if doing so

⁸⁴ *Id.* at 2.

⁸⁵ *See generally* James Fawcett and Janeen Carruthers, Cheshire, North & Fawcett: Private International Law (Oxford 14th edition 2008), 766-768.

⁸⁶ Art. 11(1).

⁸⁷ Art. 11(1)(a), (b).

⁸⁸ Art. 11(1)(c).

⁸⁹ Art. 12.

‘would conflict with principles of public policy,’ or ‘would give effect to the penal, revenue or other public law’ of a foreign State.⁹⁰

Since January 2009, however, the European Community’s Rome II Regulation (‘Rome II’) has applied in the United Kingdom, where it has largely replaced the Private International Law Act.⁹¹ Under this Regulation, the general rule is that:

... the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.⁹²

An exception to this general rule exists ‘where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs,’ such that the law of that country would apply.⁹³ This exception would be unlikely to apply in transnational tort litigation regarding natural resource spoliation, as the plaintiffs would presumably be domiciled in the host State. In addition, another exception exists ‘[w]here it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected’ with another country, in which case the law of that country shall apply.⁹⁴ A ‘manifestly closer connection’ might be based on ‘a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.’⁹⁵

Rome II would likely require courts in the United Kingdom to apply the law of the State from which the natural resources were stolen, as this is where the damage would have been sustained. Because Rome II specifically indicates that courts shall not apply the law of the country in which the event giving rise to the damage occurred, it would be difficult for plaintiffs to argue that UK law should apply because, for example, corporate officers made critical

⁹⁰ Art. 14(3)(a).

⁹¹ Fawcett and Carruthers, *supra* note 85 at 766.

⁹² Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Art 4(1). *See generally* Richard Fentiman, *The Significance of Close Connection in The Rome Regulation on the Law Applicable to Non-Contractual Obligations*, eds. John Ahern and William Binchy (Martinus Nijhoff 2009).

⁹³ *Id.* at Art. 4(2).

⁹⁴ *Id.* at Art. 4(3).

⁹⁵ *Id.*

decisions in London headquarters which led to the taking of natural resources in a host State. Alternatively, plaintiffs could try to argue that the tort in the exporting country has a ‘manifestly closer connection’ with the United Kingdom, as the scope of the exception is unclear at this time, and leaves room for argumentation. It could be difficult, however, for plaintiffs to argue that there was a pre-existing relationship between them and the multinational corporation, as they would most likely not have concluded a contract of any sort.

Under Rome II, another possible exception is that the parties ‘may agree to submit non-contractual obligations to the law of their choice... by an agreement entered into after the event giving rise to the damage occurred.’⁹⁶ Thus, the plaintiffs and defendants in a Clean Trade action could, in theory, agree to apply the law of the United Kingdom, or of some other third State. It is unlikely, however, that the defendant would reach such an agreement with the plaintiff because it will often be advantageous for the defendant to have the procedural laws, if not the substantive laws of the exporting country apply. Also, it should be noted that the principle that English courts will not apply a foreign law that is inconsistent with English public policy remains intact under the Rome Regulation, which provides that the application of a foreign law may be refused if it is ‘manifestly incompatible with the public policy (*ordre public*) of the forum.’⁹⁷

According to the public policy exception, English courts will not enforce the penal, fiscal or public laws of another country. In addition, English courts will not recognise laws that constitute grave infringements of human rights or other fundamental principles of international law. In *Oppenheimer v. Cattermole*, for example, the House of Lords declared in *obiter dicta* that judges ought to refuse to recognise legislation that constitutes a grave infringement of human rights.⁹⁸ In this case, a 1941 Nazi decree deprived Jews outside of Germany of their German nationality and also took away their property without compensation.

In *Kuwait Airways v. Iraqi Airways*, the House of Lords confirmed that this public policy exception does not extend only to fundamental human rights, but may also apply to violations of

⁹⁶ Art. 14(1)(a).

⁹⁷ *Id.* at Art 26; Fawcett and Carruthers, *supra* note 85 at 854-855.

⁹⁸ *Oppenheimer v. Cattermole* [1976] AC 249 per Lord Salmon at 282.

fundamental and well-established principles of international law.⁹⁹ In this case, the defendants relied upon the act of State doctrine, which will be discussed below, to obtain recognition of an Iraqi decree that divested Kuwait Airways of title to its aircraft following the invasion of Kuwait by Iraq in 1990.¹⁰⁰ Both the Court of Appeal and the House of Lords declined to recognise the decree as a matter of public policy.¹⁰¹ The House of Lords determined that ‘Iraq’s invasion of Kuwait and seizure of its assets were a gross violation of established rules of international law of fundamental importance.’¹⁰² The court further explained that the decree was ‘not simply a governmental expropriation of property within its territory,’ but an attempt ‘to extinguish every vestige of Kuwait’s existence as a separate state,’ after having ‘forcibly invaded Kuwait, seized its assets, and taken [Kuwait Airways’] aircraft from Kuwait to its own territory.’¹⁰³

Oppenheimer and *Kuwait Airways* could potentially provide useful precedent for tort cases involving the conversion of natural resources in violation of Article 1(2) of the ICCPR and the ICESCR. Like *Oppenheimer*, transnational tort cases regarding natural resource spoliation would entail a violation of a human right, namely the right of peoples to their natural resources. Yet both *Oppenheimer* and *Kuwait Airways* concerned fundamental, well-established norms of human rights law or international law. It is not clear that the right of peoples to their natural resources constitutes a fundamental human rights norm akin to the prohibition on racial discrimination at issue in *Oppenheimer*, for example. Although this right is embodied in both of the human rights covenants, its exact scope and content are somewhat controversial, as discussed in Part II. Although strong arguments may be made in favour of the application of Article 1(2) beyond the decolonisation context, this point is not entirely settled. In addition, scholars and human rights activists have not fully fleshed out how peoples may exercise this right—that is, the content of the right is yet to be fully developed. English courts could therefore be reluctant to extend the public policy exception to a human rights norm with unsettled contours. Plaintiffs in Clean Trade actions may nevertheless wish to pursue arguments about the applicability of the

⁹⁹ *Kuwait Airways Corporation v. Iraqi Airways Company* (Nos 4 and 5), Appeal Judgment, [2002] UKHL 19; Fox, *supra* note 216 at 368.

¹⁰⁰ Fox, *supra* note 216 at 112.

¹⁰¹ *Kuwait Airways Corp* [2002] UKHL 19, para 27.

¹⁰² *Id.* at para. 29.

¹⁰³ *Id.* at para. 28.

public policy exception because the scope of this exception is not completely settled, and courts could potentially be receptive to a well-argued case.

Finally, due to the British colonial legacy, the applicable tort law in the host State will not necessarily be significantly different than that of the United Kingdom because the tort law of so many common law jurisdictions, such as South Africa and Namibia, is based on and adheres relatively closely to English tort law.¹⁰⁴ This would not be true, of course, in cases where the host State has a civil law tradition. In addition, even in host States with common law traditions, the applicable rules of limitation or prescription and damages may be significantly different than that in the United Kingdom.¹⁰⁵

E. Transnational Negligence Claims in the United Kingdom

Although plaintiffs are unlikely to pursue negligence claims for the spoliation of natural resources, as the tort of conversion more adequately captures such conduct, the most substantial body of transnational case law concerns the tort of negligence. Transnational tort litigation in the United Kingdom regarding negligence merits our attention because it provides a general model for how claimants could seek to hold corporations liable for their involvement in the spoliation of natural resources. Negligence cases may work towards accountability for multinational corporations because they can bring about compensation for victims as well as deterrence of such conduct by multinational corporations in the future.¹⁰⁶ The United Kingdom arguably provides a better model than the United States in this respect, as transnational tort litigation against multinational corporations for negligence is somewhat less developed in the United States, where the Alien Tort Statute has served as the dominant legal approach for holding multinational corporations accountable for human rights abuses.¹⁰⁷ Yet, as will be explained below, the scope and success of such litigation in the United Kingdom has been limited, and its future viability is uncertain. Noteworthy transnational tort litigation has also taken place, to a lesser extent, in

¹⁰⁴ Richard Meeran, *Tort litigation against multinationals (“MNCs”) for violation of human rights: an overview of the position outside the US*, 10, 7 March 2011, www.business-humanrights.org/media/documents/richard-meeran-tort-litigation-against-mncs-7-mar-2011.pdf.

¹⁰⁵ The scope of the applicable law extends to rules of limitation or prescription and damages, among other things, according to Rome Regulation II, Art. 15.

¹⁰⁶ Meeran, *supra* note 104 at 2.

¹⁰⁷ *Id.*

Canada and Australia, but a comparative analysis of these cases is beyond the scope of this Guide.¹⁰⁸

Beginning in the mid to late 1990s, victims of exposure to mercury, uranium, and asbestos at mining operations in South Africa and Namibia began bringing a series of negligence claims in the United Kingdom for personal injuries suffered.¹⁰⁹ In a case against the English company Thor Chemicals Holdings, for example, twenty South African citizens alleged that they were exposed to hazardous quantities of mercury during their employment with a South African subsidiary of Thor Chemicals.¹¹⁰ Although the parties settled this claim for £1.3 million in April 1997, twenty-one other plaintiffs brought another claim in January 1998 against Thor Chemicals for personal injuries because of their exposure to mercury.¹¹¹ This case also settled in October 2000. In a separate case against another English company Cape Plc, South African citizens (and one British citizen), brought a claim for personal injuries and death due to exposure to asbestos during the course of their employment in South Africa with a subsidiary of the defendant, and as a result of living in a contaminated area.¹¹² The parent company, Cape plc, allegedly breached its duty of care to its employees and those living near their operations by failing to take proper steps to ensure that appropriate working practices and safety precautions were followed.¹¹³ This case also settled in March 2003 when the parties agreed upon a scheme for the compensation of victims. As will be discussed below, courts in all of these cases refused applications to stay proceedings on the grounds of *forum non conveniens*.

In more recent years, transnational tort litigation in the United Kingdom has targeted conduct by multinational corporations in a wider range of industries and geographical locations.

¹⁰⁸ See, e.g., *Dagi v. BHP* [1997] 1 VR 428 (Australia); *Recherches Internationales Québec v. Cambior inc.* [1998] Q.J.No. 2554, Québec Superior Court (Class Action), District of Montreal, 14 August 1998.

¹⁰⁹ A Scottish citizen also brought a claim against the British company RTZ regarding exposure to uranium during the course of employment at a uranium mine in Namibia which was operated by RTZ's Namibian subsidiary. *Connelly v. RTZ Corp. Plc.* [1998] AC 854.

¹¹⁰ *Ngcobo and Others v. Thor Chemicals Holdings Ltd and Others*, Times Law Reports, 10 November 1995; Richard Meeran, *Liability of Multinational Corporations: A Critical Stage*, 1999, www.labournet.net/images/cape/campanal.htm. This Guide does not undertake an analysis of the complex 'corporate veil' issues that arise when plaintiffs sue a parent company, rather than a subsidiary, for negligence. For an outline of these issues, see Meeran, *supra* note 104 at 4-5.

¹¹¹ *Sithole and Others v. Thor Chemicals Holdings Ltd and Another*, Times Law Reports, 15 February 1999.

¹¹² *Lubbe and others v. Cape Plc.* [2000] 1 WLR 1545, 1549-1550; see also *Adams v. Cape Industries Plc.* [1990] 2 WLR 657 (regarding the enforcement of a foreign judgment).

¹¹³ *Lubbe* [2000] 1 WLR 1545, 1549-1550.

First, fifty-two Colombian farmers brought proceedings in 2004 against BP Exploration Company, registered in England and Wales, regarding environmental damage allegedly caused by the construction of the OCENSA pipeline in the 1990s. After a mediation process, the parties reached a settlement in June 2006, according to which BP did not admit liability but agreed to establish an Environmental and Social Improvement Trust Fund for the benefit of the Colombian farmers.¹¹⁴ In 2008, seventy-two other farmers brought separate proceedings against BP Exploration Company for breach of contract and negligence with respect to similar environmental damage to their lands.¹¹⁵ This case is ongoing and was expected to go to trial (although history suggests that this, too, will settle).¹¹⁶

In another case, thirty-three indigenous Peruvians brought proceedings against Monterrico Metals plc in June 2009 for its subsidiary's alleged complicity in torture and mistreatment by Peruvian police at its mine in August 2005, after a protest concerning the mine's environmental impact.¹¹⁷ Although a Chinese consortium (Xiamen Zijin Tongguan Investment Co Ltd) bought Monterrico Metals in 2007 and its headquarters are now in Hong Kong, it remains incorporated in London. The parties reached a settlement in June 2011, whereby Monterrico Metals agreed to pay compensation, though without admitting liability. Finally, another prominent claim arose when the Dutch petroleum trader, Trafigura, in August 2006 brought petrochemical waste to a port in Abidjan, Cote d'Ivoire, where it was unloaded by a local contractor.¹¹⁸ Approximately 30,000 Ivorian citizens brought proceedings in the United Kingdom, alleging that they suffered injuries as a result of the toxic waste dumped in Abidjan.

¹¹⁴ Leigh Day & Co, *Successful mediation result for Colombian farmers*, 24 July 2006, www.leighday.co.uk/News/Archive/2006/July-2006/Successful-mediation-result-for-Colombian-farmers.

¹¹⁵ *Florez v. BP Exploration Company (Colombia) Ltd*, Particulars of Claim, Queen's Bench Division, Claim No. HQ08X00328; Diane Taylor, *BP faces damages claim over pipeline through Colombian farmland*, *The Guardian*, 11 November 2009; Diane Taylor, *BP oil spill: Colombian farmers sue for negligence*, *The Guardian*, 11 January 2011.

¹¹⁶ Leigh Day & Co, *Colombian farmers' case against BP subsidiary could go to trial in 2011*, 22 December 2009, www.leighday.co.uk/news/news-archive/colombian-farmers2019-case-against-bp-subsiary.

¹¹⁷ Owen Bowcott, *Mining firm pays compensation to Peruvian mine protesters*, *The Guardian*, 20 July 2011; Leigh Day & Co., *Peruvian torture claimants compensated by UK mining company*, 20 July 2011, www.leighday.co.uk/news/news-archive-2011/peruvian-torture-victims-compensated-by-uk-miner.

¹¹⁸ Although Trafigura is based in Amsterdam, it also has offices in London.

This case concluded with a settlement in September 2009, according to which Trafigura agreed to pay \$45 million in compensation to the victims.¹¹⁹

These cases suggest the limits of transnational tort litigation in the United Kingdom as a model for litigation regarding the spoliation of natural resources. First, transnational tort litigation in the United Kingdom has been on a relatively small scale as compared with ATS litigation in the United States. The same law firm, Leigh Day & Co., appears to have represented the claimants in nearly all of the tort proceedings brought against multinational corporations in English courts. While there have been less than a dozen such cases in the United Kingdom, a significantly larger range of NGOs and private law firms have litigated over 155 ATS cases against multinational corporations in the United States.¹²⁰ Second, the targets of such litigation in the United Kingdom have not been as diverse as they have been in the United States. Plaintiffs in the United Kingdom have only brought proceedings against companies that are incorporated in or have offices in the United Kingdom. By contrast, plaintiffs in ATS cases in the United States have also brought proceedings against companies that have a much more tenuous link with the United States, such as a listing on the New York Stock Exchange. Third, transnational tort litigation in the United Kingdom has met with mixed success. The limited number of proceedings that have been brought have not ended in trials, but have instead concluded with settlement agreements that provide for compensation for claimants, but not necessarily an admission of liability from the defendant corporation.

Finally, the UK government's proposals to reform the funding of civil litigation threaten the ability of law firms like Leigh Day to bring such law suits in the future. During the litigation of the *Thor Chemicals* and *Cape Plc* cases, the plaintiffs' lawyers received public funds from the UK Legal Services Commission.¹²¹ The Access to Justice Act 1999, however, reduced the scope of legal aid available for such cases.¹²² Lawyers currently fund this type of litigation through conditional fee agreements, whereby if the plaintiffs win, the lawyers are paid and may also

¹¹⁹ Loucoumane Coulibaly and Reed Stevenson, *Trader Trafigura says settles Ivorian waste case*, Reuters, 20 September 2009; BBC, *Ivoriens receive Trafigura payout*, 3 March 2010.

¹²⁰ Jonathan Drimmer and Sarah Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley Journal of International Law 456, 460 (2011).

¹²¹ Meeran, *supra* note 104 at 14.

¹²² Ministry of Justice, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson's Recommendations*, Consultation Paper 13/10, November 2010, para. 18.

recover a ‘success fee’ from the losing side.¹²³ If the UK government carries through with plans to reform the costs regime for civil litigation, however, legal costs would no longer be recoverable from defendant corporations.¹²⁴ Legal costs would instead be deducted from the plaintiffs’ compensation according to ‘damages-based agreements’ (or contingency fees), and only to the extent that they are ‘proportionate’ to the compensation. In a May 2011 letter to the UK Justice Minister, John Ruggie, the Special Representative of the UN Secretary-General for Business and Human Rights, expressed concern that the proposed reforms would constitute a real financial disincentive for what is already a very small pool of lawyers willing to take on transnational human rights cases against multinational corporations.¹²⁵ These funding problems may represent the most serious threat to transnational tort litigation in the United Kingdom in the future.

F. Transnational Tort Litigation in the United States

In the United States, claimants may pursue transnational litigation under both the Alien Tort Statute, which is a federal law, and under state tort laws. Since the mid-1990s, the ATS has attracted considerable attention, as well as controversy, as an avenue for holding multinational corporations accountable for human rights violations.¹²⁶ Although ATS litigation has not been particularly successful in courtrooms, it has spurred debate among lawyers and activists about holding corporations accountable for conduct that violates human rights norms.¹²⁷ At this time, the potential of ATS for holding corporations liable for the spoliation of natural resources in authoritarian countries is unsettled. First, the US Supreme Court has granted *certiorari* in *Kiobel v. Royal Dutch Petroleum* and could adopt the Second Circuit’s ruling that corporations may not

¹²³ Courts and Legal Services Act 1990, s. 58, 58A.

¹²⁴ Consultation Paper, *supra* note 122; *see also*, Richard Meeran, *Multinationals will profit from the government’s civil litigation shakeup*, *The Guardian*, 24 May 2011.

¹²⁵ Letter dated 16 May 2011 from John Ruggie, Special Representative of the UN Secretary-General for Business and Human Rights to Jonathan Djanogly, MP; Corporate Responsibility Coalition, *Implications of the Jackson Civil Costs Reforms for Human Rights Cases against Multinational Corporations*, corporate-responsibility.org/implications-of-the-jackson-civil-costs-reforms-for-human-rights-cases-against-multinational-corporations/.

¹²⁶ *See, e.g.*, Gary Hufbauer and Nicholas Mitrokostas, *Awakening Monster: the Alien Tort Statute of 1789* (Institute for International Economics 2003).

¹²⁷ Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 *Journal of International Criminal Justice* 745 (2010).

be sued under the ATS. Second, it is difficult to characterise natural resource spoliation as a claim under the ATS. Finally, ATS claims typically face serious challenges regarding *forum non conveniens* as well as international comity, the political question doctrine, and the act of State doctrine, which will be explored below in Section IV. For all of these reasons, litigants may wish to consider tort litigation under state laws as well as the ATS. Because litigation under the ATS has been the predominant method through which plaintiffs have sought to hold corporations accountable for conduct that contravenes human rights norms, the following discusses the Act before examining the potential for litigation under state tort laws.¹²⁸

1. Background Information on the Alien Tort Statute

The Alien Tort Statute, which was enacted by the First Congress as a provision in the 1789 Judiciary Act, provides that ‘[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’¹²⁹ Plaintiffs rarely invoked this Statute for almost two centuries, until the *Filartiga v. Peña Irala* judgment of 1980.¹³⁰ In *Filartiga* the Second Circuit ruled that the statute provided federal jurisdiction over torture perpetrated under colour of official authority in Paraguay when the alleged torturer was found and served by an alien in the United States.¹³¹ The Second Circuit’s 1995 judgment in *Kadic v. Karadzic* represents another important landmark, as this decision clarified that the conduct of private individuals as well as State actors may give rise to liability under the Act.¹³² In *Kadic* the Second Circuit ruled that Radovan Karadzic, the President of Republika Srpska, could be held liable in his private capacity for acts of genocide, war crimes, and crimes against humanity.¹³³ Since the Second Circuit rendered this decision in the mid 1990s, plaintiffs have been bringing law suits against corporations, including those in the extractive industries, for a range of conduct tied to violence, labour-relations, environmental

¹²⁸ Joseph, *supra* note 10 at 21.

¹²⁹ 28 U.S.C. § 1350.

¹³⁰ *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir.1980).

¹³¹ *Id.* at 878.

¹³² *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir.1995).

¹³³ *Id.* at 236.

damage and more.¹³⁴ It should be noted that these cases have been brought under customary international law ('the law of nations') rather than treaties to which the United States is a party because human rights treaties such as the ICCPR are considered to be non-self executing and therefore unenforceable by the federal judiciary in the absence of legislative implementation, which has not been forthcoming.¹³⁵

The Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain* further clarified the scope of the ATS, but it did not answer the question of whether the Act applies to private individuals as well as to corporations.¹³⁶ The Court construed the term 'violations of the law of nations' very narrowly in its judgment, thereby limiting the application of the Statute. In order for norms of customary international law to provide subject matter jurisdiction under the ATS, they must be 'accepted by the civilized world and defined with a specificity comparable to the features of 18th-century paradigms,' such as violation of safe conducts, infringement of the rights of ambassadors, and piracy.¹³⁷ The Court also stressed that courts must engage in 'vigilant doorkeeping' so as to ensure that the judiciary recognises a narrow class of international norms as actionable under the statute.¹³⁸ In this case, the Court held that 'a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment' did not violate a customary international legal norm.¹³⁹ The Court in *Sosa* did not, however, clarify whether the ATS applies to corporations as well as individuals. Instead, the Court merely flagged the issue of 'whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.'¹⁴⁰

In the years since *Sosa*, the class of norms that falls under the term 'law of nations' has continued to cause confusion for courts.¹⁴¹ In addition, ATS litigation has had limited success.

¹³⁴ See, e.g., *Mujica v. Occidental Petroleum Corporations*; *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*; *Doe v. Exxon Mobil Corporation*; *Bowoto v. Chevron Corporation*; *Flores v. Southern Peru Copper Corp.*; *Sarei v. Rio Tinto, PLC*.

¹³⁵ *Sosa v. Alvarez-Machain*, 524 U.S. 692, 728 (2004).

¹³⁶ *Id.*

¹³⁷ *Id.* at 725.

¹³⁸ *Id.* at 729.

¹³⁹ *Id.* at 738.

¹⁴⁰ *Id.* at 732, n. 20.

¹⁴¹ Drimmer, *supra* note 120 at 466-467.

Many law suits against corporations have ended in dismissals for a range of reasons, including *forum non conveniens*,¹⁴² and two have ended in verdicts for the defendants.¹⁴³ A number of cases have, however, been successful to the extent that the parties reached settlements that provided for compensation. Most prominently, the law suit brought by Burmese villagers against Unocal settled for an undisclosed amount in 2005, and the suit brought by the son of the Ogoni activist Ken-Saro Wiwa against Royal Dutch Shell settled in 2009 for \$15.5 million.¹⁴⁴ More recently, one case which proceeded to trial resulted in a verdict for the plaintiff, and in two other cases courts entered verdicts for the plaintiffs.¹⁴⁵ Meanwhile, the question of whether corporations may be held liable under international law has lingered since *Sosa*. In the absence of a Supreme Court ruling on this issue, a circuit split has recently emerged.

2. The Issue of Corporate Liability Under the Alien Tort Statute

The Seventh, Ninth, Eleventh, and District of Columbia Circuits are currently in conflict with the Second Circuit, thereby creating a circuit split that has brought the Supreme Court to review the issue of corporate liability under the ATS. Most recently, in October 2011, the Ninth Circuit ruled on this issue *en banc* in *Sarei v. Rio Tinto*.¹⁴⁶ In its quite brief analysis, the Ninth Circuit determined that the ATS itself does not exclude corporate liability, and courts should accordingly ‘consider separately each violation of international law alleged and which actors may violate it.’¹⁴⁷ In addition, in July 2011, both the Seventh Circuit and the District of Columbia Circuit issued judgments in favour of corporate liability under the ATS. In *Flomo v.*

¹⁴² *Mastafa v. Australian Wheat Bd. Ltd.*, 2008 WL 4378443 (S.D.N.Y. 2007); *Turedi v. Coca-Cola*, 460 F.Supp.2d 507 (S.D.N.Y. 2005); *Fagan v. Deutsche Bundesbank*, 438 F.Supp.2d 376 (S.D.N.Y. 2005).

¹⁴³ There were verdicts for the defendants in *Bowoto v. Chevron*, 2010 WL 3516437 (N.D. Cal. 1999) and *Estate of Rodriguez v. Drummond*, 256 F.Supp.2d 1250 (N.D. Ala. 2002).

¹⁴⁴ Center for Constitutional Rights, *Historical Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers*, ccrjustice.org/newsroom/press-releases/historic-advance-universal-human-rights%3A-unocal-compensate-burmese-villagers; Center for Constitutional Rights, *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell*, 8 June 2009, ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell.

¹⁴⁵ *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, Judgment in Favor of the Plaintiff, No. 1:08CV01659 (E.D.N.Y. 2009); *Aguilar v. Imperial Nurseries*, 2008 WL 2572250 (D. Conn. 2008); *Licea v. Curacao Drydock Co., Inc.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008); see Drimmer, *supra* note 120 at 465.

¹⁴⁶ *Sarei v. Rio Tinto*, No. 02-56256, 19339-19341 (9th Cir. 2011).

¹⁴⁷ *Id.* at 19341.

Firestone, which came before the Seventh Circuit, Judge Posner, writing for the majority, held that corporate liability is possible under the ATS.¹⁴⁸ In a loosely reasoned opinion, Judge Posner explained that customary international law does bind corporations, as evidenced by the Allied Powers' dissolution of German companies at the end of the Second World War on the authority of customary international law.¹⁴⁹ In *Doe VIII v. Exxon*, which came before the District of Columbia Circuit, Judge Rogers also held that corporations may be liable under the ATS, but on a different basis.¹⁵⁰ Judge Rogers, writing for the majority, concluded that federal common law (as opposed to international law) supplies the source of law for corporate liability, and that this body of law clearly provides that corporations can be held liable for the torts committed by their agents.¹⁵¹

Additionally, in 2008 in *Sinaltrainal v. Coca-Cola* and *Romero v. Drummond Co.*, the Eleventh Circuit held that corporations may be sued under the ATS for violating international law.¹⁵² In both cases the Eleventh Circuit engaged in quite sparse analysis. In addition, both judgments rely on *Aldana v. Del Monte Fresh Produce* to support the conclusion that the law of the Eleventh Circuit provides that the ATS may grant jurisdiction against corporate defendants.¹⁵³ The court in *Aldana*, however, never explicitly addressed this issue, but instead assumed that corporations may be held liable under the Statute.¹⁵⁴ At the district court level, some courts have more fully articulated various rationales to support the conclusion that corporations are liable under the Statute. Many courts have essentially found corporations liable on the basis that it is logical to do so, and that there is no reason why they should not be liable.¹⁵⁵

¹⁴⁸ *Flomo v. Firestone*, 2011 WL 2675924 (7th Cir. 2011).

¹⁴⁹ *Id.* at 3.

¹⁵⁰ *Doe VIII v. Exxon Mobil*, 2011 WL 2652384 (D.C. Cir. 2011).

¹⁵¹ *Id.* at 20-36

¹⁵² *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

¹⁵³ *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

¹⁵⁴ *Id.*; see also *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174-75 (2nd Cir. 2009), *John Roe I v. Bridgestone Corp.*, 492 F.Supp.2d 988 (S.D.Ind. 2007), *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1164 (C.D.Cal. 2005).

¹⁵⁵ See e.g., *Al-Quarashi v. Nakhala*, 728 F.Supp.2d 702, 753-755 (D.Md. 2010); *In re XE Servs. Alien Tort Litig.*, 665 F.Supp.2d 569, 588 (E.D.Va. 2009); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455752 at 9 (N.D.Cal. 2006); *In re Agent Orange Prod. Liab. Litig.*, 373 F.Supp.2d 7, 58 (E.D.N.Y. 2005).

District courts have also stressed that extensive precedent supports the liability of corporations under the ATS, without delving into the rationales supporting those decisions.¹⁵⁶

By contrast, the Second Circuit ruled in September 2010 in *Kiobel v. Royal Dutch Petroleum* that the ATS does not extend to civil actions brought against corporations under international law.¹⁵⁷ The plaintiffs in *Kiobel* alleged that Royal Dutch Shell and Shell Transport and Trading Company, acting through a Nigerian subsidiary, aided and abetted the Nigerian government's violent suppression of protests by the Ogoni people regarding the environmental effects of oil exploration and production in the Ogoni region of the Niger Delta.¹⁵⁸ In the majority opinion, Judge Cabranes, joined by Chief Judge Jacobs, noted that because appellate review of ATS law suits has been so uncommon, unresolved issues such as this one are 'lurking' in its ATS jurisprudence.¹⁵⁹ The majority concluded that the plaintiffs' claims fell outside the limited jurisdiction of the ATS because they failed to allege violations under customary international law, which 'has steadfastly rejected the notion of corporate liability for international crimes.'¹⁶⁰ The Second Circuit therefore dismissed the complaint for lack of subject matter jurisdiction because the concept of corporate liability for violations of customary international law has not attained universal acceptance among States and therefore cannot serve as the basis of a claim under the ATS.¹⁶¹ The *Kiobel* judgment does not stand alone in rejecting corporate liability under the ATS. After a similarly lengthy analysis in *Doe v. Nestle*, the Central District for California reached the same conclusion just 9 days before the Second Circuit's judgment in *Kiobel*.¹⁶² Following the Ninth Circuit's ruling in *Sarei v. Rio Tinto*, however, the District Court's ruling in *Doe v. Nestle* no longer represents good precedent in this Circuit.

The court in *Kiobel* made it clear that its judgment does not foreclose other types of legal actions geared towards remedying harmful conduct by corporations.¹⁶³ The court noted that its

¹⁵⁶ *In re South Africa Apartheid*, 617 F.Supp.2d 228, 254-55 (S.D.N.Y. 2009); *In re Agent Orange Prod. Liab. Litig.*, 373 F.Supp.2d 7, 58 (E.D.N.Y.2005).

¹⁵⁷ *Kiobel v. Royal Dutch Petroleum*, 261 F.3d 111 (2nd Cir. 2010).

¹⁵⁸ *Id.* at 123.

¹⁵⁹ *Id.* at 117.

¹⁶⁰ *Id.* at 120.

¹⁶¹ *Id.* at 148-149.

¹⁶² *Doe v. Nestle, S.A.*, 748 F.Supp.2d 1057, 1143-1144 (C.D. Cal. 2010).

¹⁶³ *Id.* at 149.

opinion does not preclude ATS suits against individuals who perpetrate or aid and abet violations of customary international law, including corporate employees, managers, officers, and directors.¹⁶⁴ The opinion also does not foreclose the possibility of criminal, administrative, or civil actions against corporations under the domestic laws of any State.¹⁶⁵ In addition, legislative action by Congress remains a possibility.¹⁶⁶ It should be noted that Judge Leval issued a lengthy concurrence in which he agreed that the claims must be dismissed, but on the grounds that the allegations did not support a claim of aiding and abetting.¹⁶⁷ Judge Leval argued vigorously that the majority had incorrectly concluded that international law does not apply to corporations.¹⁶⁸

On 4 February 2011, the Second Circuit denied the plaintiffs' petition for a rehearing *en banc*.¹⁶⁹ The plaintiffs subsequently filed a petition for *writ of certiorari* with the Supreme Court of the United States, which the Court granted on 17 October 2011.¹⁷⁰ One of the questions presented to the Court concerns whether corporations are immune from tort liability for violations of the law of nations, as held in the court of appeals decisions, or whether they may be sued 'in the same manner as any other private party defendants under the ATS,' as the Eleventh Circuit held. Given the widely varying interpretations of the ATS in the jurisprudence, it is difficult to predict how the Supreme Court will answer this question.

In light of the above, the future of ATS litigation against corporations is currently uncertain, although the Supreme Court will rule in *Kiobel* by the end of its term in June 2012. If the Supreme Court upholds the Second Circuit's decision in *Kiobel*, then the ATS will cease to serve as a mechanism for holding corporations legally accountable, although suits against corporate officials and other individuals will still remain viable options. If, however, the Supreme Court sides with the Eleventh Circuit and overrules the Second Circuit in *Kiobel*, then ATS suits against corporations will likely continue unabated. Yet, even if the Supreme Court overrules the Second Circuit's decision, the ability of plaintiffs to bring ATS suits against

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 188-196.

¹⁶⁸ *Id.* at 149-188.

¹⁶⁹ *Kiobel v. Royal Dutch Petroleum*, 2011 U.S. App. LEXIS 220 (2nd Cir. 2011).

¹⁷⁰ *Certiorari – Summary Disposition*, 17 October 2011, www.supremecourt.gov/orders/courtorders/101711zor.pdf.

corporations will still be severely circumscribed in the Second Circuit because its ruling in *Talisman* introduced a very high threshold for aiding and abetting liability under the statute.¹⁷¹

3. Difficulty in Characterising Natural Resource Spoliation as an ATS Claim

The second, related problem facing ATS litigation for natural resource spoliation is the difficulty involved in characterising such conduct as an ATS claim according to the standard set forth in *Sosa*.¹⁷² This difficulty arises because, according to *Sosa*, norms of customary international law must be universal and definite in order to form the basis of an ATS claim.¹⁷³ International norms, such as the prohibition on pillaging and the right of peoples to dispose freely of their natural wealth and resources, fail to reach this threshold by virtue of the fact that they do not impose obligations on corporations. The ICCPR, for example, obligates States to respect, protect, and fulfil certain human rights, but it does not directly impose any obligations on corporations themselves. International human rights treaties may cause States to enact domestic legislation that prohibits pillaging by corporations, but in such an instance, domestic rather than international law will bind corporations. The corporate social responsibility movement does not overcome this problem, as it merely encourages corporations to respect human rights norms even though these norms do not technically impose obligations upon them. Thus, in the absence of any sort of definite or universally accepted international legal norm that prohibits natural resource spoliation by corporations, the standard set forth in *Sosa* for ATS claims has not been met.

This problem may be illustrated more fully by an examination of Article 1(2) of the ICCPR, which provides that ‘[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.’ The UN Human Rights Committee has explained that this provision ‘affirms a particular aspect of the economic content of the right of self-determination,’ which ‘entails corresponding duties for all States and

¹⁷¹ *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2nd Cir. 2009).

¹⁷² Open Society Justice Initiative, *Legal Remedies for the Resource Curse: A Digest of Experience in Using Law to Combat Natural Resource Corruption* (2005), 41-42.

¹⁷³ *Sosa v. Alvarez-Machain*, 542 U.S. at 732.

the international community.’¹⁷⁴ The Committee specifically noted that ‘States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph...’¹⁷⁵ Article 1(2), like all provisions of the ICCPR, obligates States, not non-State actors such as corporations. While States may seek to fulfil their obligations under this provision by passing legislation that concerns natural resource spoliation, Article 1(2) does not, in itself, obligate individuals or corporations to respect the right to a people’s natural wealth and resources. Given that this article does not have any direct application to private actors, it is not possible to argue that this norm meets *Sosa*’s requirements of universality and definiteness. Unlike the customary international legal norms prohibiting genocide, war crimes, and crimes against humanity, which impose obligations on individuals (if not corporations), the right freely to dispose of natural wealth and resources does not entail a similar obligation for non-State actors.

Finally, as noted by the Second Circuit in *Kiobel*, individual liability under the ATS remains a possibility, to the limited extent that international law binds individuals.¹⁷⁶ Plaintiffs could still pursue ATS claims against the officers of corporations regarding certain violations of international humanitarian law surrounding the extraction of natural resources in developing host countries. Pillaging, for example, could potentially give rise to individual liability for corporate officers under the ATS.¹⁷⁷

4. Tort Claims under State Law

Should corporate liability under the ATS cease to be an option in the United States, then claimants seeking to bring actions regarding human rights violations by multinational corporations may still do so under domestic tort law. Before the ATS emerged as the predominant method for holding multinational corporations accountable for human rights abuses in host countries, litigants in the United States brought their claims under state tort laws. In

¹⁷⁴ Office of the High Commissioner for Human Rights, General Comment No. 12: The right to self-determination of peoples (Art. 1), 13 March 1984, para. 5.

¹⁷⁵ *Id.*

¹⁷⁶ *Kiobel*, 261 F.3d at 149.

¹⁷⁷ See James G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, Open Society Justice Initiative, October 2010.

1984, for example, the explosion of toxic gas at the chemical plant owned and operated by Union Carbide in Bhopal, India gave rise to tort litigation in the Southern District of New York.¹⁷⁸ As will be discussed below, this case was dismissed on the grounds of *forum non conveniens*. More recently, plaintiffs have been bringing domestic tort claims alongside ATS claims. In *Doe VIII v. Exxon*, for example, plaintiffs brought claims under the ATS as well as under common law torts and the Torture Victims Protection Act. Plaintiffs in this case alleged that Exxon Mobil's security forces committed murder, torture, sexual assault, battery and false imprisonment at its natural gas extraction and processing facility in the Aceh province of Indonesia.¹⁷⁹ Domestic tort law, which applies to both individuals and corporations, could certainly apply to such conduct.

Future plaintiffs may wish to bear in mind, however, that common law tort claims do not necessarily capture the gravity of the harm occasioned by multinational corporations in host States.¹⁸⁰ Some might argue that the Alien Tort Statute reflects the seriousness of such conduct because it requires the application of international legal norms, such as the prohibition on genocide and crimes against humanity, which are usually applied to atrocities. Municipal tort law, by contrast, is commonly applied not to atrocities involving the actions of security forces, but to more ordinary, relatively small-scale conduct such as negligent driving or workplace accidents. Moreover, the private law tort of conversion is not equivalent to a violation of the international human right set forth in Article 1(2) of the ICCPR. This distinction between private and public law will be explored further below.

G. Cases Regarding Stolen National Antiquities

Most transnational tort litigation regarding human rights violations tends to involve negligence claims, but cases concerning the conversion of national antiquities may provide a better (though not perfect) model for litigation regarding natural resource spoliation. In both the United States and the United Kingdom, foreign States have very occasionally sought to remedy the theft of national antiquities by bringing claims under the tort of conversion, which concerns

¹⁷⁸ *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F.Supp. 842 (S.D.N.Y. 1986).

¹⁷⁹ *Doe VIII v. Exxon Mobil*, 2011 WL 2652384 (D.C. Cir. 2011).

¹⁸⁰ Meeran, *supra* note 104 at 2-3.

an interference with another's right to possession.¹⁸¹ This section focuses on these stolen antiquities cases rather than transnational tort cases that generally involve the tort of conversion because the former are more relevant for exploring how the spoliation of natural resources may be remedied.¹⁸² Due to choice of law rules, courts would be likely to apply the laws of the host State in such cases. While common law States would have a tort of conversion, this tort is not a part of the legal tradition in civil law States, where other, functionally similar laws would fill this role.¹⁸³

One important case dates back to the late 1980s, when Peru sued an American citizen in the Central District of California for the alleged conversion of Peruvian pre-Columbian artefacts. Peru contended that it was the legal owner of artefacts that the United States Customs Service had seized from Benjamin Johnson, and it sought an order for their return.¹⁸⁴ The court expressed sympathy for the problems faced by Peru regarding the smuggling of artefacts excavated from historic monuments, and it acknowledged that Peru was 'entitled to the support of the courts of the United States in its determination to prevent further looting of its patrimony.'¹⁸⁵ In this case, however, Peru could not establish that the artefacts were excavated in modern day Peru, nor its ownership of them at the time of exportation.¹⁸⁶ The court was far from certain as to the country of origin of the artefacts, some of which could have also come from Ecuador, Colombia, Mexico, or even Polynesia.¹⁸⁷ In addition, the extent of Peru's ownership claim was uncertain under its domestic law.¹⁸⁸

More recently, Iran brought a case in the United Kingdom against the London-based Barakat Gallery regarding the its alleged conversion of carved jars, bowls, and cups which were

¹⁸¹ See generally Patty Gerstenblith, Schultz and Barakat: *Universal Recognition of National Ownership of Antiquities*, 14 *Art Antiquity & L.* 21 (2009); Jenny Steele, *Tort Law* (Oxford 2007), 906.

¹⁸² Transnational tort cases concerning conversion outside of the national antiquities context include: *Kuwait Airways*, [2002] UKHL19 and *Playa Larga*, [1983] 2 Lloyd's Rep 171.

¹⁸³ Sarah Green and John Randall, *The Tort of Conversion* (Hart 2009), 56-57.

¹⁸⁴ *Government of Peru v. Johnson*, 720 F.Supp. 810, 811 (C.D.Cal. 1989). See also *Republic of Croatia v. Trustee of the Marquess of Northampton 1987 Settlement*, 203 A.D.2d 167 (1994); *Republic of Turkey v Metropolitan Museum of Art*, 762 F.Supp. 44 (S.D.N.Y. 1990).

¹⁸⁵ *Id.* at 811-812.

¹⁸⁶ *Id.* at 812-814.

¹⁸⁷ *Id.* at 812.

¹⁸⁸ 814-815. Cf *The Republic of Turkey v. OKS Partners*, 8 June 1994, 1994 U.S. Dist. LEXIS 17032.

made from chlorite and date back to the period from 3,000 BC to 2,000 BC.¹⁸⁹ Iran asserted its ownership of these antiquities held by the Barakat Galleries, and contended that its immediate right to their possession properly founded a claim for conversion or wrongful interference with goods.¹⁹⁰ The court held that under Iran's Legal Bill of 1979, Iran enjoyed both title and an immediate right to possession of the antiquities.¹⁹¹ Thus, Iran's interest in the antiquities could found a cause of action in conversion under English law.¹⁹² The court also held that the issue of Iran's title to the antiquities was justiciable in an English court because the relevant provisions of the 1979 Legal Bill were neither penal nor public. The provisions of the Legal Bill were not penal because they did not take effect retroactively and did not deprive anyone who already owned antiquities of their title to them.¹⁹³ Instead, they provided that antiquities that had not yet been found would all be owned by the State.¹⁹⁴ The provisions also did not qualify as public because they did not constitute export control legislation, but instead asserted rights of ownership, or a 'patrimonial claim.'¹⁹⁵ Finally, the court held that even if the Legal Bill were a foreign public law, it would be contrary to public policy for this claim to be non-justiciable because 'there is international recognition that states should assist one another to prevent the unlawful removal of cultural objects including antiquities.'¹⁹⁶

These cases arguably provide the most useful model for States seeking to remedy the spoliation of natural resources, which are relatively closely analogous to national antiquities. Both natural resources and national antiquities may be viewed as part of a State's 'national heritage.'¹⁹⁷ Just as laws vesting ownership rights over national antiquities may form the basis of conversion claims, so too may laws or constitutional provisions vesting ownership rights over natural resources in the State or in the people. Constitutional provisions regarding natural

¹⁸⁹ *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd*, [2009] QB 22, para. 4. See also *Attorney-General of New Zealand v. Ortiz* [1984] AC 1.

¹⁹⁰ *Id.* at paras 3, 10.

¹⁹¹ *Id.* at para. 86.

¹⁹² The court did not explain why, under choice of law rules, it was applying English rather than Iranian tort law.

¹⁹³ *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd*, [2009] QB 22, para. 111.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at para. 131, 149.

¹⁹⁶ *Id.* at 151-163.

¹⁹⁷ Nicholas Haysom and Sean Kane, *Negotiating Natural Resources for Peace: Ownership, Control, and Wealth-Sharing*, Briefing Paper, Centre for Humanitarian Dialogue, October 2009, 5.

resources are quite varied: constitutions may vest ownership in the State¹⁹⁸ or in the people,¹⁹⁹ or they may refrain altogether from addressing the issue of ownership of natural resources. While only constitutions with provisions that vest ownership in the people would provide proper support, on a theoretical level, for the Clean Trade project, transnational tort litigation could nevertheless be based on provisions vesting ownership in the people as well as provisions vesting ownership in the State, as will be explained below.

Depending on the laws or constitutional provisions in a given State, either civil society groups (representing ‘the people’) or the State itself could potentially bring claims in foreign jurisdictions for conversion by multinational corporations. Where laws or constitutional provisions vest ownership over natural resources in the State, then presumably only governments following a regime change would seek to reclaim possession of natural resources or to receive damages from multinational corporations for stolen natural resources. Entrenched dictators would have no incentive to challenge the status quo by bringing such claims, as they would most typically be benefiting, through embezzlement and money-laundering, from the sale of natural resources to such corporations. Where laws or constitutional provisions vest ownership of natural resources in the people, however, civil society groups could potentially bring conversion claims against multinational corporations.

¹⁹⁸ See, e.g., Indonesian Constitution, Article 33.2 (‘Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State’); Article 33.3 (‘The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people’); Constitution of Papua New Guinea, Part I, Article 2.2 (‘The sovereignty of Papua New Guinea over its territory, and over the natural resources of its territory, is and shall remain absolute’); Canadian Constitution, Article 109 (‘All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union and all Sums then due or payable for such Lands, Mines, Minerals or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situated or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same’); Nigerian Constitution, Article 44 (‘The entire property in and control of all minerals, mineral oils and natural gas in and under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone in Nigeria shall vest in the Government of the Federation’); Venezuelan Constitution, Article 12 (‘The mining deposits and of hydrocarbons, [...] existing in the national territory, under the bed of the territorial sea, in the exclusive economic zone and the continental platform, belong to the Republic, are goods of the public dominion and, therefore, inalienable and imprescriptible’).

¹⁹⁹ See, e.g., Iraqi Constitution, Article 111 (‘Oil and gas are owned by all the people of Iraq in the regions and governorates’); Ghanaian Constitution, Article 257 (‘Every mineral in its natural state, in and under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana’); Angolan Law N. 13/78 (1989) (‘All deposits of liquid and gaseous hydrocarbons which exist underground or on the continental shelf within the national territory... belong to the Angolan People’); China, Article 9 (‘Mineral resources, waters, forests, mountains, grassland, unreclaimed land, beaches and other natural resources are owned by the state, that is, by the whole people’).

The above cases suggest that plaintiffs in Clean Trade actions could encounter challenges specific to conversion claims, such as problems concerning the determination and application of foreign ownership laws. *Peru v. Johnson* illustrates the difficulties that plaintiffs can face in seeking to prove that the State has ownership in the first place. *Iran v. Barakat* demonstrates the potential challenge that claimants may face when the application of foreign ownership laws requires English courts to enforce foreign public laws. The *Barakat* case suggests, however, that foreign ownership laws would not fall within the non-justiciable ‘public law’ category as they do not constitute export control laws. In addition, even if a foreign ownership law were considered to be a public law, an argument could be made that the public policy exception to this rule of non-justiciability would apply on account of international recognition of the people’s right to their natural resources, as evidenced by the ICCPR, the ICESCR, and the African Charter.

Both *Barakat* and *Kuwait Airways* potentially provide useful precedent for how the public policy exception may allow claimants to overcome this non-justiciability barrier. In *Kuwait Airways*, the House of Lords held that in light of Iraq’s flagrant and gross violations of international law in invading Kuwait, it would be contrary to English public policy to recognise, for the purposes of the English tort of conversion, an Iraqi decree that transferred Kuwait Airways’ planes to the State-owned Iraqi Airways.²⁰⁰ As discussed above, however, it could be difficult to predict whether an English court would apply the public policy exception in the context of natural resource spoliation because the right of peoples to their natural resources is less defined than the norm prohibiting the use of force in international relations.

IV. The Pursuit of a Public Issue through Private Law

The distinction between private and public law is somewhat controversial in common law countries such as the United Kingdom, and it is little used in the United States.²⁰¹ Nevertheless, transnational tort litigation for the spoliation of natural resources could come under criticism because of the practical problems involved in blurring this conceptual distinction. In essence,

²⁰⁰ *Kuwait Airways Corporation v. Iraqi Airways Company* (Nos 4 and 5), Appeal Judgment, [2002] UKHL 19, paras 27-29. Because the alleged tort took place before the enactment of the Private International Law (Miscellaneous Provisions) Act 1995, the House of Lords had to apply the double actionability rule, according to which the tortious acts must be civilly actionable in England and the country in which they occurred. *Id.* at para. 12.

²⁰¹ J.W.F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford 1996).

such litigation entails the use of a private law mechanism to pursue a public law aim. Public law, which may also be referred to as constitutional and administrative law, concerns the relationship between the citizen and the State, as well the relationship between various governmental institutions.²⁰² Public law, for example, governs issues of where the government's power ends and individuals' rights begin.²⁰³ Private law, by contrast, mainly concerns the regulation of conduct by private parties, such as individuals and corporations, through tort, contract, and property law, etc.²⁰⁴ Although private law may also touch upon the conduct of the State, it is much less concerned with the nature of the relationship between the State and the individual.

The public law aim in transnational tort cases concerning the spoliation of natural resources would be the vindication of the rights of peoples to their natural resources. This is a matter of public law because a people's right is a function of the relationship between the people and the State. In the stronger cases, plaintiffs would be able to rely upon constitutional provisions that set forth the right of the people to their natural resources, thus drawing upon a major source of public law. Claimants would be seeking to litigate issues that touch on fundamental questions about the relationship between a people and a State, namely who should own and/or exercise control over natural resources. Tort law, by contrast, is part of private law and defines 'the circumstances in which a person whose interests have been harmed by another may seek compensation.'²⁰⁵ Tort actions have a substantial range of functions, however, including the determination of rights to land or chattels, such as through the tort of conversion.²⁰⁶

The pursuit of public law issues through private law means may have a number of practical consequences. First, transnational tort litigation may be criticised for bringing about case-by-case determinations, through private litigation, of fundamental issues that have large-scale societal implications and require more systemic solutions. Major issues such as ownership of and control over natural resources should be resolved, it might be argued, not through piecemeal judicial decisions, but through legislation or other mechanisms that bring about comprehensive reform of public laws and allow for the input of various actors in society.

²⁰² John F. McEldowney, *Public Law* (Sweet & Maxwell 2002), 5-8.

²⁰³ Mark Elliott and Robert Thomas, *Public Law* (Oxford 2011), 4-5.

²⁰⁴ *Id.*

²⁰⁵ Martin Matthews, Jonathan Morgan, Colm O'Conneide, Hepple and Matthews' *Tort: Cases and Materials* (Oxford 6th edition 2009), 1.

²⁰⁶ *Id.*

Second, commentators may object to the transnational nature of such private litigation. Transnational tort litigation entails pursuing an issue of public law in a resource-exporting State through the litigation of private legal issues in the courts of a foreign importing State such as the United Kingdom or the United States. It may be argued that if public law issues are to be resolved through private litigation, this should be done in the courts of the resource-exporting State itself, not in foreign courts with less of a stake or interest in the outcome of such litigation. The obvious response, however, would be that in many resource-exporting States with authoritarian governments, such litigation would not be possible at all.

Third, tort litigation would be pursued after harm has been done (except in the case of injunctions), and it does not represent a prophylactic mechanism for preventing the spoliation of natural resources in the future, although such litigation may have a considerable deterrent effect. Tort litigation, it could be argued, draws energy and attention away from more creative, public law techniques that could help to prevent the spoliation of natural resources, such as the enactment of transparency legislation.

Finally, defendants might challenge the plaintiff's standing to sue in such cases. This could be a problem in the United States, in particular, where in order to have standing the plaintiff must have suffered an 'injury in fact' that is individual, imminent, and concrete.²⁰⁷ In addition, the defendant must have caused the plaintiff's injury, which the court's judgment must be capable of redressing.²⁰⁸ The complicated 'injury in fact' requirement could be an obstacle for plaintiffs pursuing litigation regarding the spoliation of natural resources. The U.S. Supreme Court has interpreted the 'injury in fact' element to preclude 'generalized grievances' about the application of laws for which the political rather than judicial process may provide the more appropriate remedy.²⁰⁹ Where an injury is widely shared but still concrete, however, the Court has found that there is an 'injury in fact.'²¹⁰ In a Clean Trade action, the defendant could argue that the plaintiff is raising a generalized grievance about an inability to participate in governmental decision-making regarding the disposal of natural resources. The plaintiff would be able to argue, however, that although the grievance is widely held by the people of the State,

²⁰⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

²⁰⁸ *Id.*

²⁰⁹ *FEC v. Akins*, 524 U.S. 11 (1998).

²¹⁰ *Id.*

it is also concrete, in that concerns a specific taking of natural resources by a corporation away from the people. Furthermore, standing requirements have not posed a notable problem for plaintiffs engaged in transnational human rights litigation. The more likely obstacles to be encountered by plaintiffs will instead concern the act of State doctrine and *forum non conveniens*.

V. Potential Challenges that Plaintiffs May Face

In bringing claims against multinational corporations, plaintiffs will encounter legal challenges. Defendant corporations may, for example, challenge the jurisdiction of a foreign court on the grounds of the act of State doctrine. The existing jurisprudence leaves some uncertainty about how courts would apply the act of State doctrine to a given situation, but this uncertainty has the advantage of allowing plaintiffs the freedom to pursue inventive arguments. In addition, defendants may also raise challenges regarding *forum non conveniens*. The jurisprudence in this area is also somewhat unpredictable, such that a challenge on the grounds of *forum non conveniens* does not represent an insurmountable obstacle, though plaintiffs will want to pursue all available legal arguments.

H. Act of State Doctrine

1. The Scope of the Act of State Doctrine in the United Kingdom and the United States

Whereas State immunity removes an issue from the jurisdiction of courts because of the status of the entity concerned, the act of State doctrine precludes courts from examining the validity of acts of foreign governments in their own territories.²¹¹ The much-cited case of *Underhill v. Hernandez* articulates both the meaning and the implications of the act of State doctrine:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievance by reason

²¹¹ Thomas Main and Stephen McCaffrey, *Transnational Litigation in Comparative Perspective: Theory and Application* (Oxford 2009), 344.

of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.²¹²

This case is cited in both American and English case law on the act of State doctrine.²¹³ Civil law countries do not have an act of State doctrine, although according to Hazel Fox, the jurisdictional requirement of international competence plays a similar role.²¹⁴ The jurisprudence regarding the act of State doctrine appears to be more developed in the United States than in the United Kingdom, where the most prominent, recent cases provide examples of exceptions to, rather than the application of, the doctrine.²¹⁵ Consequently, the following focuses on the application of the doctrine in the United States, before discussing exceptions to the doctrine in the United States and the United Kingdom.

The broader doctrine of non-justiciability, which is distinct from the act of State doctrine in the United Kingdom, does not merit discussion in the context of transnational tort litigation regarding the spoliation of natural resources. The doctrine of non-justiciability, which has a somewhat uncertain scope, applies in cases where the issues at stake relate only to transactions between foreign States operating on the international plane, such that courts lack ‘judicial or manageable standards’ for the adjudication of a dispute.²¹⁶ Clean Trade actions, however, would be unlikely to concern transactions only between foreign States on an international plane, as multinational corporations in the extractive industries are commonly involved in such transactions. By contrast, the act of State doctrine in the United States actually falls under the broad umbrella of non-justiciability, and it represents an evidential bar, such that a party may not raise or prove an issue.²¹⁷ The American political question doctrine also falls under the non-justiciability umbrella, but it differs from the act of State doctrine because it represents a

²¹² *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

²¹³ See, e.g., *Luther v. Sagor* [1921] 3 KB 532, 548 (CA).

²¹⁴ Hazel Fox, *The Law of State Immunity* (Oxford 2002), 112.

²¹⁵ The most commonly cited examples of the act of state doctrine in the United Kingdom date back many decades. See *Luthor* [1921] 3 KB 532 (CA); *In re the Claim of Helbert Wagg & Co Ltd* [1956] 1 Ch 323.

²¹⁶ *Buttes Gas and Oil Company v. Hammer* [1982] AC 888, 893; Hazel Fox, *International Law and Restraints on the Exercise of Jurisdiction by National Courts of States in International Law*, ed. Malcolm Evans, (Oxford 2nd ed. 2006), 368.

²¹⁷ Malcolm Shaw, *International Law* (Cambridge 5th ed. 2003), 180; Fox, *supra* note 216 at 112.

jurisdictional bar that requires courts to abstain from resolving cases that raise issues that are more appropriately committed to other branches of the government.²¹⁸

The act of State doctrine in the United States has three elements: (1) the act must be an official act of a sovereign State; (2) the act must have been performed in the territory of the sovereign State; and (3) the relief sought must require a U.S. court to declare the act of the sovereign State invalid.²¹⁹ The act of State doctrine generally applies to ‘legislative or governmental acts affecting title to private property, moveable or immovable, located within the territory of another State.’²²⁰ The quintessential act of State is the expropriation of foreign property by a foreign State,²²¹ although the doctrine has also been applied to foreign decrees that apply to the property of nationals of the foreign State.²²² The seminal case of *Banco Nacional de Cuba v. Sabbatino* concerned Cuba’s expropriation of sugar from a Cuban company whose stock was principally owned by residents of the United States.²²³ The Supreme Court in *Sabbatino* held that it would ‘not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.’²²⁴ The Court explained that the act of State doctrine is not mandated by international law, although it does have constitutional underpinnings, in particular the separation of powers between the judicial branch and the executive and legislative branches.²²⁵ The act of State doctrine reflects the ‘strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.’²²⁶ The Court further reasoned that ‘sporadic judicial decisions’ regarding expropriations were unlikely to have a

²¹⁸ Born, *supra* note 73 at 702.

²¹⁹ *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 704 (1976); Main, *supra* note 211 at 358.

²²⁰ Fox, *supra* note 216 at 367.

²²¹ Born, *supra* note 73 at 706.

²²² *In re the Claim of Helbert Wagg & Co Ltd* [1956] 1 Ch 323.

²²³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

²²⁴ *Id.* at 421-423.

²²⁵ *Id.*

²²⁶ *Id.* at 423.

deterrent effect by comparison to the means available to the political branches to secure foreign investment, including foreign aid, economic sanctions, and the freezing of assets.²²⁷

The Supreme Court's ruling in *Sabbatino* provoked a backlash in the U.S. Congress, which passed the 'Second Hickenlooper amendment.'²²⁸ This provision precludes U.S. courts from declining to hear a case on the basis of the 'federal act of State doctrine' in cases where a party asserts (1) 'a claim of title or other right to property' (2) within the United States (3) on the basis of an act of State 'in violation of the principles of international law.'²²⁹ The Second Hickenlooper amendment is not applicable, however, in cases where the act of a foreign State is not contrary to international law, or where the U.S. President determines that the doctrine's application is required in a particular case due to U.S. foreign policy interests.²³⁰ Although the amendment appears at first glance to overrule *Sabbatino*, courts have interpreted it narrowly, and confined its application to a limited number of cases, such as those involving specific property located in the United States.²³¹

Although much of the case law on the act of State doctrine concerns expropriatory legislation, the US Supreme Court has indicated that the doctrine may also apply to the award of a contract by a foreign government, as well as to foreign legislation. The oft-cited case of *Kirkpatrick v. Environmental Tectonics*, for example, concerned a bribe paid by the company Kirkpatrick in order to obtain a contract with the Nigerian government for the construction and equipment of an aeromedical centre in Nigeria.²³² Environmental Tectonics was an unsuccessful bidder for the contract, and it brought a civil action seeking damages under the Racketeer Influenced and Corrupt Organizations ('RICO') Act.²³³ The Supreme Court held that the act of State doctrine did not apply in this case because its adjudication would involve imputing an unlawful motivation to a foreign act, as opposed to invalidating a foreign act.²³⁴

²²⁷ *Id.* at 436.

²²⁸ Born, *supra* note 73 at 744.

²²⁹ 22 U.S. §2370(e)(2).

²³⁰ *Id.*

²³¹ Born, *supra* note 73 at 744.

²³² *Kirkpatrick v. Environmental Tectonics*, 493 U.S. 400, 401-403 (1990).

²³³ *Id.* at 402.

²³⁴ *Id.* at 704-707.

In the more recent case of *Oceanic Exploration Co. v. ConocoPhillips*, the U.S. District Court for the District of Columbia distinguished *Kirkpatrick* and upheld the act of State doctrine.²³⁵ The plaintiffs, Oceanic Exploration Company and Petrotimor Companhia de Petroleos, S.A.R.L. ('Oceanic'), sought to recover damages for the loss of opportunity to compete or bid for rights to explore and produce oil and natural gas from the 'Timor Gap' in the seabed between East Timor and Australia.²³⁶ In 1974, Portugal, which was then the sovereign of East Timor, had awarded Oceanic exploration and production rights in the Timor Gap. In 1975, however, Indonesia invaded East Timor and established it as an Indonesian province. In 1989, Indonesia and Australia signed the Timor Gap Treaty, by which they agreed to exploit the oil and natural gas in the Timor Gap and also invalidated all previous unilateral concessions in the Timor Gap, including the 1974 Portuguese colonial concession. In 1991, a Joint Authority created by the Timor Gap Treaty awarded a concession to ConocoPhillips, which went on to discover substantial oil and gas reserves in an area overlapping with Oceanic's concession from Portugal. Oceanic did not participate in the 1991 bidding process because it believed that Portugal had already granted it a legitimate right to explore for oil and natural gas in the Timor Gap.

Following East Timor's independence from Indonesia in 2002, its new constitution provided for its sovereignty over natural resources and nullified concessions not ratified by the new government. East Timor and Australia accordingly signed the Timor Sea Treaty, which governed natural resource exploitation in the Timor Gap. The Timor Sea Designated Authority ('TSDA'), which was created in 2003 by the Timor Sea Treaty, provided immediate concessions to certain corporations holding existing contracts, including ConocoPhillips. Oceanic brought this law suit to seek damages for the 'theft' of its oil and natural gas rights in the Timor Gap. Oceanic alleged that ConocoPhillips had secured its concession through corrupt payments to both the Indonesian government in 1991, and to the East Timorese government following its independence.

The court in this case distinguished it from *Kirkpatrick* in part because the recognition of Oceanic's right to compete or bid following East Timor's independence would have required the court to find that the TSDA invalidly awarded contracts to companies that had won concession

²³⁵ 2006 WL 2711527 (D.D.C.).

²³⁶ *Id.* at 1-2.

rights in 1991. Such a determination would have involved a finding that the Annex to the Timor Sea Treaty, which had authorised such renewals, was invalid. The court held that the act of State doctrine barred it from passing judgment on ‘the official sovereign acts’ of Australia and East Timor, as embodied in the Timor Sea Treaty and the decisions of the TSDA, which it characterised as a ‘regulatory governmental agency.’²³⁷ Finally, the court also distinguished this case from *Kirkpatrick* on the grounds that *Kirkpatrick* concerned the award of a procurement contract, whereas this case involved decisions relating to the development of natural resources, which are ‘quintessentially sovereign prerogatives.’²³⁸ In reaching this last conclusion, the court referred to *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, in which the D.C. Circuit held that the act of State doctrine precluded it from questioning the legality of Kazakhstan’s issuance of a license permitting the removal of uranium from the country, as this constituted a sovereign act.²³⁹

Subject to a number of exceptions to the act of State doctrine, which will be discussed below, it is possible that the doctrine could impede transnational tort litigation in the United States regarding natural resources spoliation. Clean Trade actions are likely to involve a contract between a State or a State-owned company and a multinational corporation for the extraction of natural resources, although a legislative act is also conceivable. A contract or license for natural resource extraction would be likely to satisfy the three requirements for the application of the act of State doctrine in the United States. First, the act of entering into a contract with a company may be considered an official act of State, subject to the possible application of the commercial activities exception. Second, the foreign State could very well enter into such a contract or joint venture on its territory. Finally, an action under the tort of conversion would seek to have a court assess the validity of the State’s taking of natural resources by virtue of the contract or decree, etc. Cases such as *Oceanic Exploration* and *World Wide Minerals* indicate that U.S. courts may be prepared to classify a range of governmental decisions regarding natural resources as ‘sovereign acts,’ upon which the judiciary may not pass judgment.

²³⁷ *Id.* at 7.

²³⁸ *Id.* at 8.

²³⁹ 296 F.3d 1154, 1165 (D.C. Cir. 2002).

2. Exceptions to the Act of State Doctrine

There are a number of exceptions to the act of State doctrine in the United States. First, as with State immunity, courts may not apply the act of State doctrine in cases involving the commercial activities of foreign States. This exception, however, is less established in the context of the act of State doctrine than in the State immunities context. In *Alfred Dunhill of London v. Cuba*, a plurality of the Supreme Court held that the act of State doctrine does not apply to purely commercial acts, such as, in this case, the conduct of Cuba's agents in the operation of a for-profit cigar business.²⁴⁰ While four justices embraced a commercial activities exception to the act of State doctrine, four rejected it, and Justice Stevens did not state an express position. In *World Wide Minerals*, the District Court for the District of Columbia indicated that the status of this exception remains an 'unsettled question.'²⁴¹ English courts, by contrast, are not prepared to exclude from the act of State doctrine acts which are related to commercial transactions.²⁴² Thus, a party seeking to invoke a commercial activities exception to the act of State doctrine would not succeed in the United Kingdom, and in the United States the viability of this defence is somewhat uncertain. Even if a U.S. court were prepared to apply this exception, it appears as though a contract for the extraction of natural resources within a foreign State's territory may be considered a commercial act, at least in some circuits.

Second, the so-called 'Bernstein exception' to the act of State doctrine in the United States also has a tenuous status. In *First National City Bank v. Banco Nacional de Cuba*, a plurality of the Supreme Court held that courts should not apply the act of State doctrine where the Executive Branch has expressly indicated, in a 'Bernstein letter,' that its application would not advance American foreign policy interests.²⁴³ Although Justice Rehnquist's plurality opinion embraced this exception, at least five Justices rejected it.²⁴⁴ Moreover, the reaction among lower courts to the Bernstein exception has been mixed: while some have adopted it and others have rejected it, the largest number of lower courts has adopted a variation on the Bernstein exception, whereby a 'Bernstein letter' is a significant but not a dispositive factor in an act of State

²⁴⁰ *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 705-706 (1976); *Kirkpatrick*, 493 U.S. at 404-405; *World Wide Minerals*, 296 F.3d at 1166.

²⁴¹ *World Wide Minerals*, 296 F.3d at 1166.

²⁴² Fox, *supra* note 216 at 113.

²⁴³ *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972).

²⁴⁴ Born, *supra* note 73 at 729-730.

analysis.²⁴⁵ In Clean Trade actions, plaintiffs should make every attempt to obtain such a letter from the U.S. State Department. Such support from the Executive Branch may represent the best chance that plaintiffs have in overcoming the act of State doctrine, should defendants raise it. Even if the letter would not serve as a dispositive factor, it could still be of crucial assistance to plaintiffs in overcoming the act of State doctrine. Ideally, Clean Trade actions against multinational corporations that deal with authoritarian regimes in resource-exporting States would align with, rather than interfere with, U.S. foreign policy towards those States, thereby making it possible for plaintiffs to obtain this support. Finally, the act of State doctrine in the United Kingdom is subject to an exception whereby English courts will not enforce an act of a foreign State that is contrary to public policy.²⁴⁶ The public policy exception, which was discussed above in the context of choice of law rules, could also potentially be applicable as an exception to the act of State doctrine.

I. The Doctrine of Forum Non Conveniens

1. United States

The doctrine of *forum non conveniens* tends to arise in transnational litigation because most, if not all, of the events giving rise to litigation take place in foreign countries.²⁴⁷ In the United States, a defendant may raise the doctrine so as to obtain a stay or a dismissal of a case in favour of a foreign forum; judges may not raise the doctrine on their own motion.²⁴⁸ The doctrine of *forum non conveniens* should be distinguished from the concept of international comity, as the former may be raised in cases where no foreign action has been commenced, whereas the latter applies in cases where parallel litigation has already been filed in a foreign forum.²⁴⁹ Defendants in the United States have been particularly successful in obtaining stays or dismissals of cases involving claims under state tort laws as opposed to the Alien Tort Statute,

²⁴⁵ *Id.*

²⁴⁶ Fox, *supra* note 216 at 368.

²⁴⁷ Joseph, *supra* note 10 at 87-88.

²⁴⁸ *Id.* at 87.

²⁴⁹ Ronald Brand and Scott Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (Oxford 2007), 55.

although ATS cases have also been dismissed on the grounds of *forum non conveniens*.²⁵⁰ Courts, for example, largely dismissed on *forum non conveniens* grounds the many cases brought against multinational corporations regarding exposure to the pesticide DBCP (Dibromochloropropane) in Nicaragua and elsewhere.²⁵¹

This doctrine requires courts in the United States to engage in a two-step analysis: courts must first analyze whether an alternative forum is available, and, if so, they must engage in a balancing of public and private interests.²⁵² The range of potential factors means that district court judges have considerable flexibility in applying this doctrine, and they will only be overturned on appeal where there is a clear abuse of discretion.²⁵³ A substantial majority of U.S. states have adopted the doctrine of *forum non conveniens*, with approximately a dozen codifying the doctrine in the form of a statute, and approximately thirty other states recognizing the doctrine in common law.²⁵⁴ A minority of states has rejected or remained uncommitted to the doctrine.²⁵⁵

a. First Step: Adequacy of Alternative Forum

Regarding the first step, the party seeking a dismissal on the basis of *forum non conveniens* generally bears the burden of proving that the proposed alternative forum is adequate.²⁵⁶ The requirement of the existence of an alternative forum will generally be satisfied if the defendant is ‘amenable to process’ in the other jurisdiction.²⁵⁷ Exceptionally, however, the alternative forum may be inadequate where the remedy offered in that forum is ‘clearly unsatisfactory,’ such as when ‘the alternative forum does not permit litigation of the subject

²⁵⁰ Jonathan Drimmer speculates that ATS claims have not been dismissed as frequently because the ATS is contained in a federal statute rather than a state law. Drimmer, *supra* note 120 at 470-471.

²⁵¹ *Id.* at 456; *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985); *Delgado v. Shell Oil Co.*, 890 F.Supp 1324 (S.D. Tex. 1995).

²⁵² *Piper Aircraft Company v. Reyno*, 454 U.S. 233, n. 22; Brand, *supra* note 249 at 37.

²⁵³ Joseph Dellapenna, *Suing Foreign Governments and their Corporations* (Transnational Publishers 2nd ed. 2002), 317.

²⁵⁴ Born, *supra* note 73 at 298.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 341.

²⁵⁷ *Piper Aircraft Company*, 454 U.S. 233, n. 22.

matter of the dispute.²⁵⁸ In determining whether an alternative forum is available, courts look to a range of factors, including whether:

- (a) the foreign forum would lack jurisdiction over the subject matter of the dispute;
- (b) the plaintiff would not enjoy access to the foreign forum;
- (c) the defendant would not be subject to personal jurisdiction in the foreign forum;
- (d) the foreign forum would be biased or corrupt; or
- (e) the foreign forum would apply unfavourable substantive or procedural rules.²⁵⁹

In transnational tort litigation, alternative fora are likely to be the State where the harm took place, or the State in which an alien defendant is domiciled.²⁶⁰ In general, US courts are disinclined to find that foreign forums are inadequate, and in assessing adequacy, they will not necessarily give real weight to the likelihood of success for the plaintiff in the alternative forum.²⁶¹

If a defendant in a Clean Trade action sought a dismissal on the basis of *forum non conveniens*, then it is likely that the plaintiffs would challenge the adequacy of the alternative forum by arguing that it would be biased or corrupt. While the parties could concern themselves with any of the factors listed above, arguments about bias or corruption would tend to arise in Clean Trade actions because the exporting States that would be the targets of such actions would, in general, lack transparency and accountability in the public sector, including the judiciary. Arguments regarding bias and corruption have a relatively unsuccessful history in transnational tort litigation in the United States, in part because of concerns about how passing judgment on the adequacy of the legal systems of foreign States would conflict with the principle of comity.²⁶² Courts have not, however, ruled out the possibility that bias or corruption could foreclose the adequacy of an alternative forum, and plaintiffs in Clean Trade actions should not be deterred from putting forth the strongest possible arguments in this respect. Courts have stressed that

²⁵⁸ *Id.*

²⁵⁹ Born, *supra* note 73 at 341.

²⁶⁰ Joseph, *supra* note 10 at 89.

²⁶¹ *Id.*; Born, *supra* note 73 at 341.

²⁶² Joseph, *supra* note 10 at 90; *Flores v Southern Peru Copper Corp.*, 253 F.Supp.2d 510, 538-540 (S.D.N.Y. 2002); *Eastman Kodak Co. v. Kavlin*, 978 F.Supp. 1078, 1084 (S.D. Fla. 1997); *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1351 (1st Cir. 1992); *Torres v. Southern Peru Copper Corp.*, 965 F.Supp. 899, 903 (S.D.Tex. 1996); *Banco Mercantil, S.A. v. Hermandex Arencibia*, 927 F.Supp. 565, 567 (D.Puerto Rico 1996); *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d Cir. 1991).

generalized, anecdotal evidence of corruption will not be sufficient to demonstrate the inadequacy of the alternative forum. Plaintiffs may not rely on general perceptions of corruption in the courts of the alternative forum, but must provide documentation substantiating allegations of corruption, particularly those associated with the adjudication of similar claims.²⁶³ Such evidentiary support could, for example, take the form of US State Department human rights reports or World Bank reports, as well as expert witness testimony.²⁶⁴ Thus, plaintiffs bringing Clean Trade actions could potentially defeat motions for dismissal on the basis of *forum non conveniens* by marshalling detailed, quantitative documentary evidence in support of arguments about the bias or corruption of the alternative forum.

b. Second Step: Balancing Public and Private Interests

Regarding the second step of the analysis, *Gulf Oil v. Gilbert*, which is one of the seminal Supreme Court cases in the United States concerning the doctrine of *forum non conveniens*, sets forth a number of important private and public interests that require balancing.²⁶⁵ Private interests include: (1) ‘the relative ease of access to sources of proof’; (2) the availability of compulsory process for the attendance of unwilling witnesses, and the cost of obtaining the attendance of willing witnesses; (3) the possibility of viewing premises, as appropriate; (4) ‘all other practical problems that make trial of a case easy, expeditious and inexpensive; and (5) the enforceability of a judgment once it has been obtained.’²⁶⁶ The Court explained that in weighing the relative advantages and obstacles to a fair trial, courts should rarely disturb the plaintiff’s choice of forum unless the balance is strongly in favour of the defendant.²⁶⁷ The Court also set forth a series of public interest factors, including: (1) administrative difficulties due to congested court dockets; (2) the imposition of jury duty on people in a community with no relation to the

²⁶³ *Stroitelstvo Bulgaria Limited v. Bulgarian-American Enterprise Fund, et al.*, 589 F.3d 417; *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006); *In re Arbitration between Monegasque de Reasurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 499 (2d Cir. 2002); *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312-1314 (11th Cir. 2001).

²⁶⁴ *Eastman Kodak Co. v. Kavlin*, 978 F.Supp. 1078, 1085; *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 US Dist. LEXIS 3293, 56-57 (S.D.N.Y. 22 Feb. 2002); *Martinez v. Dow Chemicals*, 219 F.Supp.2d 719 (E.D. La. 2002).

²⁶⁵ *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947).

²⁶⁶ *Id.* at 508.

²⁶⁷ *Id.*

litigation; (3) the ‘local interest in having localized controversies decided at home’; and (4) the avoidance of complicated conflicts of laws problems that require courts to apply foreign laws.²⁶⁸

In general, courts defer to the forum chosen by the plaintiff.²⁶⁹ This presumption in favour of the plaintiff’s choice of forum may be overcome ‘only when the private and public interest factors clearly point towards trial in the alternative forum.’²⁷⁰ When the plaintiff is not a resident or a citizen, but instead a non-resident foreigner, then this presumption applies with less force because it is not as reasonable to assume that the choice is convenient or appropriate.²⁷¹ The jurisprudence of the Supreme Court thereby justifies more favourable treatment of residents or citizen plaintiffs than of foreign plaintiffs.²⁷² One commentator notes, however, that ‘this presumption has weakened in recent years because the courts are more sensitive to impositions on overcrowded dockets.’²⁷³ In transnational tort cases regarding the spoliation of natural resources, courts would be likely to grant less favourable treatment to the plaintiffs because they would presumably be non-resident foreigners.

This presumption in favour of the plaintiff’s choice of forum was, for example, overcome in the case of *In re Union Carbide Corp Gas Plant Disaster at Bhopal*.²⁷⁴ The court found that all of the private interest factors set forth in *Gilbert* as well as *Piper* weighed heavily towards dismissal of the case on the grounds of *forum non conveniens*.²⁷⁵ The overwhelming majority of the witnesses and evidence, as well as nearly all of the claimants, were located in India.²⁷⁶ The public interest factors also favoured dismissal because of the administrative burden that this complex litigation would pose for an American tribunal, and the excessive cost to American taxpayers of supporting the litigation in the United States.²⁷⁷ Moreover, Indian interests in the

²⁶⁸ *Id.* at 509.

²⁶⁹ *Piper Aircraft Company*, 454 U.S. at 255-256; Joseph, *supra* note 10 at 88.

²⁷⁰ *Piper Aircraft Company*, 454 U.S. at 255-256.

²⁷¹ *Id.*

²⁷² Brand, *supra* note 249 at 52.

²⁷³ Dellapenna, *supra* note 253 at 318.

²⁷⁴ *In re Union Carbide Corp Gas Plant Disaster at Bhopal*, 634 F.Supp. 842 (S.D.N.Y. 1986), *aff’d* 809 F.2d 195 (2d Cir. 1987).

²⁷⁵ *Id.* at 866-867; *Piper Aircraft Company v. Reyno*, 455 U.S. 928 (1981).

²⁷⁶ *Id.* at 866.

²⁷⁷ *Id.* at 867.

litigation outweighed American interests because of India's interest in applying its own law to an accident which affected Indian citizens in India.²⁷⁸ The court also rejected the plaintiffs' claims that the Indian justice system would not be capable of handling the Bhopal litigation because it had 'not yet cast off the burden of colonialism to meet the emerging needs of a democratic people.'²⁷⁹ The court declined to impose its standards on a developing nation with an independent and legitimate judiciary having a 'proven capacity to mete out fair and equal justice.'²⁸⁰ Sarah Joseph has, however, questioned the logic of this argument, given that Union Carbide was an American corporation, and the Indian government argued against a dismissal on the grounds of *forum non conveniens* in this case.²⁸¹

Finally, courts in the United States generally impose conditions as a requirement for granting dismissals on the basis of *forum non conveniens*. These conditions are designed to counter plaintiffs' contentions that the alternative forum would be inadequate. Such conditions may include: '(1) the defendant's consent to suit and service of process in the alternative forum; (2) the defendant's agreement to produce documents or witnesses in the plaintiff's foreign action; (3) the defendant's waiver of any statute of limitation defence in the foreign action; and (4) the defendant's consent to pay any foreign judgment obtained by plaintiffs.'²⁸² If the defendant does not meet the conditions stipulated by the court, then the action in the United States may be reinstated.²⁸³

Because analyses under the doctrine of *forum non conveniens* are so case-specific, it is difficult to assess, in the abstract, how a court would balance the public and private factors in a Clean Trade action, and what chance the plaintiffs would have of surviving a motion for a stay or dismissal. If a defendant succeeded in establishing an adequate alternative forum, then certain private and public factors would be likely to favour the resource-exporting country in which the spoliation of natural resources took place. With respect to private factors, it would probably be more convenient to conduct a trial in the location of the alleged tort, as it would be easier to

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Joseph, *supra* note 10 at 148.

²⁸² Born, *supra* note 73 at 343.

²⁸³ *Id.*

obtain access to evidence and witnesses in that forum. Regarding the public factors, the resource-exporting State arguably has a greater interest in adjudicating cases concerning the spoliation of natural resources from its territory than do courts in the United States or the United Kingdom. Plaintiffs could, however, pursue the argument that the courts of the United States have an overriding interest in regulating the conduct of American companies that operate outside of the United States, as discussed above with respect to choice of law analyses.²⁸⁴ In a Clean Trade action involving a large, U.S.-based multinational corporation, plaintiffs could develop this argument so as to defeat any motions for dismissal on the grounds of *forum non conveniens*.

2. United Kingdom

In the United Kingdom, the doctrine of *forum non conveniens* is relatively similar to that in the United States, but it plays a smaller role due to the Brussels Convention of 1968. In the seminal case of *Spiliada Maritime Corporation v. Cansulex Ltd.*, the House of Lords set forth a multi-step analysis which English courts apply when defendants raise the doctrine of *forum non conveniens*.²⁸⁵ First, the court explained that the basic principle is that there must be some other available forum with competent jurisdiction which is an appropriate forum for the trial and in which ‘the case may be tried more suitably for the interests of all of the parties and the ends of justice.’ Second, the defendant bears the burden of proof, which will shift to the plaintiff if the court is satisfied, *prima facie*, that another available forum is the appropriate one for the trial. If the defendant satisfies this burden, then the plaintiff must show ‘that there are special circumstances by reason of which justice requires that the trial should nevertheless take place’ in the United Kingdom. Third, where jurisdiction has been founded as of right, the defendant must show not only that England is not the natural or appropriate forum, but that another forum is clearly or distinctly more appropriate. Fourth, in evaluating which forum is clearly more appropriate, the court must look for ‘connecting factors,’ which include convenience, expense, the law governing the relevant transaction, and where the parties reside or conduct business. Fifth, the court will refuse a stay if no other available forum is clearly more appropriate. Finally, the court will normally grant a stay if there is another available forum which, *prima facie*, is

²⁸⁴ Joseph, *supra* note 10 at 92-93.

²⁸⁵ *Spiliada Maritime Corporation v. Cansulex Ltd.*, [1987] 1 AC 460.

clearly more appropriate, unless ‘there are circumstances by reason of which justice requires that a stay should nevertheless be granted.’ This analysis requires the court to consider all the circumstances of the case, including whether objective, cogent evidence establishes that the plaintiff will not obtain justice in the other forum.

In *Connelly v. RTZ*, the House of Lords clarified that the analysis set forth in *Spiliada* basically consists of two stages.²⁸⁶ *Connelly* involved a personal injury claim by a Scottish citizen who alleged that his throat cancer resulted from exposure to uranium at the mine of RTZ’s subsidiary in Namibia where he had worked.²⁸⁷ The court explained that the first stage of the analysis involves an examination of whether there is a more appropriate forum, based on the connecting factors.²⁸⁸ Even if another forum clearly is more appropriate, the plaintiff may nevertheless persuade the court during the second stage that justice requires that a stay should not be granted.²⁸⁹ The English analysis under the doctrine of *forum non conveniens* differs in this respect from the American analysis, which does not overtly include a ‘justice’ analysis.²⁹⁰ With respect to this second stage, the court explained that the general principle is that ‘the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English court.’²⁹¹ Plaintiffs may, for example, have to accept lower damages, a less generous system of discovery, a different system of court procedure, including rules of evidence, or lack of financial assistance.²⁹² A court will only refuse to grant a stay, however, if the plaintiff ‘can establish that substantial justice cannot be done in the appropriate forum.’²⁹³ While the availability of financial assistance in the United Kingdom, ‘coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor,’ courts normally will not refuse to grant a stay simply on this basis.²⁹⁴

²⁸⁶ *Connelly v. RTZ* [1998] AC 854 (HL), 871-872.

²⁸⁷ *Id.* at 864.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Joseph, *supra* note 10 at 116.

²⁹¹ *Connelly* [1998] AC 854, 872-873.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 873.

Connelly was one of those ‘exceptional’ cases in which the House of Lords affirmed the Court of Appeal’s decision to deny a motion to stay on the grounds of *forum non conveniens* due to the non-availability of financial assistance in Namibia. The House of Lords determined that because of ‘the nature and complexity of the case,’ it could not be tried at all without the benefit of financial assistance which was only available in the United Kingdom.²⁹⁵ Consequently, even though Namibia was the more appropriate forum, substantial justice could not be done there because it would not be possible for the case to be tried in Namibia.²⁹⁶ In *Lubbe v. Cape plc*, the House of Lords similarly declined to grant a stay because substantial justice could not be done in South Africa.²⁹⁷ Although South Africa was the more appropriate forum, plaintiffs would most likely have had no means of obtaining the necessary professional representation and expert evidence in South Africa, which would result in a denial of justice.²⁹⁸ These funding issues were compounded in this case by the lack of developed procedures in South Africa for handling group actions.²⁹⁹

The doctrine of *forum non conveniens* plays an increasingly diminished role in the United Kingdom, as compared with the United States, due to the effects of the Brussels Convention of 1968. Article 2 of the Brussels Convention states that:

Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State. Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

As a result of this provision, the doctrine of *forum non conveniens* is no longer available in cases involving a defendant who is domiciled in England, and who wishes to obtain a dismissal in favour of an alternative forum that is the court of another EU member State.³⁰⁰ A relatively recent decision of the European Court of Justice in *Owusu v. Jackson* clarified that the application of Article 2 also extends to situations in which a defendant domiciled in England

²⁹⁵ *Id.* at 874.

²⁹⁶ *Id.*

²⁹⁷ *Lubbe v. Cape plc*, [2000] 1 WLR 1545.

²⁹⁸ *Id.* at 1559.

²⁹⁹ *Id.* at 1560.

³⁰⁰ Brand, *supra* note 249 at 26.

wishes to obtain a dismissal in favour of an alternative forum that is the court of a non-EU member State.³⁰¹ *Owusu* therefore appears to mean that in the United Kingdom, the doctrine of *forum non conveniens* would not apply in any case in which the defendant is domiciled in the United Kingdom, regardless of whether the alternative forum is a court in a member State or a non-member State.³⁰² In reaching this decision, the court emphasised that the doctrine of *forum non conveniens* undermined the need for certainty and predictability in the application of the jurisdictional rules under the Brussels Convention.³⁰³ Where the defendant is not domiciled in the United Kingdom and the alternative forum is a non member State, however, then the doctrine would still apply.³⁰⁴

The limiting effect of the Brussels Convention is unlikely to have an impact on the ability of plaintiffs to bring suits regarding natural resource spoliation, as such plaintiffs are likely to be domiciled in the host State, not in the United Kingdom, and the Convention would therefore not apply. While the Brussels Convention would probably not preclude the application of the doctrine of *forum non conveniens*, it is difficult to predict whether the invocation of this doctrine would succeed, for the same reasons outlined above with respect to the United States. Given that public funding for civil litigation of this sort is no longer available in the United Kingdom, as it was during the litigation of *Connelly* and *Cape plc*, ‘justice’ analyses are currently unlikely to turn on this issue. Furthermore, the ‘connecting factors’ could tend to favour the host State, where at least the plaintiffs would presumably reside, and where the parties would likely find the necessary evidence and witnesses. Nevertheless, plaintiffs bringing Clean Trade actions in the United Kingdom could pursue arguments concerning the interest of the United Kingdom in regulating the conduct UK corporations in foreign countries. As *Connelly* and *Cape plc* demonstrate, plaintiffs can succeed in overcoming challenges on the grounds of *forum non conveniens*.

³⁰¹ *Id.* at 29; *Owusu*, [2005] WLR 942, para. 35.

³⁰² Brand, *supra* note 249 at 33.

³⁰³ *Owusu*, [2005] WLR 942, paras 38-43.

³⁰⁴ Brand, *supra* note 249 at 26.

J. Repatriation of Funds

The repatriation of natural resources, or funds derived from natural resources, would not be a straightforward or easily achievable outcome in transnational tort litigation. This section briefly examines the conceptual and practical challenges that plaintiffs could face in attempting to redress the spoliation of natural resources through transnational tort litigation. This section does not, however, engage in an analysis of the damages laws that would be applicable in cases involving the spoliation of natural resources, as this would require a detailed comparative legal analysis that lies beyond the scope of this Guide. As explained above, choice of law analyses would probably lead courts to apply the laws of the resource-exporting State, rather than the laws of the forum State. The issue of damages is therefore likely to be governed by the laws of any number of host States, not the laws of the United Kingdom or the United States.

Trials or settlements regarding the spoliation of natural resources would probably result in the payment of damages rather than the return of the natural resources themselves. From a practical standpoint, the return of the natural resources would be impossible or very difficult in many cases because the resources would have been used in the production of something else, or would have been subject to value-adding processes, such as oil refinement. Minerals from the DRC, for example, would have been used in the production of mobile phones and computers, while oil from Sudan would have been used to produce plastic goods in China. Unless plaintiffs file for injunctions to stop the exportation of natural resources in the first place, as did civil society groups in Liberia following the armed conflict there, it will not be possible to bring about the return of natural resources that have long since entered consumer markets by the time a case concludes.³⁰⁵ Moreover, even if plaintiffs were somehow to succeed in bringing about the return of stolen natural resources, the repatriation of large quantities of petroleum, lumber, or minerals could pose considerable practical problems.

Thus, plaintiffs will in all likelihood be seeking the repatriation of funds derived from natural resources, rather than the natural resources themselves. Damages or settlement payments would represent the repatriation of misappropriated funds. Successful law suits against multinational corporations—that is, law suits that survive motions for a stay or dismissal on the grounds of the doctrine of *forum non conveniens*—are likely to end in settlements, rather than in

³⁰⁵ Open Society Justice Initiative, *supra* note 172 at 47-48.

damages awarded by judges or juries. All of the transnational tort cases in the United Kingdom discussed above, for example, ended in a settlement instead of trial.

After a settlement has been reached in a class action suit, however, the payment of large sums of money to thousands of plaintiffs raises serious logistical issues. The settlement of the law suit in the United Kingdom against Trafigura, for example, resulted in the distribution of \$45 million amongst more than 30,000 claimants in Cote d'Ivoire, many of whom lacked bank accounts. Moreover, after an Ivorian court ordered that the funds be distributed by a local Ivorian activist, lawyers for the claimants expressed concerns about whether the claimants would actually receive the money.³⁰⁶

On a more conceptual level, the appropriateness of distributing a settlement award to even a large group of claimants is questionable, in light of our premise that natural resources belong to the people who should control as well as benefit from such wealth. While it is, of course, preferable for 30,000 claimants to benefit from a country's natural resource wealth, as opposed to a single entrenched dictator and his family members, it would be even more legitimate for the entire populace to enjoy the benefits of such wealth in the form of education, health care, housing, and infrastructure. The repatriation of funds derived from natural resources should benefit the people as a whole, to the greatest extent possible. Damages in transnational tort litigation cases should, in essence, resemble the repatriation of funds following stolen asset recovery. Damages would ideally be invested in the provision of social services and infrastructure, of which resource-exporting developing countries are often in great need. As with the repatriation of stolen assets, such massive expenditures would, however, require some type of monitoring to ensure that the repatriated funds were not themselves misappropriated by the government or other entities. The experiences of countries like Nigeria, Peru, and Indonesia with the repatriation of stolen assets would be useful in designing and monitoring the use of damages paid in transnational tort litigation.

VI. Conclusion

The victims of natural resource spoliation may pursue a range of legal remedies against multinational corporations and States, at both the domestic and international levels. This Guide

³⁰⁶ BBC News, *Fear for Ivory Coast pay-out cash*, 22 January 2010.

has sought to explore the possibility of transnational tort litigation against corporations in the United States and the United Kingdom, and in particular claims regarding the tort of conversion. Both jurisdictions have a history of opening their courts to the litigation of transnational tort cases. Transnational claims in the United Kingdom, however, have centred on negligence for personal injuries, death, and environmental damage. Such negligence claims allow plaintiffs to target wrongful conduct associated with the extraction of natural resources, but not the actual extraction or sale of the resources themselves. In the United States, the existence of the Alien Tort Statute has meant that plaintiffs generally pursue claims under customary international law (or the ‘law of nations’) rather than state tort laws. Yet, not only is the future viability of litigation under the ATS under question because of the *Kiobel* case, but the right of peoples to their natural resources probably would not meet the threshold set forth in *Sosa* for claims under the ATS. Meanwhile, a small body of jurisprudence regarding the theft of national antiquities exists in both the United States and the United Kingdom, and this could potentially serve as a model for remedying natural resource spoliation. Both national antiquities and natural resources form part of the national heritage of States, and national ownership laws or constitutional provisions may provide a basis for tort litigation in circumstances involving the theft of ancient artefacts as well as natural resources like oil, gas, and minerals.

The success of transnational tort litigation regarding the spoliation of natural resources could depend in part on whether plaintiffs can overcome the challenges that defendants might bring regarding the act of State doctrine and the appropriateness of the forum. After defeating these challenges, plaintiffs could also encounter practical problems in the distribution of damages or settlement payments. These potential challenges, however, are not insurmountable and should not deter those wishing to bring Clean Trade actions. Some of the arguments discussed above with respect to the act of State doctrine and *forum non conveniens* are, as of yet, untested in the context of a case involving control over natural resources. Plaintiffs would therefore have the freedom to make new, creative arguments that build on existing jurisprudence in the United States and the United Kingdom. There is much potential for innovative litigation that seeks to enforce the right of peoples to control their natural resources.