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A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress

Keywords

Indigenous Peoples, Defenses, Torts, Human Rights Law, International Law: History, Practice and Procedure

**A CASE STUDY IN MULTINATIONAL CORPORATE
ACCOUNTABILITY**

**ECUADOR'S INDIGENOUS PEOPLES STRUGGLE FOR
REDRESS**

Maxi Lyons

INTRODUCTION

Multinational corporations often wield more power than many of the world's nations, the immense wealth and political influence of multinationals make them powerhouses in the global economy. These domineering enterprises are often able to undertake profit-making endeavors, particularly involving the consumption or extraction of natural resources, in developing nations with little or no regulation and often without meeting social and cultural responsibilities to the local communities and environments adhered to in the United States (U.S.). The eastern half of the Ecuadorian Amazon, known as Oriente, is one of the richest bioregions on the planet, and a rich source of oil that has been exploited by multinational oil companies for thirty years.¹ Oil extraction in the Amazon has led to contamination of the waters and land, deforestation, and resulted in sickness in indigenous communities, threatening some communities with cultural extinction.² The jungle of Ecuador will be extinguished in its entirety within forty years at the present rate of deforestation however, the oil extracted and sold in the global marketplace is the foundation of Ecuador's economy and is therefore promoted by the Ecuadorian government as the key to development.³ Despite initial opposition by the Ecuadorian government, indigenous peoples of Ecuador formed grassroots resistance movements educating and galvanizing local communities against

Second year law student, University of Denver School of Law; Baccalaureate degree in English and Social Science, University of Southern Colorado; Professional experience in the fields of law, international travel, real estate investments and public relations in environmental remediation. The author would like to acknowledge the professors who have guided her academic pursuits and the friends and family who have guided her personal growth.

1. Peter Lippman, *Introduction: Environmental Assault and Grassroots Resistance*, The Advocacy Project, Defending the Amazon, at http://www.advocacynet.org/cpage_view/amazonoil_introduction_17_58.html (last visited Mar. 17 2004). See *Rights Violations in the Ecuadorian Amazon: The Human Consequences of Oil Development*, The Center for Economic and Social Rights, Mar. 1994 at x, available at www.cesr.org/publications.htm (last visited April 4, 2004) [hereinafter CESR].

2. Lippman, *supra* note 1.

3. *Id.*

exploitation, which led to citizens of Ecuador and Peru filing two putative class actions against Texaco (now ChevronTexaco⁴) alleging the oil company polluted rain forests and rivers in those two countries, causing environmental damage and personal injuries.⁵ The litigation surrounding the now consolidated cases has been touted as “the antiglobalization trial of the century”⁶ Although environmental contamination and human rights violations are central to the legal case, the fundamental issue underlying this landmark case is corporate responsibility, in particular, the accountability of multinational corporations operating in developing and underdeveloped countries where regulation is often far more lax than standards a corporation operating in the U.S. would be held to.

This paper takes the position that multinational corporations have social and environmental responsibilities to the peoples and environs from which their enterprises profit that demand legal remedy when breached. As a case study in multinationals operating without accountability, this paper details the developments and implications of the case against ChevronTexaco throughout more than a decade of litigation and discusses generally the barriers to redress encountered by plaintiffs, such as the Ecuadorian and Peruvian plaintiffs, attempting to bring suit against multinationals operating in a global market. Section II discusses the background of ChevronTexaco’s operations in Ecuador and the political and economic environment at the time of operations as well as the impacts of these operations to the natural and cultural environment in Ecuador and Peru and the potential liabilities incurred as a result. Section III analyzes the cases brought against ChevronTexaco for their allegedly sub-standard waste disposal techniques that resulted in environmental and cultural devastation. Section IV highlights the associated case now pending in Ecuador, which was brought following the U.S. federal court’s dismissal of the U.S. suit. Section V looks to the future of Ecuador’s oil development as an economic force following the ChevronTexaco debacle. Section VI outlines the new laws and regulations that will shape oil extraction in the future by empowering indigenous peoples to have both information and meaningful participation in the processes. Section VII considers generally the barriers encountered by plaintiffs attempting to gain access to redress for wrongs committed by multinationals in foreign jurisdictions, and Section VIII proposes solutions for improving means of redress as a mechanism for demanding multinational accountability in an international context. Section IX calls for universal standards to be established through collaborative efforts of the international community to demand multinational social, cultural and economic accountability in the environs within which they operate.

4. In 2001, Texaco became ChevronTexaco following a merger between the two companies. See *infra* text accompanying note 68. In this paper, the name Texaco is used for activities before 2001 and ChevronTexaco is used for activities following 2001.

5. See *Aguinda v. Texaco (Aguinda I)*, 1994 WL 142006, 6 (SDNY April 11, 1994). See also *Ashanga v. Texaco, Inc.*, Dkt. No. 94 Civ. 9266 (S.D.N.Y. filed Dec. 28, 1994).

6. Marc Lifsher, *Chevron Would Face \$5 Billion Tab For Amazon Cleanup, Expert Says*, WALL ST. J., Oct. 10, 2003, available at <http://www.texacorainforest.org/wallstreet.htm> (last visited April 4, 2004).

BACKGROUND/HISTORY

The matter of environmental contamination by Texaco, a U.S. domiciled multinational corporation, in Ecuador was facilitated by a combination of legal, political and economic factors. In the 1970's and 1980's, "environmental protection was virtually nonexistent in Ecuador" as "the first environmental impact assessments were only introduced in Latin America in the 1990's."⁷ Economics was a key factor for both the Republic of Ecuador, who leased the land within the sensitive rainforest region to Texaco for exploitation as a source of wealth for the state, and Texaco who gained high profits with no government regulation or oversight.⁸ Government corruption was also a factor in the despoiling of the Amazon as "most of the time Texaco was in Ecuador, the government was unrepresentative and corrupt. Local people, whose forest was leveled and whose water was polluted, were completely unaware of what oil exploration would do to them."⁹ Thus, the issue that arises is what responsibilities do corporations seizing such prime profit-making opportunities have to the ecosystems, societies, and economies within which they operate. Corporate accountability, a topic much debated since the Enron scandal, should extend beyond accountability to board members and stockholders to "those most directly affected by their operations."¹⁰ Thus, underlying the legal technicalities of the ChevronTexaco case is the more critical issue of multinational corporate accountability for the welfare of whole societies from whom they profit.

Texaco's Operations in Ecuador

In 1964, the Ecuadorian government invited Texaco to develop the country's first oil field in the Oriente and Texaco's Ecuadorian subsidiary, Texaco Petroleum Company (TexPet), commenced oil exploration.¹¹ In 1967 Texaco found oil near the Columbian border, an unspoiled jungle region of Ecuador that was, at the time, inhabited by indigenous tribes and missionaries.¹² Texaco began drilling in the Oriente as part of consortium in which Gulf Oil Corporation (Gulf) and Texaco owned equal shares with the Ecuadorian government-owned PetroEcuador

7 The Advocacy Project, *From the Editors: Corporate Responsibility on Trial*, 16 AMAZON OIL 5, Mar. 11, 2001, at http://www.advocacynet.org/news_view/news_192.html (last visited April 4, 2004) [hereinafter *From the Editors*].

8. Judith Kimerling, *The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice or Business as Usual?* 7 HARV. HUM. RTS. J. 199, 201 (1994).

9. *From the Editors, supra* note 7.

10. *Id.*

Agunda v. Texaco, Inc. (*Aguinda IX*), 303 F.3d 470, 473 (2d Cir. 2002). The first oil field was located in a 200 square mile region of the Amazon's Oriente region. See Amazon Watch, Ecuador, The Chevron-Texaco Toxic Legacy: Timeline – The Case Against ChevronTexaco, at http://www.amazonwatch.org/amazon/EC/toxico/index.php?page_number=5 (last visited Mar. 15, 2004).

12. T. Christian Miller, *Ecuador: Texaco Leaves Trail of Destruction: As ChevronTexaco Faces Major Lawsuit, Evidence Portrays a Company and Nation that for Years Showed Little Concern for the Environment*, L. A. TIMES, Nov. 30, 2003, available at <http://www.corpwatch.org/news/PND.jsp?articleid=9249> (last visited April 4, 2004).

acquiring a twenty-five percent share in 1974.¹³ PetroEcuador became the majority stakeholder in 1976 when it acquired Gulf's interests.¹⁴ By 1980, in addition to drilling hundreds of wells, the consortium had constructed the 312-mile trans-Ecuador pipeline traversing the Andes and built access roads throughout the jungle.¹⁵ TexPet operated the oil pipeline and handled all drilling operations until PetroEcuador assumed responsibility for the pipeline in 1989 and for drilling operations in 1990.¹⁶

Techniques Employed by Texaco

Between 1971 and 1992 when Texaco ceased operations in Ecuador, Texaco had drilled 339 wells in over a million acre concession and extracted roughly 1.4 billion barrels of crude oil from the Amazon.¹⁷ Texaco's operations generated more than 3.2 million gallons of waste each day and accidental spills from the pipeline released an estimated 16.8 million gallons of crude into the Amazon River – all discharged without prior treatment or followup monitoring.¹⁸ The "drilling muds" produced during Texaco's oil extraction contain "water, oil, heavy metals and chemicals used in drilling."¹⁹ U.S. government studies have shown that drilling muds such as those dumped in unlined pits near the wells in the Oriente, can contain "toxic levels of benzene, a known carcinogen, and lead, which can impede mental development in children."²⁰ Additionally, Texaco used dirt pits to separate the oil from water, which produced a waste called "produced water, a brine that was dumped into nearby streams."²¹ According to studies of produced water in the U.S., it also contains "high levels of benzene and arsenic."²² These wastes from Texaco's operations are blamed for the devastation of streams, rivers, and wetlands in the Amazon basin, impacting both Ecuador's and Peru's indigenous inhabitants.²³

In response to a request from Ecuador's Minister of Energy and Mines for an environmental audit of the oil fields in 1994, Texaco asserted that during the company's years of operation they complied with all laws and regulations along with the company's "operating practices which often go beyond the environmental laws and regulations of countries around the globe."²⁴ In sharp contrast to

13. *Agunda IX*, 303 F.3d at 473.

14. *Id.*, See Texaco Inc.'s Memorandum of Law in Support of its Renewed Motions to Dismiss Based on Forum Non Conveniens and International comity at 15.

15. Miller, *supra* note 12.

16. *Agunda IX*, 303 F.3d at 473.

17. Kimerling, *supra* note 8, at 205.

18. *Id.* The volume of crude spilled from the trans-Ecuador pipeline alone exceeds that of the Exxon Valdez, the largest oil spill in U.S. history, which dumped approximately 10.8 million gallons of oil into the Prince William Sound. *Id.* at n.28.

19. Miller, *supra* note 12.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Agunda I*, 1994 WL 142006 at 1.

24. Kimerling, *supra* note 8, at n.5 (citing Letter for J. Michael Trevino, Vice President of Texaco

Texaco's practices, however, "large [U.S.] operators had mostly abandoned the use of unlined dirt pits to dispose of drilling muds" by the mid-1980s due to more stringent disposal regulations for oil waste prompted by growing health and environmental impact concerns.²⁵ Less than five percent of oil wastes in the U.S. were dumped into dirt pits in 1985, according to a survey by industry trade group American Petroleum Institute.²⁶ Most drilling muds were shipped to special off-site disposal centers and while most U.S. states with petroleum activity banned the discharge of oil wastes into freshwater streams in the 1940s and 1950s, the U.S. federal government banned such dumping nationwide in 1979 with only very limited exceptions.²⁷ Alternatively, oil companies in the U.S. and many other countries were reinjecting waste into the ground.²⁸

According to the interviews and documents produced during discovery in the U.S. case, "Texaco dumped waste water directly into streams and the jungle instead of using disposal methods safer for the environment and public health that became common in the United States during the 1970s and 1980s. Oil company officials regarded those methods as too expensive to be cost-effective in Ecuador."²⁹ A 1976 Texaco memorandum indicated that "the Ecuadorian government wanted the pits drained and covered because they collapsed in heavy rains and released contaminated water" but warned that such action would be "considerably more costly"³⁰ Although the Ecuadorian pits were never drained, Texaco officials maintain the pits were promptly repaired.³¹ Michael Econimides, coauthor of *The Color of Oil*, stated, "That's an obviously bad practice. They would never have done that in the United States."³² Judith Kimerling, an environmental law professor and author of *Release of Amazon Crude*, which first exposed the impact of Texaco's oil developments in 1991, said, "The big picture is that we know from experience around the world that it's irresponsible to just dig a hole, dump your waste and walk away. That's exactly what Texaco did in Ecuador."³³ The plaintiffs suit alleges "[t]he waste, a chemical stew of heavy metals such as arsenic and carcinogens such as benzene, increased levels of cancer, infant mortality, spontaneous abortions, headaches, stomach ailments and skin diseases [and that] the effects of pollution also harmed crops and livestock."³⁴

Petroleum Company, to K. Bandell, rainforest activist (Aug. 5, 1993) (on file with the Harv. Hum. Rts. J.)).

25. Miller, *supra* note 12.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Lifsher, *supra* note 6.

Health and Cultural Impacts

Nearly 2.5 million acres of pristine rain forest were opened up to land speculation, colonization, deforestation, ranching, logging and agri-industry as a result of Texaco's access roads forcing the indigenous Tetetes off their land and dispossessing the indigenous Cofan of their traditional territory³⁵ In addition to being displaced, the deforestation and pollution have severely degraded the indigenous peoples' hunting and fishing territories leading to malnutrition and pushing them to the brink of extinction.³⁶ Furthermore, exposure to outside influences has destabilized indigenous communities and exposed them to epidemics of foreign diseases, prostitution and alcoholism.³⁷

In an Affidavit of the Secoya Tribe, Elias Piaguata, offers the following testimony:

We are a traditional people of fishermen and hunters who for centuries have depended on the river and land in order to survive.

The effects of what Texaco has done have been disastrous for us. Because of the contamination caused by Texaco in the river, we can no longer fish; use water from the river to cook or drink; wash our clothes in the river; or bathe peacefully in the river. Before Texaco came, a hunter spent three hours finding food for this whole family. Now, with the low number of animals, a hunter can go out for the whole day and not find even a little animal. We do not have enough food and we are undernourished.

Our health has been damaged seriously by the contamination caused by Texaco. Many people in our community now have red stains on their skin and others have been vomiting and fainting. Some little children have died because their parents did not know they should not drink the river water.³⁸

In April of 1993, a Harvard public health study found that oil-related contaminants in the drinking, bathing and fishing water samples contained polycyclic aromatic hydrocarbons (PAHs) ten to one-thousand times greater than USEPA's safety guidelines.³⁹ The study concluded that "[t]he presence of high levels of toxic compounds and oil-related injuries indicate that the exposed

35. Kimerling, *supra* note 8, at 206. Displacement is widely believed to have hastened their extinction as a people. *Id.* at n.32 (citing Interview with Luis Carrera, President of the Environmental Advisory Commission to the President of the Republic, in Quito, Ecuador (Jan. 26, 1994)).

36. *Id.* at 206-07. Other adverse impacts include the destruction of crops, forest resources, and habitat, erosion, sedimentation of surface waters, and soil degradation. *Id.* at n.30.

37. Kimerling, *supra* note 8, at 207.

38. Affidavit of the Secoya Tribe Given by Elias Piaguata, *Agumda LX.*, (No. #93-CV-7527). See Amazon Watch, Ecuador: *The Chevron-Texaco Toxic Legacy: The Legal Case Against ChevronTexaco*, at http://www.amazonwatch.org/amazon/EC/toxico/index.php?page_number=4 (last visited April 4, 2004). Indigenous tribes of Huaorani, Quichua, and Secoya were also forced off their territorial lands by Texaco's expanding infrastructure. Kimerling, *supra* note 8, at n.33.

39. CESR, *supra* note 1 at Executive Summary.

population faces an increased risk of serious and non-reversible health effects such as cancers and neurological and reproductive problems.⁴⁰

A study published in 2002 by Miguel San Sebastian, a Spanish epidemiologist, found that people living in countries with oil drilling faced significantly higher risks of cancer, especially stomach, rectum and kidney cancer for men, and cervix and lymph node cancer for women.⁴¹ The report was produced after San Sebastian examined 985 cases of cancer in the Amazon reported to a central health registry between 1985 and 1998.⁴² According to San Sebastian, "What the studies show is that something is happening there. But it's tough to make the direct link that the oil is causing these cancers."⁴³ San Sebastian's study was criticized by Jack Siemiatycki, a University of Montreal professor of epidemiology and authority on environmental causes of cancer, who said "[t]here's no more than a hint of link" between cancer and oil exposure.⁴⁴ San Sebastian's 1999 *Yana Curí Report* acknowledged that his study of San Carlos where Texaco built more than thirty wells was not enough to prove the devastating health effect of Texaco's operations throughout the region, but did find that males were at risk for cancer of the larynx, bile ducts, liver, stomach, melanoma and leukemia associated with a high risk of mortality from such diseases.⁴⁵ A health study published by the Ecuadorian Union of Popular Health Promoters of the Amazon (UPPSAE) found that individuals exposed to oil had higher occurrences of abortion, elevated rates of fungal infection, dermatitis, headache, and nausea.⁴⁶ While the science as to the cause of the devastating health crises in the Oriente is disputed, it is clear that both the health and cultures of the indigenous peoples have been damaged by ChevronTexaco's oil operations there.

Texaco's Economic and Political Sway on The Republic of Ecuador

Texaco used its immense economic resources and political ties to maintain their operations with little to no government oversight or regulation. According to T. Christian Miller, a writer for the *Los Angeles Times* that reviewed discovery materials and conducted interviews of litigants, discovery documents reveal that "Texaco executives dined with presidents and ministers, the U.S. Embassy gave Texaco access to top officials during trade missions, [and] Texaco handed out contracts to current and former Ecuadorian military officials. One memo notes the benefits of continuing a contract with a former Ecuadorian navy officer."⁴⁷

40. *Id.*

41. Miller, *supra* note 12.

42. *Id.*

43. *Id.*

44. *Id.*

45. Dr. Miguel San Sebastian, *Yana Curí Report Summary*, Sept. 1999, available at <http://www.texacorainforest.com/case/index.htm> (last visited April 4, 2004) (Two medial doctors in collaboration with the Department of Tropical Medicine and Hygiene of the University of London conducted the public health study of the inhabitants of San Carlos.).

46. CESR, *supra* note 1, at 9 (The study examined 1,465 people in ten communities with 1,077 residing in oil-contaminated areas and 388 in non-contaminated areas.).

47. Miller, *supra* note 12.

Texaco used its economic superiority to manipulate its often strained relations with the Ecuadorian government. "On a few occasions, when the disputes got especially nasty, the company withheld payments to the government for the oil it was shipping out."⁴⁸

Conversely, Texaco also issued multimillion-dollar loans with generous terms to the economically-challenged Ecuadorian government. When Ecuador's president made an urgent plea following a devastating earthquake in 1987 Texaco agreed to supply an interest-free \$33 million loan.⁴⁹ Officials noted that it would help the company acquire a contract extension.⁵⁰ Economic forces weighed heavily in Texaco's favor as a means of manipulating environmental regulation of its operations, and in turn, the Republic of Ecuador used the pretext of an improved economy to justify exploiting its own people and their habitats.

The Ecuadorian government's regular budget cuts for environmental programs are representative of their lack of concern for the environmental impact of Texaco's drilling operations. Government-owned PetroEcuador, a partner in the consortium, played a supporting role in the devastation of the Amazonian Oriente region. Texaco manager, Rene Bucaram, said, "the state oil company erased the budget line for environmental operations to save money" and Texaco "would follow suit by suspending its 37.5% share of the funding required in the consortium deal."⁵¹ Memorandums produced through discovery showed that in some years Texaco's budget was zero for environmental tasks.⁵² "Nine out of twelve months, [the government] cut the costs for environmental work," and Texaco had no qualms with cutting its budget in response.⁵³ PetroEcuador's president and former Texaco worker said Texaco "should have followed the same standards they were following in the United States, but the authorities here were not demanding it. Texaco did what the authorities asked, the minimum required. Back then, nobody talked about the environment."⁵⁴ Ecuadorian government officials said they were unaware of the environmental damage taking place at the time. They said Texaco "assured them that it was using the best technology available."⁵⁵ Retired Gen. Rene Vargas, who headed Ecuador's Energy Ministry in the early 1970s, claimed, "If they had done in the U.S. what they did here, they would have been made prisoners. They knew it was a crime."⁵⁶ The responsible parties have been pointing fingers at one another for over a decade, meanwhile the indigenous peoples whose health, cultures and habitats were all-but destroyed by the consortium's activities in the Oriente have received no reparations.

48. *Id.*

49. *Id.*

50. *Id.* ("Texaco's public relations image is in need of improvement, which will be attended to immediately, said one memo written by a Texaco executive after the quake).

51. *Id.*

52. *Id.*

53. *Id.* (Texaco Manager Bucaram said, "I wouldn't say Texaco was sorry to see this happen. I'd be a liar.").

54. *Id.*

55. *Id.*

56. *Id.* ("Call us ignorant, call us ingenious, I accept it. We just didn't know, said Vargas).

Texaco's Departure from Ecuador

PetroEcuador acquired complete ownership of the Consortium in 1992 when TexPet relinquished its interests in the operation.⁵⁷ Upon termination of the concession, Texaco conducted two audits to assess the impact of the consortium's operations on soil, water and air, and assess compliance with environmental laws, regulations and generally accepted operating practices.⁵⁸ A summary of one of these audits reported that during the consortium's two decades of operations, "some activities were potentially noncompliant with Ecuadorian law" and samples from five rivers determined that the discharge of produced water had altered their chemistry to be higher in salt, oil and particulate waste.⁵⁹ The summary further noted contamination at 25% of the well sites visited, but characterized the damage as limited.⁶⁰ Despite these findings, Texaco asserts that the audits conclude there was no lasting or significant environmental impact from the consortium's operations.⁶¹ A close review of the audits' criteria and basic assumptions reveals that the absence of specific quantitative standards by which to measure Texaco's compliance, Texaco could conduct its operations "in accordance with any level of compliance [it] felt appropriate or necessary."⁶² Additionally the criteria's adopts a compliance standard defined by oil industry practices in tropical regions (remote Third World countries) rather than compliance standards based on environmental and public health impacts.⁶³

In March 1995, after two lawsuits were filed in a U.S. federal court against Texaco for pollution caused in the Oriente and Peruvian lands downstream, Texaco negotiated an Agreement for Environmental Reparations with the Ecuadorian government which resulted in a \$40 million dollar cleanup in exchange for a Final Release of Claims and Delivery of Equipment and negotiated a settlement with Municipalities in the drilling region that released Texaco from any future obligations or liabilities.⁶⁴ While ChevronTexaco contends that its \$40-million cleanup in response to the audits was designed to ensure that there was no lasting environmental damage, Steven Donziger, a lawyer for the plaintiffs, said, "It's like treating skin cancer with makeup. They never dealt with the underlying problems."⁶⁵ Plaintiffs' claims that the cleanup effort was deficient are supported by a local environmental group associated with the plaintiffs whose survey of the waste pits cleaned by Texaco "found that nearly all continued to have oil residue or

57. *Agunda IX*, 303 F.3d at 473.

58. ChevronTexaco, *Environmental Remediation*, at <http://www.texaco.com/sitelets/ecuador/en/overview/#a4> (last visited Apr. 4, 2004).

59. Miller, *supra* note 12.

60. *Id.*

61. ChevronTexaco, *supra* note 58.

62. Kimerling, *supra* note 8, at 217 (citing HBT Agra Limited, Final Assessment Criteria for an Environmental Evaluation of the Petroecuador Consortium Oil Fields, 27-28 (Oct. 1992)).

63. Kimerling, *supra* note 8, at 217.

64. ChevronTexaco, *Environmental Remediation*, at <http://www.texaco.com/sitelets/ecuador> (last visited Mar. 15, 2004).

65. Miller, *supra* note 12.

other contamination.”⁶⁶ Remediation by Texaco prior to its departure from Ecuador, although strongly criticized by plaintiffs as inadequate, is heavily relied upon by Texaco as excusing it from over twenty years of social and environmental irresponsibility.⁶⁷

After a merger in 2001, Texaco became ChevronTexaco, the second largest energy company in the world.⁶⁸ The newly formed company did not deny dumping production wastes into the Amazonian environment, but claimed their waste disposal techniques at the time were consistent with oil industry practices in other tropical countries such as Angola, Brazil, Columbia, Indonesia, Mexico, and Nigeria.⁶⁹ In other words, they employed disposal practices used in underdeveloped nations that had little to no environmental regulatory standards rather than the more stringent health-based standards imposed by the U.S. ChevronTexaco dismissed the health claims in the Oriente as unsupported by any credible, substantiated scientific evidence.”⁷⁰

Moreover, the company denied responsibility for any environmental damage based on their position as a minority partner and their claim that operations were controlled by the state-owned oil company PetroEcuador and TexPet (Texaco's Ecuador subsidiary), as well as approved by the Ecuadorian government.⁷¹ Although ChevronTexaco maintains that its only involvement in Ecuadorian oil development was through indirect investment in its subsidiary, TexPet, the affidavits of plaintiffs' witnesses indicate that “the most important contract for field operations were approved and signed in the United States” and company policy demanded that authorization be sought regarding annual budgets and expenditures.⁷² Despite ChevronTexaco's claim of only indirect involvement in Ecuador, lax environmental regulatory structures and a complicit Republic of Ecuador desperate for direct foreign investment created oil operation that gave rise to substantial liabilities.

Potential Liabilities for Reparations in the Oriente

Plaintiffs against Texaco sought money damages and extensive equitable relief to redress contamination of the water supplies and environment including: financing for environmental cleanup to create access to potable water and hunting

66. *Id.*

67. ChevronTexaco, *supra* note 64.

68. Amazon Watch, Ecuador: *The Chevron-Texaco Toxic Legacy*, at http://www.amazonwatch.org/amazon/EC/toxico/index.php?page_number=5 (last visited Mar. 17, 2004). On Oct. 9, 2001, Chevron and Texaco completed the merger that formed ChevronTexaco. ChevronTexaco, *Chronology of Events: Texaco and Ecuador Chronological Overview*, at <http://www.texaco.com/sitelets/ecuador> (last visited Apr. 10, 2004).

69. ChevronTexaco, *Response to Claims*, at http://www.texaco.com/sitelets/ecuador/en/response_to_claims/ (last visited Apr. 4, 2004) [hereinafter ChevronTexaco Response to Claims].

70. *Id.*

71. *Id.*

72. *Id.* at Silva Aff. ¶¶ 2-3.

and fishing grounds; renovating or closing the Trans-Ecuadorian Pipeline; creation of an environmental monitoring fund; establishing standards to govern future Texaco oil development; creation of a medical monitoring fund; and injunction restraining Texaco from entering into activities that risk environmental or human injuries, and restitution.⁷³ Dave Russell, an Atlanta-based toxics specialist and U.S. expert consultant to the plaintiffs estimated that “[c]leaning up toxic wastes in the Ecuadorian Amazon region could cost ChevronTexaco Corp. more than \$5 billion and take as long as ten years.”⁷⁴ According to Russell, “The damage is to the entire ecosystem and the only way to effectively curtail pollution would be to dig up, transport and incinerate millions of tons of contaminated soil. Such a project would dwarf any decontamination effort ever undertaken.”⁷⁵

U.S. CASES: AGIENDO & JOTA V TEXACO

A putative class action suit against Texaco, Inc., *Aguinda v. Texaco* (*Aguinda I*), was filed in November of 1993 in federal court in New York by a team of U.S. lawyers headed by Ecuadorian-American Cristbal Bonifaz, and Joseph C. Kohn, a Philadelphia lawyer, on behalf of plaintiffs comprised of mestizo settlers, members of the Cofan, Siona, and Secoya indigenous communities of the Sucumbios and Orellana provinces, in the north of the Oriente.⁷⁶ New York was chosen by plaintiffs as the home of Texaco’s international headquarters where many of the decisions regarding oil operations in Ecuador were made.⁷⁷ The suit alleges abuses by Texaco that include large-scale disposal of inadequately treated hazardous wastes and destruction of tropical rain forest habitats in the Amazon basin resulting in harm to indigenous peoples living in the rain forest and to their property, and to the stability of Amazon basin habitats.⁷⁸ Lead attorney Bonifaz, formerly a chemical engineer, described the environmental destruction as an “apocalyptic environmental nightmare unlike any the rainforest has ever seen.”⁷⁹

Fearing the suit against Texaco would deter future international investment in Ecuador’s oil development, the Ecuadorian government initially opposed the suit. In December 1993, Texaco moved for dismissal on grounds of failure to join the Republic of Ecuador, international comity, and forum non conveniens.⁸⁰ Texaco also submitted a letter addressed to the U.S. Department of State from Ecuador’s ambassador to the U.S. stating that Ecuador regarded the suit as “an affront to

73. *Jota v. Texaco Inc. (Aguinda IV)*, 157 F.3d 153, 156, n.2 (2nd Cir. 1998).

74. Lifsher, *supra* note 6.

75. *Id.* (“To put this in perspective, you’re looking at something, sizewise, larger than the Chernobyl disaster, said Russell.”)

76. Complaint, *Aguinda v. Texaco, Inc. (Aguinda I)*, Dkt. No. 93 Civ. 7527 (S.D.N.Y. filed Nov. 3, 1993); The Advocacy Project, *The Fight for the Amazon: In the New York Courts*, 16 AMAZON OIL 5, Mar. 11, 2001, at http://www.advocacynet.org/news_view/news_192.html (last visited Apr. 4, 2004). See also *Aguinda IX*, 303 F.3d at 473.

77. *Aguinda IX*, 303 F.3d at 473 (noting plaintiffs’ allegations that Texaco’s Ecuador activities were “designed, controlled, conceived, and directed through its operations in the United States.”)

78. *Aguinda I*, 1994 WL 142006 at 1.

79. *The Fight for the Amazon: In the New York Courts*, *supra* note 76.

80. *Aguinda IX*, 303 F.3d at 474.

Ecuador's national sovereignty"⁸¹ Despite Texaco's assertions that Ecuador's courts would be a more convenient forum for litigation, Judge Broderick issued a groundbreaking decision upholding the plaintiffs' claim that Texaco's dumping in Ecuador could be in violation of international law and reserved decision on Texaco's motion to dismissing stating:

[t]he extent to which any actionable conduct falls into these categories cannot be determined absent discovery to permit definition of the actual events, if any, which are violative of law enforceable by the courts of the United States, and what relief, if any, would be appropriate. It is thus unclear at this point whether or not any indispensable parties are currently omitted from the complaint."⁸²

In December of 1994, lawyers representing Peruvian individuals, *Jota*, and indigenous communities filed a companion class action suit based on the same grievances and alleging the pollution spread downstream to Peru.⁸³ *Jota* plaintiffs alleged they would suffer personal injuries and property damage as a result of "negligent or otherwise improper oil piping and waste disposal practices" and based their claims on "theories of negligence, public and private nuisance, strict liability, medical monitoring, trespass, civil conspiracy, and the Alien Tort Claims Act (ATCA)."⁸⁴

The death of Judge Broderick in February 1995 changed the course of the *Aguinda I* suit, which was then assigned to Judge Barrington Parker for completion of discovery and was again transferred to District Judge Jed Rakoff, who found the previous courts afforded the plaintiffs "unusual leeway."⁸⁵

U.S. District Court and Second Circuit Court of Appeals Play Hot Potato

First U.S. District Court Decision

In November 1996 following discovery, Judge Rakoff granted Texaco's motion and dismissed the *Aguinda* complaint on grounds of international comity, forum non conveniens, and failure to join indispensable parties proclaiming Ecuador's courts would be a more convenient forum for the litigation.⁸⁶ In response to the court's declaration that the Sovereign Immunities Act barred the court's assertion of jurisdiction over either Ecuadorian entity, the government of

81. *Id.*

82. *Aguinda I*, 1994 WL 142006 at 7, 10.

83. *Ashanga v. Texaco, Inc. (Jota)* Dkt. No. 94 Civ. 9266 (S.D.N.Y. filed Dec. 28, 1994)(original complaint was labeled *Ashanga*, but is since known as *Jota*). See also *Aguinda IX*, 303 F.3d at 474.

84. *Aguinda v. Texaco, Inc. (Aguinda VIII)*, 142 F Supp. 2d 534, 537 (S.D.N.Y. 2001); *Aguinda IX*, 303 F.3d at 473.

85. *Aguinda v. Texaco, Inc. (Aguinda II)*, 945 F Supp. 625, 627 (S.D.N.Y. 1996).

86. *Aguinda II*, 945 F Supp. at 628 (The court noted that the plaintiffs' failure to join PetroEcuador and the Republic of Ecuador as parties would make granting equitable relief "unenforceable on its face, prejudicial to both present and absent parties, and an open invitation to an international political debacle.").

Ecuador filed a motion to intervene and plaintiffs simultaneously filed a motion to reconsider the court's dismissal.⁸⁷ The Republic of Ecuador's affidavit stated that it was motivated to "protect the interests of the indigenous citizens of the Ecuadorian Amazon who were seriously affected by the environmental contamination attributed to the defendant company" and agreed to "procure the necessary indemnization in order to alleviate the environmental damage caused by Texaco."⁸⁸ The Ecuadorian government did not, however, waive sovereign immunity with regard to claims asserted by the Jota plaintiffs or counterclaims made by Texaco.⁸⁹ Both motions were denied in the decision to dismiss.⁹⁰ After the second complaint (*Jota*) was dismissed in 1997 the citizens of Ecuador and Peru appealed.⁹¹

First U.S. Appeal

In October 1998, the Second Circuit Court of Appeals vacated and remanded Judge Rakoff's decision instructing the District Court to independently re-weigh the relevant factors for a forum non conveniens dismissal and review international comity "in light of all the then current circumstances, including Ecuador's position with regard to the maintenance of this litigation in the United States forum."⁹² The Court of Appeals articulated an intent to ensure that Texaco would submit to jurisdiction in Ecuador.⁹³

Following the Court of Appeal's decision, the citizens of Ecuador and Peru moved for recusal of Judge Rakoff on grounds that the judge's attendance at an expense-paid seminar sponsored by organizations that received funding from Texaco after his initial dismissal of the case raised the appearance of impropriety.⁹⁴ After Judge Rakoff denied the motion, Plaintiffs sought a writ of mandamus and Court of Appeals Circuit Judge Winter denied the petition finding that Judge Rakoff did not abuse his discretion in denying petitioner's motion and that attendance at the expense-paid environmental law seminar, given Texaco's "indirect and minor funding role and the lack of a showing that any aspect of the seminar touched upon an issue material to the disposition of a claim or defense in the current litigation, [a] reasonable person would not doubt the judge's

87. *Agunda IV* 157 F.3d at 158. See Sovereign Immunities Act, 28 U.S.C. §§ 1603(b), 1604 (stating foreign state shall be immune from the jurisdiction of the Courts of the United States and of the States).

88. *Agunda IV* 157 F.3d at 157-58.

89. *Id.* at 158.

90. *Id.*, *Agunda v. Texaco, Inc. (Agunda III)*, 175 F.R.D. 50, 50-53 (S.D.N.Y. 1997) (denying motions for intervention and reconsideration).

91. *Agunda IV* 157 F.3d at 158.

92. *Agunda IV* 157 F.3d at 159, 161. See also *Agunda v. Texaco, Inc. (Agunda V)*, 2000 U.S. Dist. LEXIS 745 (S.D.N.Y. 2000) (reopening the record to consider additional submissions regarding whether the courts of Ecuador and/or Peru might reasonably be expected to exercise a modicum of independence and impartiality).

93. *Agunda IV* 157 F.3d at 159.

94. See *Agunda v. Texaco, Inc. (Agunda VI)*, 139 F. Supp. 2d 438 (S.D.N.Y. 2000). See also *Agunda v. Texaco, Inc. (In re Agunda)*, 241 F.3d 194, 197, 206-7 (2nd Cir. 2001).

impartiality in this case” and therefore, disqualification was not required.⁹⁵

U.S. District Court Decision on Remand

In the District Court case on remand, Ecuador’s ambassador to the U.S. informed the Court that the Republic of Ecuador was “not willing under any circumstance, to waive its sovereign immunity and be subject to rulings by Courts of the United States.”⁹⁶ Thereafter, Texaco renewed its motion to dismiss after consenting to personal jurisdiction in Peru and Ecuador and stipulating that it would waive statute of limitation defenses for the appeal period to allow plaintiffs to file in Ecuador, and plaintiff’s use of discovery acquired in the U.S. courts in future suits.⁹⁷ In a forty-six page decision issued May 30, 2001, Judge Rakoff again granted Texaco’s motion to dismiss concluding that Texaco satisfied the burden of demonstrating an adequate alternative forum, the private and public interest factors weighed heavily in favor of Texaco, and rejected the plaintiff’s assertions that public interest factors should be analyzed under the ATCA Law of Nations test.⁹⁸ The court also addressed concerns expressed by plaintiffs that Ecuador’s Interpretive Law 55 stipulates that its courts cannot weigh a case once it has been filed abroad by reassuring Plaintiffs that it would be willing to reconsider if the Ecuadorian court dismissed the suit on the basis of Ecuadorian Law 55/98.⁹⁹

After considering arguments about whether the Ecuadorian court could be impartial after a military coup that deposed President Jamil Mahuad,¹⁰⁰ Judge Rakoff said the courts of Ecuador can exercise “that modicum of independence and impartiality necessary to an adequate alternative forum” and that “[t]he record establishes overwhelmingly that these cases have everything to do with Ecuador and nothing to do with the United States.”¹⁰¹ The case was once again appealed to the U.S. Court of Appeals for the Second Circuit.

Final U.S. Appeal

Attorneys for the Ecuadorian plaintiffs disagree that Ecuadorian courts exercise the necessary independence from military involvement in civil affairs. Citing corruption and bureaucratic obstruction in the Ecuadorian court system,

95. *Aguinda VI*, 139 F Supp. 2d at 439; *Aguinda v. Texaco, Inc. (Aguinda VII)*, 241 F.3d at 194, 198, 206-7 (2nd Cir. 2001).

96. *Aguinda IX*, 303 F.3d at 475; *See also Aguinda VIII*, 142 F Supp. 2d at 537 (District Court decision of Judge Rakoff).

97. *Aguinda IX*, 303 F.3d at 475.

98. *Aguinda VIII*, 142 F Supp. 2d at 534, 537, 548, 553.

99. *Id.* at 546-47 (Law 55/98 was new Ecuadorian statute that attempted to preclude lawsuits initiated in a foreign forum.).

100. President Jamil Mahuad was replaced by elected vice-president, Gustavor Noboa. U.S. Department of State, *Ecuador: Country Reports on Human Rights Practices – 2001*, Mar. 4, 2002, available at <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8356.htm>.

101. *Aguinda VIII*, 142 F Supp. 2d at 538, 543-44, 545-46; Reuters, *Judge Dismisses Indians Suits Against Texaco*, June 1, 2001, available at <http://www.planetark.com/dailynewsstory.cfm?newsid=11029> (last visited Apr. 4, 2004).

plaintiffs' attorneys claim overwhelming impediments.¹⁰² The 1999 State Report for Ecuador concluded that Ecuador's legal system was "inefficient and corrupt."¹⁰³ Furthermore, plaintiffs' appellate brief urged that a ruling concerning itself only with the functionality of a foreign court as an adequate alternative forum allows U.S. corporations to violate the Law of Nations with impunity.¹⁰⁴ Some of the obstacles cited were the inadequacies of the Ecuadorian court, the inability to compel witness testimony, prohibition of class actions, and exorbitant court filing fees.¹⁰⁵ Additionally, plaintiffs point out that the largest fines for failure to comply with a court order are between \$90 and \$180 U.S. dollars.¹⁰⁶

The U.S. Court of Appeals for the Second Circuit considered many of the obstacles cited by the plaintiffs, but ultimately affirmed the District Court's dismissal of the Ecuadorian and Peruvian plaintiffs' suit for forum non conveniens with an extension of time to file their actions in Ecuador.¹⁰⁷ The decision was premised on the theory of forum non conveniens.¹⁰⁸ The Court of Appeals for the Second Circuit articulated the test for forum non conveniens to be first, ascertaining the degree of deference due to plaintiffs' choice of forum followed by a determination as to whether an adequate alternative forum exists.¹⁰⁹ If so, the court must "then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake" to determine whether the defendant can meet the burden of proof requisite to overcoming the plaintiff's choice of forum.¹¹⁰

In considering whether Ecuador was an adequate alternative forum, the Court found no abuse in discretion by the District Court in its findings that Law 55/98 would not preclude a suit in Ecuador after having first been initiated in the U.S. as the Law had been declared unconstitutional by the Ecuadorian Constitutional Court on April 30, 2002.¹¹¹ The Court further found no merit to plaintiff's claims that Ecuadorian courts were unreceptive to tort claims and with regard to the absence of class action mechanisms stating "[w]hile the need for thousands of individual plaintiffs to authorize the action in their names is more burdensome than having them represented by a representative in a class action, it is not so burdensome as to deprive the plaintiffs of an effective alternative forum."¹¹² As to the arguments of Ecuadorian courts' corrupt influence and ability to be impartial, the court cited the

102. *Brief for Plaintiffs-Appellants*, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2nd Cir. 2002) (Nos. 01-7756(L), 01-7758(Con)) at 13-14.

103. *Id.* at 12-13.

104. *Id.* at 52.

105. *Id.* at 11-12, 28.

106. *Id.* at 28-29.

107. *Aguinda IX*, 303 F.3d at 477-80.

108. *Id.* at 480. Forum non conveniens is "[t]he doctrine that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought. *Black's Law Dictionary*, 290-91 (2nd pocket ed. 2001).

109. *Id.* at 476.

110. *Id.*

111. *Id.* at 477.

112. *Id.* at 477-78.

District Court's finding and noted that "because these cases will be the subject of close public and political scrutiny, as confirmed by the Republic's involvement in the litigation, there is little chance of undue influence being applied."¹¹³ The Court, however, did agree with the plaintiffs' objection to the District Court's allowance of only sixty days to file claims in Ecuador stating that "[i]n Ecuador, because class action procedures are not recognized, signed authorizations would need to be obtained for each individual plaintiff. This presents a formidable administrative task for which we believe sixty days is inadequate time."¹¹⁴ Thus, the Court directed the District Court to modify its ruling to make dismissal "conditioned on Texaco's agreeing to waive any defense based on a statute of limitations for limitation periods expiring between the date of filing these United States actions and one year (rather than sixty days) following the dismissal of these actions."¹¹⁵

The court also found no abuse of discretion in the District Court's conclusion that private interests "weigh heavily" in favor of an Ecuadorian forum.¹¹⁶ The Court stated:

The relative ease of access to sources of proof favors proceeding in Ecuador. All plaintiffs, as well as members of their putative classes, live in Ecuador or Peru. Plaintiffs sustained their injuries in Ecuador and Peru, and their relevant medical and property records are located there. Also located in Ecuador are the records of decisions taken by the Consortium, along with evidence of Texaco's defenses implicating the roles of PetroEcuador and the Republic. By contrast, plaintiffs have failed to establish that the parent Texaco made decisions regarding oil operations in Ecuador or that evidence of any such decisions is located in the U.S.¹¹⁷

Furthermore, the court noted that it would be onerous for a New York court to handle translation issues and that "to the extent that evidence exists within the U.S., plaintiffs' concerns are partially addressed by Texaco's stipulation to allow use of the discovery already obtained."¹¹⁸ Likewise, the Court found that the district court was within its discretion in concluding that the public interest factors tilt in favor of dismissal.¹¹⁹ The Court did not address the two additional practical considerations raised by plaintiffs regarding financial burden of filing fees in Ecuador and travel advisories issued for the province in which the Ecuadorian trial would be held stating that, "[i]t is sufficient answer that these contentions need not be recognized when raised for the first time on appeal."¹²⁰ The Court also passed on the plaintiffs' plea to interpret the ATCA "to encompass their environmental claim" and "to express a strong U.S. policy interest in providing a forum for

113. *Id.* at 478 (citing *Aguinda VIII*, 142 F. Supp. 2d at 544-46).

114. *Id.* at 478.

115. *Id.* at 478-79.

116. *Id.* at 479.

117. *Id.*

118. *Id.*

119. *Id.* at 480.

120. *Id.* at 479.

the adjudication of such claims”¹²¹ The Court, therefore, affirmed the District Court’s dismissal subject to modification. Thus, the theory of forum non conveniens served as a mechanism to protect multinationals from liability in the U.S. where the wrongs committed by the multinational’s subsidiaries were committed in a foreign jurisdiction.

ECUADOR CASE: REPUBLIC OF ECUADOR AND PETROECUADOR V TEXACO

Ecuadorian Trial Proceedings Begin

The case filed in Ecuador following the U.S. Second Circuit Court of Appeals affirmation of the District Court’s dismissal on grounds of forum non conveniens, represented the first time Texaco or any other U.S. oil company was forced to face judgment in an Ecuadorian court.¹²² This landmark lawsuit was heard in “a small courthouse in Lago Agrio, a remote town in the heart of Ecuador’s oil operations.”¹²³

The trial’s first phase, focusing on testimony and evidence, ended on October 27 2003 after testimony, including that of former minister of Ecuador’s Ministry of Mines and Energy who testified that a Texaco subsidiary “knowingly used primitive waste disposal techniques in the 1970s and 1980s.”¹²⁴ Questioning of witnesses, including experts, in an Ecuadorian trial is done by the judge working from questions proposed by the parties’ lawyers; there are no cross-examinations.¹²⁵ Judge Albert Guerra Bastidas questioned witnesses including Rene Vargas Pasos, the former energy minister who dealt with Texaco’s Ecuador subsidiary in the mid-1970s.¹²⁶ Pasos told the judge “Texaco designed and managed the oil fields that fouled the region with vast quantities of oily waste.. Texaco knew its waste pits were not well-constructed, that they were” polluting the rain forest.¹²⁷ “I believe they were committing a crime against the region and the country, he added. “The consequences have demonstrated this: hundreds of people dead and sick. The water from the rivers is not good for drinking, not for bathing. It is a disaster.”¹²⁸

121. *Id.* at 480 (“Even if we were to accept plaintiffs’ view of the law on both questions, the private and public interest factors that affect this case would nonetheless require that we affirm the district court’s judgment.”).

122. Amazon Watch, Media Advisory, *Historic Trial Against ChevronTexaco Begins Tomorrow In Ecuador: Protests At Company’s Headquarters in California*, Oct. 20, 2003, at <http://www.texacorainforest.org/historictrial.htm> (last visited Apr. 4, 2004).

123. *Id.*

124. Tom Knudson, *Testimony Ends in Oil Giant’s Ecuador Trial*, SACRAMENTO BEE, Oct. 30, 2003, <http://www.texacorainforest.org/oct302003.htm> (last visited Apr. 4, 2004).

125. Lifsher, *supra* note 6.

126. Knudson, *supra* note 124.

127. *Id.*

128. *Id.*

ChevronTexaco presented no witnesses during the first phase.¹²⁹ However, "thousands of pages of previously confidential memos, studies and internal documents that reveal the inner workings of Texaco and its majority partner, the Ecuadorian state oil company, Petroecuador," were released.¹³⁰ An internal Texaco letter included in the thousands of pages of documents submitted into evidence by Plaintiffs' attorneys indicated the "oil company rejected the option of lining its earthen waste pits to protect the environment as too expensive."¹³¹ A letter written in 1980 by a Texaco manager stated, "The current [unlined] pits are necessary for efficient and economical operation of our drilling operations. The total cost of eliminating the old pits and lining new pits would be \$4,197,958. It is recommended that the pits neither be lined nor filled."¹³² Texaco "decided not to spend the money. And the consequence of not spending money was sacrificing peoples' lives."¹³³ Other documents filed with the court detail spills from the Trans Ecuadoran Pipeline, which carries oil over the Andes. "From 1972 to 1989, breaks hemorrhaged 297,000 barrels of oil along the pipeline's 300-mile path."¹³⁴ "These are not just random spills. This is the result of a decision made by Texaco to install a type of drilling process that would lead to a systematic dumping of toxins"¹³⁵

"In a statement released as the trial began last week, Ricardo Reis Veiga, the company's vice president and general counsel for Latin America, flatly denied any wrongdoing."¹³⁶ Texaco representatives further maintain that the use of unlined pits was both legal in Ecuador at the time and standard practice in regions with clay soil, such as the Amazon.¹³⁷ ChevronTexaco also disputes the claims of damages to health. According to ChevronTexaco spokesman Chris Gidez, "Over ten years of litigation have yet to produce any credible and substantiated scientific information."¹³⁸ Plaintiffs claim they could not afford large scientific studies, but a study of cancer and other health problems in one village, an area with thirty oil wells, found "ten cases of cancer in the village, resulting in a cancer rate of more than twice the national average."¹³⁹ The study's analysis was labeled "inadequate cursory and misleading" by ChevronTexaco's hired toxicologist.¹⁴⁰ Residents however continue to assert claims such as those of Luis Yanza, a plaintiff and community organizer who has lived in the region for twenty-six years, "ChevronTexaco left the environment full of toxins, the rivers, the land,

129. Lifsher, *supra* note 6.

130. Miller, *supra* note 12.

131. Knudson, *supra* note 124.

132. *Id.*

133. *Id.* (quoting Cristobal Bonifaz, lead U.S. Attorney).

134. *Id.*

135. Brooke A. Masters, *Case in Ecuador Viewed As Key Pollution Fight: U.S. Legal Team Suing ChevronTexaco*, WASHINGTON POST, May 6, 2003, at E01 (quoting Steven Donziger, one of the plaintiffs' lawyers).

136. Knudson, *supra* note 124.

137. *Id.*

138. Masters, *supra* note 135.

139. *Id.*

140. *Id.*

and a lot of people are suffering. They haven't cleaned up the toxins."¹⁴¹

Although ChevronTexaco officials further assert that Ecuador's national oil company set policy for the venture, and that the drilling met all of the country's environmental requirements, Ecuador's laws were interpreted to allow dumping of wastes versus the more expensive U.S.-mandated process of re-injecting the oil-contaminated water back into the well.¹⁴² Yet again the company reverted back to its unconditional release by the government of Ecuador following the 1998 remediation effort.¹⁴³ "ChevronTexaco's effort to shift any remaining responsibility to the Ecuadorian government doesn't reflect legal and technical realities at the time Texaco pioneered Amazon oil exploration in the early 1970s. As the "operating partner, Texaco had a legal obligation to employ "best practices in respect to the environment"¹⁴⁴

In the daunting second phase of the trial, the judge will conduct a personal investigation in the field before bringing the parties back for potential further questioning.¹⁴⁵ There will be "an inspection of 100 to 150" areas.¹⁴⁶ In addition to the site visits to be conducted, Judge Guerra Bastidas has yet to review the over 5,000 pages of documents obtained through discovery in the U.S.¹⁴⁷ "His decision, which could be appealed to the Ecuadorian Supreme Court, is expected in six to eight months."¹⁴⁸

Implications of the Ecuadorian Trial

The case in Ecuador is being watched closely by environmental and human rights advocates as well as domestic and multinational corporations because "[l]egal experts say it could be a groundbreaking case, establishing a new way for environmental activists to force multinational corporations to pay for what activists say is environmental devastation."¹⁴⁹ A 2003 *Washington Post* article claims:

U.S.-based multinational corporations often try to get cases tried in developing countries, a tactic that can kill the case entirely because most American plaintiff's lawyers have neither the money nor the expertise to sue in Third World courts. Later if the corporations lose, they often argue that the overseas legal process was flawed or that their U.S. headquarters should not be held responsible for the errors of a subsidiary in the developing world.¹⁵⁰

Because foreign courts have previously encountered difficulties in making U.S.

141. *Id.*

142. *Id.*

143. Knudson, *supra* note 124 (quoting Cristobal Bonifaz, the lead attorney in the U.S. for the plaintiffs).

144. Lifsher, *supra* note 6.

145. *Id.*

146. Knudson, *supra* note 124 (quoting Judge Guerra Bastidas).

147. *Id.*

148. Lifsher, *supra* note 6.

149. Masters, *supra* note 135.

150. *Id.*

multinational companies obey their decisions, the warning by the Second Circuit Court of Appeals that U.S. courts would “step back in if the company tried to avoid a judgment imposed by the Ecuadorean court” may be key to effective adjudication of wrongs committed by U.S. multinationals in foreign jurisdictions.¹⁵¹ According to Chris Jochnick, a New York lawyer who founded the Center for Economic and Social Rights, oversight by the U.S. courts of a foreign case “puts pressure on the Ecuadorian court system to perform, that might be the best resolution. There are thousands of these cases, and there are only so many the U.S. courts can handle.”¹⁵²

It is unclear how the Ecuadorian court will rule on the lawsuit in view of President Lucio Gutierrez’s bid to attract foreign investment in continuing Ecuador’s oil development.¹⁵³ The spokesman for the Ecuadorian embassy said the Ecuadorian government had not taken a position on the lawsuit, but did say “it is very clear that the people in the region have health problems and have suffered for more than ten years. More work is needed to repair the area.”¹⁵⁴

THE LEGACY CONTINUES ECUADOR’S NEW OIL FRONTIERS

The case is of particular significance today as Ecuador continues to seek foreign investment in oil development and companies such as Los Angeles-based Occidental Petroleum and Spanish energy company Repsol YPF are utilizing the newly opened oil pipeline to drill in untouched sections of the Amazon.¹⁵⁵ “With U.S. and international oil companies now pushing deeper into Ecuador’s virgin rain forest, a review of the documents, new studies, and interviews with current and former Texaco executives and Ecuadorian officials provide a portrait of how the search for oil can wreak havoc on a remote place and its people.”¹⁵⁶ It is estimated that 4.5 billion barrels, the equivalent of an eight-month supply of the U.S. oil demand, remain in the Amazon.¹⁵⁷ The new pipeline doubles the capacity of the Amazon to Pacific Coast terminals, with which Occidental Petroleum expects to boost production from 70,000 to 100,000 barrels per day from its new Eden oil field located seventy miles south of Lago Agrio.¹⁵⁸ Eden is one of the most environment-friendly oil facilities in Ecuador with buried power lines and filtered and cleaned rainwater.¹⁵⁹ “It had a high cost, but it’s the most responsible thing to do,” said Fernando Granizo, Eden’s field manager.¹⁶⁰ Although the Texaco embroilment has brought greater scrutiny and tighter regulations to drilling

151. *Id.*

152. *Id.*

153. *Id.*, (Gutierrez was supported by indigenous groups in his 2000 coup that eventually led to his election as President in 2002.).

154. *Id.*

155. Miller, *supra* note 12.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

operations in the Amazon, roads, pipelines, and spills are inevitable. "You can minimize the effect. But there's no human activity that can be done without impacting the environment. None," said Carlos D'Arlach, Oxy's regional vice president of community relations.¹⁶¹ Other environmental and indigenous rights advocates such as Esperanza Martines of Ecological Action, an Ecuadorian environmental group, believe that environmentally sensitive areas and the habitat of indigenous cultures should be completely off limits as she explains, "It's not right to sacrifice new areas when this frontier is in such fragile territory. You can't say something is right, just because it is legal."¹⁶²

While the people of the Oriente await reparations for the environmental, cultural, and medical damage imposed on their territories, the push for oil continues. The men from the state oil company told Monica Torres, an Oriente resident, that they wanted to drill another oil well behind her house and gave her three sheets of tin to cover her roof as compensation.¹⁶³ Although free from Texaco's exploitive practices, the Republic of Ecuador appears to be continuing Texaco's legacy of maximizing profit to the detriment of the Ecuadorian people's health and habitat.

ANALYSIS OF ECUADOR'S LEGAL FRAMEWORK. PAST AND PRESENT

Environmental Protection The Role of the Republic of Ecuador

From the inception of oil extraction operation in Ecuador environmental protection laws, though weak and often unenforced, were in existence. A 1971 law required oil companies to prevent pollution but contained no specific standards.¹⁶⁴ In accordance, Texaco's contract specifically required it to "prevent contamination of water, air, and soil."¹⁶⁵ In 1976, the Law for the Prevention and Control of Contamination prohibited the contamination of the environment by pollutants harmful to human life, health or well-being and declared "the protection of air, water and soil resources, and the conservation, improvement and reclamation of the environment to be in the public interest" however, implementing regulations for water pollution were not passed until 1989 with noise and air regulations implemented in 1990 and 1991 respectively.¹⁶⁶

In 1981 a new law was enacted to establish environmentally protected zones, which the oil companies, supported by governmental agencies, maintained

161. *Id.*

162. *Id.*

163. *Id.* (Monica Torres added, "They said they were going to take out more crude to help Ecuador,")

164. The Advocacy Project, *The Fight for the Amazon: Contempt for the Law*, 16, AMAZON OIL 5, Mar. 11, 2001, http://www.advocacy.net/news_view/news_192.html (last visited Apr. 4, 2004) [hereinafter *Contempt for the Law*].

165. *Id.*

166. Kimerling, *supra* note 8, at 207-8, n.39.

permitted the extraction of subsoil minerals.¹⁶⁷ Ecuador's courts decided "that the companies did indeed have a right to extract subsoil minerals from protected areas."¹⁶⁸ The main environmental protection agency in Ecuador was placed under the Ministry of Energy and Mines. Petroecuador formed an internal environmental unit, however, it functioned primarily as a public relations service.¹⁶⁹

In 1977 when Petroecuador acquired a 62.5 percent share of the Texaco consortium drilling in Ecuador and later took over drilling and pipeline operations in the early 1990s, it continued to disregard the environment.¹⁷⁰ Additionally, the Ecuadorian Congress's committee appointed to supervise the exploitation of resources in protected areas made no impact on oil extraction operations. Although stricter regulations were passed in 1992 requiring re-injection of production water, lining of waste pits, and restricted access to new settlers, these requirements have not been enforced.¹⁷¹ "Implementing regulations are underdeveloped and enforcement mechanisms limited" due to Ecuador's dependence on the capital and technology of multinational corporations and "administrative agencies charged with enforcement lack human and financial resources, political and technical support, and coordination."¹⁷² When political support is granted, political instability forces the status quo as evidenced when former President Jamil Mahuad's decreed protection for rainforests from drilling, mining and logging was nullified by a coup that deposed him.¹⁷³

Indigenous Peoples Right to Consultation

International laws ratified by Ecuador and the new Ecuadorian Constitution establish rights for indigenous peoples to have a say in state decisions and projects, such as oil extraction, effecting their territory and cultural survival.¹⁷⁴ However, a 1994 report from CESR found that citizens of Ecuador have no access to information regarding oil operations or the associated health risks, and that the country's constitutional court not provided effective relief for oil contamination claims.¹⁷⁵ Amazonian residents should have been accorded the right to protection against pollution and consultation on oil exploration within their territories as derived from international law implemented by Ecuador.

International law protects the right of all people to shelter, livelihood, and a safe environment. Specifically, the 1976 International Covenant on Economic,

167. *Contempt for the Law*, *supra* note 164. The 1981 law is in reference to the Forestry Law for Conservation of Natural Areas and Wildlife, R.O., No. 64, Aug. 24, 1981. See generally Kimerling, *supra* note 8, at n.118.

168. *Contempt for the Law*, *supra* note 164.

169. *Id.*

170. *Id.*

171. *Id.*

172. Kimerling, *supra* note 8, at 208.

173. *Contempt for the Law*, *supra* note 164.

174. See *infra* text accompanying notes 176, 178, 184.

175. CESR, *supra* note 1, at 27.

Social, and Cultural Rights, ratified by Ecuador, declares that “[i]n no case may a people be deprived of its own means of subsistence,” and proclaims the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁷⁶ In addition, the 1986 U.N. Declaration on the Right to Development reaffirms the “right of peoples to self-determination, by virtue of which they have the right to pursue their economic, social, and cultural development.”¹⁷⁷ The 1992 Rio Convention on Biological Diversity calls on signatory governments to introduce procedures requiring an environmental impact assessment for proposed projects that allow for public participation and requires parties to protect and encourage customary use of resources in accord with traditional cultural practices to the conserve or sustain resources.¹⁷⁸

After the Ecuadorian government-sponsored preparatory meeting for the Rio +5 conference in 1997 concluded that “Ecuador lacked legislation to promote public participation in evaluation of development projects, legislation requiring such participation was included in Ecuador’s new Constitution, which was implemented in 1998.”¹⁷⁹ Article 86 of the Constitution promises “to protect the public’s right to live in a healthy environment and to prevent contamination.”¹⁸⁰ Article 84 guarantees the “nontransferable ownership of communal lands, which will be inalienable and indivisible” and “specifically guarantees indigenous participation in the use and administration of nonrenewable resources and in the benefits resulting from exploitation of those resources, as well as indemnification for damages caused by that exploitation.”¹⁸¹ Article 88 further guarantees participation in state decisions affecting the environment.¹⁸² Article 247 however, preserves the state’s claim over subsoil resources, including oil, and decrees that these resources will be exploited in the national interest.¹⁸³ The Constitution is reinforced and supplemented by the International Labor Organization’s 1989 Indigenous and Tribal Peoples Convention (ILO 169), which was ratified by Ecuador in May 1998 and clearly states that the “Government shall: (a) [c]onsult the peoples concerned whenever consideration is being given to legislative or administrative measures which may affect them directly”¹⁸⁴ Article 7 specifies

176. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (xxi), 21 U.N.GAOR Supp (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, (1976) (quoted material can be found at Art. I, Para. 2 and Art. 12, Para. 1 respectively), available at http://www.unesco.org/education/information/nfsunesco/pdf/SOCIAL_E.PDF (last visited Apr. 4, 2004).

177. Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR (1986), available at <http://www.unhcr.ch/html/menu3/b/74.htm> (last visited Apr. 4, 2004).

178. Convention on Biological Diversity (Rio de Janeiro), Dec. 29 1993, 1760 U.N.T.S. 79, Art. 14, Para. 1(a), Art. 10(c).

179. The Advocacy Project, *The Fight for the Amazon: Ignoring the Right to Consultation*, 16 AMAZON OIL 5, Mar. 11, 2001, http://www.advocacynet.org/news_view/news_192.html (last visited Apr. 4, 2004).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, The General Conference of International Labour Organisation, 76th Sess., adopted June 27, 1989, at Art.

that “the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, and spiritual well-being.”¹⁸⁵ Article 15 of ILO 169 specifically identifies the significance of natural resources declaring that “[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources” and when “the state retains ownership of subsoil resources, governments shall consult with” peoples whose lands are affected to determine to what degree proposed projects will prejudice their interests prior to any undertakings or permitting pertaining to their land.¹⁸⁶ International law as adopted by Ecuador as a signatory clearly requires the participation of indigenous communities where customarily territorial lands are concerned.

The new OCP pipeline project that was pushed through without public participation, however, is an example of the government’s disregard for the rights and protections now afforded indigenous communities.¹⁸⁷ Despite Ecuador’s ownership of the subsurface resources, a recent legal finding “suggests that indigenous people have the right under international law to veto any exploitation without their consent.”¹⁸⁸ The Inter-American Court of Human Rights issued a decision August 31, 2001, ruling that “the government of Nicaragua violated the rights of the Awas Tingni community when it granted concessions to a private company to log on the community’s traditional lands without consulting with the community or obtaining its consent.”¹⁸⁹

This is the first binding decision that holds that indigenous peoples have communal property rights to land and natural resources based upon traditional patterns of use and occupation” and that “as a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property.”¹⁹⁰

Because Ecuador is a state party to the American Convention on Human Rights, on which this decision was based, the ruling could prove to be a critical legal precedent for Ecuadorian indigenous communities seeking a voice in decisions to extract oil within their traditional territories.¹⁹¹ Additionally, the decision required

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185. *Id.* at Art. 7.

186. *Id.* at Art. 15, Par. 1 & 2.

187. The Advocacy Project, *Defending the Amazon*, *LEGAL ISSUES: The Right to Consultation and the Texaco Lawsuit*, Feb. 2002, http://www.advocacynet.org/cpage_view/amazonoil_legal_17_63.html [hereinafter *The Right to Consultation*].

188. *Id.*

189. Inter-Am. C.H.R., *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Aug. 31, 2001, paras. 153b) & 155, available at http://www.utulsa.edu/law/classes/nce/INTERAMER_CT_HUMAN_RTS_Mayagna.htm (last visited Apr. 4, 2004). [hereinafter *IACHR*]; *The Right to Consultation*, *supra* note 187.

190. *The Right to Consultation*, *supra* note 187; *IACHR*, *supra* note 189, at paras. 149 & 151.

191. *The Right to Consultation*, *supra* note 187.

Nicaragua to establish procedures in accord with national and international norms, which give prompt and specific official recognition and demarcation of the indigenous community's rights to its communal natural resources and to abstain from granting or considering any concessions to used natural resources occupied by the indigenous peoples until land tenure issues were resolved or an agreement between the parties was reached.¹⁹²

While the requirements set forth in the decision could serve as a framework for national legislation protecting indigenous territories, the decision as a whole serves as an affirmation that indigenous people have a collective right to their lands, resources, and environment. Although the Ecuadorian government could now be required, at least on paper, to include the indigenous communities in decisions regarding whether oil extraction or preservation of the environment and indigenous culture were in Ecuador's national interest, the indigenous communities were neither consulted nor allowed to meaningfully participate in the state's decision regarding oil exploration or extraction between 1971 and 1990 during the bulk of Texaco's operations in Ecuador. Retroactive application of existing laws and international standards and decisions to the relevant period of Texaco's operations would be a boon for plaintiffs in the Ecuadorian trial.

Texaco, however, according to ChevronTexaco's official website on Ecuador, argues the environmental and labor laws referenced in the lawsuit are not applicable because according to Ecuadorian Civil Code, claims for damages must be brought within four years of the alleged activity¹⁹³ Moreover, ChevronTexaco notes that the laws referenced in the suit did not exist at the time of operation and are not applicable, claiming the Ecuadorian legal system has a "general principle of non-retroactivity of laws" and therefore, "it is not appropriate to hold operations responsible for meeting the requirements of a law or regulation that did not exist at the time of the operations."¹⁹⁴ Neither Article 15 of Agreement 169, nor the Constitution of 1998, nor the Environmental Management Act (issued in 1999) were in effect in Ecuador at the time of the alleged damages.¹⁹⁵

While the legal battle continues in Ecuador and human rights and environmental activists as well as multinational operations worldwide await the landmark decision from the Ecuadorian court, the issue of multinational accountability and the challenges presented by lack of means of redress against multinationals remain.

MEANS OF REDRESS AGAINST MULTINATIONALS

The suit brought against Texaco in the U.S. is typical of a relatively new strategy employed by environmental and human rights activists to get U.S. corporations into court for abuses committed abroad. Although many U.S. judges are hesitant to hear disputes arising outside the U.S., the 1789 Alien Tort Claims

192. IACHR, *supra* note 189, at para. 158(1) & (2).

193. ChevronTexaco Summary, *supra* note 64.

194. *Id.*

195. *Id.*

Act, which was adopted as a means for the U.S. to prosecute pirates, became the center of lawsuits brought against multinationals in the U.S. when a court of appeals ruled in 1980 that the Act allowed foreigners to sue each other in the U.S. over charges of breaking international laws or legal norms.¹⁹⁶ At the time the *Aguinda I* suit was brought in 1994, it relied on Principle 2 of the Rio Declaration stating that states have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.”¹⁹⁷ Judge Vincent L. Broderick’s landmark decision found it significant that U.S. laws governing hazardous wastes may have prohibited Texaco’s conduct had the alleged conduct been carried out in the United States.¹⁹⁸ He stated that “it is relevant as confirming United States adherence to international commitments to control such wastes. This tends to support the appropriateness of permitting suit under 28 USC 1350 if there were established misuse of hazardous waste of sufficient magnitude to amount to a violation of international law.”¹⁹⁹ Judge Broderick’s decision is the first to offer dicta nearly recognizing a violation of the law of nations for practices inconsistent with domestic environmental law based on non-treaty international law that “may be treated as the ‘sober second thought of the community’ upon which, all law ultimately rests.”²⁰⁰ Although a significant legal victory has yet to be claimed under this strategy a victory for the plaintiffs would create a powerful precedent and Judge Broderick’s dicta leads further down that path than prior court decisions have dared to venture.²⁰¹

Plaintiffs suing multinationals generally prefer developed-world courts as the forum for lawsuits because the courts offer more independence, more plaintiffs’ attorneys are available, and the cases draw more public attention that places pressure on companies to settle.²⁰² Furthermore, the rules regarding discovery and the relative ease of bringing class-actions suits make U.S. courts particularly attractive to plaintiffs.²⁰³ Jurisdictional questions, however, have the potential to tie cases up for years as evidenced in the *Aguinda* case. “The legal wrangling can go on for years.”²⁰⁴ On the other side, defendants typically argue for cases to be heard in the country where the incidents allegedly occurred as did Texaco spokesman Chris Gidez. “The operations are there [Ecuador]. The evidence is there. The plaintiffs are there. To think that a U.S. jury could manage this litigation

196. See David R. Baker, *U.S. Firms Face Suits for Overseas Acts: New Twist on Anti-pirate Law Blurs Border, Extends, Liability*, SAN FRANCISCO CHRONICLE, June 15, 2002, at A-1, available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/06/15/MN194282.DTL> (last visited Apr. 4, 2004).

197. *Aguinda I*, 1994 WL 142006 at 6.

198. *Id.* at 7

199. *Id.*

200. *Aguinda I*, 1994 WL 142006 at 6 (citing Chief Justice Harlan F. Stone in *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936)).

201. Baker, *supra* note 196.

202. Masters, *supra* note 135.

203. *Id.*

204. *Id.* (quoting Malcolm J. Rogge, Canadian scholar who has written about transnational environmental cases).

when everything is going to be in another language and everything is in Ecuador is preposterous.”²⁰⁵ Although U.S. courts appear to provide a means of redress for foreign plaintiffs against the wrongs committed by multinationals globally, many barriers exist to successfully pursuing such a lawsuit.

Barriers to Redress Against Multinationals

First and foremost among barriers to suits against multinational corporations are economic and political mechanisms. According to Alice Palmer of the Foundation for International Environmental Law and Development, multinational corporations “have the greatest capacity to cause harm to people and the environment on a global scale and to use political, financial and legal leverage to avoid being brought to account.”²⁰⁶ Palmer claims that “[w]orkers and local communities seeking to hold multinationals to account for the harm they cause invariably find that the formidable economic leverage of these corporate giants, combined with legal and financial obstacles, works to deny them redress.”²⁰⁷ The circumstances cited as the most common reasons for the lack of redress against multinationals include: 1) national reluctance to enforce regulations that might threaten foreign investment; and 2) corporate structures that place parent corporations beyond the reach of domestic laws; and 3) local communities that lack the financial resources to seek redress.²⁰⁸

The Structure of Multinational Enterprises and Their Legal Implications

Multinationals are a group of related entities based in various countries such as a parent entity in the U.S. and subsidiaries in other countries.²⁰⁹ Additionally, both the parent and subsidiary may own and operate joint ventures or contract with one another for various aspects of operations and supply.²¹⁰ Generally, public international law governs states, not individuals, and multinationals are afforded the same legal status of domestic corporations that of *legal persons*.²¹¹ Furthermore, because each of the entities based in different countries will be subject to different legal jurisdictions, multinationals “can exploit jurisdictional gaps and escape effective regulation.”²¹² When a wrong is committed by a multinational in the host country, claims are made against the specific entity whose operations caused the harm.²¹³ The *corporate veil* separates each corporate entity so that the parent is screened from the liability of a subsidiary or a joint-venture

205. Baker, *supra* note 196.

206. Alice Palmer, *Community Redress and Multinational Enterprises*, 2, Foundation for International Environmental Law and Development (FIELD), Nov. 2003.

207. *Id.* at 4.

208. *Id.*

209. Palmer, *supra* note 206, at 5.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 7

partner from liability of the joint venture's operations.²¹⁴ Entities are separated by *separate legal personality* which is a "legal construct that separates each corporate entity from the other corporate entities within the same corporate 'family tree'."²¹⁵ The corporate veil is pierced only by a demonstration of the requisite amount of control is exercised by one corporate entity over another, thereby making the controlling entity liable for the operations of the other.²¹⁶ Thus, the multinationals are structured in a manner that allows them to exploit gaps in both domestic and international legal frameworks as separate legal entities afforded status as legal persons rather than states.

Exploitation of Developing Countries by Multinationals

Multinationals often seek out developing countries (host countries) with a large workforce and an abundance of natural resources for foreign direct investments while maintaining the parent company in a developed country (home country).²¹⁷ Incentives created by countries seeking to attract foreign direct investment from multinationals often include regulatory structures "sympathetic to foreign investment" because the foreign investments generate jobs, economic activity and development for the host country as was demonstrated in the Republic of Ecuador's complicity in Texaco's oil extraction operations.²¹⁸ Host countries often have no comprehensive system of corporate regulation or the systems are ineffective due to lack of resources to enforce existing laws, while multinational structures allow limited recourse and present jurisdictional limitations.²¹⁹ Additionally, the host country's government may favor the economic interests created by the multinationals investment over enforcement of regulation.

Barriers to Redress in Host Countries v. Barriers in Home Countries

Access to the appropriate administrative body or court by those harmed in the host country by multinational operations may be limited. Ineligibility to bring a case is encountered on the basis of standing, which varies by country but typically requires that only the individuals demonstrating present harm having standing to bring a complaint.²²⁰ Thus, those who may suffer harm in the future or as is often the case with environmental harm, those demonstrating only general harm not to a specific, affected individual may be barred from bringing suit.²²¹ Additionally, some countries preclude legal proceedings from being brought if legal action was initiated in another country, such as Law 55/98 in Ecuador.²²²

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 5.

219. *Id.* at 8-9.

220. *Id.* at 7, 9.

221. *Id.*

222. *Id.* at 9.

Another pervasive barrier worldwide is the economic inequity among the parties. Even though individuals or groups may be eligible to bring suit, they may lack the resources to pursue lengthy litigation against multinationals who generally “have significant financial and legal resources to defend claims against them.”²²³ Finally, multinationals are often structured to ensure that “the entity operating in the host state has only limited financial assets to compensate or remediate harm” and jurisdictional limitations preclude reaching the assets of the parent entity in developed countries where the bulk of the multinationals assets are located.²²⁴ Even if complainants can successfully overcome all the aforementioned barriers and acquire a judgment in the host-country against the multinational, the judgment may not be recognized by the multinational’s home state as legally enforceable.²²⁵

Significant barriers are also encountered by complainants seeking redress in a multinational’s home country. The most frequently encountered barriers to redress for foreigners in the multinational’s home countries are issues of choice of forum or venue, the structure of the multinational or corporate veil, sovereign immunity of governments for suits involving foreign governmental bodies, extraterritorial application of domestic laws to foreign activities, and financial resources to bring suit in home countries.²²⁶ Although in the U.S. the Alien Tort Claims Act (ATCA) allows U.S. federal courts to hear claims by foreigners for violations of international laws by a multinationals’ operations in foreign countries, “very few cases advance beyond procedural questions to resolve substantive matters.”²²⁷ Procedural barriers were key to Texaco’s victory in the *Agunda* case, wherein the theory of forum non conveniens precluded the plaintiffs from having the substantive issues heard by a U.S. court.

PROPOSED SOLUTIONS TO MEANS OF REDRESS AGAINST MULTINATIONALS

Successfully achieving corporate accountability for multinationals demands solutions that afford greater access to justice and equity as well as means of sustainability for societies globally. While intergovernmental agreements and the development of national regulations promote corporate accountability on a national or intergovernmental scale, “attempts to develop a legal framework for corporate accountability at the international level have been fragmented and limited by the prevailing view of the international community that public international law can bind countries but not corporations.”²²⁸ As recognized by the barriers encountered in both home and host countries in the *Agunda* case discussed at length above, “it would appear that the barriers to redress for multinational wrongs at the national level cannot be dealt with by individual governments acting alone.”²²⁹

223. *Id.*

224. *Id.* at 7, 9.

225. *Id.* at 10.

226. *Id.* at 11.

227. *Id.* at 10-11.

228. *Id.* at 4.

229. *Id.* at 14.

Alternatively, an international approach could serve two primary functions: 1) facilitate systematic reforms to national means of redress, and 2) create international means of redress where national systems fail.²³⁰ Alice Palmer proposes the first step requires governments to work together to identify those means of redress that already exist as well as the gaps or failures in their implementation followed by governments agreeing on a principal mechanism for redress.²³¹ Based on those principal elements identified, "an international agreement on national means of redress for multinational wrongs" could be implemented.²³² Such an international agreement would, in addition to providing financial and technical assistance to national governments for implementation, set out elements for eligibility or standing, provisions of financial and legal resources to bring suits, timing and manner of hearings, availability of remedies, and enforcement of foreign judgments.²³³ Secondly, in addition to serving a backstop to failures in the national procedures, an international framework of means of redress but would also require that individuals be granted access to international channels of redress.²³⁴

The difficulties of implementing such a mechanism lie in gaining international consensus on the many procedural necessities such as standards, complaint procedures, enforcement (particularly binding authority of an international court on national governments), and defining remedies.²³⁵ Some non-binding mechanisms are currently under development, such as the United Nations Sub-Commission Norms on the Responsibilities of Transnational Corporations, which could provide the framework for an international structure.²³⁶ The most comprehensive of the binding examples attempts to require national development of means of redress via agreement is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in force since October 2001.²³⁷ The Convention sets out procedural requirements for access to information and public participation in environmental matters, and provides a means of redress for breaches of those requirements or violations of any national environmental law.²³⁸ The Convention also addresses the availability of remedies and assistance mechanisms to remove

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 15.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 16; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), The UN Economic Commission for Europe (UNECE), June 25 1998, available at <http://www.unece.org/env/pp/documents/cep43e.pdf> (last visited Apr. 4, 2004). The stated objective is to contribute to the protection of the right of every person to live in an environment adequate to his or her health and wealth being and to ensure this right parties are required to take measures to implement and enforce provisions to achieve access-to-justice. *Id.* at Art. 1 & Art. 3, Para. 1.

238. *Id.* at Art. 9.

financial and other barriers.²³⁹ Implementation of an international agreement based on such a model would require universal acceptance to applying international laws to individuals and multinationals, subjecting them to the jurisdiction of an international court. While an international mechanism of providing means of redress is essential to effective regulation of multinational activity in a global market, this option presents the substantial challenge of gaining international consensus on universal means of redress where global economies are implicated.

CONCLUSION

Seeking accountability of multinationals in an era of globalization has proven a daunting task, particularly for indigenous communities lacking adequate means of redress for wrongs committed in host countries. Although indigenous peoples were unsuccessful at winning a favorable decision in the U.S. (home country) of the multinational ChevronTexaco for environmental, cultural, and health damages incurred in Ecuador and Peru (host countries), the decade of litigation has resulted in improved legal structures for indigenous peoples rights.

Ecuador's indigenous movements were galvanized to action which has led to immense public attention and scrutiny of multinational oil development in Latin America as well as tougher laws in Ecuador. Ecuador's constitution now affords indigenous peoples the right to consultation on decisions that affect them. Additionally, recently implemented environmental laws such as Convention 169 of the International Labor Organization give indigenous peoples the right to decide their own model of development. International organizations have also bolstered indigenous rights recently with the Inter-American Court on Human Rights issuing a ruling that indigenous peoples have communal property rights to land and natural resources based upon traditional patterns of use and occupation.

Although progress is being made, substantial work remains within the international community to ensure that multinationals, while benefiting economically from global workforces and markets also fulfill their role of social and cultural responsibility and of improving the economic stability of the markets within which they operate. Multinationals must be held to universal standards that ensure social and environmental responsibility and prevent cultural and environmental devastation such as that inflicted by the ChevronTexaco debacle in Ecuador. Whether the outcome of the Republic of Ecuador's pending case against ChevronTexaco is decided in favor of the indigenous peoples or the multinational, the matter has opened a Pandora's Box of legal, political and economic implications that must be addressed on an international scale. A responsible world economy must be attended by universal standards for multinational accountability, which demands consensus and collaboration from the international community

239. *Id.* at Art. 9, Para. 4 requires the availability of "adequate and effective remedies" that are "fair, equitable, timely and not prohibitively expensive. (Art. 9, Para. 5 requires States party to the Convention to consider "the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.").

acting on grounds of good faith and good neighborliness rather than exploitation of underdeveloped nations for profit.