Delayed Justice: A Case Study of Texaco and the Republic of Ecuador’s Operations, Harms, and Possible Redress in the Ecuadorian Amazon

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Abstract

Multinational corporations engaging in natural resource extraction are often enticed by nascent foreign regulatory regimes and private dispute settlement mechanisms intended to induce investment. The result of a complicit government and poor operational practices can be environmental devastation and widespread human rights violations for which there is little redress. This paper analyzes the challenges inherent in using private dispute resolution mechanisms to hold corporations accountable for regulatory violations through the lens of Texaco’s 30-year operations in the Ecuadorian Amazon and the *Aguinda v Chevron* litigations in New York and subsequently Ecuador. The case represents the one of the most significant examples of a group of foreign plaintiffs potentially holding a multinational corporation accountable for its tortious acts in a developing country. The decades-long litigation that followed Texaco’s operations in Ecuador has offered little in the way of corrective justice for its plaintiffs. It may however, prove an effective deterrence by showing oil companies and other multinationals that they may be held to account for human rights and environmental violations even where domestic countries were complicit in non-enforcement of regulations. Despite the enormous hurdles plaintiffs face, the case may begin to signal to multinationals that exploiting the “race to the bottom” in regulations by capital-starved developing countries may backfire in the long run on their balance sheets, especially with a few minor, but potentially instrumental reforms to speed and provide finality in these private dispute settlement actions.

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Introduction

Deep within the cradle of the Amazon River in a region called the Oriente, an American corporation is standing trial for dumping nearly twice the amount of oil that was spilled by the Exxon Valdez in 1989 into one of the world’s most biodiverse and ecologically important areas. What is most remarkable about this trial is not that a multinational company has been alleged of egregious misconduct in the Third World – this is not new – but that it is the first time a class action lawsuit for environmental damage of this magnitude has gone this far.¹ Moreover, it is a modern-day David and Goliath story that began in a New York District Court in 1993, brought by affected indigenous groups as private citizens.

The original suit, Aguinda v. Texaco, was dismissed from U.S. Federal Court in 2002.² However, an organization called Frente representing 46 colonists and indigenous individuals³ continued the Aguinda trial in May 2003 in Lago Agrio, Ecuador. The litigation seeks damages for Texaco’s nearly 30-year operation of an oil concession in the Amazon. With its purchase of Texaco Corporation in 2001, Chevron Corporation assumed all of

¹ Maass, Peter. “Slick” Outside. March 2007 (can be found at http://outside.away.com/outside/culture/200703/ecuador-oil-1.html) p. 1
² Aguinda v. Texaco Inc. 303 F.3d 470 (2d Cir. 2002)
³ There are no class action procedures in Ecuador. Each plaintiff was required to join as individuals as there are no absent class members. The action was authorized by Ecuador’s 1999 Environmental Management Act.
the liabilities of the original defendant company\textsuperscript{4}. If the lawsuit is successful, the Amazon Defense Front or \textit{Frente}, a local NGO that claims to represent all locally affected colonists and tribes, stands to collect up to $17 billion in damages. The trial entered its final phase in 2008 after court-appointed independent expert Richard Cabrera published an Expert Damages Report of $16.3 billion in damages.\textsuperscript{5} (the Cabrera damages projection was revised upwards to $27.3 billion in November 2008). On February 14, 2011, the Ecuadorian Court handed down a final ruling for Chevron to pay more than $9 million in damages with an additional $9 billion if Chevron did not formally apologize by the end of that month.\textsuperscript{6} Chevron has appealed the result in Ecuador and had already secured a temporary restraining order on enforcement of the judgment even before it was handed down after it filed racketeering charges against the plaintiffs and their lawyers.\textsuperscript{7} The preliminary injunction was reversed and vacated by the 2\textsuperscript{nd} Circuit\textsuperscript{8} on January 26, 2012 but the RICO suit still goes on.

\begin{footnotesize}
\textsuperscript{4} Chevron has disputed that its acquisition of Texaco was not a true “merger” but rather a stock acquisition whereby the acquired company remains a separate subsidiary. To date, its argument has been unsuccessful in all proceedings.
\textsuperscript{7} Chevron v. Dozinger et al, Inc., 11 Civ. 0691 (S.D.N.Y. 2011) (Order on Plaintiff’s Motion for a Temporary Restraining Order)
\textsuperscript{8} Chevron Corp. v. Naranjo, ___ F.3d ___, 2012 WL 232965 (2d Cir. Jan. 26, 2012)
\end{footnotesize}
The ChevronTexaco case highlights how difficult it is for locally affected citizens to get effective redress for the substandard environmental and social conduct of multinationals operating in countries where immense wealth translates into political power. In many developing nations with little regulation or few institutions capable of requiring compliance, corporations can run roughshod over the environment during natural resource extraction, with little regard for the social and cultural impact to local communities and environments. However, the case’s immense award and its potential to influence other legal actions in the developing world may force corporations to adhere to minimal standards of social responsibility. With all of the uncertainty amidst rulings against Chevron, shareholders began to take notice of the potential immense costs to the company long ago.

This paper details the *Aguinda* case, subsequent Ecuadorian action, and extralegal pressure on both parties to analyze the effectiveness of private litigation for the two key public policy goals of private actions against multinational corporate tortfeasors: (1) effective restitution for the harmed and (2) future deterrence against substandard practices that cause similar

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10 Robertson, Jordan. “Chevron Annual Meeting Heats Up Over Ecuador Suit.” *Associated Press*. May 27, 2009. (“A proposal seeking a more detailed human rights policy from Chevron got 28 percent of the vote. A separate proposal for a report on Chevron’s criteria for investing or operating in countries with questionable human rights records took 26 percent of the vote. Another measure focused on how Chevron assesses the environmental laws in other countries got less than 7 percent. Similar proposals in the past have never received more than 10 percent of the vote.”)
environmental damage. It will argue that the current litigation against Chevron in Ecuador has not provided effective redress to the specific people harmed, but has begun to put corporations on notice that they will have to answer for their actions that cause environmental harm. Section II explains the history of Texaco’s operations in Ecuador, its practices, and the cleanup prior to Texaco’s exit from Ecuador. Section III details the New York Aguinda case brought by private citizens against Texaco in New York for substandard safety and environmental practices and the subsequent dismissal of that suit ten years later on forum non conveniens grounds. Section IV discusses the Aguinda that was tried in Ecuadorian district court in the heart of the Amazon in Lago Agrio and its outcome. Section V discusses the extralegal actions pertaining to the Aguinda trial in Ecuador and likely next steps in the litigation. Section VI then discusses the implications of the Chevron litigation for both the plaintiffs and multinational corporate tortfeasors generally. It discusses the shortcomings of the current system as exemplified by the Chevron case but also explains that empowering local plaintiffs actually harmed by multinational corporations conduct is a good starting point to encourage better environmental and social practices.

II. Texaco’s History, Operations, Exit, Cleanup, and Legacy

History of Oil & the Oriente in Ecuador
Until 1964, Ecuador had no large-scale oil exploration and virtually no environmental and legal protections for oil extraction. As such, the Ecuadorian government had no experience in oil exploration when they invited Texaco to develop the country’s first oil field through its newly formed Ecuadorian subsidiary, the Texaco Petroleum Company (TexPet). TexPet signed a contract with Ecuador to develop oil fields in the Oriente in 1964 and began full-scale production in 1972 in this legal and operational vacuum. Its operation was based out of Lago Agrio (“Sour Lake”), Ecuador named after Sour Lake, Texas, the site of Texaco’s first successful oil field.

Until then, few major roads existed to cross the Andes and the Oriente was left largely untouched, inhabited only by 20,000 or so indigenous Indians from the Cofan, Hauorani, Secoya, Siona, and Quechua tribes. After the discovery of oil, however, roads began to crisscross indigenous territories, separating them, and introducing massive new socioeconomic pressures and competing norms about how to use the jungle. Moreover, the Ecuadorian government encouraged settlers to move to the Oriente by offering free land to anyone willing to clear the jungle and farm it as a means of establishing firm control over the newly valuable territory. Conflicts and disease transmission between settlers, now known as “colonists,” and indigenous

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11 Lyons at 703.
13 Maass at 3.
14 Maass at 3.
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peoples forced many indigenous tribes to move further into the jungle or abandon their traditional lifestyles.\textsuperscript{15} The plaintiffs in the \textit{Aguinda} suit consists of both colonists and Indian representatives.

\textbf{Environmental Regulations in Ecuador Prior to and During Drilling}

In the 1970s and 1980s, “environmental protection was virtually nonexistent in Ecuador” and “the first environmental impact assessments were introduced in Latin America in the 1990’s.”\textsuperscript{16} However, even in 1971, Ecuador’s Law of Hydrocarbons did require field operators to “adopt necessary measures to protect flora, fauna and other natural resources” and “prevent contamination of water, air, and soil.”\textsuperscript{17} Other generally applicable anti-contamination laws such as the Law of Waters, adopted in 1972 and the Law for the Prevention and Control of Environmental Contamination also included language that should have set up a regulatory mechanism to oversee oil production.\textsuperscript{18} However, no regulatory system was put into place to demand compliance with these laws until the 1990s. In fact, no entity even promulgated regulations defining the general terms used in the Constitution,

\textsuperscript{15} For an excellent, detailed discussion of the cultural pressures faced by indigenous tribes after the discovery of oil in the Oriente, see \textit{Savages} by Joe Kane. \textit{Random House}. New York, 1995.
\textsuperscript{16} Lyons at 703.
\textsuperscript{18} Kimerling at 434.
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the Law of Hydrocarbons and Ecuador’s Concession Agreements with foreign oil companies.

Instead, TexPet was to set its own environmental standards and allowed to self-police its operations to prevent contamination. To extract the oil, TexPet entered into a joint-venture with the Ecuadorian government-owned company, PetroEcuador. While PetroEcuador was the majority shareholder19, Texaco was the deemed the “operator” of the entity and was authorized to design, procure, install, manage, and operate the infrastructure for the operation.20 TexPet’s production contract stated that it was to use “modern and efficient” equipment in the operations and provide “practical training and studies” to Ecuadorian students and workers in the oil fields.21

**Texaco’s Operations in Ecuador and Resulting Environmental Damage**

During its twenty-one years drilling in Ecuador, TexPet drilled 339 wells and built 18 central production stations in over a million-acre concession and extracted approximately 1.4 billion barrels of crude oil from

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19 Initially, TexPet and Ecuadorian Gulf had 37.5% of the consortium with PetroEcuador owning 25%. In 1974, PetroEcuador purchased Ecuadorian Gulf’s share to become the majority shareholder.

20 Kimerling at 435.

21 Decreto Supremo No. 925 [Supreme Decree No. 925], ch. IX, cl. 40.1, from General Guillermo Rodriguez Lara, President of Ecuador (Aug. 16, 1973)
the Oriente.\textsuperscript{22} Amazon Watch, an environmental group that works with the \textit{Frente} to publicize the damage, claims that Texaco netted more than $30 billion in profits. For its part, Chevron claims that Texaco profited only $490 million after royalties and taxes conceding that the joint venture grossed $25 billion.\textsuperscript{23} Whatever the value of the extraction, the main issue of fact in the \textit{Aguinda} case has to do with Texaco’s operational procedures and whether it did enough to prevent or contain environmental damage in the Oriente.

The main sources of environmental damage from the Texaco/PetroEcuador’s operations are (1) Leaching or discharge of “formation water” and drilling wastes held in unlined pits (2) Leaching or discharge of “produced water” and drilling wastes held in unlined pits (3) Accidental discharge from the trans-Ecuadorian pipeline and subsidiary pipelines operated by Texaco (4) Deliberate dumping and spraying of oil and drilling wastes. Each of these is explained, \textit{infra}.

Oil development can be divided into three stages – exploration, production, and transportation.\textsuperscript{24} During the exploratory phase, water is pumped deep into underground reservoirs to force out crude and along with it, accompanying water called “formation water” containing leftover oil,

\textsuperscript{22} Kimerling, Judith, \textit{The Environmental Audit of Texaco’s Amazon Oil Fields: Environmental Justice or Business as Usual?}, 7 Harv. Hum. Rts. J. 199, 207 (1994)
\textsuperscript{23} Maass at 3.
\textsuperscript{24} “Rights Violations in the Amazon: The Human Consequences of Oil Development,” \textit{The Center for Economic and Social Rights}. March 1994. P. 6
metals, and water with high levels of benzene, chromium-6, and mercury.\textsuperscript{25} On average, each exploratory well produces 4,165 cubic meters of drilling wastes containing a mixture of drilling muds, lubricants, petroleum, natural gas, and formation water containing high concentrations of heavy metals and salt.\textsuperscript{26} In the Oriente, TexPet deposited formation water into unlined open-air pits adjacent to the exploratory wells.\textsuperscript{27} As crude oil began to flow, more formation water was added to the pits during testing of the finds. While this was normal industry procedure during exploration, TexPet’s practices deviated in that they abandoned the pits rather than emptying or treating them, as was standard practice in the United States and other countries with environmental oversight of oil exploration.\textsuperscript{28} Most of the water produced in U.S. oil fields is re-injected underground because its high level of salinity makes it nearly impossible to treat without corroding treatment equipment.\textsuperscript{29} In Ecuador, most of this mixture was left in unfenced, uncovered pits, generally about seven feet deep;\textsuperscript{30} and much of the waste subsequently leached into the environment.

The major source of contamination from TexPet’s practices, however, started with the production phase. As oil is extracted from operational wells,

\textsuperscript{25} Maass at 4.
\textsuperscript{26} Rights Violations in the Amazon at 6.
\textsuperscript{27} Kimerling, supra note 9, at 454.
\textsuperscript{28} Langewiesché at 8.
\textsuperscript{29} Kimerling, supra note 9 at 452.
\textsuperscript{30} The water table in the Oriente is generally 10 feet below the surface, though it varies from on the surface in swamps up to 30 feet below the surface on hills.
it is pumped to separation stations or production stations, which separate oil from wastes comprised of formation water, gas, and heavy metals.\(^{31}\) This mixture is called “produced water” or “oil field brine” due to its high salinity. In Ecuador, TexPet discharged virtually all of the produced water it generated into the environment via unlined, open waste pits known as production pits.\(^{32}\) Texaco maintains that these pits were universally self-lining because the soil was made of impermeable clay. However, soil and water samples from nearby soil and waterways indicate that the component elements of the waste leached from the pits.\(^{33}\) By the time Texaco handed control of operations to PetroEcuador in 1990, the operations generated more than 3.2 million gallons of produced water each day containing between 1,600-16,000 gallons of oil discharged directly into the environment or into unlined pits in the environment.\(^{34}\)

In addition to normal and willful discharge of formation and produced water, an additional estimated 16.8 million gallons\(^{35}\) of crude was spilled into the environment through accidental spills from TexPet’s pipeline system.\(^{36}\)

The pipeline system, which crosses countless streams and rivers that feed

\(^{31}\) “Rights Violations in the Amazon” at 6.

\(^{32}\) Kimerling, \textit{supra} note 9 at 452

\(^{33}\) Langewiesche at 8.

\(^{34}\) Judith Kimerling, \textit{Amazon Crude}, Natural Resources Defense Council (1991) at 65, note 6 citing Republic of Ecuador, Ministry of Energy and Mines, \textit{Producciones de Petroleo, Agua de Formation y Gas Natural}

\(^{35}\) Kimerling, \textit{supra} note 9 at 457.

\(^{36}\) By comparison, the famous Exxon \textit{Valdez} spilled approximately 10.8 million gallons of oil into the Prince William Sound, the largest oil spill in United States history.
into the Amazon River, frequently ruptured from normal corrosion, earthquakes, and even impact by vehicles and animals. The system was designed in the absence of environmental oversight and not for environmental mitigation purposes. As a result, the nearest valve for a spill could be tens of kilometers away allowing oil to spill for days without detection and before the breached line was evacuated.\(^{37}\) Rather than evacuate leftover oil in the breached line into contained holds, TexPet simply allowed the oil in the line to spill out into the environment before making repairs.\(^{38}\)

A final source of environmental degradation was simply poor construction, maintenance, and operational practices by Texaco and its local operators. For example, Texaco regularly sprayed crude oil on its roughly 600km of unpaved roads throughout the Oriente for dust control and maintenance.\(^{39}\) The workers it was contracted to train were so poorly informed of sanitary practices that they regularly applied crude to their heads to prevent balding or took jars of crude to parents suffering from arthritis.\(^{40}\) TexPet’s employees and independent contractors were operating without any standard industry guidelines or procedures and were often completely ignorant of the potentially toxic substances with which they were working.

\(^{37}\) Kimerling, *Amazon Crude* supra note 31 at 69, 71.

\(^{38}\) Kimerling, *supra* note 9 at 458

\(^{39}\) Kimerling, *supra* note 9 at 450.

Texaco’s Exit

Tex-Pet ceased control of the operation and exited the country when PetroEcuador acquired complete ownership of the Consortium in 1992.\(^{41}\) In the months before Texaco’s exit, PetroEcuador announced that it would conduct an audit to assess the operation’s impact on soil, water, and air and its compliance with environmental regulations and generally accepted operating practices.\(^ {42}\) The decision-making process occurred behind closed doors with both PetroEcuador and Texaco acting as factfinders and arbiters without consultation with outside parties.\(^ {43}\) The audit ended in 1994 without ever producing a final report; however, a draft report recognized the needs to, \textit{inter alia}, modernize operations at production stations, end the use of open waste pits, and adopt an oil spill contingency and waste plan.\(^ {44}\)

III. The Aguinda Cases in New York

In November 1993, colonists and members of the Cofan, Siona, and Secoya indigenous communities filed a class action suit in Federal Court in

\(^{41}\) Lyons at 709.
\(^{42}\) Id.
\(^{43}\) See generally Kimerling, supra note 19
New York, where Texaco was headquartered. The suit alleged that the plaintiffs had suffered personal injuries and “are at a significantly increased risk of developing cancer as a result of exposure” to large-scale disposal of untreated hazardous wastes.

Texaco moved to dismiss the action on the grounds of, *inter alia*, international comity and forum non conveniens. Throughout the 1990s, Texaco argued that any suit related to its operation in Ecuador should be filed in Ecuadorian court. It contended that the Ecuadorian court system was a fair and adequate alternative forum. For example, its Motion to Dismiss in 1999, stated, “Ecuador’s judicial system provides a fair and adequate alternative forum” and its “Constitution guarantees due process and equal protection, and its courts provide important substantive and procedural rights.” The motion also stated that “plaintiffs may seek relief in Ecuador for personal injuries and property damage from Consortium activities” and they

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45 Plaintiffs’ Complaint, Aguinda v. Texaco, Inc., No. 93 Civ 7527 (S.D.N.Y. Nov. 3 1993)
46 Id. at ¶51.
47 Kimerling, *supra* note 9 at 484 citing Defendant Texaco Inc.’s Motion to Dismiss, Aguinda v. Texaco, Inc. No. 93 Civ. 7527 (S.D.N.Y. Dec. 28, 1994)
48 Texaco Inc.’s Memorandum of Law in Support of its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, Aguinda v. Texaco Inc. 93 CIV. 7527 (JSR), Jan. 11, 1999.
49 Appendix to 93 Civ. 7527, Affidavit by Dr. Enrique Ponce y Carbo, a former Justice of Ecuador's Supreme Court and a former law professor at the Catholic University of Ecuador, ¶¶3-6.
“would not be subjected to violence or intimidation.”50 Texaco also submitted an affidavit by Dr. Ricardo Vaca Andrade, which offered evidence of judicial sanctions to show “continuous and efficient control of the Administration of Justice in Ecuador to fight corruption.”51 These affidavits helped support Texaco’s claim that Ecuador provided an adequate alternate forum, but would later be used by Aguinda plaintiffs in the Ecuadorian trial to rebut Chevron’s claims that the Ecuadorian Court system is corrupt and biased.

**Texaco’s Remediation Agreement the with the Ecuadorian Government**

In response to the Aguinda litigation and the potential for huge liability arising from its actions in Ecuador, Texaco sought remediate the alleged environmental damage in the suit four years after it officially exited the country and consortium. Outside of court, Texaco and the Ecuadorian government negotiated the environmental issues raised in the lawsuit resulting in a series of agreements where Texaco agreed to implement remediation work on certain waste pits and make payments for socio-economic compensation projects. In return, the Ecuadorian government and Petroecuador agreed to release Tex-Pet and Texaco from all claims, obligations, and liability to the Ecuadorian State and national oil company.

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50 Appendix to 93 Civ. 7527, Affidavit by Dr. Adolfo Callejas Ribadeneira, ¶¶11-13.
51 Appendix to 93 Civ. 7527, Affidavit of Dr. Ricardo Vaca Andrade, ¶ 4.
“related to contamination from the operations.\footnote{Kimerling, Judith, \textit{Symposium: Lands, Liberties, and Legacies: Indigenous Peoples and International Law: Regional Issues in the International Indigenous Rights Movement: Transnational Operations, Bi-National Injustice: ChevronTexaco and Indigenous Huraorani and Kichwa in the Amazon Rainforest in Ecuador}, 31 Am. Indian L. Rev. 445, 465 (2006).} In the agreement, Texaco offered to remediate 37.5\% of the pits, a fraction derived from its post-1974 share of ownership of the consortium.\footnote{Langewiesche at 13.} To complete the work, Texaco hired an American engineering and consulting firm, Woodward-Clyde, to design and supervise the voluntary remediation for $40 million, though most of the firms actually doing the work were Ecuadorian.\footnote{Id.} Texaco negotiated a 5,000 parts per million standard for Total Petroleum Hydrocarbons (TPH) in its remediation contract in order to secure release for liability. The mean standard in the United States for cleanups is usually 100 TPH and Ecuador’s normal standard is 1000 TPH.\footnote{Id.}

Chevron claims that the cleanup ensures that there was no lasting environmental damage, though plaintiffs cite numerous independent experts who claim that the remediation was grossly inadequate and represented just “cosmetic” changes.\footnote{See T. Christian Miller: “Texaco Leaves Trail of Destruction: As ChevronTexaco Faces a Major Lawsuit, Evidence Portrays a Company and a Nation that for Years Showed Little Concern for the Environment,” \textit{L.A. Times}, Nov. 30, 2003.} For example, in many documented instances, remediation work simply consisted of covering unlined open waste pits with dirt and then using a Toxic Characteristic Leaching Procedure (TCLP) test to
determine that soil concentration of TPHs were below 5000 ppm.\textsuperscript{57} The TCLP test employed by Texaco test consists of measuring trace amounts of TPHs that leach out of the soil when it is saturated with water rather than the amount of contaminants resident in the soil itself.\textsuperscript{58} Actual contamination when soil is directly tested in several “remediated” sites measured up to 300,000 ppm TPH during investigation in 2006.\textsuperscript{59} Disputes in the testing and standards of the remediation have led to new fraud allegations against Chevron and several Ecuadorian government officials in the Aguinda case currently in Ecuador.\textsuperscript{60}

Nevertheless, the Ecuadorian government granted release for liability after certifying the remediation and completion of work by Woodward-Clyde in 1998. ChevronTexaco now claims that the 1995 remediation agreement released the company from all liability on the “related to the environmental effects” including those from the private plaintiffs.\textsuperscript{61} ChevronTexaco also sought AAA arbitration of claiming the remediation agreement indemnified it against any judgment reached by the Lago Agrio court in the current \textit{Aguinda} case and that the Republic was separately obligated to resolve any disputes.

\begin{itemize}
\item \textsuperscript{57} Kimerling, \textit{supra} note 9 at 505.
\item \textsuperscript{58} The TCLP test is not approved by the US E.P.A. for remediation testing.
\item \textsuperscript{59} \textit{See} Dr. Ann Maest, Mark Quarels, and William Powers, “How Chevron’s Sampling and Analysis Methods Minimize Evidence of Contamination,” March 8, 2006. (on file with Lago Agria Court and plaintiffs)
\item \textsuperscript{60} Complaint, Lawsuit for Alleged Damages Filed Before The President of the Superior Court of “Nueva Loja,” in Lago Agrio, Province of Sucumbis; on May 7, 2003 By 48 Inhabitants of the Orellana And Sucumbios Province, ¶ I-11. (“Aguinda Complaint in Ecuador, 2003)
\item \textsuperscript{61} Answer to the Complaint filed by Maria Aguinda Salazar v. ChevronTexaco Corp. at ¶ 1.9, Superior Court of Nueva Loja [Ecuador]
\end{itemize}
over the meaning of this agreement through arbitration stipulated by their original Joint Operating Agreement.\textsuperscript{62} In July 2007, a New York Federal Court granted the Ecuadorian Republic a permanent stay of arbitration, which was affirmed by the Second Circuit in part based on the ruling that the release covered lawsuits only by the Ecuadorian government itself, and not those by private citizens.\textsuperscript{63} In 2010, the Supreme Court refused to grant certiorari on the issue.\textsuperscript{64} Chevron’s current BIT (Bilateral Investment Treaty) arbitration seeks an award to compel Ecuador to compel its court to dismiss the plaintiffs’ case or indemnify Chevron for whatever it has to pay the plaintiffs based on the Remediation Agreement.

\textit{The District Court’s First Ruling and Remand}

In November 1996, Judge Rakoff\textsuperscript{65} granted Texaco’s motion to dismiss on all three grounds argued by Texaco: international comity, \textit{forum non conveniens}, and failure to join indispensable parties.\textsuperscript{66} The court reasoned that the case should be dismissed because the Foreign Sovereign Immunities Act barred the court’s assertion of jurisdiction over both PetroEcuador and


\textsuperscript{63} See Kenney at 873 and see 499 F. Supp. 2d at 460-69.

\textsuperscript{64} ChevronTexaco Corp. v. Republic of Ecuador, 129 S.Ct. 2862 (US 2009)

\textsuperscript{65} Judge Jed Rakoff took over the case after Judge Broderick passed away in March 1995 while discovery was underway

\textsuperscript{66} See \textit{Aguinda I}, 945 F. Supp. at 627-28
the government of Ecuador. A key factor in the decision was the opposition from the government of Ecuadorian President Duran Ballen. The Ecuadorian government filed an *amicus curiae* brief arguing that “Ecuador’s sovereign right over its natural resources is paramount” and that the exercise of jurisdiction would violate the principle of international comity. It also urged the U.S. State Department to intervene, fearing the lawsuit would disincentivize foreign investment in Ecuador.

Soon after the dismissal however, Ecuador’s new government under President Abdalá Bucaram reversed opposition to the suit and joined the plaintiffs in asking the court to reconsider dismissal. The new government contended that the case would not damage the sovereignty of Ecuador and would further the interest of its indigenous citizens. The Republic of Ecuador filed a motion to intervene agreeing to waive sovereign immunity claims, though not with regard to claims asserted by the Jota plaintiffs or counterclaims made by Texaco. Both the motions by the Republic of Ecuador

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67 Id.
69 Kimerling, *supra* note 9 at 488 citing Brief Amicus Curiae of the Republic of Ecuador at 7-11.
70 Embassy of Ecuador, Diplomatic Protest from Embassy of Ecuador to U.S. Dept. of State, no. 4-2-138/93 (signed by Ambassador Edgar Terán (Dec. 3, 1993).
71 Kimerling, *supra* note 9 at 515
72 Letter of Leonidas Plaza Verduga, Attorney General of Ecuador, to Judge Rakoff (Dec. 18, 1996)
Ecuador and the plaintiffs were denied\(^74\) and the plaintiffs filed appeal with the Second Circuit.

In 1998, the Second Circuit remanded and held that dismissal on *forum non conveniens* and international comity grounds were clearly erroneous without a condition requiring Texaco to waive statute of limitations defenses and submit to jurisdiction in Ecuador. It also ruled that failure to join an indispensable party was grounds for dismissal only for claims that sought to enjoin PetroEcuador’s current activities.\(^75\) The Court heavily considered the Ecuadorian government’s change in position with regard to the litigation. In vacating the initial ruling, it instructed the district court to reconsider the international comity and *forum non conveniens* arguments in light of the “current circumstances,” meaning Ecuador’s new position in favor maintenance of the litigation in the United States.\(^76\)

The drastic change in the Ecuadorian government’s position with regard to the lawsuit and its effect on the Court cannot be understated. This example illustrates the power the doctrine of international comity grants to a foreign government by placing it in the position of determining whether a U.S. court will hear a case about a U.S. company’s actions within that country’s borders. In the case of smaller, developing countries that are

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\(^74\) Aguinda v. Texaco, Inc., 175 F.R.D. 50, (S.D.N.Y. 1997) (denying motions to reconsider and intervene)

\(^75\) See *Jota* at 162.

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beholden to large corporations for resource extraction, the alliance between governments and corporations can leave individual plaintiffs with no avenue for redress when the government can lobby to not have a case heard in the U.S. For example, there is little doubt that Texaco used its economic resources, expertise, and political clout to work with the government of Ecuador and its state-owned oil company to operate without much regulation in its nearly 30 years in the Oriente.\textsuperscript{77} This cooperation between poorer countries’ governments and low environmental standards is also evidenced by Texaco-Chevron’s claim that their waste disposal techniques were consistent with industry practice in other tropical developing countries such as Angola, Nigeria, and Indonesia.\textsuperscript{78} Giving foreign governments the power to stop a lawsuit in the U.S. for a U.S. company’s actions can allow corporations to operate with impunity if the developing country’s courts are also inadequate to redress for a corporation’s torts.

\textit{Second District Court Decision}

In response to the Second Circuit’s remand, Texaco agreed to submit to personal jurisdiction in Ecuador, waive statute of limitation defenses to allow

\textsuperscript{77} See \textit{generally}, T. Christian Miller: “Texaco Leaves Trail of Destruction: As ChevronTexaco Faces a Major Lawsuit, Evidence Portrays a Company and a Nation that for Years Showed Little Concern for the Environment,” \textit{L.A. Times}, Nov. 30, 2003. (Texaco regularly handed out contracts to current and former Ecuadorian military officials, dined with Presidents and ministers, and provided interest-free loans to the Ecuadorian government, and employed techniques such as withholding oil payments for concessions)

\textsuperscript{78} Lyons at 709.
plaintiffs to file suit in Ecuador, and agreed to allow the plaintiffs to use discovery obtained in the U.S. As a result, in May 2001, Judge Rakoff granted Texaco’s renewed motion to dismiss on *forum non conveniens* grounds. On appeal, the Second Circuit repeated Judge Rakoff’s conclusion that the *Aguinda* case has “everything to do with Ecuador and nothing to do with the United States.” However, the court did direct the District Court to make dismissal “conditioned on Texaco’s agreeing to waive any defense based on a statute of limitations” in light of the unavailability of class action procedures in Ecuador, which would have necessitated plaintiffs’ counsel to obtain signed authorizations each individual plaintiff.

IV. The Aguinda Case in Ecuador

Most observers, plaintiffs, and ChevronTexaco believed that dismissal meant the end of the *Aguinda* action because of the costly and daunting task of rallying support in Ecuador and obtaining signatures from affected parties. However, after nine years since the start of the suit, the plaintiff’s counsel promised to continue the suit in Lago Agrio, Ecuador and declared that the plaintiffs could join as a single group with *Frente* based on the dismissal from

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79 See Texaco Inc’s Memorandum of Law in Support of Its Renewed Motion to Dismiss Based on Forum Non Conveniens and International Comity, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Jan. 11, 1999) at 1-2, 5
80 Id. at 476
81 Lyons at 716 citing *Aguinda*, 303 F.3d at 478-79.
the U.S. courts as long as the only named plaintiffs from the dismissed *Aguinda* action were permitted to join.\(^{82}\) Plaintiff’s counsel heralded the dismissal from U.S. court and the new suit as a victory, hailing the “landmark decision” as “the first of its kind in world history where an American company is forced by American courts to show up in another country’s courtroom and comply with whatever judgment that comes out of that courtroom.”\(^{83}\)

In May 2003, forty-six of the *Aguinda* plaintiffs filed a new lawsuit against Chevron Texaco and TexPet in the Superior Court of Justice of Nueva Loja in Lago Agrio.\(^{84}\) The complaint asked the court to determine the cost of full remediation to be borne by Chevron, based on Ecuadorian law and the same facts as the original *Aguinda* complaint and additionally for alleged fraud in the Texaco’s conduct of the voluntary remediation and release for liability with the Ecuadorian government.\(^{85}\)

Specifically, the complaint claims that Texaco’s practices as operator of the consortium through its TexPet subsidiary breached “the express norms contained under Clause 43 of the 1972 Texaco-Gulf Consortium as well as the 1973 Decree 925, which state that it must adopt all the measures for the protection of the flora, the fauna, and other natural resources and to avoid

\(^{82}\) Kimerling, *supra* note 9 at 628-29
\(^{83}\) Kevin Koenig, “ChevronTexaco on Trial,” *World Watch*, Jan.-Feb. 2004 at 10, 11 (quoting plaintiff’s counsel John Bonifaz)
\(^{84}\) *Aguinda* Complaint in Ecuador, 2003
\(^{85}\) Id.
contamination of the air, water, and soil.\textsuperscript{86} The complaint also alleged breaches of 1971 Hydrocarbons Law, which mandated adoption of “all necessary measures” to protect flora, fauna, and other natural resources during “oil exploration and exploitation activities.”\textsuperscript{87} Finally, the complaint alleged that Texaco’s operations violated the Law for Preservation and Control of Environmental Contamination published March 31, 1976 which prohibits the discharge,\textit{ inter alia} “to sewer waters or residual waters that may contain contaminating elements harmful to the human health or to the fauna, flora … to rivers or water streams… as well as the filtration into the soil.”\textsuperscript{88} The petition pointed to epidemiological studies,\textsuperscript{89} environmental samples, and practices discussed \textit{supra} to pray for a full remediation of the environment in the concession area and for costs of health supervision and social redress.\textsuperscript{90}

Chevron’s amended answer denied all of the complaint’s allegations and defends on several grounds. First, Chevron claimed that ChevronTexaco is not a proper party to the lawsuit because the alleged wrong-doing was

\begin{itemize}
  \item \textsuperscript{86} Id. at ¶ IV-7. P. 16
  \item \textsuperscript{87} Id. at ¶ IV-8a. P. 17
  \item \textsuperscript{88} Id. at ¶ IV-8b. p.17 citing Article 16 of the Law for Preservation and Control of the Environmental Contamination. \textit{Supreme Decree 374}. Official Gazette 97, March 1976.
  \item \textsuperscript{89} For example, one study focusing on the town of San Carlos found 2.3 times more cancers in men than the average in Quito and lymphoma rates in women 6.7 times higher than those in Quito [“Yana Curi” (“Black Gold”) by the Department of Tropical Medicine and Hygiene at the University of London]
  \item \textsuperscript{90} \textit{See} Aguinda Complaint in Ecuador at 22.
\end{itemize}
committed by TexPet, a wholly owned subsidiary of Texaco; the lawsuit, however was being alleged against a completely new entity, Chevron, which was not even a party to the New York *Aguinda* cases.\(^{91}\) Chevron also defended that the 1995 Remediation Agreement and 1998 release granted by the Ecuadorian government should serve as a complete bar to any claims against TexPet.\(^{92}\) Chevron also contended that the lawsuit is being based on a 1999 Environmental Management Act that does not retroactively apply to TexPet’s conduct,\(^{93}\) though plaintiffs argue their claims are based on common law tort actions and the general environmental decrees discussed *supra*. Finally, Chevron’s defense has been based on the partiality of the court, its appointed expert, and interference from the pro-plaintiff Correa government as denying it a fair trial and due process under the Ecuadorian Constitution.\(^{94}\) The most severe of these allegations regarding the partiality of the tribunal and of the court-appointed expert are discussed *infra*.

**The Trial**

An Ecuadorian civil trial is divided into three phases – inspection, damages assessment, and the decision on the scale of the culpability and remediation. During the inspection phase, under Ecuadorian law, the judge

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\(^{91}\) Chevron’s Petition to Dismiss as amended. Oct. 8\(^{\text{th}}\), 2007. Superior Court of Justice of Nueva Loja. (can be found at http://www.t texaco.com/sitelets/ecuador/docs/petitiontodismissen.pdf) at 17.  
\(^{92}\) Id. at 18.  
\(^{93}\) Id. at 10.  
\(^{94}\) Id. at 1.
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personally investigates evidence to determine if environmental contamination was present at particular well sites that contained former Consortium oil production facilities. That meant hundreds of field inspections with lawyers, media, security, and locals in tow for over three years visiting site after site in the Oriente. During the second phase, an independent expert determines the extent of, causation for, and amount of damage resulting from any environmental contamination found. The expert relies on scientific data gathered in the phase one inspections. The Ecuadorian procedures minimize oral arguments and rely on submitted documents to determine culpability – by 2007, over 200,000 pages had been generated in the record. In the final phase, the judge determines the scale of the cleanup. The chief judge’s position rotates every two years.

During the trial, it became evident that Texaco and the consortium were aware of some of the environmental damage the use of unlined pits and spills was causing. For example plaintiffs submitted a letter from 1980 written in response to a request from the Ecuadorian government to look into lining wastewater pits in 1980. Texaco officials told state energy officials that lining pits – a precaution against leaks that was common at the time in the United States – would be “prohibitively expensive.” Chevron argued that dumping wastewater was “common practice” in the past and with the large

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95 Langewiesche, at 2.
96 Maass at 7.
rivers in the Oriente, wastewater dissipates within a few hundred yards making any credible sampling traceable to their dumping impossible.\footnote{Maass at 4 (quoting Rodrigo Perez – Chevron’s subsidiary’s chief legal adviser in Ecuador).}

Another internal memo instructed Texaco officials in Ecuador to report only spills that attracted the attention of the news media or regulators.\footnote{Forero at 3.}

\textit{Investigation Phase}

The court began scheduling inspections in the fall of 2004. At the start of the trial, 122 inspection sites were listed mostly on request by the plaintiffs – Chevron had requested 36. Each inspection was conducted by the judge, attorneys on both sides and their technical teams. The parties would hear about the site and the history of oil operations there, including PetroEcuador’s continued operations; both parties’ experts would also take samples of each site.\footnote{Langewiesche at 4.} Both sides’ experts, unsurprisingly have interpreted data from the same sites in opposite ways. Chevron’s position is that scientific evidence from the sites coupled with Texaco’s remediation between 1995 and 1998, which was certified by the government, show that it remediated its proper 37.5% share of damage TexPet caused and that any remaining contamination has to be the responsibility of PetroEcuador and its ongoing operations.\footnote{Chevron’s Petition to Dismiss as amended, supra note 111 at 21.} The plaintiffs, on the other hand, contend that, let

\footnote{98 Maass at 4 (quoting Rodrigo Perez – Chevron’s subsidiary’s chief legal adviser in Ecuador).}
\footnote{99 Forero at 3.}
\footnote{100 Langewiesche at 4.}
\footnote{101 Chevron’s Petition to Dismiss as amended, supra note 111 at 21.}
alone scientific data from the sites, it is plainly visible that ten years after the “voluntary remediation,” pools of oil still bubble up to the surface from the covered, remediated sites.

By 2007, only 45 inspections had been completed and the plaintiffs, believing they had carried the burden of proof withdrew their request for the remainder of the judicial inspections fearing the process could continue indefinitely. Chevron fought the change in the number of inspections and publicly began to question the partiality of the trial and judge in particular. Specifically, Chevron claims that stopping the judicial inspections and beginning expert determination amounts to allowing the plaintiffs to waive their burden of proof and is a denial of due process and justice. The judge agreed that enough data had been collected to warrant moving to the next phase of the trial.

Expert Damages Assessment

After the Court conducted investigations and determined that there was in fact some environmental damage attributable to Texaco’s operation, it moved to appoint an independent expert to determine the scope of the damages and cost of cleanup. Plaintiffs’ counsel proposed only Ecuadorian experts and Chevron proposed only foreign experts. Under Ecuadorian law, the judge made an appointment to break the impasse, naming Richard

\(^{102}\) Id. at 2.
Cabrera to direct a team to produce a report on the full consequences in the concession area where Texaco operated. Cabrera was charged to evaluate the total environmental damages, specify the origin of such damages, detail the current existence of substances affecting the environment from that damage, specify technical work required to “reclaim and restore” the environment,” and provide a court-sanctioned estimate of the cleanup costs.

Cabrera’s First Report

Cabrera issued his first report on March 24, 2008 finding that “the primary cause of the contamination is the oil exploration and development operations conducted by TexPet, whose operations left behind the primary sources of contamination, crude petroleum and production waters. Further, he determined that the contamination in the Concession area exacted considerable damage to they ecosystem, indigenous groups, and caused adverse health effects to people living immediately near wells, including “cancer, death by cancer, and spontaneous abortions.” Cabrera also addressed Texaco’s 1995-1998 remediation. He concluded that the methods

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103 Langewiesche at 4.
105 Id. at 3.
106 Id. at 4.
used left large amounts of contamination far above environmental standards and even above the standards in the remediation contract.\textsuperscript{107}

None of these scientific results were surprising to independent observers or to the parties. However, what caught international attention was Cabrera’s recommended damage assessment of $8.02 billion not counting “unjust enrichment,” which adds another $8.3 billion.\textsuperscript{108} Cabrera estimated the cost of remediating all soils to below 1000 ppm TPH to be $1.7 billion compared with the $40 million that Texaco spent in the mid-90s to attempt to reach the same goal. Compensation for losses for excess cancer was nearly $3 billion.\textsuperscript{109} The damages assessment also included “Other Reparations,” including $430 million to “provide a health care system for the people of the region” and another $430 million “to implement a land, food, and cultural recovery program.”\textsuperscript{110} “Unjust enrichment was defined as the money Texaco saved by not managing oil wastes properly, not reinjecting produced water, constructing defective waste pits, and by burning gases instead of recapturing them. Chevron and other commentators seized upon these assessments as

\textsuperscript{107} Id.
\textsuperscript{108} Id. at 6.
\textsuperscript{109} Cabrera’s report found that 21.33\% of the families surveyed in the Concession area near drilling sites reported at least one case of cancer in the family. Further, there was a strong correlation between cancers and relative proximity to well sites with over 59\% of people living less than 250 meters from a well reporting at least one cancer in the family.
\textsuperscript{110} Id. at 5
being far outside the scope of the independent expert’s charge and as
evidencing bias against the defendants.\textsuperscript{111}

\textit{Cabrera’s Revised Report}

In November 2008, Cabrera revised his report upward to a range of
$18.1 billion to $27.3 billion counting “unjust enrichment.”\textsuperscript{112} The revised
estimate increases compensation for cancer deaths to $9.5 billion taking into
account new demographic and epidemiological data estimating 1,400 “excess
cancer deaths” with each loss of life valued at $6.8 million, the same number
used by the US Environmental Protection Agency.\textsuperscript{113} The estimate also adds a
new $3.2 billion remediation to clean groundwater, which Cabrera
determined was contaminated during Texaco’s operation and is a primary
source of exposure to toxins.

In response to the revised report, Chevron has declared the trial
“irretrievably politicized” by the plaintiffs and the Government of Ecuador. It
has balked at the $27 billion damages estimate contending that it is “roughly
half of Ecuador’s gross domestic product” and aims “to address every alleged
environmental, health, and social issue in the Oriente today based on the

\textsuperscript{111} Chevron’s Rebuttal to the Supplemental Expert Report, Executive
derebuttalexecutivesummary.pdf)
\textsuperscript{112} “$27 Billion Damage Assessment.” ChevronToxico – The Campaign for
toxicocom/about/historic-trial/27-billion-damages-assessment.html
\textsuperscript{113} Id.
operations of a consortium that ended 17 years ago. Chevron also complains that the expert’s damages assessment would not have the state-owned oil company pay any fines or remediation costs even though it owned a majority of the consortium.

Chevron has also produced evidence from secret recordings and outtakes from Crude to show that Cabrera was not indeed independent. Instead, Chevron alleges that Cabrera was handpicked by the plaintiffs whose own experts ghostwrote the damages assessment, even going so far as to meet with Cabrera to plan a strategy two weeks before his appointment as independent expert. In addition, Chevron has produced evidence showing that the similarities between the plaintiff’s environmental consulting company, Stratus and Cabrera’s report show that the Cabrera’s report itself was ghostwritten by Stratus who then “verified” his findings. Those issues are central in Chevron’s RICO filing, discussed infra.

Extralegal Issues dealing with the Case – Pressure from the Plaintiffs and Defendants

Both the plaintiffs and defendants have fought a massive public relations war outside of Court to influence the trial and its legitimacy.

115 Complaint, Chevron Corp. v. Dozinger et al. 11 CV 0691, 51 S.D.N.Y February 1, 2011 at 51
116 Id. at 58
Plaintiffs have sought to paint Chevron’s tactics as an attempt to run out the clock and delay justice indefinitely until the indigenous plaintiffs give up. They have also accused Chevron of trying to use pressure tactics and executive branch influence to influence the outcome of the trial. One example cited is Chevron’s lobbying of the Bush and Obama Administrations to cancel trade preferences for Ecuadorian exports that are granted to Ecuador annually under the Andean Trade Preferences Act (ATPA). Chevron hoped to use the trade preferences to exert leverage over Ecuadorian President Rafael Correa to settle the case. The lobbying effort was met with condemnation by several Democratic lawmakers who asked the U.S. Trade Representative not to interfere in private litigation. President Obama did extend trade benefits because Ecuador had not violated any legal requirements, but suggested that he was concerned about a possible “politicization” of the case.

Chevron argues that the trial in Ecuador is no longer impartial because President Rafael Correa has made it a nationalism issue. Chevron points to statements made by President Correa to the plaintiffs that they have the “full

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119 Id.
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support” of the President. Corrrea has also invited “the whole world (to) be witness to the atrocities Texaco caused.” Chevron has also attacked the trial itself as being corrupt and a sham. In September, 2009, Chevron won the recusal Judge Nunez who was overseeing the last part of the trial on corruption allegations and then the recusal of Judge Ordonez who had taken over for Nunez’s replacement Zambrano, for failure to investigate collusion between the plaintiffs and Cabrera. Chevron won the Nunez recusal after it released secret video recordings between a company contractor with Judge Juan Nunez. Chevron claimed the recordings show Judge Nunez saying that Chevron was guilty of polluting the environment. Chevron also showed another tape with a political operative asking for a $3 million bribe from a Chevron contractor to win pollution cleanup business resulting from the decision. Chevron claimed that Nunez, who wasn’t present at the meeting, was to receive a third of the money. Nunez vigorously denied that he disclosed his ruling or that he was part of a bribery scheme and claimed that the videos were manipulated and edited. The tapes were far from clear on both points. However, Judge Nunez agreed to recues himself to avoid

120 Chevron’s Rebuttal to the Supplemental Expert Report, Executive Summary.
additional delays or attempts by Chevron to undermine the proceedings as a result of the allegations.\textsuperscript{122}

Even as the appeals process in Ecuador is just beginning, Chevron plans to use statements from the Ecuadorian government to show that executive interference denied the company a fair trial and that it should not be bound by that judgment in the United States or elsewhere. Plaintiffs’ counsel responds to these allegations by pointing to Texaco’s fourteen affidavits to the U.S. district court in New York praising the fairness of the Ecuadorian courts when it sought to have the case dismissed for forum non conveniens in the 1990s.\textsuperscript{123} Texaco alleges that the political and judicial circumstances have greatly changed in Ecuador and Latin America since the 1990s when those affidavits were filed.

\textbf{V. The Ruling and Next Steps}

On February 14, 2011, Presiding Judge Nicolas Zambrano issued a $9 billion judgment in favor of the plaintiffs in Lago Agrio.\textsuperscript{124} Chevron has appealed the judgment to the first instance appellate court, which under


\textsuperscript{124} Case No. 2003-0002, Presiding Judge: AB. Nicholas Zambrano Lozada. Provincial Court of Sucumbios. February 14, 2011
Ecuadorean law, automatically stays its enforcement. It is pursuing a strategy to challenge the entire proceeding and to block enforcement of the judgment abroad since it has no assets in Ecuador. It’s efforts consist primarily of charging the Ecuadorean plaintiffs and their US lawyers for fraud and attempting to force Ecuadorean government to dismiss the ruling under the Bilateral Investment Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (the “BIT”), incorporating by reference the 1976 UNCITRAL Arbitration Rules (the “UNCITRAL Rules”). It will also challenge the enforcement judgment outside of Ecuador if the plaintiffs bring an enforcement action.

**Considerations for Foreign Enforcement Actions in the US**

If Chevron exhausts its appeals in Ecuador, the plaintiffs will try to have the judgment enforced in the US and abroad since Chevron has no assets to seize in Ecuador. It is unclear how the U.S. courts will honor an adverse judgment against Chevron from the Ecuadorian courts. Chevron has already promised its shareholders that it will not be forced to pay any judgment imposed by Ecuadorian Courts ensuring that there will be years of appeals in U.S.

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Courts.\textsuperscript{127} Courts have sometimes conditioned \textit{forum non conveniens} dismissal on an agreement to pay whatever final judgment the foreign jurisdiction renders.\textsuperscript{128} However, in this case, the Second Circuit only warned ChevronTexaco that U.S. courts would step back in if the company tried to avoid a judgment imposed by the Ecuadoran court.\textsuperscript{129}

Since the late 19\textsuperscript{th} Century, jurisdictions in the U.S. have generally recognized foreign judgments under the doctrine of comity.\textsuperscript{130} Today, most states have adopted the Uniform Foreign Money-Judgment Recognition Act (UFMJRA) or equivalent state statute.\textsuperscript{131} Under the UFMJRA, a foreign judgment “is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit,” unless one of several named exceptions is proven.\textsuperscript{132} Exceptions include whether the foreign court lacked personal or subject matter jurisdiction or that “the judgment was rendered under a system which does not provide impartial tribunals or procedures

\textsuperscript{128} See Heiser at 616 citing \textit{In re} Silicone Gel Breast Implants Prod. Liab. Litig., 887 F. Supp. 1469, 1478–79 (conditioning dismissal on defendants’ submission to jurisdiction in various alternative forums, acceptance of service of process, waiver of limitations defenses, and agreements to pay final judgments); \textit{In re} Union Carbide Corp. Gas Plant Disaster at Bhopal, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) (conditioning dismissal on defendant’s consent to jurisdiction in the courts of India, waiver of any statute of limitations defenses, compliance with the discovery rules of the Federal Rules of Civil Procedure, and agreement to satisfy any judgment)
\textsuperscript{129} Brooke Masters, “Case in Ecuador Viewed As Key Pollution Fight: U.S. Legal Team Suing ChevronTexaco.” \textit{Washington Post}, May 6, 2003 at E01.
\textsuperscript{130} Hilton v. Guyot, 159 U.S. 113, 163–64 (1895)
\textsuperscript{132} See Heiser at 635 (citing UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 2-4(a), 13 U.L.A. (Part II))
compatible with the requirements of due process of law.\textsuperscript{133} States may also choose not to enforce foreign judgments if the cause of action under which the foreign judgment was rendered is repugnant to the public policy of the state in which the enforcement court sits.\textsuperscript{134} Defendants generally challenge adverse foreign judgments on public policy or due process grounds under the UFMJRA.\textsuperscript{135}

Texaco submitted to Ecuadorian jurisdiction when it petitioned for \textit{forum non conveniens} and so the relevant issues to enforce judgment will be whether the Ecuadorian trial denied it due process through a partial tribunal or whether the judgment is against the public policy of New York. Proper due process does not mean that foreign courts must offer all of the Due Process requirements of the U.S., but that foreign procedures must be “fundamentally fair” and not offend against “basic fairness.”\textsuperscript{136} Successful due process challenges have generally required specific proof that the foreign court was corrupt such as proof of bribes or governmental pressure and bias.\textsuperscript{137}

A substantive challenge to a foreign judgment falls under the exception that the cause of action under which the judgment was rendered is repugnant

\textsuperscript{133}Id.
\textsuperscript{134}UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT §§ 4(c)(7), 13 U.L.A. (Part II) 11 (Supp. 2007)
\textsuperscript{135}Kenney at 863.
\textsuperscript{136}See Heiser at 649.
\textsuperscript{137}See Heiser at 639 citing Bridgeway Corp. v. Citibank, 201 F.3d 134, 137–38, 142–44 (2d Cir. 2000) (refusing to enforce Liberian judgment because Liberia’s judicial system is in disarray and the Constitution concerning judiciary no longer followed); see also Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410–13 (9th Cir. 1995) (refusing to enforce Iranian judgment against sister of Shah of Iran because after the Shah was deposed, the Iranian judicial system could not provide her fair treatment or basic due process).
to the public policy of the enforcing state. Courts cannot refuse to enforce a judgment simply because the judgment offends the state’s public policy; instead, it can only refuse if the substantive law of the foreign court is contrary to the public policy of the state.\textsuperscript{138} For example, U.S. Courts have refused to recognize judgment for libel suits where the foreign libel law was repugnant to the 1\textsuperscript{st} Amendment,\textsuperscript{139} but have even enforced causes of action that would not be recognized in the enforcement forum in cases involving less fundamental rights.\textsuperscript{140}

The \textit{Aguinda} case is based on a common law environmental tort that would not be repugnant to public policy. As such, Chevron will have to provide specific evidence that it was denied a fair, impartial trial in Ecuador. Even if it fails to carry that burden, the action will assuredly add years to the already 18-year old litigation.

\textbf{Chevron’s RICO Case & Evidence of Fraud}

On February 1, less than two weeks before the Ecuadorian ruling, Chevron filed a RICO (Racketeer Influenced and Corrupt Organizations) suit

\textsuperscript{138} Heiser at 654
\textsuperscript{139} See Heiser at 654 citing Sarl Louis Feraud Int’l v. Viewfinder Inc., 406 F. Supp. 2d 274, 281–85 (S.D.N.Y. 2005) (refusing to recognize French money judgment for unauthorized posting of photographs on defendant’s website under the public policy exception because incompatible with the First Amendment), \textit{vacated on other grounds}, 489 F.3d 474 (2d Cir. 2007)
\textsuperscript{140} See Heiser at 654 citing \textit{e.g.}, Sw. Livestock & Trucking Co. v. Ramon, 169 F.3d 317, 321 (5th Cir. 1999) (recognizing Mexican judgment on promissory note even though interest charged was usurious under Texas law)
against the Aguinda plaintiffs, attorneys, and a third party environmental consulting company seeking a declaration that “any judgment against Chevron in the Ecuador lawsuit is a result of fraud and therefore unenforceable” in the Southern District in New York. It points to outtakes from the documentary, *Crude*, allegedly showing plaintiffs’ attorney Steve Dozinger and Stratus Consulting, Inc. colluding with Cabrera to ghost write the Cabrera damagers report. One week later, Judge Kaplan of the Southern District issued a temporary restraining order that blocks the RICO defendants “from receiving benefit from, directly or indirectly, any action, or proceeding for recognition or enforcement any judgment entered against Chevron in Ecuador.” On March 11th, the Court granted a preliminary injunction barring Ecuador receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the judgment rendered against Chevron. It found, *inter alia*, that “there is abundant evidence before the Court that Ecuador has not provided impartial tribunals or procedures compatible with due process of law...especially in cases such as this.” The 2nd Circuit vacated

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141 Press Release, “Chevron Files Fraud and RICO Case Against Lawyers and Consultants Behind Ecuador Litigation.” February 1, 2011
142 Complaint, Chevron Corp. v. Dozinger et al. 11 CV 0691. S.D.N.Y February 1, 2011
143 11 Civ. 0691 (LAK) S.D.N.Y 2011, Chevron Corp. v. Dozinger et al

144 Chevron Corp. v. Dozinger et al, 11 Civ. 0691 (LAK) S.D.N.Y 2011
145 Id. at 77.
the preliminary injunction and vacated the court’s trial schedule on the declaratory judgment.\textsuperscript{146}

\textit{Chevron’s Attempt to Quash the Ruling through Arbitration}

In another corollary action, Chevron successfully petitioned the Permanent Court of Arbitration (PCA) to order the Republic of Ecuador to “take all measures at its disposal to suspend… the enforcement or recognition within and without Ecuador of any judgment” against Chevron in the Lago Agrio case.\textsuperscript{147} The issue in front of the PCA is parallel to the Aguinda litigation but does not apply to their claims. Instead, Chevron is asserting wrongdoing on the part of Ecuador under Ecuador’s BIT with the US, which concerns the encouragement and reciprocal protection of investments alleging that the Ecuadorian government has failed to provide impartial tribunals. In an unrelated BIT ruling on March 31\textsuperscript{st}, the PCA found Ecuador violated the U.S-Ecuador Bilateral Investment Treaty by not providing an effective means of asserting claims and enforcing rights against Ecuador for contract breach claims dating back to 1993.\textsuperscript{148} The Aguinda plaintiffs appealed to the Second

\textsuperscript{146} Chevron Corp. v. Naranjo, ___ F.3d ___, 2012 WL 232965 (2d Cir. Jan. 26, 2012)

\textsuperscript{147} PCA Case No. 2009-23 Order for Interim Measures 9 February 2011

Circuit to stop Chevron from pursuing the arbitration since Chevron had earlier agreed to “satisfy” any Ecuadorian judgment. The Second Circuit agreed that Chevron had only reserved UFMJRA rights to defend against foreign enforcement, but held that BIT Arbitration was not precluded by this limited reservation.\(^{149}\)

**Next Steps**

As the appeals process gets under way in Ecuador, a new round of litigation and arbitration may be the where the most impactful decisions come in the Aguinda case. Both the plaintiffs and Chevron expect Chevron to lose in Ecuador, but with the pending arbitration and blockage of enforcement for fraud in the United States, it will likely be years before a settlement or final outcome to the case.

**Continuing Problems in the Oriente**

Regardless of when or what the conclusion of the case against ChevronTexaco comes, it is certain that the Oriente will continue to suffer. One thing that is clear is PetroEcuador is not blameless and company and government officials acknowledge that the state firm also dumped waste into waterways and spilled from its pipelines after assuming control.\(^{150}\)

PetroEcuador’s own records indicate that it had 801 spills between 1990 and


\(^{150}\) Forero at 3.
2004 and a total spill volume of 1.9 million gallons, while independent reports estimate that volume is actually well over 3.2 million gallons.\textsuperscript{151} After Texaco’s exit, other companies such as Repsol YPF and Occidental Petroleum began operating the concession and new concessions are being granted even today to other less environmentally-reputable firms such as China’s Sinopec International Petroleum.\textsuperscript{152} Whatever judgment comes against Chevron will still feel unsatisfactory to environmental observers as the Ecuadorian government, PetroEcuador, and subsequent operators continue to operate with impunity for their part in the damage.

Meanwhile, there is fairly strong support for Chevron’s claim that the Ecuadorian \textit{Aguinda} trial has been marked by at least some foul play, which makes the outcome feel unsatisfactory regardless of the merits of the plaintiff’s case. Much evidence of corruption and foul play in the case come from outtakes of \textit{Crude}, which show instances of plaintiff’s lawyers interfering with the independent damage inspector, extralegal tactics to pressure judges, and multiple \textit{ex parte} meetings by plaintiff’s lawyers while

\textsuperscript{152} “Ecuador Talking With China Over $1B Oil Payment,” \textit{Wall Street Journal}. July 13, 2009
Ecuadorean judges made important appointments with regard to independent experts and damage assessments.\textsuperscript{153}

Further, the problem of shoddy environmental performance in oil exploitation is not restricted to Ecuador. Texaco-Chevron claimed that their waste disposal techniques were consistent with industry practice in other tropical developing countries such as Brazil, Columbia, Nigeria, and Indonesia.\textsuperscript{154} It is telling that their standards were consistent with their own practices in those nations and not developed countries. Developing countries continue to seek foreign investment in oil development and other resource extraction because they lack the expertise to do so themselves. These countries do not demand high environmental standards because oil companies refuse to sign contracts requiring them and increasingly add indemnity and arbitration provisions to resource extraction contracts similar to the Joint Venture Agreement and Remediation Agreement between Texaco and the Ecuadorean Government.\textsuperscript{155} Moreover, developing countries can be reluctant to press environmental tort claims for fear of chilling future foreign

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{153}] For a detailed summary of questionable plaintiffs’ lawyers’ legal tactics, see generally, 11 Civ. 0691 at 11-58.
\item[\textsuperscript{154}] Lyons at 709.
\item[\textsuperscript{155}] See Kenney at 882 citing Roger P. Alford, \textit{Arbitrating Human Rights}, 83 Notre Dame L. Rev. 505, 518-20, 527-38 (2008) (discussing contract formation between foreign sovereigns and multinational corporations and advocating corporations use their power to induce governmental compliance with human rights regimes). See also Kenney citing Alford at 518, 526 predicting “[t]o the extent that corporations are increasingly subject to third-party claims for human rights violations arising out of or related to a contract with a sovereign . . . corporations will seek to shield themselves from this third-party risk by invoking the arbitration clause in the contract against the sovereign.”
\end{enumerate}
\end{footnotesize}
investment. Many scholars agree that the unequal bargaining power between corporations and developing countries’ governments driven by the need for foreign direct investment results in negative consequences for environmental and human rights of those countries’ citizens.

These problems will continue to exist regardless of the outcome of the Aguinda case. A true, comprehensive solution would require a change in host countries’ governments as well as true consequences for operators’ practices if they participate in a “race to the bottom” for regulations during resource extraction.

VI. Implications of the Aguinda Actions as a Public Policy Matter

In the fundamental sense, class actions are suits brought by a specific class of plaintiffs who allege that the defendant’s actions caused a specific, redressable injury. If Chevron is made to pay for at least some of its

156 Brief Amicus Curiae of the Republic of Ecuador, Aguinda v. Texaco, Inc. No. 93 Civ. 7527 at 198 (S.D.N.Y. Jan. 26, 1994) (government stresses the importance of foreign investment and oil development to Ecuador’s economic policies in opposing the Aguinda action)


158 The Aguinda case in Ecuador is not officially “class action” because class procedures do not exist in Ecuador. However, the case in the US was initially a class action and frente’s suit is comprised of a group of plaintiffs.
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damage in the Oriente, the action will have been successful from a legal standpoint. A different question, however, is whether the action was successful from a public policy perspective. Specifically, was the suit an effective way to compensate those injured by conduct and an effective way to govern conduct in the future to ensure that it does not happen again? This section addresses whether the Aguinda action effectively provides (1) redress for the harmed, and (2) deterrence for the perpetrators.

Effective Restitution Goal

Assuming that the plaintiffs succeed in Lago Agrio, the judgment will still fail to be an effective redress for those injured for two chief reasons: (1) the parties bringing the suit are not representative of all of the injured (2) techniques employed by sophisticated defendants to “run out the clock” unfortunately allows for many potential plaintiffs to pass away without ever seeing effective restitution.

The “affected population” whose rights are being asserted includes “the five indigenous people of the area, “ the Cofan, Huaoani, Kichwa, Secoya, and Siona, as well as colonists. However, the 46-member class includes only colonists and Kichwa and Secoya Indians with no Cofan, Huaorani, or Siona among the plaintiffs. Moreover, no relief is requested directly for the affected

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159 Aguinda Complaint in Ecuador, 2003, ¶ I.
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communities or indigenous peoples. Instead, the lawsuit seeks damages for the cost of a full environmental remediation to be paid to the local NGO, Frente, which would apply the funds as determined by the judgment. Frente was founded in 1994 by a group of colonists in Lago Agrio to administer money from the Aguinda lawsuit. It is not a plaintiff and the decision to award relief directly to it was made by lawyers without consulting plaintiffs or affected communities.

Some of the indigenous peoples in the Oriente fear that lawyers and NGOs are using their name for private gain and are distrustful of outsiders after years of exclusion from decision-making that affects them by governments, companies, environmental NGOs and others. In July 2003, ninety plaintiffs selected directly by Huaorani and Kichwa communities filed a lawsuit against ChevronTexaco in the Superior Court of Justice of Tena. They sought to vindicate the same rights that were purportedly being vindicated in the Aguinda case. The case was dropped due to jurisdictional reasons and because of the plaintiffs could not afford the costly litigation. Several indigenous groups continue to demand that Frente stop using their names until they can participate in the decision-making about their claims and remedies. All of this points to a major flaw in the Aguinda class action

160 Kimerling, supra note 9 at 631
161 Id.
162 Kimerling Symposium, supra note 63 at 479
163 Id. at 474.
164 See generally Id. at 480.
165 Id. at 483.
from the perspective of restitution to those actually harmed – it is difficult to allow class members to have input in the litigation and there is no guarantee that an award will actually reach the harmed.

In cases like Aguinda, indigenous residents were never consulted when the Ecuadorian government contracted for oil extraction on their lands and were never consulted when the government signed a release to Texaco for its liabilities.\textsuperscript{166} Even today, the vast majority has only token participation in the Aguinda lawsuit and their unease is evidenced by efforts to file separate actions based on grassroots participation. Aguinda was complicated by the unavailability of class action procedures in Ecuador allowing only named plaintiffs from the U.S. Aguinda cases to file. In the future, large-scale environmental and human rights actions seeking to vindicate indigenous peoples’ rights should include democratic decision-making and prior informed consent principles\textsuperscript{167} in order to be fair to the actual victims of corporate and government wrong-doing.

Another reason the Aguinda class action may not provide effective restitution for the harmed is the immense time it takes to resolve this kind of civil case. Over 17 years have passed since Texaco exited Ecuador and the first complaint was filed in New York in this case. Since then, the costly, cumbersome trial has bogged down in both the United States and Ecuador over jurisdictional issues while damage in the Oriente continued. In its

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\item \textsuperscript{166} Kimerling, \textit{Symposium} supra note 63 at 507.
\item \textsuperscript{167} Kimerling, \textit{Symposium supra} note 63 at 507.
\end{itemize}
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private interest factors analysis for granting *forum non conveniens* dismissal, the Second Circuit did not take into account the inconvenience to plaintiffs of starting over in Ecuador’s courts after eight years of litigation. Over time, many of the people who bore the brunt of the environmental contamination have passed away or lived through unmitigated suffering from the Consortium’s operations. Moreover, delay is costly from an environmental standpoint as the chemicals from Texaco’s actions spread and cause damage the longer they remain in the environment without remediation. Even if Chevron eventually pays for its damage, the recipients will likely be people and communities that succeeded those actually injured. Granted, the lawsuit is as much about continuing damage from Texaco’s operations as it is about the damage caused during its operations, but to provide effective redress to all of those actually injured requires a faster, more efficient mechanism than any outcome the *Aguinda* case will provide.

**Effect Deterrence Goal**

The *Aguinda* cases will provide a stronger deterrence for corporations operating in weak governance areas to better internalize the costs of their actions as they would if they were operating in their home jurisdictions. High costs of litigation, negative public relations, and a potentially huge payout have put Chevron and other oil companies on notice that they will be forced to pay remediation for substandard practices. Still, it is unsatisfying because
Ecuadorian governments between 1970 and 1992 and PetroEcuador are at the least also partly responsible for the environmental damage from the operations. The *Aguinda* action will not force the Ecuadorian government to internalize its actions and in fact, gives it the ability to continuing behaving in the same way while using Chevron as a scapegoat. Effective deterrence can only occur if all of the responsible parties have to internalize the cost of their actions so that they are incentivized to change their behavior in the future. Recently, U.N. Special Representative on Business and Human rights, John Ruggie, produced a framework to address the human rights implications of the acts of multi-national corporations abroad.\(^{168}\) One point of focus of the report was that many countries’ governments themselves are characterized by pervasive discrimination against indigenous peoples\(^{169}\), and indeed, at the time of oil discovery, Ecuador’s policy towards the indigenous people in the Oriente was one of colonization and assimilation.\(^{170}\) Regardless of Texaco’s culpability in the Oriente, there is little doubt that the damage will continue at the hands of another entity as long as there is no recourse for the region’s inhabitants against their own government’s policies.


However, while the *Aguinda* case will not punish the Ecuadorian government for its actions, it may still provide effective deterrence because Texaco was the enabling party. The oil company is the cheapest cost avoider due to its ability to have prevented the contamination by using better methods ex ante.\textsuperscript{171} Moreover, the government of Ecuador would never have been able to extract oil without Texaco or any other multinational with expertise in oil extraction. If Texaco or any other enabling party were held to more strict standards, the government of Ecuador would have to follow those higher standards because it does not have the ability to be the operator. Thus, if multinationals had to abide by a minimum standard, that minimum would be the floor in Ecuador and any other nation. Viewed that way, forcing Chevron to internalize the entire $27 billion in damages may go further from a deterrence perspective than having the Ecuadorian government share in the damages. Note, that while a solution along these lines would force U.S. companies to operate with higher standards, it is not clear that foreign oil companies would follow suit and instead may create a “race to the bottom” to provide the most favorable terms to foreign governments in order to win concessions. However, such a rule would still affect many of the world’s current largest oil field operators\textsuperscript{172} and a significant amount of oil field operations in developing countries.

\textsuperscript{171} Kenney at 878.
\textsuperscript{172} ChevronTexaco, ConocoPhillips, Halliburton, and ExxonMobil are based out of the United States.
It is evident that the *Aguinda* litigation is already affecting Chevron and causing it to change practices. At its annual shareholders meeting in April 2008, representatives from Trillium Asset Management offered a resolution demanding itemized accounts of Chevron’s spending in the Ecuador case. While the resolution failed to pass, it was noteworthy that large institutional investors have begun to see the costs of potential liability from bad practices and begun to demand answers. If there is a major payout at the end of the *Aguinda* cases, Chevron will be one of the first companies forced to pay for its actions abroad when taking advantage of nonexistent environmental standards in a host country. That would put corporations on notice that they should at least abide by some minimum standards regardless of whether foreign governments demand them.

**Recommendation for a More Effective Regime**

A more effective regime to compensate to provide more effective redress and deterrence for future conduct should tackle the problems of access to courts, delays, and provide better incentives for foreign governments to protect their environments. However, a solution that merely sends all multinational tort cases to U.S. and other home country courtrooms would fall short of providing an incentive for citizens of developing countries to push for higher standards of accountability from their own governments.

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173 Maass at 5.
and judicial reforms. Rather than opening the floodgates by dropping *forum non conveniens* entirely, I propose a 2-step solution that lowers the barriers for these cases to be brought in the US, while simultaneously implicitly creating a body of law that creates an informal international standard of “best” or at least “minimum practices” so that oil field operators actually know a defined lower bound.

As discussed *supra*, *forum non conveniens* and international comity present major obstacles for foreign plaintiffs seeking redress for harms by multinational corporations. Corporations pursue these avenues to dismiss cases in the U.S. because they are calculating that plaintiffs will not have the resources to continue pursuing the litigation and “starting over” in countries that lack plaintiff-friendly rules such as discovery.174 International comity as grounds for dismissal is troubling because it gives host countries’ governments an almost-veto power (see discussion p. 24 above) on whether cases against U.S. companies for actions abroad can go forward in U.S. courts. In light of the race for foreign direct investment, international comity can be another way that multinationals team with foreign government partners to subvert human rights principles similar to what we see with Texaco, PetroEcuador, and the Ecuadorian government in the first *Aguinda*.

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dismissal.176 *Forum non conveniens* grounds for dismissal, with its malleable standard of “adequate alternative forum,” also serves as a way to delay or deny justice because multinationals agree to submit to jurisdiction in foreign courts only to later claim that those proceedings are unfair in order to drag the process on further if the plaintiffs do actually pursue action in the foreign jurisdiction.

Where possible, the United States should not close its doors to foreign plaintiffs for actions by U.S. companies or even companies with significant presence in the U.S. There is a substantial disparity between Western countries and developing countries in the legal protection of the environment.176 Unrepresentative governments, underdeveloped tort law, and other reasons discussed *supra* regarding the desire for foreign direct investment, *inter alia*, account for much of the disparity.177 The process to correct these disparities will not happen overnight, and simply trying one-off cases in the US will not create any pressure in developing countries to protect the rights of affected minorities. However, in the most egregious cases, especially those involving a foreign government’s state-owned oil company, holding operating companies responsible in the US can begin to break the nexus of sophisticated field operators and unresponsive governments. U.S. courts, expert in complex litigation, can begin to create a minimum standard

175 *See generally Aquinda I*, 945 F. Supp. at 627-28.
177 *See generally SRSG Report 2009*
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of international oil field operation and chip away at the ambiguity of “best” or “standard” practice clauses that lead to a “race to the bottom” in resource extraction.\(^\text{178}\)

Should U.S. Courts continue to broadly construe the “availability of an alternative adequate forum” and use \textit{forum non conveniens} to dismiss cases, they should at least stipulate that defendant not only submit to jurisdiction in the foreign forum, but also promise to honor the judgment there. Doctrinally, Courts could also accord collateral estoppel-like principles to the competency of the foreign courts during the enforcement phase in the U.S. The “compatible with the requirements of due process” inquiry of the UFMJRA nearly the same as the threshold inquiry under \textit{forum non conveniens} as to whether an alternative forum is “adequate,” except now the inquiry is from the defendant’s perspective.\(^\text{179}\) For example, from 1992 to 2001, Texaco claimed numerous times that Ecuador was an adequate forum and could provide impartial proceeding to have the case dismissed from the U.S. The ruling to dismiss that claim should now preclude Chevron’s attempts to not

\(^{178}\) A Wawryk, “The Adoption of International Environmental Standards by Transnational Oil Companies: Reducing the Impact of Oil Operations In Emerging Economies” (2002) 20 \textit{Journal of Energy and Natural Resources Law} 402-434. Published with variations as “Improving the Operations of Transnational Oil Companies in Emerging Economies”, University of Dundee, \textit{Centre for Petroleum, Mining and Energy Internet Journal}, vol 13, December 2002. (“the absence of a strong and independent judiciary in many emerging economies, together with governments strongly committed to oil exploitation, often at the expense of the environment, means that phrases such as "best practice" and "internationally acceptable norms" may be interpreted to require the lowest level of environmental protection rather than the most stringent practices.”)

\(^{179}\) See Heiser at 639.
have the judgment enforced on the exact opposite grounds. If this were the rule, Texaco may not be as ready to have the case dismissed and moved to a country that could potentially award damages like the $27 billion figure that Ecuador’s courts are prepared to do.

Such a solution would also help provide more effective restitution by speeding up the process of redress. As discussed above, delays are a key cause of disrupting effective redress for the harmed. They are calculated to hope that plaintiffs will eventually give up – the longer ChevronTexaco delays the case, “the greater the chance it will win by attrition or diminish the settlement value of the case as the plaintiffs’ resources and patience wear thin.” Applying issue preclusion to the issue of foreign courts competency would effectively tell Chevron that they must live with the choice of forum they make. As such, they may not pursue forum non conveniens dismissal as vigorously as in the current system and may elect to continue the case in the U.S. where they have the assurance against such massive judgment. Even if they make the calculation that submitting to foreign jurisdiction is worth the risk because plaintiffs will give up or that the defendants hold sway in that country, they will not be able to delay once the final judgment is made in the foreign jurisdiction.

Reforms in Deterrence and a “Race to the Bottom”

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180 Kenney at 874.
Regardless of Chevron’s blame, the outcome of this case will feel unsatisfactory because the Ecuadorian government’s complicity will go unpunished. While it would be impossible to force a foreign government to pay in Court, a better system in the future would change the incentives for developing countries’ governments to “race to the bottom” of regulations as a way to attract investment. One way to do this would be to establish universal minimum standards of operation based on industry standard in developed countries and by professional organizations. Development contracts will continue to use “best practices” standards set by host countries, but at a minimum, companies would operate knowing that internationally accepted best practices would be the floor. While U.S. environmental statute that applies to corporations acting in the U.S. has yet been applied to find a corporation liable for their actions abroad, (judges have not found Congressional intent to apply U.S. environmental statutes abroad\textsuperscript{181}), one model could be for courts to enforce “best practices” clauses by looking to companies’ own voluntary associations’ standards. For example, Chevron is a member of the American Petroleum Institute, and the API’s commitment to environmental stewardship is part of the association’s by-laws\textsuperscript{182}.

The worldwide chemical industry’s Responsible Care program could serve as a model for oil operators. The voluntary code includes standard performance indicators and reporting requirements. For Courts, such a

\textsuperscript{182} Wawryk at 116.
standard reporting requirement eases the task of discovery and culpability at a minimum. For oil field operators, such regulation could actually serve to create a “race to the top” whereby modernized, experienced operators impose higher standards to exploit a competitive advantage and not risk being undercut.\footnote{See generally, Id. at 117.} Host countries would also have less room to ignore their affected populations when such an explicit international code is being ignored by its consortium with international operators.

**Conclusion**

The U.S. and Ecuadorian *Aguinda* cases demonstrate the difficulties of getting redress for harms by U.S. corporations abroad. Corporations are attracted to developing countries for natural resources, cheap labor, and relaxed regulations meant to lure foreign investment.\footnote{Segal at 73.} In many cases, those countries’ courts offer no remedies to citizens injured by the actions of a foreign corporation due to lack of institutions and procedures or corruption.\footnote{See generally Paul Santoyo, *Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability*, 27 Hous. J. Int’l L. 703, 705 (2005). (discussing reasons why companies pursue *forum non conveniens* dismissals and the general undesirability of the doctrine)} Plaintiffs wishing to hold U.S. companies accountable in U.S. courts also face the nearly impossible obstacles of international comity doctrine and *forum non conveniens*, which often dismiss cases to be held in the countries where the harm occurred. Both of these doctrines severely limit the administration
of justice as most plaintiffs fail to file suit in their home countries where courts are unresponsive and procedures are cumbersome and costly; indeed the vast majority of cases dismissed for *forum non conveniens* never get filed again in foreign courts. Further, even if a case is brought abroad, challenges to the judgment bring the suits back to the U.S. for another costly and long legal battle as to the legitimacy of the foreign judgment.

As discussed *supra* page 24, the doctrine of comity places the nexus of foreign governments and U.S. corporations in the strong position to decide whether cases against them will be held in the U.S. Dismissal for comity represents an abdication of the administration of justice by U.S. Courts where there is no chance that foreign courts will provide an effective remedy. While it is unadvisable to simply open the floodgates of litigation or risk forum shopping, in egregious cases where host country governments were heavily involved resource extraction, the availability of “adequate alternative forum” should be construed less broadly and U.S. should begin to chip away at the race to the bottom in environmental performance.

The *Aguinda* case shows the real costs of multinational corporations operating abroad in the vacuum of environmental regulations. Aside from the unprecedented environmental damage from over 30 years of oil extraction operations, affected plaintiffs have already spent over 17 years in Court with no end in sight. The action cannot be deemed successful from an effective

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remediation perspective because the delay in justice as mean that entire generations harmed by the Consortium’s activities will never see any redress. Even if the Ecuadorian court awards damages, the appeals process in Ecuador and subsequent enforcement procedures in the U.S. will drag the process on further. The case has, at least, been slightly more successful from a deterrence perspective and shareholders have already begun demand audits of environmental practices and disclosure for liabilities by U.S. corporations.

To truly begin reforming a race to the bottom, holding corporations more accountable, and increasing pressure on host countries to be more responsive to their own affected populations, it is necessary to remove ambiguity from “best practices” clauses so that they actually mean something to be evaluated against. Doing so would both give clear ex ante guidelines for deterrence and speed the process of justice if cases are indeed brought.

Opening U.S. courts alone to litigate foreign actions would be insufficient to provide incentive to reform home countries’ legal systems to protect its own people’s rights. However, a balance must be struck in which U.S. courts accept litigation in cases where there truly is no adequate alternative forum because of host country corruption. And when courts dismiss cases for forum non conveniens, corporations should not be rewarded for “run out the clock” tactics with endless appeals against enforcement of judgments to which they opened themselves. Doing so would begin teaching companies that they will be held account to minimum standards regardless of the deal they may strike with host countries.