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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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 results of a complicit government and poor operational practices can be environmental devastation and widespread human rights violations for which there is little redress. This Article analyzes the challenges inherent in using private dispute resolution mechanisms to hold corporations accountable for regulatory violations through the lens of Texaco's thirty-year operations in the Ecuadorian Amazon and the Aguinda v. Chevron *litigations in New York and, subsequently, Ecuador. The case represents 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 nonenforcement of regulations. Despite the enormous hurdles plaintiffs face, the case may begin to signal to multinationals that exploiting a regulatory race to the bottom in capital-starved developing countries may backfire in the long run on their balance sheets, especially with a few minor, but potentially instrumental, reforms to provide finality in these private dispute settlement actions.*

* © 2012 Suraj Patel. J.D. 2010, NYU School of Law; B.A. 2005, Political Science, Stanford University. Mr. Patel would like to thank Professor Frank Upham for his support and encouragement in conducting this research and helping shape his views of the connections between law and development.

I. 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.[1] What is most remarkable about this trial is not that a multinational company has been accused 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.[2] 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.

1. Peter Maass, *Slick*, OUTSIDE, March 2007, at 101-02.
2. *Id.*

The original suit, *Aguinda v. Texaco*, was dismissed from U.S. federal court in 2002.[3] However, an organization called Frente, representing forty-six colonists and indigenous individuals,[4] continued the *Aguinda* trial in May 2003 in Lago Agrio, Ecuador.[5] The litigation seeks damages for Texaco's nearly thirty-year operation of an oil concession in the Amazon.[6] With its purchase of Texaco Corporation in 2001, Chevron Corporation assumed all the liabilities of the original defendant company.[7] If the lawsuit is successful, the Amazon Defense Front or 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.[8] On February 14, 2011, the Ecuadorian court handed down a final ruling for Chevron to pay approximately $8.6 billion in damages and threatened to add the same amount in punitive damages if Chevron did not formally apologize by the end of that month.[9] Chevron has appealed the result in Ecuador and, before the judgment was even handed down, had already secured a temporary restraining order on enforcement of the judgment by filing racketeering charges against the plaintiffs and their lawyers.[10] The United States Court of Appeals for the Second Circuit reversed and vacated the preliminary injunction six

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3. Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002).

4. There are no class action procedures in Ecuador. Each plaintiff was required to join as an individual because there are no absent class members. The action was authorized by Ecuador's 1999 Environmental Management Act (R.O. 1999, 245) (Ecuador).

5. Complaint, Maria Aguinda Salazar et al. v. ChevronTexaco Corp., No. 002-2003 (Super. Ct. of Nueva Loja May 7, 2003) (Ecuador).

6. *Id.* at 4-8.

7. Texaco Corporation, headquartered in New York, operated in Ecuador under its wholly owned subsidiary, TexPet. In 2001, Chevron purchased Texaco Corporation and by extension the TexPet subsidiary. Therefore, while the original *Aguinda* suit was *Aguinda v. Texaco*, the current lawsuit's parties are *Aguinda v. Chevron*. Texaco Corporation no longer exists as an independent entity. This Article uses ChevronTexaco and Chevron interchangeably to signify that while Chevron did not operate a concession in Ecuador, its liability stems from Texaco's operation in Ecuador, which Chevron assumed with its purchase. Chevron argued that its acquisition of Texaco was not a true "merger" but rather a stock acquisition whereby the acquired company remains a separate subsidiary. *See* Answer to the Complaint at 2-3, Maria Aguinda Salazar et al. v. ChevronTexaco Corp., No. 002-2003 (Super. Ct. of Nueva Loja Oct. 21, 2003) (Ecuador). To date, its argument has been unsuccessful in all proceedings.

8. *See* Court Expert Summary Report at 6, Richard Stalin Cabrera Vega, Expert for the Court of Nueva Loja, Maria Aguinda Salazar et al. v. ChevronTexaco Corp., No. 002-2003 (Super. Ct. of Nueva Loja Mar. 24, 2008) (Ecuador).

9. Simon Romero & Clifford Krauss, *Chevron Is Ordered To Pay $9 Billion by Ecuador Judge*, N.Y. TIMES, Feb. 15, 2011, at A4.

10. *See* Order on Plaintiff's Motion for a Temporary Restraining Order at 1-2, Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (No. 11-CV-691).

months later, in September, with reasons released on January 26, 2012,[11] but the RICO suit continues.

The *Aguinda* case highlights how difficult it is for locally affected citizens to get effective redress for the substandard environmental and social conduct of multinational corporations 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.[12] However, the immense award in *Aguinda*, 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 costs to the company.[13]

This Article details the *Aguinda* case, subsequent Ecuadorian action, and extralegal pressure on both sides 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 environmental damage. It argues 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. Part II explains the history of Texaco's operations in Ecuador, its practices, and the cleanup prior to Texaco's exit from Ecuador. Part III details the New York *Aguinda* case, brought by private citizens against Texaco for substandard safety and environmental practices, and the subsequent dismissal of that suit ten years later on forum non conveniens

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11. *See* Chevron Corp. v. Naranjo, 667 F.3d 232, 247 (2d Cir. 2012).

12. *See* Maxi Lyons, Comment, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT'L L. & POL'Y 701, 727-28 (2004) (citing ALICE PALMER, FIELD, COMMUNITY REDRESS AND MULTINATIONAL ENTERPRISES 2 (2003)).

13. *See* Jordan Robertson, *Chevron Annual Meeting Heats Up over Ecuador Suit*, SEATTLE TIMES (May 27, 2009), http://seattletimes.com/html/businesstechnology/2009269260_apuschevronshareholders.html. "A proposal seeking a more detailed human rights policy from Chevron got 28 percent of the vote, which was in line with the level of support from previous years. 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. In those two areas, similar proposals in the past have never received more than 10 percent of the vote." *Id.*

grounds. Part IV discusses the *Aguinda* case tried in the Ecuadorian district court located in Lago Agrio, in the heart of the Amazon, and its outcome. Part V discusses the extralegal actions pertaining to the *Aguinda* trial in Ecuador and likely next steps in the litigation. Part 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

A. History of Oil and the Oriente in Ecuador

Until 1964, Ecuador had no large-scale oil exploration and virtually no environmental and legal protections for oil extraction.[14] As such, the Ecuadorian government had no experience in oil exploration when it invited Texaco to develop the country's first oil field through its newly formed Ecuadorian subsidiary, the Texaco Petroleum Company (TexPet).[15] TexPet signed a contract with Ecuador to develop oil fields in the Oriente in 1964 and in 1972 began full-scale production in a legal and operational vacuum.[16] Its operation was based out of Lago Agrio, Ecuador, named after Sour Lake, Texas, the site of Texaco's first successful oil field.[17]

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 persons from the Cofán, Huaorani, Secoya, Siona, and Quechua tribes.[18] 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

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14. *See* Lyons, *supra* note 12, at 703.

15. Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and* Aguinda v. Texaco, 38 N.Y.U. J. INT'L L. & POL. 413, 435-36 (2006).

16. *Id.* at 449 n.99; Lyons, *supra* note 12, at 703. There were a few generally applicable laws containing broad environmental controls. However, with little developed regulatory law, there was a scarce chance for enforcement. *See* Kimerling, *supra* note 15, at 436-37, 566.

17. Maass, *supra* note 1, at 103. Ecuador's national oil company (Corporacion Estatal Petrolera Ecuatoriana, CEPE, now PetroEcuador) acquired stock in the initial Texaco consortium, and in 1977, became the majority shareholder of the consortium. Texaco retained 37.5% of the stock and continued to operate the trans-Ecuadorian pipeline until 1989, as well as the consortium's exploration and production facilities until 1990. PetroEcuador remained 62.5% owner until Texaco's exit from Ecuador. *See* Kimerling, *supra* note 15, at 420 n.17.

18. Maass, *supra* note 1, at 103.

to use the jungle.[19] 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.[20] Conflicts and disease transmission between settlers, now known as "colonists," and indigenous peoples forced many indigenous tribes to move further into the jungle or abandon their traditional lifestyles.[21] The plaintiffs in the *Aguinda* suit consist of both colonists and indigenous representatives.[22]

B. Environmental Regulations in Ecuador Prior to and During Drilling

"The Oriente's booming oil industry ha[d] operated with virtually no environmental and public health controls . . . . Very little ability or will exist[ed] within the Ecuadorian government to establish meaningful environmental regulation and oversight."[23] It was not until a study was published in 1990 that government officials were put on notice of the environmental impacts of the pollution caused by oil operations,[24] and it was not until 1992 that environmental impact assessments were initiated.[25] 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 "to prevent contamination of water, air, and soil."[26] Other generally applicable contamination laws, such as the Law of Waters, adopted in 1972, and the Law for the Prevention and Control of Environmental Contamination, adopted in 1976, also included language that should have set up a regulatory mechanism to oversee oil production.[27] However, no regulatory system was put into place to demand compliance with these laws until the 1990s.[28] In fact, no entity even promulgated regulations defining the general terms used in the Constitution, the Law of Hydrocarbons, and Ecuador's Concession Agreements with foreign oil companies.

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19. *See id.*
20. *Id.*
21. *Id.* For an excellent, detailed discussion of the cultural pressures faced by indigenous tribes after the discovery of oil in the Oriente, see JOE KANE, SAVAGES (1995).
22. *See* Kimerling, *supra* note 15, at 476.
23. JUDITH KIMERLING ET AL., AMAZON CRUDE 48 (Susan S. Henrikson ed., 1991).
24. Kimerling, *supra* note 15, at 438.
25. *Id.* at 468-69.
26. *See id.* at 433 (citing L. de Hidrocarburos [Law of Hydrocarbons] (R.O. 1978, 711) (Ecuador), *amended by* (R.O. 1982, 306) (Ecuador)).
27. *See id.* at 434.
28. *See id.* at 468-69.

Instead, TexPet was to set its own environmental standards and was allowed to self-police its operations to prevent contamination.[29] To extract the oil, TexPet entered into a joint-venture with the Ecuadorian government-owned company, PetroEcuador.[30] While PetroEcuador was the majority shareholder,[31] Texaco was the deemed the "operator" of the entity and was authorized to design, procure, install, manage, and operate the infrastructure for the operation.[32] 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.[33]

C. Texaco's Operations in Ecuador and Resulting Environmental Damage

During its twenty-one years drilling in Ecuador, TexPet drilled 339 wells and built eighteen central production stations in over a million-acre concession and extracted approximately 1.5 billion barrels of crude oil from the Oriente.[34] Amazon Watch, an environmental group that "works with the Frente to publicize the damage in the Oriente, claims Texaco netted more than $30 billion in profits."[35] For its part, Chevron claims that Texaco profited only $490 million after royalties and taxes, conceding that the joint venture grossed $25 billion.[36] Whatever the value of the extraction, the main issue of fact in the *Aguinda* case deals 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 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, and (4) deliberate dumping and spraying of oil and drilling wastes. Each of these is explained *infra*.

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29. *Id.* at 436.

30. *See id.* at 419-20 & n.17.

31. 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. *See id.* at 420 & n.17.

32. *Id.* at 435.

33. *Id.* at 435-36 (citing Decreto Supreme No. 925 [Supreme Decree No. 925], ch. IX, cl. 46.1 (1973) (Ecuador)).

34. *Id.* at 449-50.

35. Maass, *supra* note 1, at 103.

36. *Id.* at 103-04.

"Oil development can be divided into three stages—exploration, production and transportation."[37] During the exploratory phase, "water is often pumped deep into underground reservoirs to force out the crude" and, along with the crude comes water called "formation water" containing leftover oil, metals, and water with high levels of benzene, chromium-6, and mercury.[38] On average, each exploratory well produces 4165 cubic meters of drilling wastes containing a mixture of drilling muds, petroleum, natural gas, and formation water containing high concentrations of heavy metals and salt.[39] In the Oriente, TexPet deposited formation water into unlined open-air pits adjacent to the exploratory wells.[40] As crude oil began to flow, more formation water was added to the pits during testing of the finds.[41] 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.[42] Most of the water produced in U.S. oil fields is reinjected underground because its high level of salinity makes it nearly impossible to treat without corroding treatment equipment.[43] In Ecuador, most of this mixture was left in unfenced, uncovered pits, generally about seven feet deep, and much of the waste subsequently leeched into the environment.[44]

The major source of contamination from TexPet's practices, however, started with the production phase. As oil is extracted from operational wells, it is pumped to separation stations or production stations, "which separate oil from wastes comprised of formation water, oil remnants, gas, and toxic chemicals."[45] This mixture is called produced water or "oil field brine" due to its high salinity.[46] In Ecuador, TexPet discharged virtually all of the produced water it generated into the environment via unlined, open waste pits known as production pits.[47] Texaco "maintains that the pits were universally self-lining because

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37. CTR. FOR ECON. & SOC. RIGHTS, RIGHTS VIOLATIONS IN THE ECUADORIAN AMAZON: THE HUMAN CONSEQUENCES OF OIL DEVELOPMENT 6 (1994), *available at* http://cesr.org/article.php?id=153.
38. Maass, *supra* note 1, at 104.
39. CTR. FOR ECON. & SOC. RIGHTS, *supra* note 37, at 6.
40. Kimerling, *supra* note 15, at 450-51.
41. William Langewiesche, *Jungle Law*, VANITY FAIR, May 2007, at 226, 291.
42. *Id.* at 291.
43. Kimerling, *supra* note 15, at 452, 507.
44. *See* KIMERLING, *supra* note 23, at 65-67; *see also* Maass, *supra* note 1, at 104.
45. CTR. FOR ECON. & SOC. RIGHTS, *supra* note 37, at 6.
46. *Id.*
47. KIMERLING, *supra* note 23, at 65.

universally the soil was made of impermeable clay."[48] However, soil and water samples from nearby soil and waterways indicated that the component elements of the waste leeched from the pits.[49] 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 1600 and 16,000 gallons of oil discharged directly into the environment or into unlined pits in the environment.[50]

In addition to normal and willful discharge of formation and produced water, an estimated 16.8 million gallons of crude was released into the environment through accidental spills from TexPet's pipeline system.[51] The pipeline system, which crosses countless streams and rivers that feed into the Amazon River, frequently ruptured from normal corrosion, earthquakes, and even impact by vehicles and animals.[52] 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.[53] 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.[54]

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 600 kilometers of unpaved roads throughout the Oriente for dust control and maintenance.[55] The Ecuadorian oilfield workers Texaco was supposed to be training were so poorly informed of the toxic hazards of crude that they regularly applied it to their heads to prevent balding or took jars of crude to parents suffering from arthritis.[56] 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.

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48. Langewiesche, *supra* note 41, at 291.
49. *See id.*
50. *See* Kimerling, *supra* note 15, at 455-56.
51. *Id.* at 457. "By comparison, the EXXON VALDEZ spilled an estimated 10.8 million gallons into the Prince William Sound, in the largest oil spill in United States." *Id.* at 458.
52. *See* KIMERLING, *supra* note 23, at 71.
53. *Id.* at 69, 71.
54. Kimerling, *supra* note 15, at 458.
55. *Id.* at 450.
56. *Id.* at 655.

D. Texaco's Exit

TexPet ceased control of the operation and exited the country when PetroEcuador acquired complete ownership of the Consortium in 1992.[57] In the months before Texaco's exit, Texaco 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.[58] The decision-making process occurred behind closed doors with both PetroEcuador and Texaco acting as fact finders and arbiters without consultation with outside parties.[59] The audit ended in 1994 without ever producing a final report.[60] However, a draft report recognized the need to, inter alia, modernize operations at production stations, end the use of open waste pits, and adopt an oil spill contingency and waste plan.[61]

III. THE *AGUINDA* CASES IN NEW YORK

In November 1993, colonists and members of the Cofán, Siona, and Secoya indigenous communities filed a class action suit in federal court in New York, where Texaco was headquartered.[62] The suit, filed under the Alien Torts Statute, alleged that the plaintiffs had suffered personal injuries and "[were] at a significantly increased risk of developing cancer as a result of their exposure" to large-scale disposal of untreated hazardous wastes.[63]

Texaco moved to dismiss the action on the grounds of, inter alia, international comity and forum non conveniens.[64] Throughout the 1990s, Texaco argued that any suit related to its operation in Ecuador should be filed in Ecuadorian court.[65] It contended that the Ecuadorian court system was a fair and adequate alternative forum.[66] For example,

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57. Lyons, *supra* note 12, at 709.

58. *Id.*

59. Judith Kimerling, *The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice or Business as Usual?*, 7 HARV. HUM. RTS. J. 199, 200-01 (1994).

60. Kimerling, *supra* note 15, at 474 (citations omitted).

61. *Id.* at 473-74 (citing 1 HBT AGRA LTD., DRAFT ENVIRONMENTAL ASSESSMENT OF THE PETROECUADOR-TEXACO CONSORTIUM OIL FIELDS 10-10 to -12, *available at* http://chevrontoxico.com/assets/docs/HBT-Agra-Vol-1-Draft-Oct-1993.pdf).

62. *See* Complaint, Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996) (No. 93 Civ. 7527).

63. *Id.* ¶ 51.

64. Kimerling, *supra* note 15, at 484 (citing Motion To Dismiss, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Dec. 28, 1993)).

65. Kimerling, *supra* note 15, at 418.

66. Lyons, *supra* note 12, at 714.

Texaco's Motion to Dismiss in 1999[67] 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."[68] The motion also stated that "plaintiffs may seek relief in Ecuador for personal injuries and property damage from Consortium activities" and they "would not be subjected to violence or intimidation."[69] 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."[70] Their statements and this affidavit 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.

A. Texaco's Remediation Agreement with the Ecuadorian Government

In response to the *Aguinda* litigation and the potential for huge liability arising from its actions in Ecuador, Texaco sought to remediate the alleged environmental damage in the suit four years after it officially exited the country and Consortium.[71] 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 socioeconomic compensation projects.[72] In return, the Ecuadorian government and PetroEcuador agreed to release TexPet and Texaco "from all claims, obligations, and liability to the Ecuadorian State and national oil company 'related to contamination' from the operations."[73] In the agreement, Texaco offered to remediate 37.5% of the pits, a fraction derived from its post-1974 share of ownership in the Consortium.[74] To complete the work, Texaco hired an American engineering and

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67. *See* 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., No. 93 Civ. 7527 (S.D.N.Y Jan. 11, 1999).

68. *Id.* at 18-19.

69. *Id.* at 20.

70. Kimerling, *supra* note 15, at 551 (citing Affidavit of Dr. Ricardo Vaca Andrade ¶ 4, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. May 30, 2001)).

71. Maass, *supra* note 1, at 105-06.

72. Langewiesche, *supra* note 41, at 294.

73. Judith Kimerling, *Transnational Operations, Bi-National Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 465 (2007).

74. Langewiesche, *supra* note 41, at 294.

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.[75] Texaco negotiated a 5000 parts per million (ppm) standard for Total Petroleum Hydrocarbons (TPH) in its remediation contract in order to secure release for liability.[76] The mean standard in the United States for cleanups is usually 100 TPH and Ecuador's normal standard is 1000 TPH.[77]

Chevron claims that the cleanup ensures that there is no lasting environmental damage, though plaintiffs cite numerous independent experts who claim that the remediation was grossly inadequate and represented just "cosmetic" changes.[78] For example, in many documented instances, remediation work simply consisted of covering unlined open waste pits with dirt and then testing to determine that soil concentration of TPH was below 5000 ppm.[79] The testing employed by Texaco consists of measuring trace amounts of TPH that leach out of the soil when it is saturated with water rather than the amount of contaminants resident in the soil itself.[80] Actual contamination when soil was directly tested in several "remediated" sites measured up to 29,657 ppm TPH during an investigation in 2006.[81] 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.[82]

Nevertheless, the Ecuadorian government granted release from liability after certifying the remediation and completion of work by Woodward-Clyde in 1998.[83] ChevronTexaco now claims that the 1995 remediation agreement released the company from all liability "related to the environmental effects" including those from the private plaintiffs.[84] ChevronTexaco also sought relief before the American Arbitration Association (AAA), "claiming the remediation agreement indemnified it

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75. *Id.*
76. *Id.*
77. *Id.*
78. *See* T. Christian Miller, *The Hunt for Black Gold Leaves a Stain in Ecuador*, L.A. TIMES, Nov. 30, 2003, at A1.
79. Kimerling, *supra* note 15, at 505-06.
80. *Id.* at 505 & n.249 (citations omitted).
81. *See* Expert Report: How Chevron's Sampling and Analysis Methods Minimizes Evidence of Contamination at 3, Maria Aguinda Salazar et al. v. ChevronTexaco Corp., No. 002-2003 (Super. Ct. of Nueva Loja Mar. 8, 2006) (Ecuador) (on file with Lago Agria Court and plaintiffs).
82. *See* Complaint, *supra* note 5, ¶ I-11.
83. *See* Answer to the Complaint, *supra* note 7, at I.9, II.A.2.1.2.
84. *Id.* at I.9.

against any judgment reached by the Lago Agrio court" in the current *Aguinda* case "and that [Ecuador] was separately obligated to resolve any disputes over the meaning of this agreement through arbitration" stipulated by their original Joint Operating Agreement.[85] In June 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.[86] In 2010, the Supreme Court refused to grant certiorari on the issue.[87] Chevron "filed an international arbitration claim against the government of Ecuador citing violations of the country's obligations under the United States-Ecuador Bilateral Investment Treaty [BIT], investment agreements, and international law."[88] The arbitration seeks to enforce prior agreements and settlements that the government of Ecuador entered into with TexPet.[89]

B. The District Court's First Ruling and Remand

In November 1996, Judge Rakoff[90] granted Texaco's motion to dismiss on all three grounds argued by Texaco: international comity, forum non conveniens, and failure to join indispensable parties.[91] The court reasoned that the Foreign Sovereign Immunities Act barred the court's assertion of jurisdiction over both PetroEcuador and the government of Ecuador.[92] A contributing factor in the decision was the opposition from the government of Ecuadorian President Durán Ballén. The Ecuadorian government filed an amicus curiae brief requesting that the court "'abstain' from accepting the case because it 'may result in a substantial and unwarranted interference with Ecuador's sovereign right to develop and regulate its own natural resources and may strain the

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85. Cortelyou Kenney, *Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation*, 97 CAL. L. REV. 857, 872 (2009) (citing Republic of Ecuador v. ChevronTexaco Corp., 499 F. Supp. 2d 452, 457 (S.D.N.Y. 2007)).

86. *See id.* at 873 (citing Ecuador v. ChevronTexaco Corp., 499 F. Supp. 2d 452, 460-69 (S.D.N.Y. 2007); Ecuador v. ChevronTexaco Corp., 296 F. App'x 124, 124 (2d Cir. 2008)).

87. *Ecuador*, 296 F. App'x 124, *cert. denied*, 129 S. Ct. 2862 (2009).

88. Press Release, Chevron Corp., Chevron Files International Arbitration Against the Government of Ecuador over Violations of the United States-Ecuador Bilateral Investment Treaty (Sept. 23, 2009), http://www.chevron.com/news/press/release/?id-2009-09-23.

89. *Id.*

90. Judge Jed Rakoff took over the case after Judge Broderick passed away in March 1995 while discovery was underway. Aguinda v. Texaco, Inc., 945 F. Supp. 625, 626-27 (S.D.N.Y. 1996).

91. *See id.* at 627-28.

92. *Id.*

friendly relations between the United States and Ecuador.'"[93] It also urged the United States State Department to intervene, fearing the lawsuit would be a disincentive to foreign investment in Ecuador.[94]

Soon after the desired dismissal, Ecuador's new government under President Abdalá Bucaram "reversed its opposition to the lawsuit and joined the plaintiffs in asking the court to reconsider the dismissal."[95] The new government contended that the case would not damage the sovereignty of Ecuador and would further the interest of its indigenous citizens.[96] The Republic of Ecuador filed a motion to intervene, agreeing to waive sovereign immunity claims.[97] Both the motions by the Republic of Ecuador and the plaintiffs were denied[98] and the plaintiffs filed an appeal with the Second Circuit.

In 1998, the Second Circuit remanded and held that dismissal on forum non conveniens and international comity grounds were erroneous without a condition requiring Texaco to waive statute of limitations defenses and submit to jurisdiction in Ecuador.[99] The court also ruled that failure to join an indispensable party was grounds for dismissal only for claims that sought to enjoin PetroEcuador's current activities.[100] The court heavily considered the Ecuadorian government's change in position with regard to the litigation.[101] 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.[102]

The drastic change in the Ecuadorian government's position with regard to the lawsuit and its effect on the court cannot be overstated. This situation illustrates the power the doctrine of international comity grants to a foreign government by placing it in the position of determining

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93. Kimerling, *supra* note 15, at 487-88 (quoting Brief Amicus Curiae of the Republic of Ecuador, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Jan. 26, 1994)).

94. *See* Kimerling, *supra* note 15, at 487 (citing Embassy of Ecuador, Diplomatic Protest from Embassy of Ecuador to U.S. Dep't of State, no. 4-2-138/93 (signed by Ambassador Edgar Terán (Dec. 3, 1993)).

95. *Id.* at 515.

96. Jota v. Texaco, Inc., 157 F.3d 153, 158 (2d Cir. 1998).

97. *Id.*

98. Aguinda v. Texaco, Inc., 175 F.R.D. 50 (S.D.N.Y. 1997), *vacated*, 157 F.3d 153 (2d Cir. 1998) (denying motions to reconsider and intervene).

99. *See Jota*, 157 F.3d at 155.

100. *See id.* at 162.

101. *See id.* at 160.

102. *See* Aguinda v. Texaco, Inc., 945 F. Supp. 625, 627 (S.D.N.Y. 1996), *dismissal vacated*, *Jota*, 157 F.3d at 158-61, *aff'd as modified*, Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002).

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 beholden to large corporations for resource extraction, the alliance between governments and corporations can leave individual plaintiffs with no avenue for redress when their government can lobby to not have a case heard in the United States. 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 thirty years in the Oriente.[103] The expectation that poorer countries' governments will have low environmental standards is also evidenced by ChevronTexaco's claim that its waste disposal techniques were consistent with industry practice in other tropical developing countries such as Angola, Nigeria, and Indonesia.[104] Giving foreign governments the power to stop a lawsuit in the United States for a U.S. corporation's actions can allow corporations to operate with impunity if the developing country's courts are also inadequate to redress the corporation's torts.

C. 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 plaintiffs to file suit in Ecuador, and agreed to allow the plaintiffs to use discovery obtained in the United States.[105] As a result, in May 2001, Judge Rakoff granted Texaco's renewed motion to dismiss on forum non conveniens grounds.[106] 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.'"[107] However, the court directed 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

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103. *See* Miller, *supra* note 78 (showcasing its heavy hand, "Texaco handed out contracts to current and former Ecuadorian military officials," its executives "dined with presidents and ministers," it provided generous loans to the Ecuadorian government, and it employed techniques such as withholding oil payments for concessions).

104. Lyons, *supra* note 12, at 710.

105. *See* Texaco Inc.'s Memorandum in Support of Its Renewed Motions To Dismiss Based on Forum Non Conveniens and International Comity at 1-2, 5, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Jan. 11, 1999), *available at* http://www.texaco.com/sitelets/Ecuador/docs/motions_to_dismiss.pdf.

106. *See* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2002).

107. *Aguinda*, 303 F.3d at 476 (quoting *Aguinda*, 142 F. Supp. 2d at 537).

procedures in Ecuador, which would have necessitated plaintiffs' counsel to obtain signed authorizations from each individual plaintiff.[108]

IV. THE *AGUINDA* CASE IN ECUADOR

Many observers, plaintiffs, and ChevronTexaco believed that dismissal meant the end of the *Aguinda* action due to the costly and daunting task of rallying support in Ecuador and obtaining signatures from affected parties. However, nine years after the initial case filings, plaintiffs' counsel promised to continue the suit in Lago Agrio, Ecuador.[109] Plaintiffs' counsel declared that the plaintiffs could join as a single group with Frente based on the dismissal from the U.S. courts, as long as only the named plaintiffs from the dismissed *Aguinda* action were permitted to join.[110] Plaintiffs' 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."[111]

In May 2003, forty-six of the *Aguinda* plaintiffs filed a new lawsuit against ChevronTexaco and TexPet in the Superior Court of Justice of Nueva Loja in Lago Agrio.[112] 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 regarding Texaco's voluntary remediation and release from liability with consent from the Ecuadorian Government.[113]

Specifically, the complaint claimed 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 stated that it must adopt all the measures for the protection of the flora, the fauna and other natural resources and to avoid contamination of the air, water and soil.[114]

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108. Lyons, *supra* note 12, at 716 (quoting *Aguinda*, 303 F.3d at 478-79).

109. Kimerling, *supra* note 15, at 628.

110. *Id.* at 628-29, 631-32.

111. Kevin Koenig, *ChevronTexaco on Trial*, WORLD WATCH, Jan.-Feb. 2004, at 11 (quoting plaintiffs' counsel John Bonifaz).

112. *See* Complaint, *supra* note 5.

113. *See id.* at 22-25.

114. *Id.* § IV(7).

The complaint also alleged breaches of the 1971 Hydrocarbons Law, which mandated adoption of "all the necessary measures to protect the flora, fauna, and other natural resources" during "oil exploration and exploitation activities."[115] Finally, the complaint alleged that Texaco's operations violated the Law for Prevention and Control of Environmental Contamination, published March 31, 1976, which "prohibits the discharge of sewer waters or residual waters that may contain contaminating elements harmful to the human health or to the fauna, the flora . . . , to rivers or water streams . . . as well as the filtration into the soil."[116] The petition pointed to epidemiological studies,[117] environmental samples, and operation and production practices to pray for a full remediation of the environment in the concession area and for costs of health supervision and social redress.[118]

Chevron's amended answer denied all of the complaint's allegations and defended on several grounds.[119] First, Chevron claimed that ChevronTexaco was not a proper party to the lawsuit because the alleged wrong-doing was 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.[120] 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.[121] Chevron also contended that the lawsuit is based on the 1999 Environmental Management Act, which does not retroactively apply to TexPet's conduct,[122] though plaintiffs argue their claims are based on common law tort actions and the general Ecuadorian environmental decrees.[123] Finally, Chevron's defense has been based on the partiality of the court, its

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115. *See id.* § IV(8)(a) (citing L. de Hidrocarburos [Law of Hydrocarbons] (R.O. 1971, 322) (Ecuador)).

116. *Id.* § IV(8)(b) (citing Law of Prevention & Control of the Environmental Contamination (R.O. 1976, 374) (Ecuador)).

117. 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. MIGUEL SAN SEBASTIÁN & JUAN ANTONIO CÓRDOBA, "YANA CURI" REPORT: THE IMPACT OF OIL DEVELOPMENT ON THE HEALTH OF THE PEOPLE OF THE ECUADORIAN AMAZON 11 (Kristen Keating trans., 1999).

118. *See* Complaint, *supra* note 5, § VI; *supra* Part II.C.

119. *See* Petition To Dismiss, Maria Aguinda Salazar et al. v. ChevronTexaco Corp., No. 002-2003 (Super. Ct. of Nueva Loja Oct. 8, 2007) (Ecuador), *available at* http://www.texaco.com/sitelets/Ecuador/docs/petitiontodismissen.pdf.

120. *Id.* at 18-20.

121. *See id.* at 18.

122. *See id.* at 10.

123. Complaint, *supra* note 5, § V.

appointed expert, and interference from the pro-plaintiff Correa Government as denying it a fair trial and due process under the Ecuadorian Constitution.[124] The most severe of these allegations regarding the partiality of the tribunal and of the court-appointed expert are discussed in the following Subparts.

A. The Trial

The Ecuadorian civil trial was divided into three phases: inspection, damages assessment, and the decision on the scale of the culpability and remediation.[125] During the inspection phase, under Ecuadorian law, the judge personally investigates evidence to determine if environmental contamination was present at particular well sites that contained former Consortium oil production facilities.[126] 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.[127] During the second phase, an independent expert determines the extent of, causation for, and amount of damage resulting from any environmental contamination found.[128] The expert relies on scientific data gathered in the phase one inspections.[129] 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.[130] In the final phase, the judge determines the scale of the cleanup. During the trial, it became evident that Texaco and the Consortium were aware of some of the environmental damage caused by the use of unlined pits and subsequent spills. For example, the plaintiffs submitted a letter from 1980 written in response to a request from the Ecuadorian government to look into lining wastewater pits in that year.[131] "Texaco officials told state energy officials that lining pits—a precaution against leaks that [was] common in the United States—would be prohibitively expensive."[132] Chevron argued that dumping wastewater was "common practice" in the past and with the large rivers in the Oriente, wastewater dissipated within a few

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124. *See id.* at 1-2.

125. *See* Steven R. Donziger, *Rainforest Chernobyl: Litigating Indigenous Rights and the Environment in Latin America*, HUMAN RIGHTS BRIEF, Winter 2004, at 3-4.

126. *Id.* at 3.

127. *Id.*

128. *Id.* at 4.

129. *See id.*

130. Langewiesche, *supra* note 41, at 229.

131. Juan Forero, *In Ecuador, High Stakes in Case Against Chevron*, WASH. POST, Apr. 28, 2009, at A12.

132. *Id.*

hundred yards making any credible sampling traceable to their dumping impossible.[133] Another internal memo "instructed Texaco officials in Ecuador to report only spills that attracted the attention of the news media or regulators."[134]

1. Investigation Phase

The court began scheduling inspections in the fall of 2004.[135] At the start of the trial, 122 inspection sites were listed, mostly on request by the plaintiffs—Chevron had requested thirty-six. Each inspection was conducted by the judge, attorneys on both sides, and their technical teams.[136] The parties heard about the site and the history of oil operations there, including PetroEcuador's continued operations. Both parties' experts also took samples of each site.[137] 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.[138] The plaintiffs contend that, scientific data from the sites aside, 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.[139]

By 2007, only forty-five 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 the judge in particular. Specifically, Chevron claimed that stopping the judicial inspections and beginning expert determination amounted to allowing the plaintiffs to waive their burden of proof and was a denial of due process and justice.[140] The judge agreed that enough data had been collected to warrant moving to the next phase of the trial.[141]

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133. Maass, *supra* note 1, at 105 (quoting Rodrigo Perez—Chevron's subsidiary's chief legal adviser in Ecuador).

134. Forero, *supra* note 131.

135. *See* Donziger, *supra* note 125, at 4.

136. *See id.*

137. Langewiesche, *supra* note 41, at 291.

138. *See* Petition To Dismiss, *supra* note 119, at 25-27.

139. *See* Maass, *supra* note 1, at 118.

140. *See* Petition To Dismiss, *supra* note 119, at 1-2.

141. *See id.* at 1.

2. 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.[142] 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 Cabrera to direct a team to produce a report on the full consequences in the concession area where Texaco operated.[143] Cabrera was charged with evaluating the total environmental damages, specifying the origin of such damages, detailing the current existence of substances affecting the environment from that damage, "[s]pecify[ing] the technical work . . . [required] to reclaim the environment and restore it," and providing a court-sanctioned estimate of the cleanup costs.[144]

3. Cabrera's First Report

Cabrera issued his first report on March 24, 2008, finding that "[t]he primary cause of the contamination [was] the oil exploration and development operations conducted by TexPet,"[145] whose operations left behind the primary sources of contamination, crude petroleum and production waters.[146] Further, he determined that the contamination in the concession area exacted considerable damage to the ecosystem and indigenous groups, and caused adverse health effects to people living immediately near wells, including "cancer, death by cancer, and spontaneous abortions."[147] Cabrera also addressed Texaco's 1995-1998 remediation and concluded that the methods used left large amounts of contamination "above environmental standards, and even above the standards in the remediation contract."[148]

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 including "unjust enrichment," which adds another $8.3 billion.[149] Cabrera estimated the cost of remediating all soils to below 1000 ppm

142. *See* Donziger, *supra* note 125, at 4.
143. *See* Court Expert Summary Report, *supra* note 8, at 1.
144. *Id.* at 2-3.
145. *Id.* at 3.
146. *Id.*
147. *Id.* at 3-4.
148. *Id.* at 4.
149. *Id.* at 6.

TPH to be $1.7 billion,[150] compared with the $40 million that Texaco spent in the mid-1990s. Compensation for losses for excessive cancer deaths was assessed at nearly $3 billion.[151] The damages assessment also included "other reparations," including $480 million to "[p]rovide a health care system for the people of the region" and another $430 million to "[i]mplement a land, food, and cultural recovery program."[152] Unjust enrichment was defined as the money "Texaco saved . . . by not managing oil wastes properly, by not reinjecting produced water, by constructing defective waste pits, and by burning gases instead of [re]capturing [them]."[153] Chevron and other commentators seized upon these assessments as being far outside the scope of the independent expert's charge and as evidencing bias against the defendants.[154]

4. Cabrera's Revised Report

In November 2008, Cabrera revised his report upward to a range of $18.1 billion to $27.3 billion including unjust enrichment.[155] The revised estimate increased compensation for cancer deaths to $9.5 billion taking into account new demographic and epidemiological data estimating 1401 "excess cancer deaths" with each loss of life valued at $6.8 million, the same number used by the United States Environmental Protection Agency.[156] 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.[157]

In response to the revised report, Chevron has declared the trial "irretrievably politicized" by the plaintiffs and the Government of Ecuador.[158] It has balked at the $27 billion damages estimate contending that it is "roughly half of Ecuador's gross domestic product" and aims "to

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150. *Id.* at 4.

151. *Id.* at 5. 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 approximately 59% of people living less than 250 meters from a well reporting at least one cancer in the family. *Id.* at 30-31.

152. *Id.* at 5.

153. *Id.* at 6.

154. *See* Chevron's Rebuttal to the Supplemental Expert Report, Executive Summary at 1, Maria Aguinda Salazar et al. v. ChevronTexaco Corp., No. 002-2003 (Super. Ct. of Nueva Loja 2008) (Ecuador), *available at* http://www.chevron.com/documents/pdf/cabrerarebuttalexecutive summary.pdf.

155. *See $27 Billion Damages Assessment*, CHEVRONTOXICO, http://chevrontoxico.com/about/historic-trial/27-billion-damages-assessment (last visited Nov. 12, 2012).

156. *See id.*

157. *See id.*

158. Chevron's Rebuttal to the Supplemental Expert Report, *supra* note 154, at 1.

address every alleged environmental, health, and social issue in the Oriente today based upon the operations of an oil consortium that ended 17 years ago."[159] Chevron also complained 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.[160]

Chevron has also produced evidence from secret recordings and outtakes from *Crude* to show that Cabrera was not indeed independent.[161] Instead, Chevron alleged 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.[162] In addition, Chevron has produced evidence showing that the similarities between the plaintiffs' environmental consulting company, Stratus Contractors, and Cabrera's report show that the Cabrera's report itself was ghostwritten by Stratus Contractors, who then "verified" his findings.[163] Those issues are central in Chevron's RICO filing, discussed in the following Subparts.

B. 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. The plaintiffs sought to paint Chevron's tactics as an attempt to run out the clock and delay justice indefinitely until the indigenous plaintiffs give up. The plaintiffs have also accused Chevron of trying to use pressure tactics and of having the executive branch intervene in 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).[164] Chevron hoped to use the trade preferences

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159. *Id.*

160. *Id.*

161. *Crude* is an American documentary produced by Joe Berlinger that followed the *Aguinda* case in Ecuador. It features interviews with plaintiffs' and defendants' counsel, as well as President Rafael Correa. In 2010, Judge Lewis Kaplan ordered Berlinger to turn over more than 600 hours of footage and outtakes to Chevron. *See* Dave Itzkoff, *Judge Rules that Filmmaker Must Give Footage to Chevron*, N.Y. TIMES ARTSBEAT, May 6, 2010, http://artsbeat.blogs.mytimes.com/2010/05/06/judge-rules-that-filmmaker-must-give-footage-to-chevron/.

162. *See* Amended Complaint at 50-51, Chevron Corp. v. Donziger, No. 11 CV 0691 (S.D.N.Y Feb. 1, 2011).

163. *Id.* at 96.

164. *See* Jim Lobe, *Chevron Fails in Effort to Lift Trade Benefits*, INTER PRESS SERV. NEWS AGENCY, July 2, 2009, http://www.ipsnews.net/2009/07/us-ecuador-chevron-fails-in-effor-to-lift-trade-benefits.

to exert leverage over Ecuadorian President Rafael Correa to settle the case.[165] The lobbying effort was met with condemnation by several Democratic lawmakers who asked the United States Trade Representative not to interfere in private litigation.[166] 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.[167]

Chevron argued that the trial in Ecuador is no longer impartial. Chevron pointed to statements made by President Correa to the plaintiffs that they have the "full support" of the President.[168] Correa has also invited "the whole world [to] be witness to the atrocities Texaco caused."[169] Chevron has also attacked the trial itself as being corrupt and a sham.[170] In September 2009, Chevron won the recusal of Judge Nuñez, who was overseeing the last part of the trial, on corruption allegations and then the recusal of Judge Ordonez who had taken over for Judge Nuñez's replacement Judge Zambrano, for failure to investigate collusion between the plaintiffs and Cabrera.[171] Chevron won Judge Nuñez's recusal after it released secret video recordings between a company contractor and Judge Nuñez.[172] Chevron claimed the recordings showed Judge Nuñez saying that Chevron was guilty of polluting the environment.[173] 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.[174] Chevron claimed that Judge Nuñez, who was not present at the meeting, was to receive a third of the money.[175] Judge Nuñez vigorously denied that he disclosed his ruling or that he was part of a bribery scheme and claimed

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165. *Id.*

166. *See* Braden Reddall, *U.S. Senators Seek Chevron/Ecuador Trial Without U.S. Meddling*, REUTERS, June 26, 2009, http://www.reuters.com/article/2009/06/27/chevron-ecuador-idUSN2635126920090627.

167. *See* Lobe, *supra* note 164.

168. Chevron's Rebuttal to the Supplemental Expert Report, *supra* note 154, at 1.

169. *See* Bret Stephens, *Amazonian Swindle*, WALL ST. J., Oct. 30, 2007, at A18 (quoting President Rafael Correa).

170. *See id.*

171. *See* Simon Romero & Clifford Krauss, *Under Pressure, Ecuadorean Judge Steps Aside in Suit Against Chevron*, N.Y. TIMES, Sept. 5, 2009, at A8.

172. *See* Karen Gullo & Stephan Kueffner, *Ecuadorean Judge Steps Down in Chevron Amazon Suit*, BLOOMBERG, Sept. 4, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVa3YWX4h0JE.

173. *Id.*

174. *Id.*

175. *See id.*

that the videos were manipulated and edited.[176] The tapes were far from clear on both points. However, Judge Nuñez agreed to "recuse himself to avoid additional delays or attempts by Chevron to undermine the proceedings" as a result of the allegations.[177]

Even though 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.[178] Plaintiffs' counsel responded to these allegations by pointing to Texaco's ten "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.[179]

V. THE RULING AND NEXT STEPS

On February 14, 2011, Presiding Judge Zambrano issued an $18.2 billion judgment in favor of the plaintiffs in Lago Agrio.[180] Chevron appealed the judgment to the first instance appellate court, which under Ecuadorian law, automatically stays its enforcement.[181] Chevron is pursuing a strategy to challenge the entire proceeding and to block enforcement of the judgment abroad since it has no assets in Ecuador.[182] Chevron's efforts consist primarily of charging the Ecuadorian plaintiffs and their U.S. lawyers with fraud and attempting to force the Ecuadorian Government to dismiss the ruling under the BIT "between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment . . . , incorporating by reference the 1976 UNCITRAL Arbitration Rules."[183]

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176. *See id.*

177. *Id.*

178. *See* Press Release, Chevron Corp., Chevron Appeals Illegitimate Ruling in Ecuador (Jan. 20, 2012), http://www.chevron.com/chevron/pressreleases/article/01202012_chevronappealsillegitimaterulinginecuador.news.

179. *See Ecuadorians Hit Chevron with $18 Billion Enforcement Action in Canada, Says Amazon Defense Coalition*, BLOOMBERG, May 30, 2012, http://www.bloomberg.com/article/2012/05-31/ahfqVuQdewhQ.html.

180. *See* Maria Aguinda Salazar et al. v. ChevronTexaco Corp., No. 002-2003 (Sucumbíos Provincial Ct. of Justice of Nueva Loja Feb. 14, 2011) (Ecuador).

181. *See* Press Release, *supra* note 178.

182. *See* Press Release, Chevron Corp., Chevron Statement on Ecuador Judgment Enforcement Action (May 30, 2012), http://www.chevron.com/chevron/pressreleases/article/05302012_chevronstatementonecuadorjudgmentenforcementaction3850_25gnews.

183. Order for Interim Measures at 3, Chevron Corp. v. Ecuador, No. 2009-23 (Perm. Ct. Arb. Feb. 9, 2011), *available at* http://www.chevron.com/documents/pdf/Ecuador/TribunalInterimMeasuresOrder.pdf.

Chevron will also challenge the enforcement judgment outside of Ecuador if the plaintiffs bring an enforcement action.

A. Considerations for Foreign Enforcement Actions in the United States

If Chevron exhausts its appeals in Ecuador, the plaintiffs will try to have the judgment enforced in countries where Chevron has assets, because Chevron has no seizable assets in Ecuador. If enforcement actions are filed in the United States, it is unclear how the U.S. courts will honor an adverse judgment against Chevron from the Ecuadorian courts.[184] 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. courts.[185] Courts have sometimes conditioned forum non conveniens dismissal on an agreement to pay whatever final judgment the foreign jurisdiction renders.[186] 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 Ecuadorian court."[187]

Since the late nineteenth century, jurisdictions in the United States have generally recognized foreign judgments under the doctrine of comity.[188] Today, most states have adopted the Uniform Foreign Money-Judgment Recognition Act (UFMJRA) or equivalent state statute.[189] 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.[190] 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 compatible with the requirements of due process of law.'"[191] States may also choose not to

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184. *See* Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 616-17 (2008).

185. *See* Ben Casselmen, *Chevron Expects to Fight Ecuador Lawsuit in U.S.*, WALL ST. J., July 20, 2009, at B3.

186. See Heiser, *supra* note 184, at 617.

187. Brooke Masters, *Case in Ecuador Viewed As Key Pollution Fight: U.S. Legal Team Suing ChevronTexaco*, WASH. POST, May 6, 2003, at E1.

188. *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

189. *See* Heiser, *supra* note 184, at 634-35.

190. *See id.* at 635 (quoting UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3, 13 U.L.A. 49 (2002)).

191. *Id.* (quoting UNIF. FOREIGN COUNTRY MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(1), 13 U.L.A. 59 (2002)).

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.[192] Defendants generally challenge adverse foreign judgments "on public policy or due process grounds under the [UFMJRA]."[193]

Texaco submitted to Ecuadorian jurisdiction when it petitioned for forum non conveniens. The relevant issues to enforce judgment will be whether the Ecuadorian trial denied Texaco 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 United States, but that "foreign procedures must be 'fundamentally fair' and not offend against 'basic fairness.'"[194] 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.[195]

A substantive challenge to a foreign judgment falls under the exception that the cause of action under which the judgment was rendered is repugnant to the public policy of the enforcing state.[196] Courts cannot refuse to enforce a judgment simply because the *judgment* offends the state's public policy; instead, it can only refuse to enforce a judgment if the substantive law of the foreign court is contrary to the public policy of the state.[197] For example, U.S. courts have refused to recognize judgments for libel suits where the foreign libel law was repugnant to the First Amendment,[198] but have enforced causes of action that would not be recognized in the enforcement forum in cases involving less fundamental rights.[199]

The *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 Chevron fails to carry that burden, the action will assuredly add years to the already eighteen-year-old litigation.

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192. UNIF. FOREIGN COUNTRY MONEY-JUDGMENTS RECOGNITION ACT § 4(c)(3), 13 U.L.A. 26 (Supp. 2012).

193. Kenney, *supra* note 85, at 863 n.29 (citing Heiser, *supra* note 184, at 635-57).

194. *See* Heiser, *supra* note 184, at 640 (internal quotations omitted).

195. *See id.* at 639 (citations omitted).

196. *See id.* at 653 (citations omitted).

197. *Id.* at 653-54 (citations omitted).

198. *See id.* at 654 (citations omitted).

199. *See id.* (citations omitted).

B. Chevron's RICO Case and Evidence of Fraud

On February 1, 2011, less than two weeks before the Ecuadorian ruling, Chevron filed a RICO (Racketeer Influenced and Corrupt Organizations) suit 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 the result of fraud and therefore unenforceable"[200] in the Southern District of New York. Chevron points to outtakes from the documentary *Crude*, allegedly showing plaintiffs' attorney Steve Donziger and Stratus Consulting, Inc. colluding with Cabrera to ghost write the Cabrera damages report.[201] One week later, Judge Kaplan of the Southern District issued a temporary restraining order that blocked the RICO defendants "from . . . receiving benefit from, directly or indirectly, any action or proceeding for recognition or enforcement of any judgment entered against Chevron . . . in Ecuador."[202] On March 7, the Court granted a preliminary injunction barring Ecuador from "receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the judgment" rendered against Chevron.[203] 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."[204] The Second Circuit reversed the district court's decision, vacated the preliminary injunction, and remanded to the district court with instructions to dismiss Chevron's declaratory judgment claim.[205]

C. 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

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200. Press Release, ChevronTexaco, Chevron Files Fraud and RICO Case Against Lawyers and Consultants Behind Ecuador Litigation (Feb. 1, 2011), http://www.chevron.com/chevron/pressreleases/article/02012011_chevronfilesfraudandricocaseagainstlawyersandconsultantsbehindecuadorlitigation.news.

201. *See* Amended Complaint, *supra* note 162, at 58-59.

202. Order on Plaintiff's Motion for Temporary Restraining Order at 2, Chevron Corp. v. Donziger, No. 11 Civ. 0691 (S.D.N.Y. Feb. 9, 2011).

203. Opinion 100038 Granting in Part and Denying in Part Motion for Preliminary Injunction, Chevron Corp. v. Donziger, No. 11 Civ. 0691 (S.D.N.Y. Mar. 7, 2011).

204. *Id.* at 77.

205. Chevron Corp. v. Naranjo, 667 F.3d 232, 234 (2d Cir. 2012).

Chevron in the Lago Agrio case.[206] 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 United States, which concerns the encouragement and reciprocal protection of investments, alleging that the Ecuadorian government has failed to provide impartial tribunals.[207] In an unrelated BIT ruling on March 30, 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.[208] The *Aguinda* plaintiffs appealed to the Second Circuit to stop Chevron from pursuing the arbitration since Chevron had earlier agreed to "satisfy" any Ecuadorian judgment.[209] 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.[210]

D. Next Steps

As the appeals process gets under way in Ecuador, a new round of litigation and arbitration may be 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 comes through the U.S. courts. The plaintiffs have also proceeded with enforcement actions in Canada and Brazil, which are not contingent on collateral litigation in the United States.

E. Continuing Problems in the Oriente

Regardless of when the case against ChevronTexaco concludes, or what the conclusion is, it is certain that the Oriente will continue to suffer. It is clear that "PetroEcuador is not blameless," and "[c]ompany and government officials acknowledge that the state firm" also polluted

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206. Order for Interim Measures, *supra* note 183, at 3.

207. *See* Claimants' Notice of Arbitration at 15, Chevron Corp. v. Republic of Ecuador, Case No. 2009-23 (Perm. Ct. Arb. Sept. 23, 2009).

208. Braden Reddall, *Chevron Wins an Ecuador Claim, Awaits Major Ruling*, REUTERS, Mar. 31, 2010.

209. *See* Decision at 6, 8-9, Ecuador v. Chevron Corp., No. 10-1020-CV(L) (2d Cir. Mar. 17, 2011).

210. *See id.* at 4.

waterways and had spills from its pipelines after assuming control.[211] PetroEcuador's own records indicate that it had "801 spills between 1990 and 2004 and a total spill volume of 1.9 million gallons."[212] 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.[213] Whatever judgment comes against Chevron will still feel unsatisfactory to environmental observers due to the Ecuadorian government, PetroEcuador, and subsequent operators continuing to operate with impunity for their part in the damage.

Meanwhile, there is fairly strong support for Chevron's claim that the Ecuadorian *Aguinda* trial has been marked by at least some foul play, which makes the outcome feel unsatisfactory regardless of the merits of the plaintiffs' case. Much of the evidence of corruption and foul play in the case come from outtakes of *Crude*, which show instances of the plaintiffs' lawyers interfering with the independent damage inspector, extralegal tactics to pressure judges, and multiple *ex parte* meetings by plaintiffs' lawyers while Ecuadorian judges made important appointments with regard to independent experts and damage assessments.[214]

Further, the problem of shoddy environmental performance in oil exploitation is not restricted to Ecuador. ChevronTexaco claimed that their waste disposal techniques were consistent with industry practice in other tropical developing countries such as Brazil, Columbia, Nigeria, and Indonesia.[215] It is telling that their standards were consistent with their own practices in those nations and not developed countries.[216] 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 the companies increasingly add indemnity and arbitration provisions to resource extraction contracts similar to the Joint Venture Agreement and Remediation Agreement between Texaco and the

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211. Forero, *supra* note 132.

212. Petition To Dismiss, *supra* note 119, at 5.

213. *See* Ilan Brat, *Repsol To Sell Ecuador Oil Affiliate to Sinopec*, WALL ST. J. (Aug. 1, 2012), http://online.wsj.com/article/BT-CO-20120801-705530.html.

214. *See generally* Amended Complaint, *supra* note 162 (detailing questionable plaintiffs' lawyers' legal tactics).

215. Lyons, *supra* note 12, at 710.

216. *Id.*

Ecuadorian Government.[217] Moreover, developing countries can be reluctant to press environmental tort claims for fear of chilling future foreign investment.[218] 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.[219]

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[220] 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 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 Part addresses whether the *Aguinda* action effectively provides redress for the harmed and deterrence for the perpetrators.

A. Effective Restitution Goal

Assuming that the plaintiffs succeed in Lago Agrio, the judgment may still fail to be an effective redress for those injured for two main reasons: (1) the parties bringing the suit may not be representative of the injured, and (2) techniques employed by sophisticated defendants to run

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217. *See* Kenney, *supra* note 85, at 859-60 n.15; *see also* Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 518-20 (2008).

218. *See* Brief Amicus Curiae of the Republic of Ecuador, Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996) (No. 93 Civ. 7527), 1994 WL 16188165 (government stresses the importance of foreign investment and oil development to Ecuador's economic policies in opposing the *Aguinda* action).

219. *See* Kenney, *supra* note 85, at 882.

220. The *Aguinda* case in Ecuador is not officially a "class action" because class action procedures do not exist in Ecuador. However, the case in the United States was initially a class action, and Frente's suit is comprised of a group of plaintiffs.

out the clock unfortunately allow for many potential plaintiffs to pass away without ever seeing effective restitution.

Those whose rights are allegedly being asserted in the *Aguinda* suit are the five indigenous people of the area: the Cofán, Huaorani, Kichwa, Secoya, and Siona, as well as colonists in the area.[221] However, the forty-six-member class includes only colonists and Kichwa and Secoya Indians with no Cofán, Huaorani, or Siona among the plaintiffs.[222] Critics contend that "no relief is requested directly for the affected communities or indigenous peoples," but rather 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 their judgment rather than directly to the affected communities.[223]

Frente was founded in 1994 by a group of colonists in Lago Agrio to administer money from the *Aguinda* lawsuit.[224] Judith Kimerling, who has worked extensively with indigenous groups in the Oriente, contends that Frente is not a plaintiff and "the decision to award the relief to the NGO . . . was apparently made by the lawyers, without consulting the plaintiffs and affected communities."[225] However, plaintiffs' lawyers point to the fact that few cases have ever had such broad popular support in the area where they are being conducted.[226] Graham Erion, an attorney for the plaintiffs, maintains that the Assembly of Afectados, whose members are chosen or elected by the affected tribes, manage strategy and make all dispositive decisions for the case.[227] He also points out that much of the award will benefit the local area through healthcare spending and will establish indigenous cultural institutions.[228] The relief sought was for remediation, but indigenous groups are to get a share of punitive damages.[229]

Nevertheless, 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 being excluded from the decision-making process by governments, companies, environmental NGOs and others.[230] In July 2003, ninety plaintiffs selected directly by Huaorani and

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221. *See* Kimerling, *supra* note 15, at 631.
222. *See id.*
223. *Id.*
224. *See id.* at 632.
225. *Id.* at 631-32.
226. Telephone Interview with Graham Erion, Co-Counsel for Plaintiffs (July 13, 2012).
227. *Id.*
228. *Id.*
229. *Id.*
230. Kimerling, *supra* note 73, at 479.

Kichwa communities filed a lawsuit against ChevronTexaco in the Superior Court of Justice of Tena.[231] They sought to vindicate the same rights that were purportedly being vindicated in the *Aguinda* case.[232] The case was dropped due to jurisdictional reasons and because the plaintiffs could not afford the costly litigation.[233] 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.[234] This strife is to be expected in such a long-spanning, large case, but by and large, Frente does maintain popular support in Ecuador. However, this points to a flaw in the *Aguinda* class action 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–even in a case with broad popular support.

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.[235] *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 transparent, democratic decision making and prior informed consent principles[236] from the outset[237] 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 seventeen 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 been bogged down in both the United States and Ecuador over jurisdictional issues while damage in the Oriente continues. In its 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

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231. *Id.* at 478.
232. *See id.* at 478-79.
233. *See id.* at 480.
234. *See id.* at 478, 483.
235. *See id.* at 505-07.
236. *Id.* at 507.
237. The Assembly of Afectados was not formed until the case was brought back to Ecuador.

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, because the chemicals from Texaco's actions spread and cause more 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* cases will provide.

B. Effective Deterrence Goal

The *Aguinda* cases will provide a stronger incentive 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, deterring similar future actions. 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 continue behaving in the same way while using Chevron as a scapegoat.[238] 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, John Ruggie, the United Nations Special Representative for Business and Human Rights, produced a framework to address the human rights implications of the acts of multinational corporations abroad.[239] One point of focus of the report was that many countries' governments themselves are characterized by pervasive discrimination against indigenous peoples,[240] and indeed, at the time of oil discovery, Ecuador's policy towards the indigenous people in the Oriente was one of colonization and

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238. Chevron can counterclaim PetroEcuador for contribution to the judgment, but the plaintiffs have not named it as a party.

239. *See* John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007).

240. *See id.* at 829-30.

assimilation.[241] 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.

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*.[242] Moreover, the government of Ecuador would not have been able to extract oil without Texaco or another 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 currently affect many of the world's largest oil field operators[243] and a significant amount of oil field operations in developing countries.

It is evident that the *Aguinda* litigation is already affecting Chevron and causing it to change its practices. At its annual shareholders meeting in April 2006, representatives from "Trillium Asset Management offered a resolution . . . demanding itemized accounts of [Chevron's] spending in the Ecuador case."[244] 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 have begun to demand answers.[245] 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

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241. *See* Chris Jochnick & Nina Rabaeus, *Business and Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon*, 33 SUFFOLK TRANSNAT'L L. REV. 413, 429 (2010) (citing Kimerling, *supra* note 73, at 449).

242. *See* Kenney, *supra* note 85, at 878.

243. ChevronTexaco, ConocoPhillips, Halliburton, and ExxonMobil are based out of the United States.

244. Maass, *supra* note 1, at 115.

245. *See id.*

abroad in taking advantage of nonexistent environmental standards in a host country. That would put corporations on notice that they should at least abide by minimum standards regardless of whether foreign governments demand them.

C. Recommendation for a More Effective Regime

A more effective regime 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 the United States 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 and judicial reforms. Rather than opening the floodgates by dropping forum non conveniens entirely, I propose a two-step solution that lowers the barriers for these cases to be brought in the United States, while simultaneously, implicitly developing 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.[246] Corporations pursue these avenues to dismiss cases in the United States because they calculate 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, is costly.[247] International comity as grounds for dismissal is troubling because it gives host countries' governments a vetolike power 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 where 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* dismissal.[248] 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

246. *See supra* Part III.B.

247. *See Heiser*, supra note 184, at 609 n.4.

248. *See* Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y 1996), *vacated by* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998).

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 United States. There is "[a] substantial disparity . . . between Western countries and developing countries in the legal protection of the environment."[249] Unrepresentative governments, underdeveloped tort law, and other factors regarding the desire for foreign direct investment, inter alia, account for much of the disparity.[250] The process to correct these disparities will not happen overnight, and simply trying one-off cases in the United States 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 United States can begin to break the nexus of sophisticated field operators and unresponsive governments. U.S. courts, with their expertise in complex litigation, can begin to create a minimum standard 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.[251]

Should U.S. courts continue to broadly construe the availability of an alternative adequate forum and use forum non conveniens to dismiss cases, they should at least stipulate the 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 United States. The "compatible with the requirements of due process" inquiry of the UFMJRA is nearly the same as the threshold inquiry under forum non conveniens as to whether an alternative forum is "adequate," except now the inquiry is from the defendant's perspective.[252] For example, from 1992 to 2001, Texaco claimed numerous times that Ecuador was an adequate forum and could

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249. William G. Bassler & Yitzchok Segal, *Mediating International Environmental Tort Claims in the Shadow of the Alien Tort Claims Act*, 63 DISP. RESOL. J. 72, 74 (2009).

250. *See* Ruggie, *supra* note 239, at 826; *supra* Part II.B, III.A, V.E.

251. *See* Alexandra S. Wawryk, *Adoption of International Environmental Standards by Transnational Oil Companies: Reducing the Impact of Oil Operations in Emerging Economies*, 20 J. ENERGY & NAT. RESOURCES L. 402, 432 (2002) ("[T]he 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.").

252. *See* Heiser, *supra* note 184, at 639.

provide impartial proceeding to have the case dismissed from the United States. The ruling to dismiss that claim should now preclude Chevron's attempts to not 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 award.

Such a solution would also help provide more effective restitution by speeding up the process of redress. As discussed, 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."[253] Applying issue preclusion to the competency of foreign courts 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 United States where they have the assurance against such a massive judgment. Even if they make the calculation that submitting to foreign jurisdiction is worth the risk because plaintiffs will give up or because the defendants hold sway in that country, they will not be able to delay once the final judgment is made in the foreign jurisdiction.

D. Reforms in Deterrence and a Race to the Bottom

Regardless of *Aguinda*'s result, 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 "[n]o 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.

253. Kenney, *supra* note 85, at 874.

environmental statutes abroad),[254] 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 (API), and the API's commitment to environmental stewardship is part of the association's by-laws.[255]

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.[256] For courts, such a 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.[257] 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.

V. 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.[258] In many cases, those countries' courts offer no remedies to citizens injured by the actions of a foreign corporation due to a lack of institutions and procedures or corruption.[259] Plaintiffs wishing to hold U.S. companies accountable in U.S. courts also face the nearly impossible obstacles of the 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 unreceptive and procedures are cumbersome and costly; indeed the vast majority of cases dismissed for forum non conveniens never get filed

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254. Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 27 (2003).

255. Wawryk, *supra* note 251, at 405.

256. *See id.* at 406.

257. *See id.* at 432.

258. *See* Bassler & Segal, *supra* note 249, at 73.

259. *See* 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, 714 (2005) (discussing reasons plaintiffs end the litigation).

again in foreign courts.[260] Further, even if a case is brought abroad, challenges to the judgment bring the suits back to the United States for another costly and long legal battle as to the legitimacy of the foreign judgment.

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 United States. 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 in resource extraction, the availability of an "adequate alternative forum" should be construed less broadly and the United States 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 thirty years of oil extraction operations, affected plaintiffs have already spent over seventeen years in court with no end in sight. The action cannot be deemed successful from an effective remediation perspective because the delay in justice means 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 United States will drag the process on further. The case has, at least, been slightly more successful from a deterrence perspective and shareholders have already begun to 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. Doing so would both give clear *ex ante* guidelines for deterrence and speed the process of justice if cases are indeed brought.

Solely opening U.S. courts to litigate foreign actions would be insufficient to provide incentive to reform home countries' legal systems to protect their own people's rights. However, a balance must be struck

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260. *See* Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1388 (1991).

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 accountable to minimum standards regardless of the deal they may strike with host countries.