INDIGENOUS PEOPLES AND THE OIL FRONTIER IN AMAZONIA: THE CASE OF ECUADOR, CHEVRONTEXACO, AND *AGUINDA V. TEXACO**

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* In addition to the sources cited *infra*, this Article draws on the author's observations during regular visits since 1989 to oil field facilities and affected communities in Ecuador's Amazon region; participation in local, national, and international fora; and interviews and ongoing dialogue with local residents, oil company workers and executives, and governmental officials, including environment officials in successive Ecuadorian governments and some U.S. and European officials.

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I. Introduction

The discovery of commercial quantities of oil in the Amazon rainforest in Ecuador in 1967 by a consortium of foreign companies (Texaco and Gulf, both now part of ChevronTexaco)[1] was heralded as the salvation of Ecuador's economy, the

1. Both Gulf and Texaco are now part of Chevron Corporation. *See* Norsul Oil & Min. Co., Ltd. v. Texaco, Inc., 703 F. Supp. 1520, 1524 (S.D. Fla. 1988) (Chevron Corp. acquired Gulf Oil Corp. in 1983); Press Release,

product that would, at last, pull the nation out of chronic poverty and "underdevelopment." At the time, the national economy was based on agriculture, centered on the production and export of bananas.[2] The discovery of "black gold" fueled dreams of easy money, and oil quickly became the centerpiece of Ecuador's quest for modernization and progress.

Exports of Amazon Crude began in 1972, after Texaco completed construction of a 313-mile pipeline to transport crude oil out of the remote Amazon region, across the Andes Mountains, to the Pacific coast. The "first barrel" of Amazon crude was paraded through the streets of the capital, Quito, like a hero. In some neighborhoods, residents could get drops of crude to commemorate the occasion. After the parade, the oil drum was placed on an alter-like structure at the Eloy Alfaro Military Academy.[3]

But the reality of oil development turned out to be far more complex that its triumphalist launch. For indigenous peoples in the Amazon rainforest, the arrival of Texaco's work crews meant destruction rather than progress. Their homelands were invaded by outsiders with unrelenting technological, economic, and political power. The first ones came from the sky; over time, they dramatically transformed natural and

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Texaco, Texaco Stockholders Approve Company's Merger with Chevron (Oct. 9, 2001), http://www.chevron.com/news/archive/Texaco_press/2001/0/pr10_9c.asp; Press Release, ChevronTexaco, ChevronTexaco Corporation Changes Name to Chevron Corporation, Unveils a New Visual Image (May 9, 2005), http://www.chevron.com/news/press/2005/2005-05-09.asp (reporting that Texaco Inc. and Chevron Corp. merged in 2001 to form ChevronTexaco Corp. (ChevronTexaco); in 2005, ChevronTexaco changed its name to Chevron).

2. The other principal exports were cocoa and coffee. JOHN D. MARTZ, POLITICS AND PETROLEUM IN ECUADOR 157 (1978). As an exporter of agricultural products, Ecuador had long been subject to rounds of economic boom and bust. It was first incorporated into the world of international trade through cacao production; by the turn of the twentieth century, the export of cacao was the core of the national economy. *Id.* at 66-67. Unlike many Latin American nations, Ecuador did not participate in the process of industrialization spurred by import substitution policies in the 1930s. Efforts to move the country away from the dominant agro-exporting model began in the 1960s and initially focused on textiles and food products. Notwithstanding those efforts, Ecuador's economic axis remained banana production until the oil boom began. *Id.* at 122, 157.

3. Interview with Mariana Acosta, Executive Director, Foundation Images for a New World, in Quito, Ecuador (Mar. 3, 1994).

social environments. Their worlds changed forever, Amazonian peoples have borne the costs of oil development without sharing in its benefits and without participating in a meaningful way in political and environmental decisions that affect them.

In 1993, a class action lawsuit was filed against Texaco in federal court in New York, on behalf of indigenous and settler residents of Ecuador's oil fields who have been harmed by pollution from the company's operations. In 2002, the case, *Aguinda v. Texaco, Inc.*, was dismissed on the ground of forum non conveniens, in favor of litigation in Ecuador. The distrct court denied the plaintiffs a day in court here, ruling that the lawsuit belongs in Ecuador because it has "everything to do with Ecuador and nothing to do with the United States."[4] The Second Circuit Court of Appeals affirmed, subject to the condition that Texaco agree to submit to the jurisdiction of Ecuador's courts and waive defenses based on any statutes of limitation that expired between the date the lawsuit was filed and one year after the dismissal.[5]

This Article begins with a brief review of events leading to that lawsuit and an analysis of petroleum policy, Amazon policy, and environmental protection policy in Ecuador. The review calls into question the court's conclusion that the case has "nothing to do with the United States." A history of the litigation and related events follows. The Article then examines the application of the forum non conveniens doctrine. It concludes that application of the doctrine by the District Court and the decision to dismiss the lawsuit were colored by a series of detailed but questionable factual assumptions, including erroneous and unsupported findings about the history of litigation in Ecuador's courts, and rulings on material facts related to decisionmaking and control of the operations that caused the alleged injuries. It further concludes that the balancing of private and public interest factors by the court was uneven and did not take into account a number of factors that favored the

4. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001).

5. Aguinda v. Texaco, Inc., 303 F.3d 470, 478-79 (2d Cir. 2002). On remand, the district court conditioned dismissal on Texaco's agreement to submit to jurisdiction of Ecuador's courts and waive defenses based on statutes of limitations expiring between the date the case began and sixty days after dismissal. *Aguinda*, 142 F. Supp. 2d at 534, 539.

plaintiffs' choice of a U.S. forum. The Article concludes with some general observations and recommendations.

II. Governments and Policy in Ecuador

A. *Government Instability and Petroleum Politics*

Texaco's discovery of commercially valuable oil ignited an oil rush, and petroleum quickly came to dominate Ecuador's economy. The company named the first commercial oil field Lago Agrio, after an early Texaco gusher in Sour Lake, Texas; erected a one-thousand barrel per day (bpd) refinery that had been prefabricated in the United States; and expanded exploration and production operations deeper into the rainforest.[6] Production rose to more than two-hundred thousand bpd by the end of 1973; that same year, government income quadrupled.[7] By 1977, Ecuador's gross national product (GNP) had increased to $5.9 billion from $2.2 billion in 1971.[8]

At the time of Texaco's discovery (1967), Ecuador was governed by an interim president. In 1968, a popularly elected president, José Maria Velasco Ibarra, took office. A veteran caudillo, this was Velasco Ibarra's fifth presidency. After two years, he suspended the constitution and assumed dictatorial power. In 1972, he was removed by the military, amidst a wave of popular protest against the president.[9]

The coup continued what political scientist David Martz has aptly described as Ecuador's "historic pattern of ineffective government giving way beneath the burdens of economic adversity and diminishing political legitimacy."[10] Politics in Ecuador are volatile. Most political parties are weak, and alliances shift both within and between parties. Regimes change with considerable frequency, and even when regimes stay in

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6. Judith Kimerling, Amazon Crude 43 (1991).

7. Martz, *supra* note 2, at 4. Ecuador joined OPEC in 1973; in 1994, it withdrew from OPEC, reportedly "to ingratiate itself with the United States." Alberto Acosta, *Ecuador: Entre la ilusión y la maldición del petróleo* [*Ecuador: The illusion and the curse of oil*], Ecuador Debate, Apr. 2003, at 88. **R**

8. Martz, *supra* note 2, at 4. **R**

9. *Id.* at 6. Military officers "shared the national fervor over exaggerated dreams of the wealth of black gold." *Id.* at 89.

10. *Id.* at 66.

power, turnover at high levels is not uncommon.[11] This political heritage has not been fundamentally changed by petroleum and despite a strong statist tradition, as in other Latin American countries, the legitimacy of the political system in Ecuador is Aminimal."[12] Public confidence in political elites and government institutions, including the courts and bureaucracy, is low, and political parties and public officials are widely considered to be among the most corrupt in Latin America.[13]

The Government of the Armed Forces that ousted Velasco Ibarra was led by General Guillermo Rodríguez Lara and described itself as "revolutionary nationalist." Rodríguez Lara promoted the idea that, because the oil belongs to the State, it is a resource that can benefit all Ecuadorians and catapult the nation into modern times, unlike the earlier banana and cacao booms which had, for the most part, benefitted elites in the coastal region. Within a month of assuming power, the government outlined its philosophy and goals in a document entitled *Philosophy and action plan of the revolutionary nationalist Government of Ecuador*. It described the country as "unjust and

11. For example, between 1830, when Ecuador became a republic, and 1895, twenty-one individuals and juntas occupied Ecuador's presidency for a total of thirty-four times; only six completed their constitutional term of office. DAVID CORKILL & DAVID CUBITT, ECUADOR: FRAGILE DEMOCRACY 10 (1988). The 1925-1947 period was even more tumultuous, with no fewer than twenty-three different heads of state catapulted in and out of power. During 1948-1960, three successive elected administrations completed their constitutional terms of office, but this apparent stabilization of democracy was followed by twelve years of volatility. President Velasco Ibarra, elected overwhelmingly in 1960 for a fourth non-consecutive term, was ousted in 1961 by his vice president, Carlos Julio Arosemena Monroy. Arosemena, in turn, was removed from office by a military junta in 1963. Three years later, the junta's collapse led to a provisional government and new Constituent Assembly. That Assembly chose the president who was in power when news of Texaco's discovery became public. MARTZ, *supra* note 2, at 5-6. R

12. *Id.* at 5. However, as discussed *infra*, Ecuadorian institutions had very little influence or presence in the Amazon at the onset of the oil rush. The discovery of oil reserves made the "conquest" of that region a national imperative; as a result, petroleum led to fundamental political change in the territories of indigenous Amazonian peoples because the reach and influence of the national political system was extended into the oil frontier.

13. *See, e.g.*, Transparency International, Transparency International Corruption Perceptions Index 2003 (Oct. 7, 2003), *available at* http://ww1.transparency.org/pressreleases_archive/2003/dnld/cpi2003.pressrelease.en.pdf; *General, President, Managing Director*, THE ECONOMIST, Apr. 1, 1995, at 39.

backward," and harshly criticized prior governments and political elites:

> The constant failures of governments, absence of the people in centers of decision, the administrative immorality and inefficiency, the incapacity and insincerity of political parties and groups to interpret popular aspirations and the fundamental economic structure, have determined the existence of an unjust and backward society, with small oppressing groups and the majority oppressed.
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> Facing this situation the Armed Forces, responsible for the survival of the Ecuadorean State, on having assumed power [not] with leaders or caudillos but as an Institution, is prepared to implant a new national, ideological political doctrine, which permits it to carry through the substantial transformation in the socioeconomic and juridical order which the Republic demands.[14]

Not surprisingly, the document—which also promised "energetic action against socially and economically privileged groups"—disquieted traditional elites. In December 1972, the military government presented more concrete policies in an ambitious five-year development plan. The *Comprehensive Plan for Transformation and Development, 1973-77* set forth three fundamental objectives: national integration, improved living conditions, and strengthened economic output through the more rational use of natural resources. The plan was more reformist than radical; nonetheless, the government's promise of better conditions for Ecuador's marginal population continued to make traditional elites uneasy.[15]

At the onset of the oil boom, then, nationalist sentiments were stimulated in petroleum policymakers. The government claimed state ownership of oil resources, created a national oil company (Corporacion Estatal Petrolera Ecuatoriana, CEPE, now Petroecuador), reduced the size of areas that had been leased to Texaco-Gulf and other foreign companies, raised royalty and tax payments by foreign companies, and de-

14. MARTZ, *supra* note 2, at 97 (quoting REPÚBLICA DEL ECUADOR, FILOSOFÍA Y PLAN DE ACCIÓN DEL GOBIERNO REVOLUCIONARIO Y NACIONALISTA DEL ECUADOR: LINEAMIENTOS GENERALES (1972)). **R**

15. *Id.*

manded major investments in roads, airports, and other infrastructure. Petroecuador acquired stock in the Texaco-Gulf Consortium, and, in 1977, it became the majority shareholder after acquiring Gulf's remaining interests.[16] Texaco, however, 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.[17]

Before long, however, international economic realities asserted themselves, "disappointing" Ecuador's nationalistic policymakers.[18] Texaco and other international companies launched a counteroffensive to increase profitability and fend off the possible specter of nationalization. As the operator of Ecuador's commercial fields, Texaco's strategy of paralyzing selected oil field activities and its public relations campaign were particularly effective in putting pressure on the govern-

16. KIMERLING, AMAZON CRUDE, *supra* note 6, at 43; *see* MARTZ, *supra* note 2, at 99-105, 168. R R

17. On June 6, 1974—two years after oil production began—Petroecuador (then CEPE) acquired a 12.5% participating interest in the Texaco-Gulf Consortium from Texaco and a 12.5% interest from Gulf, giving it a 25% share of the stock in the consortium. Republic of Ecuador, Ministry of Energy and Mines, *Contrato para la ejecución de trabajos de reparación medioambiental y liberación de obligaciones, responsabilidades y demandas* [Contract for Implementation of Environmental Remedial Work and Release from Obligations, Liability and Claims] at 2 (May 4, 1995) (signed by Dr. Galo Abril Ojeda, Minister of Energy and Mines; Dr. Federico Vintimilla Salcedo, Executive President of Petroecuador; Dr. Rodrigo Pérez Pallares, Legal Representative of Texaco Petroleum; and Mr. Ricardo Reis Vega, Vice President of Texaco Petroleum) [hereinafter Remediation Contract]. The price of the acquisition was roughly $45 million; the new agreement meant that Petroecuador would receive roughly a quarter of the consortium's production, which it could then sell directly on the world market. MARTZ, *supra* note 2, at 111. Petroecuador (then CEPE) acquired Gulf's remaining share for $82,128,000,000, pursuant to an agreement that was signed on May 27, 1977, but effective from December 31, 1976. This made Petroecuador the majority shareholder in the new consortium, with 62.5%, and more than doubled the amount of crude it could sell directly on the world market. Texaco continued as the operator of the consortium and owner of 37.5% of the stock; Gulf left the country. *See id.* at 168, 186; Answer to the Complaint filed by Maria Aguinda Salazar v. ChevronTexaco Corp. at ¶ II.A.1.18, Superior Court of Nueva Loja [Ecuador] (Oct. 21, 2003) [hereinafter ChevronTexaco Answer], *available at* http://www.texaco.com/sitelets/ecuador/docs/2003oct21_dismiss.pdf. R

18. MARTZ, *supra* note 2, at 370. R

ment. Traditionalist domestic elites also favored the interests of foreign oil companies.[19]

As a result, when confronted by the realities of governance and the power of foreign oil companies and traditional elites, the Rodríguez Lara government vacillated over the extent to which petroleum policy should be reformist and nationalistic or traditionalistic in outlook.[20] After narrowly surviving a right-wing coup in 1975, Rodríguez Lara was removed from power in 1976 and replaced by a three-man junta, the Consejo Supremo de Gobierno (CSG). The CSG moved Ecuador toward economic policies favoring the status quo and negotiated a return to civilian rule in 1979.[21] By that time, there was growing alarm that, without renewed investment by foreign oil companies to find and develop new fields, Ecuador's oil reserves would soon be depleted. Thus, after initial gains in state control, the balance of power shifted from Ecuador to the international oil companies.[22]

As described by Martz in his study of petroleum policy in Ecuador through 1984, "leading policymakers often have less independent power than is believed," irrespective of who occupies the government and whether it is a civilian or military regime.[23] In Ecuador's relations and negotiations with foreign oil companies, he concludes: "Occasional spurts of more inde-

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19. *Id.* at 131-32, 144-154.

20. Martz defines traditionalistic policy as "committed to the status quo, where there are merely small marginal adjustments over time." By contrast, an "innovative" approach to policy "seeks genuine if gradual changes and reform while working within the system . . . . [It] reflects a different outlook toward the future . . . yet seeks its goals through what are also incremental policies." *Id.* at 18.

21. According to Martz, the armed forces were "outmaneuvered by civilian progressives led by Jaime Roldos Aguilera." *Id.* at 6. Roldos was elected president in 1979. *Id.* at 247. However, he experienced significant obstacles in implementing reformist policies, and less than two years into his term, he was killed in a plane crash. *Id.* at 249-257, 303. The vice president, Osvaldo Hurtada Larrea, an ally from a rival political party, assumed the presidency and served the remainder of the five-year term. *Id.* at 303. The next three presidents, Leon Febres Cordero, Rodrigo Borja Cevallos and Sixto Durán Ballén, each completed their (four-year) term of office; since Durán left office in 1996, no elected president has completed his term of office. *See infra* notes 284, 306 and accompanying text.

22. MARTZ, *supra* note 2, at 376. **R**

23. *Id.* at 395.

pendent and nationalistic petroleum policy were not sufficient to vitiate the multinationals' superiority."[24]

Although relations between Ecuador and Texaco (and other multinational oil companies) have not been static, at the core of those relationships lies a stark and enduring political reality: Since the oil boom began, successive governments have linked national development plans and economic policy almost exclusively with petroleum policy, and the health of the industry has become a central concern for the State. Domestically, the industry enjoys hegemony over the economy, both in terms of national development and as the primary source of revenue.[25]

But in the international arena, Ecuador is a relatively small producer. As a result, its petroleum policy does not significantly influence the international industry, and it is vulnerable to global market forces and pressures. Oil development has accentuated Ecuador's dependence on foreign export markets and foreign investment, technology and expertise.[26] At the same time, because oil is a nonrenewable resource, levels of production—and revenues—cannot be sustained without ongoing operations to locate and develop new reserves.[27]

The initial bonanza and easy money from Texaco's early finds were relatively short-lived, and, in 1977, only a "flood of

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24. *Id.* at 391-92. He predicts that this is "unlikely to change" in the near future:

> [S]o long as petroleum policy is Ecuador's dominant economic force . . . basic policy objectives will favor economic development over national sovereignty whenever the two are in serious conflict . . . . [A]bsent conditions of economic largesse, the State] will have little choice but to yield political control in order to maximize earnings and buttress the economy. . ..Barring the discovery of new major reserves, Ecuador will remain a marginal producer . . . . Whatever the regime, it will be hard-pressed to deal effectively with foreign corporations. It will be difficult at best to increase bargaining leverage . . . .

Id. at 391-92.

25. *See* U.S. ENERGY INFORMATION ADMINISTRATION, ECUADOR COUNTRY ANALYSIS BRIEF (2005) (Oil industry accounts for 40% of export earnings and one-third of tax revenues).

26. MARTZ, *supra* note 2, at 392. **R**

27. Investments in existing facilities are also needed to maximize production levels.

foreign borrowing" by the government sustained Ecuador's economic growth.[28] Because of its oil reserves, Ecuador has been able to secure massive loans for its size and has accumulated a staggering foreign debt over the years. Currently, payments on the debt account for more than 40% of the national budget.[29] Similarly, the benefits of oil development have not been well distributed, and the percentage of Ecuadorians living in poverty has remained stubbornly high. Government figures reported in the press in 1995 put the poverty level at 67% of the population, up from 47% in 1975 and 57% in 1988.[30] A recent World Bank analysis of Ecuador's development trends over the last two decades found that both poverty and the gap between rich and poor had increased, and in 2001, the richest fifth of the population received 64% of the national income while the poorest fifth received only 1.7%.[31]

By 1979, when the military ceded power to a constitutional civilian government, public officials were sadly proclaiming that the boom had ended. This lamentation reflected both a growing fear that oil reserves would be depleted within

28. MARTZ, *supra* note 2, at 207-08. **R**

29. Telephone Interview with Alberto Acosta, in Quito, Ecuador (July 3, 2003). The figure for 2003 was nearly 44% of the national budget. *Id.*

30. *En el Ecuador el 67% es pobre* [*In Ecuador, 67% Are Poor*], EL COMERCIO, Mar. 7, 1995, at C3. Nongovernmental figures put the poverty level as high as 75%. Diego Cornejo Menacho, *La Política de la Superlativa Pobreza* [*The Politics of Superlative Poverty*], EL COMERCIO, Sept. 21, 1993.

31. World Bank, Report and Recommendation of the President of the International Bank for Reconstruction and Development and the International Finance Corporation to the Executive Directors on a Country Assistance Strategy for the Republic of Ecuador ¶ II.B.11 (2003) [hereinafter World Bank Report on Ecuador], *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/ECUADOREXTN. Real economic growth per capita was negative in 1980-1989 (-0.6 percent) and zero in 1990-1999. *Id.* Income inequality is among the highest in the world. *Id.* ¶ II.A.9. In 1996, the wealthiest fifth of households received 53% of household income, while the poorest fifth received 5%. World Bank, Social Indicators of Development 1996, 100-01 (1996). In 1997, in a submission to the Organization of American States Inter-American Commission on Human Rights (IACHR) for a report on human rights in Ecuador, the government identified poverty as the most serious obstacle preventing Ecuadorians from enjoying the economic, social and cultural rights recognized in human rights instruments. Inter-Am. C.H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 Doc. 10 rev. 1 (Apr. 24, 1997) [hereinafter IACHR Report on Ecuador], *available at* http://www.cidh.org/publi.eng.htm.

a few years and problems in other economic sectors. In addition, domestic demand for petroleum products had risen sharply, reducing the amount of oil available for export and threatening to make Ecuador a net importer of petroleum if significant new reserves were not developed.[32]

Officials of the new civilian government echoed the laments of the former regime. The most serious long-term problem they faced was "the extended interruption" of new exploration and production activities, the result of unresolved conflict between the government and multinational oil companies.[33] Oil exploration and production is a "capital-intensive, technology-driven"[34] industry. Petroecuador had only limited capacity to develop oil on its own. The nation needed multinational corporations to find and develop new reserves. At the same time, however, the power of nationalist sentiment and the desire of Ecuadorian leaders not to appear as *entreguistas*—selling out national resources to international interests—made it difficult to resolve conflicts with foreign companies.[35] Meanwhile, the national economy continued to deteriorate, and the initial wave of prosperity receded among the middle sector and above. Inflation reduced purchasing power, and, in 1982, a debt crisis rocked the nation. Mass migration to the cities continued, and uprooted peasants added to "the already unmanageable concentration of unemployed and underemployed in the squalid slums of Quito and Guayaquil."[36]

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32. *See* MARTZ, *supra* note 2, at 4-5. **R**

33. *Id.* at 5.

34. The language in quotes is borrowed from CHEVRONTEXACO, UP TO THE CHALLENGE, 2002 ANNUAL REPORT 17 (stating that ChevronTexaco is "widely recognized as a partner of choice [for capital intensive, technology-driven exploration and production operations], a reputation built on trust, broad experience, exceptional skills in project management, outstanding technical resources, and the proven ability to run safe, reliable, environmentally responsible operations"), *available at* http://media.corporate-ir.net/media_files/NYS/CVX/reports/cvx_02_ar.pdf; *see also id.* at 5 (describing the energy industry as "technologically intensive," and the company as "technology led").

35. MARTZ, *supra* note 2, at 5. **R**

36. *Id.*at 5.

In 1982, Ecuador overhauled its hydrocarbon and tax laws in an effort to attract new foreign investment.[37] The first contract under the new law was signed with a subsidiary of Occidental Petroleum on January 25, 1985. For Petroecuador's then-General Manager, Patricio Ribadeneira, the agreement marked a "new phase in the history of Ecuadorean hydrocarbons," in which foreign participation in exploration and production would again be welcomed.[38]

Since that time, alarm over forecasts of the depletion of productive oil reserves has become a recurring theme in petroleum politics, as have the twin policy goals of expanded reserves and renewed exploration, and the corollary need to reform laws and policies to make Ecuador more attractive to foreign investors.[39] Thus, despite repeated, vociferous protests over the years by international oil companies about efforts by government officials to modify state contracts with foreign companies—and related calls for stable laws and implementation of the rule of law in Ecuador—international oil companies, at every juncture, have continued to pressure Ecuador to change laws and contracts to favor their interests.[40]

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37. *See Ley de Hidrocarburos* [Law of Hydrocarbons], *Decreto Supremo No. 2967,* R.O. 711 (Nov. 15, 1978), amended by DL 101, RO 306 (Aug. 13, 1982) (Ecuador) [hereinafter Law of Hydrocarbons].

38. MARTZ, *supra* note 2, at 355. **R**

39. Another recurring issue in petroleum politics is domestic pricing of petroleum products. For a discussion of pricing policies through the mid-1980s, s*ee generally id.* The issue remains highly contentious.

40. *See, e.g.*, *1990s Bright for Post-OPEC Ecuador*, OIL & GAS JOURNAL 56, 56-61 (Mar.1, 1993); Letter from Leslie Alexander, Ambassador, Embassy of the United States of America (Quito), to Melina Selverston, Director, Coalition for Amazonian Peoples and their Environment (Jan. 7, 1997) (on file with author); Letter from J. Curtis Struble, Charge' d'affaires, Embassy of the United States of America (Quito), to Melina Selverston, Director, Coalition for Amazonian Peoples and their Environment (Dec. 27, 1996) (on file with author); Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 COLUM. J. ENVT'L L. 289, 314-318, 341, 348-49 (2001) [hereinafter Kimerling, *International Standards*] (discussing Occidental's current contract with Ecuador, which was renegotiated in 1997 at the request of the company in order to take advantage of reforms to the Law of Hydrocarbons that were adopted in 1993 in a renewed effort to attract foreign investment; and Occidental's apparent strategy to freeze applicable environmental requirements and exempt the company from environmental laws and regulations that might be adopted in the future, despite assurances of continual improvement, voluntary compliance with standards that go beyond legal requirements, and compliance with Ecuadorian law).

Nearly four decades after the oil rush began, Ecuador continues to rely primarily on foreign companies to finance costly exploration and production activities and to transfer new technology. This economic and technological dependency, coupled with the importance of oil revenues and investment to the economy, give foreign companies enormous power in their relations with the government. Despite Ecuador's nominal authority as a sovereign nation, the actual power that government officials can—or believe they can—exercise over multinational oil companies is limited. In negotiations, government officials have prioritized the need to promote oil production, locate additional reserves, and maximize the state's share of revenues and participation in hydrocarbon development, including production and marketing. They have used the state's limited leverage primarily to exercise control over economic aspects of development, including production rates, state ownership of oil and gas reserves, financial audits of investments and expenditures, and guarantees to ensure that companies finance continued exploration in areas licensed to them.[41]

B. *Amazon Policy and the Rights of Indigenous Peoples*

Ecuador's policy of national integration essentially meant incorporating the Amazon region into the national economy and assimilating its native inhabitants into the dominant national culture. At the time the policy was launched, when the rush began, Ecuadorian institutions and Western civilization had very little influence or presence in the region. The discovery of black gold made the conquest of Amazonia a national

41. Kimerling, *International Standards*, *supra* note 40, at 336. Over the last decade, a number of studies have documented what is known as "the oil curse." The term refers to developing nations whose economies depend on the export of oil, and which are likely to suffer from high levels of corruption and other political and economic problems—such as poverty, low indices of human development and stunted democratic development—related to their sudden wealth and concentration of economic and political power. *See generally, e.g.*, ALAN H. GELB, OIL WINDFALLS: BLESSING OR CURSE? (1998) (study by World Bank economist finding that oil wealth in most developing countries had made conditions worse, contrary to popular assumptions); TERRY LYNN KARL, THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES XV (1997); Catholic Relief Services, *Bottom of the Barrel: Africa's Oil Boom and the Poor* (2003), *available at* http://www.catholicrelief.org/get_involved/advicacy/policy_and_strategic_issues/oil_report.cfm. R

imperative. The oil boom also provided infrastructure to penetrate remote, previously inaccessible areas and monies to support the Ecuadorian military and bureaucracy. Successive governments have continued to view the Amazon as a frontier to be conquered, a source of wealth for the State, and an escape valve for land distribution pressures in the highland and coastal regions.

Government policies in the 1970s and 1980s aggressively promoted internal colonization of the Amazon. The government promised land titles and easy credit to settlers who migrated to the region, cleared the rainforest, and planted crops or pasture—even though most soils in the region are not well suited to livestock or mono-crop production.[42] Government officials pledged to "civilize" native peoples and integrate them into the dominant national culture.

Not surprisingly, most indigenous peoples did not want to be "civilized" by outsiders. To them, "civilization" and assimilation meant rejecting their beliefs and way of life, lowering their standard of living, and entering the lowest social and economic levels of Ecuadorian society. It meant new diseases that shamans could not cure; the erosion of food security and self-reliance in meeting basic needs; and a loss of sovereignty and deepening spiral of dependency on outsiders and the cash economy. The loss of ancestral lands threatened their very survival. From the perspective of native peoples, the government's national integration policy meant national expansion and ethnocide.[43]

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42. *See* KIMERLING, AMAZON CRUDE, *supra* note 6, at 39-40. **R**

43. For a fuller discussion, s*ee generally id.*; NORMAN E. WHITTEN, JR., INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, ECUADORIAN ETHNOCIDE AND INDIGENOUS ETHNOGENESIS: AMAZONIAN RESURGENCE AMIDST ANDEAN COLONIALISM (1976). The term "ethnocide" is borrowed from Whitten. An anthropologist, Whitten explains: "The concept of ethnocide is taken from genocide, and refers to the process of exterminating the total lifeway of a people or nation, but in the ethnocidal process many of the peoples themselves are allowed to continue living." *Id.* at 24. Whitten described "the attempts of ethnocide aimed at indigenous people" in Ecuador's Amazon region as:

> [S]ystematic, large scale, and planned, as well as random, local and unintended. Illustrations of ethnocidal policies include monolingual education in Spanish, proselytization by Catholics and Protestants, courses in social organization aimed at altering family, kinship, and other bases of social cooperation and competition

On a visit to Amazonia in 1972, President Rodríguez Lara rebuffed an appeal for formal recognition of native peoples in the government's new development policies. He said that all Ecuadorians were "part Indian," with blood of the Inca, Atahualpa; and insisted that he, too, was "part Indian," although he did not know where he had acquired his "Indian" blood. "There is no more Indian problem," he proclaimed, "we all become white when we accept the goals of the national culture."[44] Within ten days, the President's declaration of national ethnic homogeneity was codified by executive decree in

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launched by government, church, and Peace Corps Volunteers, and the steady encapsulation of natives on eroding territories, without infrastructural support. Even in the area of medicine it is difficult for a native person to buy a physician's services without being treated to a lecture about the evils of *chica*—manioc gruel, with low alcoholic content—drinking.

Id. at 24. In essence, these national policies were "aimed at cultural obliteration and assimilation into a lower class serf-like existence." *Id.* at 3-4.

44. WHITTEN, *supra* note 43, at 12. The exchange took place during a discussion after a speech by the President in Puyo, in Pastaza province (south of Texaco's operations). The five-hour speech stressed two aspects of development: expansion of infrastructure and the need for accelerated small scale commercial production and improved land use. As described by Whitten, the President General: R

> [R]ailed against the prevalence of such critical indigenous subsistence crops as manioc and the practice of swidden agriculture. He urged poor colonists to work with the [government] Institute for Agrarian Reform and Colonization . . . to secure titles to land, loans from banks, and to clear away the jungle and plant such marketable crops as rice, cocoa, corn and grain, and to obtain and care for cattle and swine. He promised that modern pesticides . . . . and defoliants would be made available through government programs of education aimed at conquest of the forest.

Id. at 10-11. Local indigenous Kichwa leaders had prepared a letter to deliver to the President, also described by Whitten, as:

> [I]n line with the direction of explicit national policy. They said they wished to participate in the processes of nationalization, to sell products, and to educate their children. Then they simply stated that until a means was found to eliminate encroachment and settlement of colonists on their land, they had little time to participate in the nationalist development. They asked him to set up a mechanism leading to a rapid solution to their loss of rights of usufruct on comuna territory, and to direct a small percentage of the budget designated for infrastructural development to provide access roads and improved schools and more teachers . . . . Among themselves, while listening to the [speech on] the radio, [members of that comuna] puzzled over the "production" aspects of the Presi-

the National Law of Culture. This ideal of national culture, established by administrative decree, became the "formal, permissible cultural emphasis" for those who sought to participate in national development.[45]

Notwithstanding that, Ecuadorian society has continued to be multi-ethnic and multi-cultural, and both racism against indigenous peoples and extremes of wealth and poverty persist. Anthropologist Norman Whitten described ethnicity and racism in 1976: "No person casually wandering through any part of Ecuador . . . could ever be so ideologically deluded as to imagine himself in anything resembling an ethnically homogenous setting."[46] On racism, he quotes anthropologist Joseph Casagrande:

> Like several of its neighbors (Colombia, Peru, Bolivia), Ecuador is characterized by a castelike division between the Indian and non-Indian sectors . . . . Even the kindliest among the whites tend to look upon the Indian as a child perpetually held at a developmental stage lower than that of a full adult human being, or they regard him simply as a brute little better than any animal capable of carrying a heavy load . . . . T]he fact that some Indian groups in Ecuador are singled out for special comment or praise—the [highland] Otavalenos, for example, are said to be proud, clean, industrious, intelligent, and so on—is in effect to commend them for having qualities that one is surprised to find among Indians and at the same time to damn other Indian groups with the implication that these are precisely the qualities they *don't* have . . . . In short, racism in Ecuador is

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dent's speech . . . . If everyone plants cash crops, the comuneros mused, what will we eat?

Id. at 11-12. Those attending the speech asked a respected Bishop to present their case to the President when he called for questions after the address. The Bishop argued that "native peoples have little chance for survival without formal recognition from the central government in its new development policies." *Id.* at 12. The President's response to the appeal did not address economic, political, or legal matters, as had answers to other questions; instead, he invoked his own ancestry, as described above in the text. *Id.*

45. *Id.* at 13.

46. *Id.* at 19.

> institutionalized to a degree that would shock even black Americans.[47]

Whitten described the "ordinary colonist" in the Amazon region as "bluntly racist" and reported that "[i]t is common to hear 'the Indian is more backward than the animals' . . . and 'the Indian is not a person because he is lower than the animals.'"[48] Today, those kinds of comments are no longer common in ordinary conversation; however, racism against indigenous peoples persists.[49] Throughout Ecuador, it is not unusual to hear people say "the Indians are backwards and dirty," "the Indians do not work," "the Indians need to change and become civilized" or "a few Indians should not be allowed to stand in the way of national development."[50]

In response to the massive influx oil workers and colonists who occupied tracts of indigenous lands, cut down the rainforest and scared away the game, some native groups fled deeper into the forest, to get away from the invaders. Most

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47. *Id.* at 19-20 (quoting Joseph B. Casagrande, *Strategies for Survival: The Indians of Highland Ecuador*, *in* CONTEMPORARY CULTURES AND SOCIETIES OF LATIN AMERICA: A READER IN THE SOCIAL ANTHROPOLOGY OF MIDDLE AND SOUTH AMERICA 93, 93-94 (1974)) (emphasis in the original).

48. *Id.* at 26. Whitten, whose field research was conducted in 1972 and 1973, explained the relegation of native peoples to "below animal" status as a reference to the "cultural adaptation made to the jungle." *Id.* at 13, 26.

49. For example, the author recently witnessed an argument between a colonist and indigenous Kichwa in the oil boom town of Coca. The man's final insult, to end the argument and dismiss the woman, was to contemptuously tell her to "go fishing," a reference to a subsistence activity that remains important to indigenous peoples, and was clearly offensive and hurtful to the woman.

50. That said, indigenous peoples have also earned the respect of many Ecuadorians over the past decade for their efforts to challenge fuel price increases and other neoliberal economic measures by the government that have been especially difficult for the poor and middle sectors to bear. In the oil fields, there have also been some instances when groups of colonists and indigenous peoples have come together—albeit temporarily, cautiously and with varying degrees of success—to try to defend their common interest in a clean and healthy environment or to promote political candidates. These tentative alliances, however, remain clouded by a long history of distrust and betrayal of native peoples, and a concern that the colonists could use, dominate, and disrespect indigenous peoples. This dynamic helps explain why it has been difficult for Amazon Defense Front (*Frente de Defensa de la Amazonia, "Frente"*)—an NGO founded by a group of colonists in Lago Agrio in the wake of news reports announcing the *Aguinda* lawsuit—to work with indigenous Kichwa and Huaorani who have been injured by Texaco's operations.

indigenous peoples, however, responded to national policies promoting assimilation and "development" by organizing themselves and joining together, at times, to find new ways to confront common threats. Though increasingly endangered by changes in their natural and social environments brought by outsiders who arrive—uninvited—in their lands, and by "ethnocidal policies seeking to hem them in, deny their existence, and denigrate their rationality and culture,"[51] indigenous peoples have maintained their own cultures and communities, while adapting to changes around them.[52] In Amazonia today, the degree of change and adaptation among indigenous communities varies considerably and reflects a number of factors, including the group and its proximity to and history of contacts with outsiders. At least one group, the Taromenane clan of Huaorani, continues to live in voluntary isolation in the forest. At least two groups, however, apparently did not survive dislocation by Texaco's operations: the Tetete people have disappeared and the Tagaeri clan of Huaorani no longer exist as a distinct group.[53]

Ecuador's government did not formally recognize indigenous land rights until around 1990 when it systematically began to grant legal land titles to indigenous groups. By that time, oil development and internal colonization had displaced native peoples from many areas, significantly reducing their traditional territories. Nonetheless, the change in policy was a major victory for native peoples.[54] It was the result of years of struggle by indigenous organizations for formal recognition of the rights of indigenous peoples, and appears to have been influenced as well by emerging international support for the

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51. Whitten, *supra* note 43, at 27. **R**

52. Whitten's paper describes this process among the Canelos Kichwa in Pastaza Province. He calls the process "ethnogenesis." *Id.* at 28-29.

53. *See infra* notes 126, 131-33 and accompanying text. **R**

54. Some groups received legal title to some lands before the policy shift, which occurred during the presidency of Rodrigo Borja. Indigenous groups with territory in national parks and other protected areas have not received title to those lands, although Ecuador's forestry law recognizes their right to use the lands for subsistence activities. Some groups, like the Cofán of Zabalo in Cuyabeno Wildlife Reserve and the Kichwa of Centro Añango in Yasuni National Park, have negotiated renewable natural resource use and management agreements with the government. Another significant advance, especially for the Kichwa, that occurred around the same time, was the adoption of bilingual education for indigenous students.

collective rights of native peoples. The State continues, however, to claim ownership of oil and other subsurface minerals in titled lands, and legal titles typically provide that indigenous peoples may not "impede" or "obstruct" oil development or mining operations in their lands.[55]

In 1998, Ecuador formally recognized the multi-cultural nature of Ecuadorian society and some collective rights of indigenous peoples with the ratification of ILO Convention 169, the International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries.[56] Later that year, a new Constitution took effect, which includes a chapter on the collective rights of indigenous peoples that echoes many of the provisions in ILO Convention 169.[57] However, implementation of those rights in the oil patch has lagged, and it remains to be seen whether they will be respected in practice by the government and by oil companies. To date, the record in not encouraging. For example, in a recent study of standards and practices for environmental protection and community relations in the area leased to Occidental Petroleum, the author found that—despite both the constitutional provisions and public pledges by the company to voluntarily raise standards and respect its indigenous neighbors—efforts by Kichwa residents to participate in environmental and development decisionmaking and monitoring have been rebuffed, and community lands solicited by the company for use for production facilities have been expropri-

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55. *See, e.g.*, Ecuadorian Institute for Agrarian Reform (IERAC), Providencia No.900001772, (Apr. 3, 1990) (adjudicating legal title to 612,560 hectares of ancestral lands to the Huaorani).

56. *See* International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter ILO Convention 169], *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169.

57. 1998 CONST. tit. III, ch. 5, § 1 (Ecuador) [hereinafter 1998 Constitution]. Expanded environmental rights were also included. *Id.* tit. III, ch. 5, § 2; *see also id.* tit. III, ch. 2, art. 23, ¶ 6. For a fuller discussion, see Kimerling, *International Standards*, *supra* note 40, at 308; Judith Kimerling, *Uncommon Ground: Occidental's Land Access and Community Relations Standards and Practices in Quichua Communities in the Ecuadorian Amazon*, 11 L. & ANTROPOLOGY 179, 187 (2001) [hereinafter Kimerling, *Uncommon Ground*]; Judith Kimerling, *Rio + 10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia*, 27 COLUM. J. ENVTL. L 523, 543 (2002) [hereinafter Kimerling, *Rio + 10*]. R

ated by the State at the request of the company, without the knowledge or consent of affected communities.[58]

C. *Environmental Protection Policy*

Since at least 1971, Ecuador's Law of Hydrocarbons has included boilerplate environmental directives. Early provisions required oil field operators to "adopt necessary measures to protect flora, fauna and other natural resources" and prevent contamination of water, air, and soil.[59] Similarly, Texaco's production contract with Ecuador—negotiated after the discovery of commercially valuable reserves and signed in 1973—required Texaco "to adopt suitable measures to protect the flora, fauna, and other natural resources and to prevent contamination of water, air and soil under the control of perti-

58. For a fuller discussion, see Kimerling, *Uncommon Ground*, *supra* note 57, at 194-95; *see also* Kimerling, *Rio + 10, supra* note 57, at 549-50. Since the mid-1990s, some indigenous leaders have occupied political offices in Ecuador's National Congress and state bureaucracy. However, those developments—the result of both alliances with political parties and the formation of a new party (Pachakutik) by indigenous organizations led by CONAIE (Confederation of Indigenous Nationalities of Ecuador), and some groups on the left—have been misinterpreted by many people outside of Ecuador, and have contributed to an exaggerated international image of indigenous political power in Ecuador. Occupation of those public offices has not been accompanied by meaningful decisionmaking power or the empowerment of local communties. To the contrary, political participation through political parties has weakened—and dispersed—the organized indigenous movement by shifting the priorities of many leaders away from the needs of local communties (who feel abandoned) to the pursuit of public office, and by fomenting corruption and the emergence of an indigenous political elite that is isolated from indigenous communties. At the same time, considerable external pressures have been applied by private and public actors in an effort to use and divide indigenous organizations. **R**

59. Law of Hydrocarbons, *supra* note 37, arts. 31(s), 31(t). In 1982, art. 31(s) was amended to require companies to submit, for approval by Ecuador's Ministry of Energy and Mines (MEM), "plans, programs and projects" to protect natural resources and prevent adverse social and economic impacts on local communities. Art. 31(t) was amended to require operators to conduct operations in accordance with Ecuador's environmental laws and regulations, and international practice "in matters of preservation of the rich fisheries and farming industry." *Id.* Subsequent amendments to the law retained the provisions. **R**

nent organs of the state."[60] In addition, the generally applicable Law of Waters, adopted in 1972,[61] and Law of Fishing and Fishing Development, adopted in 1974,[62] included general exhortations to prevent pollution and protect the environment. The Law for the Prevention and Control of Environmental Contamination, passed in 1976 and copied nearly verbatim from a Mexican law, was dedicated entirely to pollution control.[63] In theory, those requirements offer mechanisms for command-and-control or performance-based regulation of significant sources of oil field pollution. In practice, however, Texaco and other oil companies have ignored the laws and successive governments have failed to implement and enforce them.[64]

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60. Decreto Supremo No. 925 [Supreme Decree No. 925], ch. IX, cl. 46.1, from General Guillermo Rodríguez Lara, President of Ecuador (Aug. 16, 1973) [hereainfter 1973 Production Contract].

61. Ley de Aguas [Law of Waters], Decreto Supremo No. 369 [Supreme Decree No. 369], R.O. No. 69, art. 22 (May 30, 1972) (Ecuador). Regulations adopted in 1973 define contaminated water broadly but do not include quantitative water quality standards. President of the Republic, *Reglamento General para la Aplicación de la Ley de Aguas* [General Regulations for the Application of the Law of Waters], art. 89, R.O. No. 233 (Jan. 26, 1973) (Ecuador).

62. *Ley de Pesca y Desarrollo Pesquero* [Law of Fishing and Fishing Development], art. 47, R.O. No. 497, (Feb. 19, 1974) (Ecuador), renumbered in R.O. No. 252 (Aug. 19, 1985) (Ecuador) (prohibiting contamination of waters); *see also, id.* arts. 15, 80, 92.

63. *Ley para la Prevención y Control de la Contaminación Ambiental* [Law for the Prevention and Control of Environmental Contamination], R.O. No. 204 (June 5, 1989) (Ecuador) [translated in Food and Agriculture Legislation, vol. 26-1 (1977)]; *see also Ministerio de Salud Pública, Reglamento para la Prevención y Control de la Contaminación Ambiental en lo Relativo al Recurso Agua* [Ministry of Public Health, Regulations for the Prevention and Control of Environmental Contamination Related to Water Resources], R.O. No. 204 (June 5, 1989) (Ecuador) (including some quantitative water quality standards and requiring impact assessments, permits, and monitoring for new and existing discharges; *Ministerio de Salud Pública, Reglamento que Establece las Normas de Calidad del Aire y sus Métodos de Medición* [Ministry of Public Health, Regulations to Establish Air Quality Standards and Methods of Measurement], R.O. No. 726 (July 15, 1991) (Ecuador); and *Ministerio de Salud Publica. Reglamento para la Prevención y Control de la Contaminación Ambiental Originado por la Emisión de Ruidos* [Ministry of Public Health, Regulations for the Prevention and Control of Environmental Contamination Originating from Emissions of Noise], R.O. No. 560 (Nov. 12, 1990) (Ecuador).

64. In practice, government intervention in the hydrocarbon sector is dominated by the Ministry of Energy and Mines (MEM) and Petroecuador.

When Texaco began its operations, Ecuador did not have a history of environmental protection, and there was little public awareness or political interest in environmental issues. Moreover, environmental protection in the oil patch depends on the use of technology, and Ecuador relied on Texaco, as the operator in the oil fields, to transfer petroleum technology and train national technicians.[65] Ecuadorian officials saw Texaco as a prestigious international company with vast experience in the oil patch. They relied on Texaco to design, procure, install, manage, and operate the infrastructure that turned Ecuador into an oil exporter.[66] In the new production agreement, Texaco's wholly owned subsidiary, Texaco Petroleum Company (TexPet),[67] agreed to use "modern and effi-

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Environmental units were not created in those entities until 1984 and 1990, respectively. Irrespective of government regulation, Texaco had a duty of care under Ecuador's Civil Code. For a fuller discussion, *see* Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 SW. J. L. & TRADE AM. 293, 336-340 (1995) [hereinafter Kimerling, *Rights, Responsibilities, and Realities*]; Kimerling, *International Standards, supra* note 40, at 311-12. R

65. Unsworn Declaration by Manuel E. Navarro V. Subject to Penalty of Perjury (Mar. 3, 1994), ¶¶ 2-5, [hereinafter Navarro Declaration], *in* Brief Amicus Curiae for the Federation of Comunas Union of Natives of the Ecuadorian Amazon (FCUNAE) and Affiliated Communities and of the Indigenous Organization of the Cofán Nation of Ecuador (OINCE) and Affiliated Communities, Aguinda v. Texaco, Inc., No. 93 Civ. 7527, (Mar. 9, 1994), Ex. 3 [hereinafter Brief Amicus Curiae for FCUNAE and OINCE]. The author and the law firms Cohen, Milstein, Hausfeld & Toll and Hagens & Berman served as counsel on the brief. Navarro was the founding chief of Petroecuador's Environmental Protection Unit (*Unidad de Protección Ambiental*, UPA), created by statute when CEPE was reorganized into Petroecuador. *See, Ley Especial de la Empresa Estatal Petróleos del Ecuador (Petroecuador) y sus Empresas Filiales* Special Law of the State Company Petróleos del Ecuador (Petroecuador) and its Subsidiaries, art. 2, R.O. No. 283 (Sept. 26, 1989) (Ecuador). Prior to heading UPA, Navarro represented CEPE on the Petroleum Contracts Administration Committee for four years, and served in MEM for four years as a member of the Advisory Commission which directly advised the Minister of Energy and Mines on petroleum policy. The Navarro Declaration can also be found *in* Plaintiffs' Previously Submitted Exhibits In Support of their Memorandum of Law Responsive to this Court's January 31, 2000 Memorandum Order, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Mar. 9, 2000), Ex. P.

66. Navarro Declaration, *supra* note 65, ¶ 2. R

67. Texaco Petroleum Company was incorporated in Delaware in 1957 and became domiciled in Ecuador in 1964. ChevronTexaco Answer, *supra* note 17, ¶ II.B.1.1; *see also* Press Release, ChevronTexaco, ChevronTexaco

cient" equipment in the operations;[68] to keep all equipment and facilities "in good working condition;"[69] to hire a minimum percentage of Ecuadorian workers;[70] and to every year "receive" and subsidize twelve students or graduates of advanced oil-industry related technical studies from Ecuador's highland and coastal regions and provide them with "practical training and studies" in the oil fields.[71] Texaco Petroleum further agreed to turn over the field operations and equipment to Petroecuador "in good condition" when the contract ended.[72]

In the environmental law vacuum, Texaco set its own environmental standards, and policed itself. As Petroecuador's "professor," Texaco also set the standards for that company's operations. Texaco's standards and practices, however, did not include environmental protection or monitoring. For example, even oil spills were treated exclusively as economic rather than environmental and human health concerns. The company did not develop and implement contingency plans to contain and clean-up spilled oil and mitigate environmental damage, to provide affected residents with alternative water supplies when local waters were polluted, or to indemnify them when crops and natural resources were damaged. Em-

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Asks Judge to Dismiss Lawsuit in Ecuador: Company Cites Lack of Credible, Substantiated Evidence: Ecuador Government Released Company form All Obligations Related to Oil Operations in 1998 (Oct. 21, 2003) [hereinafter ChevronTexaco Oct. 21, 2003 Press Release], *available at* http://www.chevron.com/news/press/2003/2003-10-21_1.asp. According to an affidavit submitted to the court in the *Aguinda* litigation, Texaco Petroleum's principal place of business is Houston, Texas. Affidavit of Texaco Petroleum Company by Ricardo Reis Veiga (Dec. 23, 1998), ¶ 2 [hereinafter Veiga Affidavit], *in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motions to Dismiss, Aguinda v. Texaco, Inc., No. 93 Civ. 7527, (S.D.N.Y. Jan. 11, 1999), vol. 1, Ex. 2.

68. 1973 Production Contract, *supra* note 60, ch. IX, cl. 40.1. **R**

69. *Id.* ch. IX, cl. 40.2.

70. *Id.* ch. IX, cl. 36.1.

71. *Id.* ch. IX, cl. 38.1. Under the contract, Texaco and its consortium partner(s) were required to pay the trainees' costs for "transportation, board, food, medical care and economic subsidy." *Id.* ch. IX, cl. 38.2.

72. *Id.* ch. IX, cl. 51; *see also id.* ch. V, cl. 18.2 (a), (b) (transfer of ownership and operation of the trans-Ecuadorian Pipeline System).

ployees sometimes tried to cover-up spills because of concern about "the economic consequences of production losses."[73]

Texaco did not instruct its Ecuadorian personnel about environmental precautions or monitoring, and oil field workers—who had been trained by Texaco—were so unaware of the hazards of crude oil during the 1970s and 1980s that they applied it to their heads to prevent balding. They sat in the sun, or covered their hair with plastic caps overnight. To remove the crude, they washed their hair (and hands) with diesel. Similarly, many workers took jars of crude to parents suffering from arthritis.[74] Those rumors, attributing medicinal powers to Amazon crude, are not entirely surprising given its status as the harbinger of a great future for the nation and Texaco's neglect of environmental and health concerns.

As a result, Ecuador's petroleum policy in the 1970s and 1980s revolved around economic and national development is-

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73. In a declaration presented to the *Aguinda* court in an *amicus* brief in support of the plaintiffs, former Texaco Petroleum employee Margarita Yépez explained: "Since we were unaware of environmental damage, when oil spills (which were not rare) occurred, the company's employees covered up the facts, concerned about the economic consequences of production losses for the company and the Ecuadorian state." Unsworn Declaration by Bertha Margarita Yépez Silva Subject to Penalty of Perjury (Mar. 3, 1994) [hereinafter Yépez Declaration], *in* Brief Amicus Curiae for FCUNAE and OINCE, *supra* note 65, Ex. 2. A social worker, Yépez was based in Quito and regularly traveled to the field; *see also* KIMERLING, AMAZON CRUDE, *supra* note 6, at 69; Press Release, Republic of Ecuador, Ministry of Energy and Mines, *Dirección General de Medio Ambiente (DIGEMA) Propone Necesidad de Incorporar Plan de Contingencias Para el Sistema del Oleoducto Transecuatoriano (SOTE)* [General Directorate for the Environment (DIGEMA) Proposes the Need to Incorporate Contingency Plan for the Trans-Ecuadorian Pipeline System (SOTE)]" (undated, includes data through May 1989); HBT AGRA LTD., ENVIRONMENTAL ASSESSMENT OF THE PETROECUADOR-TEXACO CONSORTIUM OIL FIELDS, VOL. 1: ENVIRONMENTAL AUDIT 5-13 (Oct. 1993) (draft audit report prepared by HBT AGRA Limited for Petroecuador-Texaco Consortium) [hereinafter HBT Agra Draft Audit Report] ("Prior to 1990, no [oil] spill prevention methods were in place," and a spill response plan "has yet to be developed"); Navarro Declaration, *supra* note 65, ¶ 3 ("Since Texaco was the company that pioneered Ecuadorian petroleum activity and operated the consortium, by means of agreement with the state it trained national technicians and transferred its technology to the Ecuadorian state oil company; in that activity there was no evidence of any considerations of an environmental nature."); *id* at ¶ 4. R R R

74. Interview with Margarita Yépez, former social worker for Texaco Petroleum (1973-1989), in Quito, Ecuador (Mar. 3, 1994).

sues—and did not include a serious environmental component.[75] The evidence in the historical record, however, does not suggest that environmental neglect was a conscious and informed policy choice by Ecuador at that time.[76] Unlike Texaco, which had, or should have had, knowledge about both the hazards of oil field pollution and technology that could be used to reduce it—such as reinjecting rather than discharging oil field brine—the Ecuadorians were inexperienced and apparently unaware of the environmental tradeoffs in the oil patch. In the triumphalist welcome to Texaco's discovery of commercially valuable oil and the struggle over whether petroleum policy should be nationalistic or traditionalistic in outlook, environmental protection issues were eclipsed entirely.

Indeed, when confronted in 1990 with a study by an environmental lawyer from the United States (the author) that documented shocking pollution and other impacts from operations by Texaco and other oil companies (subsequently published as *Amazon Crude*), environmental officials in Ecuador's Ministry of Energy and Mines (MEM) professed ignorance. Texaco was their "professor," they explained; the company taught them how to produce oil but did not teach them about environmental protection.[77]

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75. Not surprisingly, Martz's detailed study of petroleum policy in Ecuador through 1984 does not mention environmental protection or indigenous peoples. *See* MARTZ, *supra* note 2. R

76. As discussed *infra,* the evidence to the contrary in the *Aguinda* record is limited to self-serving affidavits and deposition testimony by high-level Texaco and Texaco Petroleum employees that were generated as part of the litigation. *See infra* note 527 and accompanying text.

77. KIMERLING, AMAZON CRUDE, *supra* note 6, at xxvi. The author's study in Ecuador was the first to document widespread pollution and other environmental and social impacts from oil development in tropical forests. It was based on extensive field observations and interviews during repeated visits to the region in 1989-1990, in collaboration with the indigenous organizations, FCUNAE (Federation of Comunas Union of Natives of the Ecuadorian Amazon) and CONFENIAE (Confederation of Indigenous Nationalities of the Ecuadorian Amazon), and other research. The disclosures first appeared in a draft report in 1989, which was distributed by CONFENIAE and translated into Spanish and German. Subsequently, the author expanded the report; in 1991, it was published, with color photographs, as *Amazon Crude* by the NGO Natural Resources Defense Council (NRDC). A Spanish-language adaptation was published with FCUNAE by Abya Yala Publications. *See generally* JUDITH KIMERLING, CRUDO AMAZÓNICO (1993). Portions of *Amazon Crude* are reprinted in Judith Kimerling, *Disregarding Environmental Law:* R

That basic view—that government officials did not realize that industry operations were taking a serious toll on the environment until international environmentalists put a spotlight on the region—was subsequently echoed by a number of civilian and military officials.[78] According to those officials, Ecua-

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Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon, 14 HASTINGS INT'L & COMP. L. REV. 849 (1991) [hereinafter Kimerling, *Disregarding Environmental Law*].

The meeting described in the text took place in July 1990, during a visit by Robert F. Kennedy, Jr. to Ecuador, accompanied by two NRDC staff. The author had previously worked as a consultant for NRDC (while in Ecuador), and was asked to take Kennedy to visit the rainforest after NRDC decided to launch a "Rescue the Rainforest" membership campaign, with Kennedy as the celebrity spokesperson. Kennedy read the draft report and visited some oil production sites, and was so moved by what he learned that he convinced NRDC to publish the report as a book, with color photographs. He was so appalled by the pollution that the group returned to Quito ahead of schedule to meet with Ecuadorian government officials before returning to the United States, where they planned to publicize the tragedy. The author also attended the meeting. Kennedy's visit is described in his preface to *Amazon Crude*. KIMERLING, AMAZON CRUDE, *supra* note 6, at ix-xxvi. NRDC's efforts to work in Ecuador ended in controversy in 1991, after it attempted to negotiate an agreement with another U.S.-based oil company, Conoco, and convince CONFENIAE and environmental NGOs to drop their opposition to plans by Conoco to produce oil in Yasuni National Park and the territory of indigenous Huaorani. For an account of the controversy, which divided CONFENIAE and prompted opposition by representatives of the Huaorani and charges of "environmental imperialism" by Ecuadorian environmentalists, s*ee* JOE KANE, SAVAGES 69-78 (1995); Joe Kane, *With Spears from all Sides*, THE NEW YORKER, Sept. 27, 1993, at 54. **R**

78. Indeed, prior to *Amazon Crude*, even prominent rainforest literature mistakenly reported that oil development did not directly harm the environment, reflecting, among other factors, the focus by environmental advocates on deforestation and efforts to establish national parks and other conservation areas in tropical forests. *See, e.g.,* Stephen Mills, *Ecuadorians Join Over Forest Oil*, BBC WILDLIFE, Mar. 1990, at 187 (noting that the "important" Ecuadorian environmental NGO Fundacion Natura "has been slow to criticize the oil companies," and reporting that in August 1989, a team from the World Conservation Union (IUCN) "visited Ecuador to prepare a preliminary report on conservation issues"; that report gave oil development "a clean bill of health, concluding: 'In general, it would appear that oil exploration and production of itself does little harm to the environment as the areas disturbed are minute in relation to the total forest estate. Problems arise through spontaneous colonization along access roads'"); ADRIAN FORSYTH AND KEN MIYATA, TROPICAL NATURE 209 (1984).

Similarly, Ecuador's Cuyabeno Wildlife Reserve was heralded by international conservationists as a "model modern tropical reserve," despite the fact that large areas of Cuyabeno were so damaged by pollution from opera-

dor relied on Texaco, as a prominent international company, to transfer oil development technology to Ecuador (and Petroecuador).[79] Both civilian and military officials in Ecuador's oil sector had learned on the job, and although they frequently struggled with Texaco and other foreign companies over economic issues and the pace of exploration and exploitation, they did not question Texaco about technical matters because they relied on the company—as the operator of the Consortium—for technical expertise.

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tions by Petroecuador and another company (Clyde Petroleum), and deforestation along oil field roads, that its boundaries were expanded in 1991 to incorporate additional lands where oil companies had not yet operated. The new boundaries increased the size of Cuyabeno from 254,760 hectares to 655,780 hectares, reportedly to make up for the devastation of roughly one-third of the original reserve. KIMERLING, CRUDO AMAZÓNICO, *supra* note 77, at 109-111. The description of Cuyabeno as a "model modern tropical reserve" is from a case study in *Saving the Tropical Forests* (published in association with the Smithsonian Institution and naming the prestigious NGO World Wildlife Fund-US and Ecuador's Department of National Parks and Wildlife as "cooperating organizations" in managing the "successful" reserve). JUDITH GRADWOHL AND RUSSELL GREENBERG, SAVING THE TROPICAL FORESTS, 85-88 (1988) [hereinafter SAVING THE TROPICAL FORESTS]. For another laudatory profile of Cuyabeno, *see* J. Nations, *Protecting Tropical Forests*, *in* TROPICAL FORESTS 108-111 (1989) (praising the reserve for going "beyond the traditional goal of protecting species and preserving wildlife habitat" to "also serve human beings") [hereinafter Nations, *Protecting Tropical Forests*]. The study in *Saving the Tropical Forests* does not mention oil development, but identifies "multiple use" as one of eight "qualities of promising reserves." SAVING THE TROPICAL FORESTS at 62. The account in *Protecting Tropical Forests* claims that an indigenous Siona park guard "monitors" Petroecuador's "actions to avoid spills and to protect the reserve's fragile ecosystems." Nations, *Protecting Tropical Forests* 108-11. For a discussion of oil development in Cuyabeno, *see* KIMERLING, AMAZON CRUDE, *supra* note 6, at 100-01; for photographs of affected areas, taken in 1989-1990, *see id.* at viii, 54, 58, 62, 68, 70, 78. R R

79. This type of reliance on foreign oil companies by governments and state oil companies is customary in the industry. For example, the view expressed by Ecuadorian officials is consistent with a recent statement by ExxonMobil in a paid advertisement in *The New York Times*: "Technical training, often at an advanced level, is usually a requirement placed upon foreign investors who wish to participate in oil and gas projects. Indeed, companies such as ExxonMobil are able to provide co-venture partners with access to the most advanced technology and training." ExxonMobil, *A Meeting of Minds*, N.Y. TIMES, Apr. 4, 2002, at A23; *see also* CHEVRONTEXACO, *supra* note 34, at 17; TEXACO INC. PUB. REL., TEXACO AND ECUADOR: SETTING THE RECORD STRAIGHT, 2-4 (1992) (on file with N.Y.U. J. INT'L L. & POL.) [hereinafter TEXACO PUBLIC RELATIONS]. R

For example, according to General René Vargas Pazzos, who was a key policymaker in the military government that ruled Ecuador when the oil rush began, the government did not question Texaco about environmental practices because officials had no idea that the operations could damage the environment: "We thought oil would generate a lot of money, and that development would benefit the country. But we did not have technical know-how, and no one told us that oil was bad [for the environment]."[80]

Texaco's contract with Ecuador required the company to use and transfer modern petroleum technology, and officials did not question Texaco's technical expertise or good faith. As explained by Vargas:

> We were fooled by Texaco. We were betrayed. We trusted the company. . . . Texaco was responsible for all of the operations. . . . We were not experts. All of the technical aspects came from Texaco. The [MEM] Hydrocarbons Directorate approved the work, but the technology came from Texaco. It is like contracting a doctor. You go in, and can see that the room is fine. But with the operation, it is beyond your control and know-how. We accepted [Texaco's technical decisions] with good faith, and thinking that they were made in good faith. . . .
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> We were happy about the petroleum. We said, "do it, and tell us what it will cost". . . . But we did not know about environmental issues. . . . How Texaco fooled us; like a child, we trusted them to do good work. . . . We thought Texaco used the best methods. After, we learned that Texaco did not. . . . But we never questioned Texaco's technical decisions because we did not know. . . . Texaco was the operator. We did not interfere in technical decisions because that was Texaco's responsibility. That is what we paid them for.

80. Interview with General René Vargas Pazzos (Ret.), in Quito, Ecuador (July 4, 2001) [hereinafter Vargas Interview]. Vargas, then an Army colonel, was the second General Manager of Petroecuador (then CEPE), from October 1973-November 1975. From January 1976-February 1977, he was Minister of Natural Resources (now MEM). MARTZ, *supra* note 2, at 185. **R**

> Gulf, too, did not condition [its approval of Consortium operations]; it had only one employee here.[81]

According to Vargas, all of the work plans and technical specifications for the operations were elaborated and approved by Texaco in the United States and sent to Quito from the company's Latin America/West Africa Division based in Coral Gables, Florida.[82] According to Margarita Yépez, who was employed by Texaco Petroleum as a social worker from 1973-1989, the operations were closely supervised by Texaco Inc.'s Coral Gables office: Every department-head in Quito had a direct telephone line to a supervisor in Coral Gables; important contracts for field operations were approved and signed in the United States; expenditures were closely supervised from the United States; and the Quito office had a full-time employee to microfilm all reports and other written materials, to send to Coral Gables in a daily mail pouch.[83]

Texaco's international prestige and day-to-day control, as the operator, of field activities gave the company enormous power in the oil patch. That power can scarcely be overestimated, and was compounded by deficiencies in the rule of law and good governance generally in Ecuador. Texaco's power and the culture of impunity in the oil fields—the belief that companies can do whatever they want and suffer no adverse consequences as long as they get the oil out of the ground—that began with Texaco and continues to this day,[84] is illustrated in a remark by an Ecuadorian worker in 1993, the year after Texaco's contract with Ecuador expired. The man was working as a truck driver for a subcontractor that dumped untreated oil on roads for dust control and maintenance purposes. When asked what he thought about the practice and whether he had any health or environmental concerns, he replied: "Three years ago I went to a training course in [the oil

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81. *Id.*; *see also* Navarro Declaration, *supra* note 65, ¶ 5 ("Regardless of the lack of environmental awareness of the Ecuadorian authorities, the lack of supervision, and the limited regulatory framework dealing with the environment, in its activity the Texaco company was under the obligation to act with the care proper to a good father, as established in the Ecuadorian Civil Code."). R

82. Vargas Interview, *supra* note 80. R

83. Yépez Declaration, *supra* note 73, ¶ 4 at 2. R

84. For a recent example of the culture of impunity, *see* Kimerling, *Rio + 10, supra* note 57, at 578-80. R

boom town,] Lago Agrio, and a *gringo* from Texaco told us that oil *alimenta,* nourishes the brain and retards aging. He said that in the United States they do this on all of the roads, and people there are very intelligent." When asked if he believed what the *gringo* from Texaco had said about the health benefits of crude oil, he answered: "It doesn't matter what I think; here, Texaco, and now Petroecuador, *manda*, gives the orders. Everyone works for them."[85]

In the wake of *Amazon Crude,*[86] environmental protection has become an important policy issue in Ecuador. This appears to be the result of awakened consciousness in Ecuador; the seriousness with which the international community treated the disclosures in the study; the empowerment of local populations that accompanied the elevation of their long-standing grievances to an international concern; and the addition of concerns about oil field pollution and the impact of oil development on indigenous peoples to the environmental and human rights agendas of Ecuadorian and international NGOs.[87]

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85. The exchange (with the author) took place on Sept. 26, 1993.

86. KIMERLING, AMAZON CRUDE, *supra* note 6. **R**

87. *See, e.g.*, Discrimination Against Indigenous Peoples: Transnational Investments and Operations on the Lands of Indigenous Peoples: Report of the United Nations Centre on Transnational Corporations pursuant to Sub-Commission Resolution 1990/26, U.N. ESCOR, Comm'n on Human Rights, 43rd Sess., ¶¶ 18, 27-28, nn. 4-5, app. at 21-22, U.N. Doc. E/CN.4/Sub.2/1991/49 (1991) (including a case history entitled "Petroleum and the Ecuadorian Amazon"); Unclassified Cable from U.S Embassy in Quito to BUSHC/SECSTATE WASHDC 0543 RUEGHL/AMCONSUL GUAYAQUIL 4372 (Aug. 20, 1991) (concerning visit to Petroamazonas facilities) (on file with N.Y.U. J. INT'L L. & POL.) [hereinafter U.S. Embassy Cable]; Inter-Am. Dev. Bank, U.N. Dev. Programme [UNDP], Amazon Cooperation Treaty, *Amazonia Without Myths*, 46-48 (1992) (commissioned by the Amazon Treaty Cooperation in order to set forth policies and strategies for development of the Amazon and contribute to the United Nations Conference on Environment and Development); 137 Cong. Rec. 7,293-95 (1991) (statement of Sen. Cranston); STRUGGLE FOR LIFE IN THE AMAZON (December 1990) (booklet in Spanish, French, and English for exhibition of photographs at the European Parliament in Strasbourg); IACHR Report on Ecuador, *supra* note 31, ch. VIII; D. Southgate & N. Bonifaz, USAID, Tribal Rights, Species Preservation, and Oil: The Volatile Mix in Eastern Ecuador (Aug. 29, 1991) (draft paper by consultants to USAID in Ecuador); Simon Espinosa, *El Fin de la Amazonía* [*The End of the Amazon*], VISATZO, Nov. 3, 1993, at 20-24 (feature article about *Amazon Crude* in leading Ecuadorian news magazine); Fernando Ortiz Crespo, *Crudo Amazonas* [*Amazon Crude*], HOY, May 24, 1991 (opinion piece in a **R** **R**

For example, in August 1991, the U.S. Ambassador to Ecuador visited Petroecuador-Texaco facilities in the field "to review the environmental measures that Petroecuador is undertaking."[88] At the time, Texaco's production contract was still in effect, but a subsidiary of Petroecuador, PetroAmazonas, operated the facilities, using the technology and training it had acquired from Texaco. A brief report of the visit was sent by cable from the American Embassy in Quito to Washington, D.C. Addressed to President George Bush and the Secretary of State, the embassy cable bears the subject heading, "Visit to PetroAmazonas Facilities: Petroecuador is Waking up to the Environmental Problem."[89] The report opens with a summary:

> The Ambassador and Embassy staff visited the PetroAmazonas Consortium fields to review the environmental measures that Petroecuador is undertak-

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leading Quito daily, favorably reviewing *Amazon Crude* and stating, "the worst thing is that [public officials] have waited until a book is published in the United States to concern themselves . . . ."); Kane, *With Spears from All Sides*, *supra* note 77, at 59-62; James Brooke, *Brazil's Remote Amazon Oil Effort,* N.Y. TIMES, Nov. 16, 1990, at C1; James Brooke, *New Effort Would Test Possible Coexistence of Oil and Rain Forest*, N.Y. TIMES, Feb. 26, 1991, at C4; *Trauter Plausch*, DER SPIEGEL 26/1991, at p. 162; *Pipeline Spills Oil Frequently, Group Says*, THE MIAMI HERALD, Oct. 5, 1990, at 9A; *Group Says Oil Firms Ruining Rain Forests*, CHICAGO TRIBUNE, Oct. 4, 1990, at 18; *Rain Forests Devastated by Oil Spills, Report Says*, PHILA. INQUIRER, Oct. 4, 1990, at 18-A; Stephen Mills, *Ecuadorians Join Over Forest Oil*, BBC WILDLIFE, Mar. 1990, vol. 8, no. 3, at 187. The *New York Times* subsequently called *Amazon Crude* "the *Silent Spring* of Ecuador's increasingly aggressive environmental movement." James Brooke, *Oil and Tourism Don't Mix, Inciting Amazon Battle*, N.Y. TIMES, Sept. 26, 1993, at A3.

88. U.S. Embassy Cable, *supra* note 87, ¶ 1. The visit, on August 17-18, 1991, followed a July 30 meeting by the Ambassador, Paul Lambert, with the author and Dr. David Neill, a botanist from Missouri Botanical Garden and co-founder of Jatun Sacha Biological Station. Jatun Sacha is located in the Ecuadorian Amazon, southwest of areas that are affected by Texaco. The meeting was reportedly arranged by a USAID official, after he learned that some U.S. oil companies working in Ecuador and staff in the commercial section of the Embassy had complained to Ambassador Lambert about *Amazon Crude* and urged him to issue a public statement emphasizing the importance of oil development to U.S.-Ecuador relations. Neill was asked by USAID to meet with the Ambassador to confirm that the environmental problems disclosed in the book were occurring, and that they were of a serious nature. Coincidentally, the author arrived in Quito days before the meeting and was invited to participate. R

89. *Id.*

> ing. At this time the steps are not impressive, but at least Petroecuador is now aware that it has a problem and is beginning to address the issue.[90]

The cable notes that the Embassy was invited to visit by the General Manager of PetroAmazonas, Wilson Pastor, and that "Pastor's basic theme is that there have been mistakes, but PetroAmazonas-Texaco is not as bad as the environmentalists have painted it to be."[91] The final paragraph of the cable concludes:

> Comment. By most accounts, Petroecuador's treatment of the environment is the worst of all the oil companies in Ecuador. In part this is because it inherited from Texaco established fields where the existing equipment and procedures do not reflect current industry practices. But some of Petroecuador's worst offenses have occurred in the new fields developed by the Petroproducción subsidiary. This is largely the result of a corporate culture that shows gross indifference for the environment. The visit suggests that at least some parts of Petroecuador are waking up to the fact that they have a large environmental problem on their hands.[92]

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90. *Id.* ¶ 1. The U.S. Embassy appeared to play a pivotal role in the early changes: after Ambassador Lambert recognized environmental performance in the oil fields as a serious challenge, the political landscape in Ecuador began to shift. However, after a few years, Embassy policy seemed to change, to favor oil company interests over environmental concerns and the need to promote dialogue between industry representatives and environmental advocates.

91. *Id.* ¶ 2.

92. *Id.* ¶ 8. The "new fields" referred to in the cable applied the same basic technology and environmental practices as fields developed by Texaco; relevant practices are briefly discussed *infra* in Part III, and remained essentially unchanged throughout Texaco's tenure. The only other company to operate production facilities in Ecuador's Amazon region at the time was Clyde Petroleum (Petroecuador-City Consortium); those operations also used the same basic practices as Texaco. KIMERLING, AMAZON CRUDE, *supra* note 6, at 44. However, Texaco was the major producer in the region; the expanse of oil field infrastructure and levels of production and associated wastes in areas developed by other companies were considerably less than Texaco's. Government figures from December 1989 put production levels at 213,840 barrels/day in the Texaco fields, or 75.83% of total production; 62,040 barrels/day in Petroecuador fields, or 22% of total production; and 6,120 barrels/day in Clyde Petroleum fields, or 2.17% of total production. **R**

Since the early 1990s, then, both government officials and oil companies in Ecuador must at least appear to be "green."[93]

Figures for accumulated production were: 93% for Texaco; 5.5% for Petroecuador; and 1.5% for Clyde Petroleum. Republic of Ecuador, Ministry of Energy and Mines, *Producciones de Petróleo, Agua de Formación y Gas Natural* [Production of Petroleum, Formation Water and Natural Gas] *Dic/89* (Dec. 1989) (unpublished document). Since Texaco's contract with Ecuador expired, Petroecuador has been the largest producer in the region, a status that reflects its operation of Texaco's former fields as well as newer developments. *See* Kimerling, *Disregarding Environmental Law*, *supra* note 77, at 858. **R** Several foreign companies, including Occidental Petroleum, EnCana, Repsol YPF, Agip, Perenco, Petrobras and Petrobell also operate production facilities. *See* U. S. ENERGY INFO. ADMIN., ECUADOR COUNTRY ANALYSIS BRIEF (Feb. 8, 2005), http://www.eia.doe.gov/cabs/ecuador.pdf.

At the time of the Embassy cable, a number of multinational companies were exploring for oil in the region, and one U.S.-based company, Conoco, was planning production operations. Conoco and other companies were beginning to make significant efforts to try to distinguish their practices—especially plans for new operations—from the pattern established by Texaco, a trend that continues to this day. *See* KIMERLING, AMAZON CRUDE, *supra* note 6, at 53, 90; Kimerling, *Rio + 10, supra* note 57, at 535, 555. Conoco sold its **R** interests in Ecuador to Maxus Energy in 1991; those fields are currently operated by Repsol YPF.

93. At the time, Ecuador and other governments were preparing for the high-profile 1992 United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit. At UNCED, more than 170 governments, including 102 heads of state, agreed that the current course of development is unsustainable, because it damages ecosystems on which all peoples depend, and deepens economic disparities between and within nations. With considerable fanfare, governments declared that "[h]umanity stands at a defining moment in history," and pledged to change course. They announced a "global consensus and political commitment at the highest level to an international partnership to achieve sustainable development." *Agenda 21*, U.N. Conference on Environment and Development, 47th Sess, ¶¶ 1.1-1.3, U.N. Doc. A/CONF.151/26 (vol. 1) (1992) [hereinafter *Agenda 21*]. At the core of the consensus was recognition that human beings are at the center of concerns for development, and environmental protection is an integral part of the development process. *See generally, Agenda 21;* United Nations Conference on Environment and Development, *Rio Declaration on Evironment and Development*, U.N. Doc. A/CONF.151/5 (1992) [hereinafter *Rio Declaration*].

UNCED was the first major U.N.-sponsored conference with strong business participation, led by the International Chamber of Commerce and newly-formed Business Council for Sustainable Development. Representatives of industry promoted the idea that international corporations can, and will, play a key role in implementing sustainable development; however, they vigorously—and successfully—opposed even a minimal system of international environmental regulation. In lieu of international regulation, devel-

It remains to be seen, however, whether these changes in consciousness and discourse will lead to environmentally significant changes in the oil fields. To date, the record is not encouraging, despite both public pledges by a growing number of oil companies to voluntarily raise environmental standards[94]

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oping countries committed to enact effective regulation at the national level to protect the environment and implement international commitments. For a fuller discussion, *see* Kimerling, *Rio + 10, supra* note 57, at 526-30. Since the Earth Summit, the term "sustainable development" has become popular, but emerging international law to promote sustainable development has been largely eclipsed by developments in international trade law that promote global markets and protect and advance the rights and economic interests of transnational corporations. *Id.* at 530-31. This imbalance in international governance is illustrated by the fact that under the rules governing trade today, there is a meaningful legal mechanism to hold a company accountable for pirating a Madonna video, but not for contaminating a community water source or destroying local fisheries. *See* Kimerling, *International Standards*, *supra* note 40, at 290. R

94. *See, e.g.*, Kimerling, *Rio + 10, supra* note 57, at 531; Kimerling, *International Standards*, *supra* note 40, at 296. Those articles are based on a study of standards and practices in Block 15, operated by a subsidiary of Occidental Petroleum. The study concludes that some things are changing in Ecuador's oil frontier, but the companies are still firmly in control of operations, including environmental and community relations standards and practices. Voluntary initiatives have led some companies to share some financial benefits of development with local communities, but a huge gap remains between promises of sustainable development and respect for the rights of indigenous peoples to participate in development and environmental decisions that affect them, and the reality of development in the oil fields. Some companies may be raising levels of environmental protection in some areas, at least in the short term; however, that is not certain and needs independent verification and long-term monitoring. One critical question that cannot be answered from the public record is whether groundwater resources are protected from contamination by waste injection activities and buried wastes and pipelines. As a general matter, although voluntary initiatives by oil companies are clearly needed to raise levels of environmental protection, they are not without peril. The promise to apply "international norms," "cutting edge technology," "best practice," and/or "corporate responsibility" has become a tool that multinational oil companies can use to dominate and control environmental information, decisionmaking and implementation; deflect and discourage meaningful oversight; rebuff and belittle grievances by affected populations; and paint a veneer of environmental excellence and social responsibility to camouflage business as usual. In addition, they can operate to undermine the development of national environmental law and capacity in developing nations like Ecuador, by arbitrarily legitimizing norms that have been defined by special interests, and reassuring government officials and other stakeholders that standards and practices are improving. Although the voluntary initiatives cannot be divorced from the so- R R R

and a clear trend on paper toward increasingly detailed—albeit incomplete—environmental legal rights and requirements, including constitutional recognition since 1984 of the right of individuals to live in an environment "free from contamination"[95] and significantly expanded constitutional group environmental rights since 1998.[96] As in other areas of the law, the failure of the State to implement meaningful environmental protection law reflects the enormous gap between legal ideals and social and political realities.[97] Moreover, as discussed below, Texaco's legacy continues to take a serious toll

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cial, economic and political context in which they operate, a major source of abuse can be linked to the widespread confusion, outside of industry circles, about the source and substance of applicable norms.

95. For the current provision, see 1998 Constitution, *supra* note 57, tit. III, ch. 2, art. 23, ¶ 6. For the 1984-(mid)1998 provision, see 1979 CONST. tit. II, § 1, art. 19(2) (provision adopted in 1984). R

96. 1998 Constitution, *supra* note 57, ch. V, sec. 2, Arts. 86-91. Many of the provisions echo emerging principles of international law, particularly the non-binding UNCED agreements. R

97. Many Ecuadorian constitutional and statutory provisions have essentially been copied from other countries or from international declarations and conventions. *See, e.g.*, Hugo Ordoñez Espinosa, 17 *Apuntos para la Reforma Constitucional* [17 Notes for the Constitutional Reforms], 37 (Tomo II) RUPTURA 57, 59-60 (1994); Kimerling, *Rio + 10, supra* note 57, at 543-44; Kimerling, *Rights, Responsibilities, and Realities*, *supra* note 64, at 300. In 1994, Ecuadorian jurist Fabian Corral described the nation's then-Constitution as "perhaps the most extreme example of the abstract application of political theory to a society." Fabian Corral, *La Reestructuración Constitucional* [*Constitutional Restructuring*], 37 (Tomo II) RUPTURA 25, 26 (1994). According to Corral, the rule of law itself is essentially a theoretical formality in a country that lives informally. *Id.* A sign at a toll booth on the outskirts of Quito is illustrative, reading: "Do not insist. Everyone must pay the toll." R R

According to the letter of the law, the Constitution is the supreme law of the land. 1998 Constitution, *supra* note 57, tit. XIII, ch. 1, art. 272. In practice, however, constitutional law has been unstable and relatively easy to manipulate, disregard and supplant. Ecuador has had twenty constitutions since becoming a republic in 1830. *See* Kimerling, *International Standards*, *supra* note 40, at 306-07. Throughout its history, Ecuador's judiciary has failed to enforce and promote the rule of law through the impartial administration of justice. *See* Kimerling, *Rights, Responsibilties, and Realities*, *supra* note 64, at 296. Although the judiciary's deficiencies have prompted repeated constitutional and other reforms since the return to democracy in 1979, as of yet those efforts have failed to establish an independent judiciary; instead, the courts have become politicized, inefficient and corrupt. Political parties use judicial appointments for political purposes and press reports of judicial activity commonly report the party affiliation of judges. Most Ecuadorians have little respect for the judiciary. *Id.* at 301-03. R R

on the region. Without a major cleanup and modernization of the facilities, now operated by Petroecuador, environmental quality—already poor in many areas—can be expected to continue to decline.[98]

III. Texaco's Operations and Impact

Oil exploration and production is an industrial activity. Among other impacts, it generates large quantities of wastes with toxic constituents and presents ongoing risks of spills. The consortium led by Texaco extracted nearly 1.5 billion barrels of Amazon crude over a period of twenty-eight years (1964-1992).[99] During its tenure as operator, Texaco drilled

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98. For a fuller discussion of environmental law in Ecuador's oil fields, *see generally id.*; Kimerling, *Rio + 10, supra* note 57; Kimerling, *International Standards*, *supra* note 40; Kimerling, Amazon Crude, *supra* note 6, at 83-84. In addition to the legacy of Texaco, the implementation of environmental law has been hampered by the absence of political will; lack of resources and technical capacity; the failure of the rule of law and good governance generally; and resistance by industry to regulation. In a recent study of an initiative by Occidental Petroleum to voluntarily raise environmental standards—purportedly beyond what the law requires—the author found that despite Ecuador's constitutional and statutory duties to develop and implement environmental law, and a clear trend on paper toward increasingly detailed, albeit incomplete requirements, Occidental and the government negotiated an environmental law framework in the company's contract with Ecuador that seems designed to perpetuate and even legalize corporate control of environmental decisionmaking and implementation. Wheras self-regulation by oil companies historically occurred because of inaction by the State, in Occidental's new contract (negotiated behind closed doors and signed in 1999), the government effectively cedes authority to the company to set environmental standards for the operations, without public disclosure, review and approval by government officials, participation by affected groups, or other democratic safeguards. In effect, this amounts to the privatization of environmental law; it raises serious questions of law, legitimacy and accountability, and could operate to undermine democracy, good governance and the rule of law in Ecuador, in addition to presenting environmental and social risks. *See generally* Kimerling, *Rio + 10, supra* note 57; Kimerling, *International Standards*, *supra* note 40. R R R R

99. The dates include exploration and production activities; production began in 1972. Texaco transferred operational responsibility for the Trans-Ecuadorian Pipeline to a subsidiary of Petroecuador on October 1, 1989. On June 30, 1990, another subsidiary of Petroecuador assumed operational responsibility for exploration and production. Texaco retained a minority ownership interest in the consortium, remained involved in management of exploration and production activities, and shared in profits from the operations until its contract with Ecuador expired on June 7, 1992. The extrac-

339 wells and built 18 central production stations, in an area that now spans more than a million acres in Ecuador's northern Amazon, primarily in the provinces of Orellana and Sucumbíos.[100] In addition to the 498-kilometer Trans-Ecuadorian Pipeline System, the company built roughly 1,000 kilometers of secondary pipelines and flow lines and more than six hundred kilometers of unpaved roads.[101] Among other sources of pollution, Texaco regularly sprayed roads with crude oil for maintenance and dust control, and deliberately dumped tons of toxic drilling and maintenance wastes,[102] in addition to an estimated 19.3 billion gallons of oil field brine,[103] into the environment without treatment or monitoring—contaminating countless rivers and streams that served as rich fisheries and water sources for local communities.

Oil field brine, also known as produced water, is extracted with crude oil and separated in the field. Natural gas is also present in oil-bearing formations and is extracted with the oil and brine. Typically, the mixture is transported through small pipelines known as flow lines from the wells to a central production station. There, crude oil is separated from the mixture and transported by pipeline for sale. Virtually all of the produced water generated by Texaco was discharged into the environment via unlined, open waste ponds known as produc-

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tion figure of nearly 1.5 billion barrels was estimated by the author using government figures from December 1989 for cumulative and daily production. During Texaco's tenure as operator, the estimated total production was more than 1.3 billion barrels. *See* Republic of Ecuador, Ministry of Energy and Mines, *Producciones de Petróleo, Agua de Formación y Gas Natural*, *supra* note 92, at 1. R

100. The number of production stations is twenty-four when lateral stations are counted separately. Texaco, "*TEXACO, 17 años, 365 días al año, 24 horas al día* [*TEXACO, 17 years, 365 days a year, 24 hours a day*]", NOTICIAS [NEWS], at 3 (1989) [hereinafter Texaco, NEWS]. At the time of Texaco's first oil strike, it operated a 5-million acre concession. *See* KIMERLING, AMAZON CRUDE, *supra* note 6, at 43. Beginning in 1969, Ecuador reclaimed most of the area. *Id.* R

101. *See* Texaco, "*TEXACO, 17 años, 365 días al año, 24 horas al día*", *supra* note 100, at 3-4.

102. Drilling and maintenance wastes were either abandoned in open, unlined waste pits at well sites and production stations, or discharged to waters or soils.

103. Calculations by the author based on Republic of Ecuador, Ministry of Energy and Mines, *Producciones de Petróleo, Agua de Formación y Gas Natural*, *supra* note 92, at 1-2. R

tion pits. Some of the gas was processed for use in the operations; however, most was flared, or burned as a waste, without temperature or emission controls, depleting a nonrenewable natural resource and polluting the air and rain with greenhouse gases, precursors of acid rain, soot, and other contaminants that likely included dioxin.[104] Because the facilities did not achieve complete separation, produced water wastes typically contained high levels of hydrocarbons, and it was not unusual to see black smoke released from flares.[105]

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104. Pollutants include oxides of nitrogen, sulfur and carbon, as well as heavy metals, hydrocarbons, and carbon particulate (soot). Many of those emissions are toxic, and nitrogen oxides can react with sunlight to form ozone near the earth. When ozone is created near the earth, it is a human respiratory irritant, and possibly worse. (Ozone pollution near the earth does not help replete the ozone layer much higher up in the stratosphere, which occurred naturally but is now eroding, especially over the Southern Hemisphere.) Nitrogen oxides and sulfur dioxide are precursors of acid rain. Oxides of carbon are greenhouse gases. Sometimes liquid hydrocarbons are sprayed from flares. *See* KIMERLING, AMAZON CRUDE, *supra* note 6, at 63-69, 114-115. In addition, light from flares—which burn day and night—attract insects. Mats of dead insects can be found near flares. *Id.* at 115 n.45. Insects are the base of the protein food chain in the rainforest, and are a food source for some species of game favored by indigenous peoples. **R**

According to MEM technical staff who spoke with the author in 1989, Texaco burned 85-88% of the associated gas as a "waste," because it was less profitable to process and sell than crude oil. Only 12-15% of the gas was processed, at a plant in Shushufindi. *Id.* at 63. Texaco's production contract prohibited the company from burning gas as a waste without explicit permission from MEM. 1973 Production Contract, *supra* note 60, cl. 15.3. That requirement was not based on environmental or health concerns; instead, it reflects the state's interest in managing and conserving reserves of natural gas, a nonrenewable resource that is claimed by the state under Ecuadorian law. **R**

Additional sources of air pollution included emissions from engines and generators that commonly use diesel fuel; open fires when waste pits were torched to prevent their contents from overflowing; dust from roads that have been repeatedly sprayed with oil; and hydrocarbons that volatilize from oil slicks in and around pits, spill sites, and oil-covered roads. Many volatile organic compounds (VOCs) can be very toxic; VOCs can also promote ozone formation near the earth. In addition to human health effects, some volatiles such as methane are known contributors to global warming. *See* KIMERLING, AMAZON CRUDE, *supra* note 6, at 55-72, 115 n.47. Pipeline pump stations are also sources of air pollution, from engines and the venting of VOCs from oil storage tanks. *Id.* at 115 n. 48. **R**

105. For photographs, see KIMERLING, AMAZON CRUDE, *supra* note 6, at 58, 64 (Clyde Petroleum and Texaco facilities). S*ee also* U.S. Embassy Cable, *supra* note 87, at ¶ 7 (observing "large amounts of black smoke" from one **R** **R**

Produced water is a noxious brew of crude oil, formation water, and chemicals that have been injected down a well or used in the separation process.[106] Formation water refers to water in underground geologic formations; in this case it refers to water in hydrocarbon-bearing formations. It typically comes from strata thousands of feet below the surface and is very hot and toxic. In addition to hydrocarbons, which include benzene and polycyclic aromatic hydrocarbons (PAHs), oil field formation water contains heavy metals, and when it comes from strata that are deep underground as in Ecuador it also contains levels of salts that are toxic to plant and animal life. The high salt content also makes it difficult to treat produced water to significantly reduce or eliminate toxicity. Salts strip filters that could otherwise remove hydrocarbons and heavy metals from the wastes, dramatically shortening their useful lifespan, and because produced water is a large volume waste stream, removing the salts (by other means, such as reverse osmosis) would be very expensive. Because of this, most produced water in U.S. oil fields is re-injected underground. Produced water can also contain naturally occurring radioactive material (NORM), although no data on NORM levels is available in Ecuador.[107]

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flare and stating that the practice of burning oil in flares "is illegal in the U.S."). Black smoke results from burning oil rather than gas and indicates the presence of high levels of soot in the emissions. The separation process is described in KIMERLING, AMAZON CRUDE, *supra* note 6, at 63-69. R

106. Chemicals that can be used in the separation process or for well maintenance include biocides, fungicides, coagulants, cleaners, dispersants, paraffin control agents, descalers, foam retardants and corrosion inhibitors; many of those chemicals very toxic. Produced water can also include chemically-treated waters that are injected for enhanced recovery. KIMERLING, AMAZON CRUDE, *supra* note 6, at 65, 69, 114 n.31.

107. When present in subsurface oil and gas formations, NORM is typically transported to the surface in produced waters. NORM can deposit in oil field equipment and may be found in scales, sludges, contaminated soils and other wastes. INTERSTATE OIL & GAS COMPACT COMMISSION, IOGCC ENVIRONMENTAL GUIDELINES FOR STATE OIL & GAS REGULATORY PROGRAMS 50 (1994). NORM is most likely to precipitate out and concentrate at any location where the product stream is concentrated, slows down or changes direction, such as pit and tank bottoms, valves, pipeline (including flow line) elbows and flanges (where pieces of pipeline are joined). Telephone Interview with Wilma Subra, President, Subra Company, in New Iberia, La. (Oct. 27, 2000).

Oil is very toxic and can harm aquatic life at levels as low as 1-100 parts per billion (ppb).[108] Benzene and some PAHs are human carcinogens. Heavy metals can also be toxic at low levels, and some PAHs and heavy metals are known to bioaccumulate in the food chain. Although chemical data from Ecuador is sketchy, a number of heavy metals that are commonly associated with oil exploration and production worldwide are proven or suspected human carcinogens.[109] Oil field pollution can also rob waters of oxygen that is needed to sustain aquatic life, causing fishkills or stressing aquatic habitats. In some waters that receive ongoing discharges of produced water and have relatively low assimilation capacity, salts can create a chlorinity gradient that operates as an invisible barrier, preventing the normal migration of fish and other aquatic life between upstream and downstream waters.[110] The discharges can also make fresh waters unfit for human consumption. In his cable to Washington after visting the oil patch, Ambassador Lambert noted that "the water that enters the Amazon river system is highly saline" and quoted a Petroecuador manager: "At some points the rivers are like the sea."[111] According to local residents, many small rivers and streams that supported a splendid diversity of aquatic life when Texaco began its operations now support almost no life, and

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108. Oil pollutants can also be incorporated into sediments. KIMERLING, AMAZON CRUDE, *supra* note 6, at 67, 73; U.S. Environmental Protection Agency, Quality Criteria for Water, USEPA Office of Water, Regulations and Standards (1986). When incorporated into sediments below the aerobic surface layer, petroleum oil can remain unchanged and toxic for long periods; among other impacts, this "could have a long-term effect on the structure of the benthic community or cause the demise of specific sensitive important species." Id. R

109. Heavy metals are also found in drilling wastes. KIMERLING, AMAZON CRUDE, *supra* note 6, at 59-61, 65. Among the heavy metals commonly associated with oil exploration and production, known or suspected carcinogens include arsenic, beryllium, cadmium, chromium and nickel; in addition, lead, cobalt and mercury are very toxic to humans. *See* TEXTBOOK OF CLINICAL OCCUPATIONAL AND ENVIRONMENTAL MEDICINE (L. Rosenstock & M.R. Cullen eds., 1994). R

110. This can affect reproductive patterns and the distribution of aquatic species. In addition, salts, bound with other contaminants, can settle along the banks of contaminated streams, and attract wildlife and domestic animals. KIMERLING, AMAZON CRUDE, *supra* note 6, at 67, 115 n.42. R

111. U.S. Embassy Cable, *supra* note 87, ¶ 5. For more information about levels of salts, see KIMERLING, AMAZON CRUDE, *supra* note 6, at 65, 114 n.37. R R

even relatively large bodies of water, such as the Coca and Napo rivers, have been seriously degraded by chronic pollution and repeated oil spills.

In the United States, the discharge of produced water and other oil field wastes into fresh waters has been generally prohibited by federal law since 1979.[112] Despite this, Texaco continued to use antiquated practices in Ecuador, including the discharge of produced water and other wastes into the environment. Since the early 1990s, when the disclosure of irresponsible oil field practices in Ecuador put an international spotlight on the industry there, other oil companies have gone to great lengths to try to distinguish their standards and practices from Texaco. *We are not like Texaco; we use leading edge technology and international standards to protect the environment,* has become a common refrain. Texaco, however, has continued to defend its practices in Ecuador and has even referred to the practice of abandoning wastes in open, unlined pits as "pit technology."[113] In its answer to the complaint in a new lawsuit against the company in Ecuador, ChevronTexaco claimed that the operations had used "the best techniques" and that "Texpet always worked with the leading edge technol-

112. 40 C.F.R. § 435.32 (2000). The no discharge standard was promulgated by United States Environmental Protection Agency (EPA) under the Clean Water Act. It applies to all wastes from onshore exploration and production, and is based on a determination by the agency that no discharge represents the (then) "best practicable control technology currently available (BPT)." *Id.* The no discharge standard does not apply to effluents from stripper wells, defined as wells that produce less than ten barrels of crude oil per day; or "beneficial use" discharges, which, in practice, are limited to operations in certain arid and semi-arid areas, where produced water meets federal effluent limitations and "has a use in agriculture or wildlife propagation." 40 C.F.R. 435.60; 435.50. For a fuller discussion of oil field regulation in the U.S., see Kimerling, *International Standards*, *supra* note 40, at 376-90; MICHELLE MACFADDIN, OIL AND GAS FIELD WASTE REGULATIONS HANDBOOK (1996). R

113. TEXACO PUBLIC RELATIONS, *supra* note 79, at 9-10 ("[U]se of pit technology for water treatment is environmentally effective and safe and even considered desirable."). As discussed *infra,* prior to the *Aguinda* lawsuit, Texaco defended the operations in Ecuador by citing the company's commitment to environmental protection and responsible operations around the world, and compliance with worldwide environmental policies; in the litigation, however, Texaco claimed that its only involvement in Ecuador was an indirect investment in a fourth-tier subsidiary, and that the parent company had no role in environmental management. R

ogy . . . using techniques and procedures generally accepted in the petroleum industry at the time."[114]

Some 235 Texaco wells are still active and are now operated by Petroecuador, using the technology and training it acquired from Texaco. Texaco handed over operational responsibility for the wells and other production facilities to the state company in June 1990. Government figures from December 1989 show that by the time of the transfer, the facilities—which had expanded to include operations in sixteen oil fields[115]—were producing some 213,840 barrels per day.[116]

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114. ChevronTexaco Answer, *supra* note 17, at ¶¶ II.B.2.2, II.B.1.4. The answer further alleges that "during all the time that Texpet operated the Consortium," its practices of "discharging formation waters on surface waters" and "spreading crude on highways . . . complied with legal standards in the United States of America, Ecuador and other countries." *Id.* at ¶ II.B.1.5. In addition to legal standards, the answer repeatedly alleges compliance with industry standards and practices and international practices. *See, e.g.*, *id.* at. ¶ II.B.1.6 (Texpet used "appropriate technology . . . [that] did not violate either Ecuadorian law or current practices in the industry at the time"); *id.* ¶ II.B.1.7(b) ("Ecuadorian law and international practices require the use of [waste pits]"); *id.* at ¶ II.B.1.5 ("Based on information provided by TEXPET, CHEVRONTEXACO CORPORATION knows that the techniques and procedures such as those used by Consortium complied with hydrocarbon industry standards"); *id.* at ¶ II.B.1.8 ("CHEVRONTEXACO CORPORATION, which obviously knows about generally-used techniques of that time in the petroleum industry, can state that [Texpet's operations] complied with the international practices of the oil industry prevailing at that time and with the legal regulations of the Republic of Ecuador."). Although both legal requirements and generally-used industry practices can be relevant to—but not necessarily determinative of—the civil liability issue of whether Texaco used the proper level of care, the references in the Answer can also arguably be read to suggest that industry practices and legal standards together form a body of law, reminiscent of discourse that is currently promoted by other multinational oil companies in Ecuador. Ironically, those companies promise to apply "international standards" in order to distinguish their operations from Texaco and Petroecuador, and reassure government officials, local communities and other stakeholders that environmental performance is improving. However, because no international environmental regulations apply to oil exploration and production, and the source and substance of "international oil field standards" are poorly understood, private industry norms are commonly confused with public legal standards. *See generally* Kimerling, *Rio + 10, supra* note 57; Kimerling, *International Standards*, *supra* note 40. **R**

115. For a list of the fields, *see* KIMERLING, AMAZON CRUDE, *supra* note 6, at 47. **R**

116. Republic of Ecuador, Ministry of Energy and Mines, *Producciones de Petróleo, Agua de Formación y Gas Natural*, *supra* note 92, at 2. **R**

They generated more than 3.2 million gallons of produced water every day,[117] virtually all of which was deliberately dumped into the environment without treatment or monitoring. According to technical staff in MEM, the amount of petroleum in Texaco's produced water ranged from 500,000 ppb to 5,000,000 ppb.[118] As a result, the operations discharged some 1,600-16,000 gallons of oil every day as part of the produced water waste stream. At the same time, they generated 49,227,000 cubic feet of gas every day,[119] most of which was burned as waste, again without environmental controls or

117. *Id.*

118. KIMERLING, AMAZON CRUDE, *supra* note 6, at 65, 114 n.38. Hydrocarbon levels are so high that oil continues to separate and rise in production pits, where it typically forms a visible cap of crude on the surface of the pit. Rainwater freely enters the pits, swelling their contents and becoming contaminated as it mixes with the wastes. For photographs of waste pits at production stations operated by Texaco and other companies, see *id.* at 57, 58, 64, 68, 70, 108. For photographs of open pits at well sites, which are also typically covered by a cap of crude, see *id.* at 66. For a photograph of an oil slick on a stream that receives discharges from a pit at a producing well site, see *id.* at viii. Like production pits, waste pits at well sites are basically big holes in the ground. They contain drilling wastes and, in the case of producing wells, wastes from well maintenance activites. Drilling wastes include drilling muds and industrial solvents that are used during drilling operations, as well as cuttings, petroleum, natural gas, and formation water that are removed from the hole during drilling and testing. *Id.* at 59. Maintenance wastes include wastes from well stimulation operations, such as workovers and fracturing. *Id.* at 63, 113 n.29. R

Waste pits at producing wells and production stations—where wastes are generated on an ongoing basis—and typically drained by an outfall pipe. Liquid wastes or thick, oozing petroleum are discharged into the environment from those pipes. The discharges accumulate in low areas—where they pollute the air and contaminate runoff and ground waters—or flow into nearby streams. Other wastes spill over the sides of the pits. *Id.* at 67. Texaco periodically torched pits to prevent overflows; however, that practice is no longer common. Since 1992, many waste pits at well sites have been covered with dirt; however, as discussed *infra* in this Part and Part VII, contaminants have not been properly contained—or, in the case of Texaco, claims of containment have not been properly verified. As a result, pollutants from most (or all) of those sites can be expected to continue to contaminate the environment.

119. Republic of Ecuador, Ministry of Energy and Mines, *Producciones de Petróleo, Agua de Formación y Gas Natural*, *supra* note 92, at 3. R

monitoring. That same year, Ecuador increased imports of natural gas for domestic consumption.[120]

As production facilities age, they generate less oil and more produced water. They also require more costly maintenance to maximize production levels and prevent spills and other accidental releases. Basic oil field economics, then, do not favor environmental protection because the cost of protection typically increases as the income stream from facilities decreases.[121] Petroecuador has continued to expand operations in the fields developed by Texaco.[122]

In addition to routine, willful discharges and emissions, accidental spills have been common. During the time that Texaco operated the trans-Ecuadorian pipeline, that line alone sent an estimated 16.8 million gallons of crude oil into the environment, mostly in the Amazon basin—according to figures recorded by MEM.[123] That total, however, is probably low. When adjusted using figures from the World Bank for one of the spills—in 1987, after the line was hit by two earthquakes and landslides—the total increased to 19.23 million

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120. KIMERLING, AMAZON CRUDE, *supra* note 6, at 114 n.33 (According to MEM technical staff, imports of LPG rose from 10.81 million cubic feet in 1988 to 14.85 million cubic feet in 1989.). **R**

121. *See* Statement of William B. Burkett, Production Operator, BP Exploration (Alaska), to Senators Joseph Lieberman and Bob Graham (Mar. 4, 2002), *available at* http://www.anwrnews.com/docs/20020404_Bill_Burkett_Letter.asp.

122. According to ChevronTexaco, Petroecuador uses "the same techniques" as Texaco—"practically no technique has been changed." ChevronTexaco Answer, *supra* note 17, at 73. However, sources in Petroecuador say that the company now reinjects some—but not all—of its produced water. Reinjection could be an environmental improvement; however, improper injection practices and poor maintenance can significantly increase the risk of groundwater contamination. *See infra* notes 259-260 and accompanying text. Some questions have been raised about Petroecuador's practices, but information to evaluate them is not publicly available. In addition, reinjection capacity is limited and Petroecuador continues to dump millions of gallons of produced water into the environment every day. **R**

123. Republic of Ecuador, Ministry of Energy and Mines, General Directorate for the Environment (DIGEMA) Proposes the Need to Incorporate Contingency Plan for the Trans-Ecuadorian Pipeline System (SOTE), *supra* note 73 (including data from some 30 spills ocurring between 1972 and May 1989). The figure only accounts for major spills from SOTE recorded by MEM; spills from secondary pipelines, flow lines, tanks and other facilities are not included. **R**

gallons.[124] By comparison, the Exxon *Valdez* spilled an estimated 10.8 million gallons into the Prince William Sound, in the largest oil spill in the United States. In contrast to the oil industry's typically energetic response to spills in the United States, Texaco's response in Ecuador was limited to shutting off the flow of petroleum into the damaged portion of the line. Before making the necessary repairs, the company allowed the oil already in the line to spill into the environment. No clean up activities were undertaken, and damages were not compensated.

Texaco's pipeline system crosses myriad rivers and streams, but because valves in the system were designed for operational purposes, rather than environmental mitigation, the nearest valve to a spill can be tens of kilometers away; thus, oil can spill for days before the breached line is evacuated. As a result, spills from the trans-Ecuadorian pipeline and secondary pipeline systems have had particularly devastating and far-reaching impacts, causing major fishkills and destroying plant and animal life for hundreds of kilometers.[125] The Coca River, a tributary of the Napo, and the Napo River have been particularly hard hit.

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124. *See id.*; INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, "ECUADOR EMERGENCY PETROLEUM RECONSTRUCTION PROJECT," at 13 (Apr. 27, 1987) (Technical Annex to President's Report and Recommendation on Proposed Loan to Ecuador for Emergency Petroleum Reconstruction Project) [hereinafter World Bank Ecuador Pipeline Reconstruction Project].

125. For example, in March 1987, earthquakes shattered a portion of the trans-Ecuadorian pipeline, spewing millions of gallons of crude into the Coca and Napo rivers. The spill caused fishkills and destroyed plant and animal life for hundreds of miles; affected waters still have not recovered their biodiversity. In May 1989, a spill from the secondary pipeline—where it crosses under the Napo River—dumped some 294,000 gallons of oil into the river. The spill coincided with flooding along the Napo, and Kichwa who live in the area reported "petroleum floods" for hundreds of kilometers (from Comuna San Carlos to the border with Peru), especially in low areas. A thick oil slick covered the waters, which remained at flood levels for two days. After the floods receded, petroleum stains remained on soils and plants until subsequent rains washed them away. Within two weeks, crops that had been flooded began to die. According to the Kichwa federation FCUNAE, some 560 families in thirty-one communities lost crops to the flood, in addition to other injuries). KIMERLING, AMAZON CRUDE, *supra* note 6, at 69, 71. For a photograph of manioc crops destroyed by the "petroleum flood," *see id.* at 74. The spill at the crossing is not included in the 19.23 (or 16.8)-million-gallon totals reported in the text because those figures do not include spills from secondary pipelines. R

Spills from flow lines, tanks, well sites, production stations and other facilities have also had devastating impacts on a local level. In addition, they have contributed to the degradation and contamination of major rivers and groundwater—and continue to do so, by some accounts with growing frequency. Depending on the location and size of the release, these spills can also cause oil slicks on waterways for scores of kilometers, fouling water supplies and fisheries of downstream communities. Because they are not cleaned up properly, spills commonly become sources of ongoing, chronic pollution in affected watersheds for months or even years.

The areas affected by pollution from spills and deliberate discharges from the Texaco-Petroecuador facilities are predominantly located in the watershed of the Napo River. The Napo is a major tributary of the Amazon River. In Ecuador, affected areas in the greater Napo basin can be divided into three sectors: (1) the Napo River and myriad lagoons and smaller rivers and streams that feed into the Napo in Ecuador, including the Tiputini River; (2) the Aguarico River basin, including the Shushufindi River (which flows into the Napo east of Ecuador, in Peru); and (3) the Cononaco River basin, including the Shiripuno River, located in the northern watershed of the Curaray River (which flows into the Napo further downstream in Peru). The Napo sector is inhabited by indigenous Kichwa and Huaorani; the Aguarico basin is inhabited by indigenous Cofán, Secoya, Siona, and Kichwa; the Curaray basin is inhabited by indigenous Huaorani. In addition to indigenous residents, the affected areas are also currently inhabited by colonists from Ecuador's highland and coastal regions, and Shuar from Ecuador's southern Amazon, who migrated to the area in the wake of Texaco's oil development activities.

The last indigenous Tetetes, now extinct as a people, reportedly fled their homelands near Lago Agrio, the boom town that sprang up around Texaco's first commercial field.[126] The Huaorani, Kichwa, Cofán, Siona, and Secoya also lost

126. Former Texaco workers have reported that Texaco dropped dynamite and bombs from helicopters to frighten its indigenous neighbors. Interview with Luis Carrera, President of the Environmental Advisory Commission to the President of the Republic, in Quito, Ecuador (Jan. 26, 1994). Displacement by Texaco is believed to have hastened the extinction of the Tetete people. *Id.*

lands and natural resources to oil field infrastructure and the flood of colonists who followed oil roads into previously inaccessible forests.[127] By 1989, an estimated one million hectares (nearly 2.5 million acres) of rainforest had been colonized along more than 500 kilometers of roads—most of them built by Texaco[128]—making oil development the primary engine of deforestation and dislocation of indigenous peoples in Ecuador's Amazon region.[129] Texaco planned the operations

127. The Cofán, who also hunted and foraged in and around the area that is now Lago Agrio, were dispossessed of huge tracts of their traditional territory, and the groups who have not migrated now live in five non-contiguous pockets of land. Estimates of the Cofán population at the time of initial contact with the Spanish range from 15,000 to 50,000 persons. Currently, they number some 1,000 persons in Ecuador (with approximately two-thirds living in the Amazon region). *See* www.cofán.org.

128. The Siona and Secoya also lost large tracts of land to infrastructure and colonization along roads in Cuyabeno Wildlife Reserve, the result of oil development by other companies. Until recently, the Siona and Secoya were not generally regarded as separate ethnic groups. Even today, the distinction is considered more political than anthropological because the groups have inter-mingled and inter-married for centuries. Their languages are mutually understood. The indigenous Secoya Organization of Ecuador (OISE) is the nominal representative of the Secoya; the Organization of the Siona Nation of Ecuador (ONISE) is the nominal representative of the Siona. Land titles, however, pre-date the political split and name both Siona and Secoya heads of household. Telephone Interview with William T. Vickers, Professor of Anthropology, Florida International University, in Miami, Fla. (Sept. 24, 1999). The population of the Siona and Secoya was estimated at some 16,000 persons at the time of initial contact with the Spanish. Today, approximately 600 remain in Ecuador; some also live in Peru. William T. Vickers, *Informe Sobre las Negociaciones entre los Secoyas del Ecuador y la Occidental Exploration and Production Company* [Report on the Negotiations between the Secoyas of Ecuador and Occidental Exploration and Production Company], (July 18, 1988).

129. The estimate is by United States Agency for International Development (USAID). KIMERLING, AMAZON CRUDE, *supra* note 6, at 75-77 (citing USAID, *Natural Resources Management and Conservation of Biodiversity and Tropical Forests in Ecuador: A Strategy for USAID*, draft 3 (Mar. 1, 1989)). Road construction also opened previously inaccessible forests to land speculation, logging, ranching and agri-industry. R

In addition, natural drainage patterns have been disrupted at many locations where Texaco effectively dammed small waterways when building roads and dumping soils during construction activities. At those sites, upstream areas are flooded with stagnant, silty water, creating the type of habitat that is known to attract malaria-carrying mosquitos. Adverse impacts of road building and other construction also include the destruction of crops and forest resources; fragmentation and loss of habitat; creation of

based on technical and economic considerations, and typically operated as if no one lived in the oil fields. In the words of one Kichwa resident, "Texaco came into our community to work, but did not even greet us."[130]

The Huaorani, a nomadic warrior people, tried to drive off the oil invaders with hardwood spears. A number of violent encounters have been reported between Huaorani and oil crews, with deaths on both sides. In response, Ecuador, Texaco, and U.S.-based Protestant missionaries from the Summer Institute of Linguistics (SIL) collaborated to pacify the Huaorani and open their territory to operations by Texaco.[131]

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barriers to migration by wildlife; erosion and soil degradation; and sedimentation and increased turbidity of surface waters. *See id.* at 75-77.

130. Kichwa in affected areas number approximately 20,000 persons and are by far the most populous indigenous group affected by the operations. Large numbers of lowland Kichwa also live in Napo and Pastaza provinces.

131. The first peaceful contacts between Huaorani and outsiders—fundamentalist missionaries from SIL and Christian Missions in Many Lands—were in 1958. Rachel Saint, whose brother was speared to death by Huaorani in 1958 (with four other missionaries) pioneered evangelization of the Huaorani. In 1955, Saint and another linguist/missionary sought out Dayuma, a Huaorani woman who was living as a slave on a plantation near Huaorani territory. At nights, after working in the fields, Dayuma worked with the linguists to recall and teach her native language. Saint told Dayuma stories from the Bible. When she was a child, Dayma's grandfather, Karae, had told her that a god created the animals, the rivers and the Huaorani. Saint appeared to know even more about God than Karae, and had answers to all of Dayma's questions about God and the afterlife. In 1958, the owner of the plantation released Dayuma and her young son, Samuel Caento Padilla, to Saint. With Dayuma's help, SIL undertook a campaign to convert the Huaorani and relocate them into a permanent settlement, built on the western edge of Huaorani territory on the Tihueno River (in Pastaza province). Saint and Elisabeth Elliot—the widow of a missionary who was killed with Saint's brother—and her young child went to live with Dayuma and her relatives at Tihueno. Saint and Dayuma gained power and influence in the new settlement because of access to food, medicine and trade goods like metal pots and cutting tools, which they "shared" with the others. Those goods also attracted some Huaorani to Tihueno; years of gift drops (by missionaries and Shell Oil) had opened the door to pacification. For a fuller discussion, *see generally* Judith Kimerling, *Dislocation, Evangelization & Contamination: Amazon Crude and the Huaorani People*, *in* ETHNIC CONFLICT AND GOVERNANCE IN COMPARATIVE PERSPECTIVE 70 (Working Paper Series, No. 215, WOODROW WILSON INT'L CTR. FOR SCHOLARS, 1995) [hereinafter Kimerling, *Dislocation, Evangelization & Contamination*]; DAVID STOLL, FISHERS OF MEN OR FOUNDERS OF EMPIRE (1982). For a report on collaboration by international oil companies and SIL to pacify indigenous peoples in Ecuador, *see* J.F. Sandoval Moreano, CEPE, *Pueblos Indígenas y Petróleo en la Amazonía Ecuatoriana*

Using aircraft supplied by Texaco, missionaries contacted and physically removed some 200 Huaorani from the path of the company's work crews and took them to live in a distant Christian settlement. Other Huaorani fled deeper into the forest, to get away from Texaco and the missionaries. At least one of those groups, the Tagaeri, continued to resist all efforts by outsiders to contact them.[132] For three decades, they hid in the

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[Indigenous Peoples and Petroleum in the Ecuadorian Amazon] (1988). For accounts of SIL activities from the perspective of the missionaries, *see* ELISABETH ELLIOT, THROUGH THE GATES OF SPLENDOR (1957) (Huaorani); ROSEMARY KINGSLAND, A SAINT AMONG SINNERS (1980) (Huaorani); ETHEL EMILY WALLIS, THE DAYUMA STORY: LIFE UNDER AUCA SPEARS (1971) (Huaorani); FRANK & MARIE DROWN, MISSION TO THE HEADHUNTERS (1961) (Shuar).

132. Kimerling, *Dislocation, Evangelization & Contamination*, *supra* note 131, at 84. The estimate of 200 is from anthropologist Laura Rival. Telephone Interview with Laura Rival (Dec. 7, 1994). The current population of known Huaorani is approximately 2,800 persons. An unknown number live in voluntary isolation, but their physical and cultural survival is in jeopardy. **R**

In addition to violence, Texaco's camps were raided. Nearly two decades before, Shell Oil had reportedly abandoned oil exploration further south in Huaorani territory because of Huaorani "savagery." KINGSLAND, *supra* note 131, 39. But this time the certainty that the region contained valuable reserves had sparked an oil rush, and Texaco and Ecuador were determined to develop the oil. Rosemary Kingsland, a Christian journalist who wrote about Rachel Saint's work with Dayuma with Saint's cooperation, described the mood of the time: **R**

> The northern strike was enormous . . . . Nothing would stop them from going in now and there was talk of using guns, bombs, flamethrowers. Most of the talk was wild, but the result would be the same: a war between the oil men and the Aucas [Huaorani]; a handful of naked savages standing squarely in the middle of fields of black gold, blocking the progress of the machine age. If it was to be a question of no oil or no Aucas, there was only one answer.

Id. at 126. According to Kingsland, Texaco turned to Ecuador's government to solve the Huaorani problem, which turned to Saint. SIL's relocation program was sped up and extended to "enemy" bands. In 1969, relocation efforts were temporarily slowed by a polio epidemic in Tihueno that left sixteen dead and sixteen crippled. (Another man was speared to death and homes were burned because the Huaorani believed that enemy clans had caused the mysterious deaths.) But soon after the epidemic, "pressure was brought to bear on SIL" to contact and relocate Huaorani who lived in Texaco's path. Oil exploration crews were within just a few miles of a longhouse, and a worker had been speared to death. *Id.* at 70, 126-31. Relocation efforts intensified in that area, this time using aircraft supplied by Texaco. Stoll, *supra* note 131, at 292. It was during this period, in the early 1970s, that most Huaorani were finally contacted. Kingsland credits Saint's **R**

forest while their ancestral lands were occupied by strangers. By the time Texaco handed over the operations to Petroecuador in 1990, the area was so degraded by pollution and deforestation from the operations and colonization along the company's road that the Tagaeri could no longer live there and were not expected to return. In 2003, the Tagaeri disappeared as a distinct group; some survivors are believed to be living with another voluntarily isolated (Huaorani) clan, the Taromenane. As a general matter, the Huaorani have lost their political sovereignty, and been thrust into a process of rapid change, loss of territory and natural resources, and environmental degradation that could lead to their extinction as a people.[133]

"civilizing influence" on the Huaorani for the "breakthrough" that allowed Texaco to enter Huaorani territory after Shell had been "chased out of a region rich in oil by a handful of Indians." Kingsland, *supra* note 131, at 126. According to Dayuma's son, Caento, Saint worked with "an open checkbook" from Texaco to relocate the Huaorani. Interview with Samuel Caento Padilla, in Quito, Ecuador (Sept. 23, 1994). For a fuller discussion, *see generally* Kimerling, *Dislocation, Evangelization & Contamination*, *supra* note 131. **R** **R**

133. For the Huaorani, then, Texaco's operations were especially traumatic. Small planes and helicopters roared unrelentingly over the forest, as oil exploration crews advanced deeper into Huaorani territory, and missionaries cruised the skies looking for longhouses and calling out to people through loudspeakers or radio transmitters hidden in baskets lowered from the air. They dropped "gifts" of mirrors, beads, metal pots, machetes, axes, rice, sugar and salt. In addition to food and other trade goods, SIL used family relations, the availability of spouses, harassment, fear and the promise of "*tierra libre* (available land)" to convince Huaorani to join their "Christian" relatives in Tihueno—while noisy air traffic and oil crews scared off the game that served as their principal food supply. According to anthropologist Laura Rival, "for the targeted Huaorani, everything was upset; there was a great deal of hustling and Saint put tremendous pressure on them to move to Tihueno." In addition to the disruption and violent conflict with oil crews, it was a period of bloody warfare—of killing and hiding—within the tribe. Tensions rose, and most finally went, in haste. It was "a terrible time," and some twenty years later people cried as they recounted events to Rival. Interview with Laura Rival, *supra* note 132. In Tihueno, the Huaorani suffered from epidemics of new diseases, severe culture shock, and other traumas. Among other problems, important forest products were depleted, there were food shortages, and the Huaorani had the rely on imported foods and medicines obtained by the missionaries. They were told that Huaorani culture is sinful and savage, and pressured to change, abandon their traditions, become "civilized" and adapt the Christian way of life. For discussions of life in Tihueno, see KINGSLAND, *supra* note 131; Kimerling, *Dislocation, Evangelization & Contamination*, *supra* note 131. For a discussion of tradi- **R** **R** **R** **R**

Before Texaco's arrival, the Huaorani and other indigenous peoples lived *bien*—or well—in harmony with their rainforest environment. Oil development violently disrupted their way of life; in addition, Texaco created poverty among forest peoples by damaging natural resources that provided them with secure, self-reliant, and sustainable sources of food, water, medicine, and shelter. Outright dispossession by colonists and the company significantly reduced indigenous territories; in many remaining lands, noise and chemical pollution from oil facilities have degraded important natural resources, further straining the subsistence base of indigenous populations and limiting their range for hunting, fishing, gathering and gardening. According to local residents, some forest species—both terrestrial and aquatic—have become more difficult to find; others have disappeared.

Rainforest habitats have been reduced, fragmented, and degraded, and pollution saturates the oil fields, in addition to affecting downstream and downwind areas. In some communities, even the rain is no longer clean, and residents say it now feels "slippery, like washing with soap." Although chemical sampling data from areas affected by Texaco are limited, PAHs and other toxic chemicals have been found in surface waters and sediments at levels that pose risks of serious illnesses.[134] In addition, benzene has been found in subsurface soils.[135] When Texaco began its search for oil, the area was pristine humid tropical forest. Now, in the headwaters of an ecosystem that is world-renowned for biological richness[136] and is be-

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tional Huaorani culture, *see,* Laura Rival, *The Growth of Family Trees; Understanding Huaorani Perceptions of the Forest*, Man 28:635-52 (1993).

134. *See* CTR. FOR ECON. AND SOC. RIGHTS, RIGHTS VIOLATIONS IN THE ECUADORIAN AMAZON: THE HUMAN CONSEQUENCES OF OIL DEVELOPMENT, 16-19, 64-69 (water samples) (1994); IEA, Report #30920-1075, (with cover letter to M. Cachere, Center for Constitutional Rights, Aug. 26, 1992) (water and sediment samples) (Disclosure: the samples were collected by a U.S.-based hydrogeologist and geologist, invited and accompanied by the author).

135. JORG HETTLER, ENVIRONMENTAL PROBLEMS OF PETROLEUM PRODUCTION IN THE AMAZON LOWLAND OF ECUADOR 55-59 (study funded by United Nations Environment Programme) (1996).

136. Amazonia is "possibly the single greatest concentration of biodiversity on the planet." Thomas Lovejoy, *Amazonian Forest Degradation and Fragmentation: Implications for Biodiversity Conservation, in* AMAZONIA AT THE CROSSROADS: THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 41 (Anthony Hall ed., 2000). For example, at Jatun Sacha Biological Station in Ecuador, scientists identi-

lieved to contain 20-25% of the world's flowing fresh water, many families no longer have clean water or enough food. The area hosts an industrial corridor with boom towns, uncontrolled colonization and deforestation, severe pollution, and degraded forests and waters.[137]

To varying degrees, indigenous families have moved away from traditional subsistence activities toward a new cash economy because of damages to natural resources or because they want cash to buy goods they cannot themselves produce. As a consequence, many people substitute carbohydrates for fish and wildlife proteins in their diet, which can lead to malnutrition and lowered resistance to disease. Moreover, when subsistence activities are undermined or abandoned, traditional indigenous cultures are eroded, and dependence on outsiders increases. The Huaorani have entered a deepening spiral of dependency on outsiders; for other groups, dependence on outsiders has grown. Texaco's operations—and oil development in general—have significantly diminished access to renewable natural resources and impaired subsistence production without providing affected indigenous populations with a means of purchasing essential goods. The loss of territory and destruction and degradation of natural resources have also impaired food security and food sovereignty, and reduced the resource base of indigenous peoples for sustainable develop-

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fied 246 species of trees in just one hectare of rainforest; by comparison, in all of North America, which spans nearly 2 billion hectares, scientists have identified only 652 native species of trees. D. NEILL AND W. PALACIOS, ÁRBOLES DE LA AMAZONÍA ECUATORIANA: LISTA PRELIMINAR DE ESPECIES [TREES OF THE ECUADORIAN AMAZON: PRELIMINARY LIST OF SPECIES] (1989).

137. Oil development also failed to consider local and regional development needs. Urban centers and settlers' homes are visibly impoverished. Public services, even in urban population centers, were described by the World Bank in 1989 as "calamitous." JAMES F. HICKS, HERMAN E. DALY, SHELTON H. DAVIS & MARIA DE LOURDES DE FREITAS, WORLD BANK DISCUSSION PAPERS, ECUADOR'S AMAZON REGION: DEVELOPMENT ISSUES AND OPTIONS 19 (1990). Most skilled and semi-skilled labor is imported into the Amazon, and oil workers live almost exclusively in company camps. The camps are islands of prosperity in a sea of poverty, sporting air conditioners, hot showers, 24-hour electricity, potable water, and television. *See id.*; J.F. SANDOVAL MOREANO, PETRÓLEO Y DESARROLLO REGIONAL [PETROLEUM AND REGIONAL DEVELOPMENT] 19 (Organizacion Internacional del Trabajo 1985); KIMERLING, AMAZON CRUDE, *supra* note 6, at 81-82. Although there have been some improvements in urban centers in recent years, public services remain poor. **R**

ment. As a general matter, the distribution of environmental costs and compensatory benefits of "development" has not been equitable, and indigenous peoples continue to bear a disproportionate share of the costs without sharing in the benefits or participating in decisionmaking that affects them. At the same time, pressures to modernize and adopt the ways of the "civilized" culture are discouraging many young people from learning the methods their ancestors used to manage rainforest resources. Exposure to outsiders has also triggered epidemics of alien diseases in some communities that shamans and traditional medicines cannot cure. Some individuals have turned to prostitution, and alcoholism and alcohol-related violence and accidents are new but growing problems.

Increasingly, both indigenous and settler residents affected by Texaco's operations attribute health problems—including malnutrition, skin rashes, memory loss, headaches, fevers, miscarriage, birth defects, and cancer—to the company's pollution. Recent epidemiological studies of affected colonists found elevated levels of miscarriage and other health problems among women in the study area, and a cancer cluster and elevated risk of cancer among men in one community.[138] These findings are likely just the tip of the iceberg because diagnostic services and health data are limited, especially in indigenous communities; exposures to toxic chemicals continue; and in cases of cancer, latency periods delay the onset of disease, and five to forty years can pass between the date of the harmful exposures and the first appearance of symptoms of the disease. Moreover, for indigenous peoples, environmental quality is not only linked to physical health, but

138. MANUEL AMUNÁRRIZ INSTITUTUE FOR EPIDEMIOLOGY AND COMMUNITY HEALTH, INFORME YANA CURI: IMPACTO DE LA ACTIVIDAD PETROLERA EN LA SALUD DE POBLACIONES RURALES DE LA AMAZONIA ECUATORIANA [YANA CURI REPORT: IMPACT OF PETROLEUM ACTIVITY ON THE HEALTH OF RURAL POPULATIONS OF THE ECUADORIAN AMAZON] 79-80 (Instituto de Epidemiología y Salud Comunitaria ed., 2000) (Ecuador); Miguel San Sebastián, *Outcomes of Pregnancy among Women Living in Proximity of Oil Fields in the Amazon Basin of Ecuador,* 8 INT. J. OCCUP. ENVIRON. HEALTH 312 (2002). A review of cancer cases reported to Ecuador's National Cancer Registry in 1985-1998 from four Amazonian provinces found that the incidence of cancer was significantly greater in counties with oil development than in counties without oil activities. Anna-Karin Hurtig & Miguel San Sebastian, *Geographical Differences in Cancer Incidence in the Amazon Basin of Ecuador in Relation to Residence Near Oil Fields,* 31 INT'L J. EPIDEMIOLOGY 1021 (2002).

also to spiritual and mental health. For example, Huaorani from the upper Shiripuno are concerned about an open waste pit in a Kichwa community near the Napo River because they believe it is weakening their shamans.

Despite a serious decline in their quality of life, most indigenous populations have managed to maintain a strong sense of identity and rich culture. Dependence on the rainforest environment remains high, even as the quality and quantity of renewable natural resources continues to grow poorer and sharp inequities in access to resources have emerged, based on variations in environmental quality, proximity to sources of pollution and loss of territory.[139] If present trends continue, however, widespread poverty, disease, hunger, and social disintegration can be expected, which, in turn, will erode indigenous cultures. To survive as peoples, indigenous populations must regain control over their remaining territories—which contain the last resources on which they depend for their economies and cultural survival—and reverse the trend toward environmental degradation. Emerging international law on the rights of indigenous peoples recognizes the special importance of land rights and a healthy environment to the health, well-being, and cultures of indigenous populations.[140] In Ecuador, unless remedial action is taken to

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139. Local economies in indigenous communities continue to be based primarily on hunting, fishing, gathering and small scale cultivation of cash and subsistence crops; however, in some areas, people no longer have reliable sources of protein or clean water for drinking, cooking, bathing, and washing because of pollution and damage to hunting and fishing resources. At the same time, there is growing interest and involvement in ecotourism.

140. *See e.g.,* ILO Convention 169, *supra* note 56; *Agenda 21*, *supra* note 93, ch. 26; Draft United Nations Declaration on the Rights of Indigenous Peoples, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/56 (1994); Proposed American Declaration on the Rights of Indigenous Peoples, Inter-American Commission on Human Rights (approved by the IACHR on Feb. 26, 1997), OEA/Ser.L/V/II.110; Mayagna (Sumo) Awas Tigni Community v. Nicaragua, Case No. 79, Inter-Am. C.H.R., (Judgment of Aug. 31, 2001); Prevention of Discrimination and Protection of Indigenous Peoples' Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur, Erica-Irene A. Daes, United Nations Economic and Social Council, Commission on Human Rights, E/CN.4/Sub.2/2004/30 (2004) & Addendum, E/CN.4/Sub.2/2004/30/Add.1 (2004)); Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous peoples and their relationship to land: Final working **R**

clean up and restore damaged areas, prevent further pollution, and upgrade and repair—or properly close and decommission—aging production facilities, the operations that were launched by Texaco and continued by Petroecuador will continue to threaten and harm natural resources at a number of locations, further diminishing the ability of present and future generations to continue, or revitalize, a sustainable and self-reliant way of life, and further reducing their resource base for sustainable development.

Beginning in 1992, waste pits at dozens of well sites were covered with dirt, without testing, treating or removing the wastes, or otherwise isolating them from the environment.[141] This was called a "clean up." At dozens of other sites, crude oil and contaminated soils and vegetation were gathered by hand and buried in unlined holes in the ground. At the time, hundreds of open, unlined waste pits dotted the region (with one or two at most well sites and two or more at most production stations), and massive oil slicks were common sights near pits and some flow lines.[142] As a result of those activities, the buried contamination is less visible, but pollutants can be expected to continue to migrate in the environment. That same year, Texaco's contract with Ecuador expired, and on June 6, 1992, the company relinquished full control of its aging facilities to Petroecuador.

IV. Environmental Audit

In 1992, months before Texaco's contract with Ecuador was scheduled to expire, Petroecuador announced that a Canadian consulting firm, HBT Agra Ltd. (Agra), would conduct an "independent and impartial" environmental audit of Texaco's facilities.[143] According to press reports, the audit was to

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paper prepared by the Special Rapporteur, Mrs. Erica-Irene Daes, United Nations Economic and Social Council, Commission on Human Rights, E/CN.4/Sub.2/2001/21 (2001).

141. For a photograph, *see* Crudo Amazónico, *supra* note 77, at 84. R

142. *See* Kimerling, Amazon Crude, *supra* note 6, at 65-67 (description based on extensive field observations with local residents in 1989-1990). R

143. *Controlarán acción ambiental de Texaco* [*Texaco's Environmental Action to be Controlled*], El Telégrafo, Apr. 30, 1992; *Texaco adjudicó contrato ambiental* [*Texaco Assigned Environmental Contract*], El Comercio, Feb. 28, 1992; *Auditoría ambiental para la Texaco* [*Environmental Audit for Texaco*], Hoy, Feb. 27, 1992.

be a thorough study of the direct and indirect environmental and socio-economic impacts of the operations, and Texaco would be bound by the results.[144] However, it soon became clear that the audit did not signal a significant change in government policy. The audit—and decisionmaking processes that directed it—proceeded behind closed doors, with Texaco and Petroecuador, both interested parties, acting as factfinders and arbiters, and without informing or consulting affected residents or environmental NGOs.[145]

To undertake the audit, Texaco, Petroecuador, and MEM established a Technical Committee, comprised solely of their representatives. To supervise the Technical Committee, they created a High Level Committee, staffed by senior officials from Texaco, Petroeucador, and MEM's environmental unit. Both committees made decisions based on consensus,[146] thereby turning the audit process into one of negotiation. As in prior environmental matters with Texaco, the Ecuadorian government failed to assume an authoritative regulatory posture.

Early in the process, the committees made two major changes to the proposed audit. First, the High Level Committee limited the audit's scope to environmental impacts, eliminating all consideration of social impacts.[147] Second, the government accepted Texaco's argument that, as co-owner and

144. *Id; Texaco's Environmental Action to be Controlled, supra* note 143. In 1990, MEM had privately notified both companies of the need for an environmental audit. Ministry of Energy and Mines, *Oficio* No. 109-90-SMA (May 11, 1990); *see also,* Hernán Ramos, *Entrevista con el Representante de Texaco en Ecuador, 'El Estado Nos Debe una Fortuna'* [*Interview with Texaco's Representative in Ecuador, "The State Owes Us a Fortune"*], EL COMERCIO, Jan. 31, 1994, at A-16 (interview with Rodrigo Pérez, Texaco's representative in Ecuador, stating that the Minister of Energy and Mines wrote to Texaco to say that he would like to have an audit "given the importance that the world is giving to ecological issue" and Texaco "answered that even though there was no legal or contractual obligation, in order to prevent attacks, we would accept the audit and even pay for half of the audit."). **R**

145. Judith Kimerling, *The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice or Business as Usual?*, 7 HARV. HUM. RTS. J. 199 (1994) [hereinafter Kimerling, *Environmental Audit*]. The auditor was selected jointly by Texaco and Petroecuador.

146. Interview with Wilson Torres, Petroecuador's Representative on the Technical Committee, and Lourdes Ayala, Attorney for Petroecuador's Environmental Unit, in Quito, Ecuador (Mar. 19, 1993).

147. *Id.*

current operator of the consortium, Petroecuador shared financial responsibility for any damage.[148] As a result, Petroecuador's interests in the audit became closely aligned with those of Texaco, and MEM also faced a potential conflict of interest. Those developments, in an allegedly independent investigation, illustrated the murkiness of legal procedures in the oil frontier. Was the audit intended to be a quasi-judicial determination of Texaco's environmental liabilities? Or, was it an in-house study by former business partners for the dissolution of their partnership? Critics feared that it was a collusive effort by the responsible parties to cover up their abysmal environmental record, find the companies responsible for only minimal damages, and exact from Texaco a nominal payment for compensation and/or limited remedial measures; in return, Texaco could be shielded from critics and limit its legal liability.

The contract with Agra called for a comprehensive investigation of the "current environmental condition" of the fields developed by Texaco and directed the auditor to ascertain whether hydrocarbon operations had adversely affected the environment or degraded natural resources, to determine the causes of such impacts, and to establish the cost of measures for environmental control, mitigation, and rehabilitation.[149] In addition to the technical component, the contractor was required to determine whether the impacts were a result of noncompliance with two sets of standards: (1) Ecuadorian laws and regulations in effect during the period of Texaco's operations; and (2) international environmental practices that were generally accepted by the oil industry for rainforest regions during that time.[150] Before undertaking the audit, Agra was required to prepare an inventory of the above-mentioned laws,

148. *Id.* Texaco also argued that the government itself shared responsibility because MEM had approved Texaco's work plans and expenditures. *Id.*

149. *Contrato de Prestacion de Servicios de Auditoría Ambiental de los Campos Petroleros del Consorcio CEPE-Texaco* [Contract for Acquisition of Services for Environmental Audit of CEPE-Texaco Consortium's Oil Fields],¶¶ 27, 1.5, 2.2-2.7, annex A (Apr. 15, 1992) (signed by Jose Gordillo, Acting Executive President, Petroecuador; Warren Gillies, Manager, Texaco Petroleum; Garry Vern Ford, Legal Representative, HBT-AGRA; and, as Honorary Witnesses, Rafael Almeida, Minister of Energy and Mines, and Guillermo Paz y Mino, Deputy Secretary for the Environment) [hereinafter Audit Contract].

150. *Id.* ¶ 2.8.

regulations and industry practices, as well as the criteria for their application. Texaco and Petroecuador had to approve that package—known as the "Criteria"—before the audit could proceed.[151] In addition, the Technical Committee approved all principal Agra personnel[152] and the well sites that the auditor randomly chose to inspect.[153] Payment of the final installment of the audit fee—forty percent—was contingent on acceptance by the Technical Committee of the final audit report.[154] Together, those requirements and the lack of transparency in the process effectively precluded the possibility of an independent and impartial audit.

The audit Criteria, approved in November 1992,[155] seemed to further narrow the scope of the environmental assessment. The audit contract called for a thorough investigation of Texaco's environmental practices and their impacts, including a determination of the nature and extent of air, water and soil contamination.[156] The Criteria, however, provided that the purpose of the audit was "to verify compliance with legal and technical requirements of the Republic of Ecuador and standard operational international oil industry practices for rainforest areas . . . for the period 1964-90."[157] Based on a flawed compilation and analysis of Ecuadorian law, the Criteria then rejected a compliance standard based on environmental and public health outcomes, effectively skirting a comprehensive assessment of the impacts of the operations.[158] The

151. *Id.* ¶¶ 2.1, 14.1, 13.1.

152. *Id.* ¶ 5.6.

153. Telephone Interview by Clive Grylls, Journalist, with an Agra employee who asked not to be named, in Calgary, Canada (1993).

154. Audit Contract, *supra* note 149, ¶ 8.1.2.c. The total value of the contract was $730,745.30. *Id.* ¶ 1.7. R

155. HBT AGRA LTD., AGRA EARTH & ENVIRONMENTAL GROUP, FINAL ASSESSMENT CRITERIA FOR AN ENVIRONMENTAL EVALUATION OF THE PETROECUADOR CONSORTIUM OIL FIELDS (Oct. 1992) [hereinafter Audit Criteria]; Letter from the Technical Committee to the High Level Committee (Nov. 24, 1992) (on file with author); Letter from the Technical Committee to the High Level Committee (Nov. 26, 1992) (on file with author).

156. Audit Contract, *supra* note 149, ¶¶ 1.5, 2.2-2.7, annex A. R

157. Audit Criteria, *supra* note 155, at 1. R

158. The basic assumption of the legal analysis was that, despite Texaco's duty under its production contract and Ecuadorian law to protect the environment, the absence of specific quantitative standards to measure compliance meant that the company could conduct its operations "in accordance with any level of compliance [it] felt appropriate or necessary." *Id.* at 27-28.

Criteria further concluded that from 1982 onward, Ecuadorian law simply required Texaco "to conduct environmental compliance in accordance with international practices for the hydrocarbon industry."[159] The review of international industry practices, however, was limited, without explanation, to practices in tropical rainforests.[160] In effect, then, the Criteria adopted a compliance standard defined by oil industry practices in tropical rainforests, thereby measuring Texaco's environmental record by poor and unregulated industry practices in other remote locations in the developing world and effec-

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Ecuador's law has included general provisions to protect natural resources and prevent contamination since at least 1971. *See supra* notes 57-63 and accompanying text. Arguably, then, the law established a performance based standard and compliance should have been measured by the impact of Texaco's operations on water quality. For a fuller discussion see Kimerling, *Environmental Audit*, *supra* note 145, at 214-22. R

159. Audit Criteria, *supra* note 155, at 27. The conclusion was based on an inaccurate translation of a 1982 amendment to the Law of Hydrocarbons. Kimerling, *Environmental Audit*, *supra* note 145, at 217-18. By ending the survey of Ecuadorian law in 1982, the Criteria failed to consider comprehensive water pollution regulations promulgated in 1989 by the Ministry of Public Health (MPH). The regulations required permits and monitoring for all new and existing discharges to surface or ground waters; forbid discharges into the headwaters of water sources; and required operators that handle hydrocarbons or other toxic chemicals to have a contingency plan, approved by the government, to prevent and control spills. Regulations for the Prevention and Control of Environmental Contamination Related to Water Resources, *supra* note 63, arts. 2, 30, 49, 64, 96, 97, 99, 100, 197, 57(a), 61, 101, 103. The regulations also include some quantitative water quality standards based on use classifications; uses include human consumption, preservation of flora and fauna, agriculture, livestock, recreation, industrial use, transportation and esthetics. *Id.* arts. 4, 9. Standards for discharge permits, set on a case-by-case basis, should take into account those classifications. *Id.* arts. 34, 36. Under the regulations, Texaco should have presented a description of its discharges and environmental impact study to MPH within two months; based on that information, the agency should have determined whether to issue a permit, valid for three years, to allow the discharges to continue. *Id.* arts. 64, 84. *See also id.* arts. 65, 73 (follow-up prodedures if a permit is denied). Texaco evidently did not comply with those requirements, and they were not enforced. R R R R

160. *See* Audit Criteria, *supra* note 155, at 28-54. "Typical Petroleum Operations" in Colombia, Trinidad and Indonesia were reviewed. The reviews acknowledged that practices in those countries had resulted in widespread ("common") pollution. *Id.* at 30-36. The reviews were followed by a series of tables of "typical" industry practices in tropical rainforest areas during intervals from 1964-1990; the tables also cited practices in Ecuador and Peru. *Id.* at 37-54. R

tively allowing Texaco and the oil industry to define both sets of compliance standards.

The audit attracted considerable media interest in Ecuador, and notwithstanding a confidentiality provision in the audit contract, some key documents were leaked, including the contract, Criteria and a draft audit report.[161] Although the draft report was preliminary and incomplete—having been prepared principally on the basis of visual observations and limited interviews/questionnaires—it nonetheless contained some important information and appeared to acknowledge that pollution in fields developed by Texaco was the norm, not the exception to the rule. For example, auditors observed spills of oil or chemicals at 158 of the 163 well sites they visited, and multiple spills at all of the production stations.[162] Similarly, in a limited chemical sampling program, the audit found contaminants in every sample of subsurface soils and ground water that was analyzed for hydrocarbons.[163]

In addition, the recommendations in the draft report seemed to confirm that the practices that had been installed—and continued—by Texaco were outdated and inadequate, by recognizing the need to modernize the operations, especially at production stations. For example, it recommended that waste pits should no longer be used at production stations; oil should no longer be dumped into the environment; air emis-

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161. *See* Kimerling, *Environmental Audit*, *supra* note 145, at note 66. **R**

162. HBT Agra Draft Audit Report, *supra* note 73, at 6-13, 6-16 to 6-20, app. F, tbl. F-7. At every production station where waste pits were inspected, auditors found contamination in soil and water—in quantities so high that it was visible to the human eye—that had migrated offsite into the environment, as a result of non-accidental discharges from the pits. *Id.* at 6-13, 6-16, 6-20. The audit did not assess the nature and extent of offsite contamination, and recommended further sampling. **R**

163. *Id.* at 8-13-8-14, tbl. 8-1. Although the draft report offered some general interpretations of the data that minimized the problem of contamination in subsurface soils, ground waters and surface waters, it clearly recognized the need for further sampling and other information, including additional data about the chemical composition of the contamination, the extension (size) of contaminated areas, and other site conditions. *See, e.g.*, *id.* at 6-12 to 6-13, 6-16, 10-1, 10-10, app. F, tbls. F-2, F-3, F-5, F-9, notes, tbl. F-7, cmt. (c), tbl. 10-1; HBT AGRA LTD., ENVIRONMENTAL ASSESSMENT OF THE PETROECUADOR-TEXACO CONSORTIUM OIL FIELDS, VOL. 2: ENVIRONMENTAL MANAGEMENT PLAN (prepared by HBT AGRA Limited for Petroecuador-Texaco Consortium), 2-1, 3-3, 3-4, 4-1 to 4-3, 5-1 to 5-4, 6-1, 8-1 (Oct. 1993) [hereinafter HBT Agra Draft EMP].

sions should be controlled; and both an oil spill contingency plan and waste management plan should be developed and implemented.[164] Notwithstanding those recommendations, and the admittedly limited and preliminary scope of the environmental assessment, Texaco has maintained that the audit "independently concluded that TexPet acted responsibly and that there is no lasting or significant impact from its former operations."[165] The audit process evidently ended some time in 1994 without a final report because MEM refused to approve it.[166] By that time, a dramatic new development in the history of the oil frontier was underway—a lawsuit against Texaco in the United States.

V. *AGUINDA V. TEXACO*: "THE RAINFOREST INDIANS' LAWSUIT" IN TEXACO'S HOMELAND

In November 1993, a class action lawsuit was filed against Texaco, Inc. in federal court in White Plains, New York, on behalf of indigenous and settler residents who have been harmed by the company's pollution. The lawsuit was filed by U.S.-based attorneys after an Ecuadorian-born lawyer, Cristóbal Bonifaz,[167] read about findings from *Amazon Crude* in a newsletter published by the NGO Oxfam America.[168]

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164. *See* HBT Agra Draft Audit Report, *supra* note 73, at 10-10 to 10-12; *see also id.* Part 5, tbl.5-2, 6-16 to 6-20. R

165. Press Release, Texaco, Texaco Statement Concerning February 1, 1999 Court Hearing: Aguinda v. Texaco and Jota v. Texaco 3 (Feb. 1, 1999) (also citing a confidential internal audit, by the contractor Furgo-McClelland, for the same allegation). *See also, e.g.,* ChevronTexaco, Texaco in Ecuador: Background, http://www.texaco.com/sitelets/ecuador/en/overview/ (last visited Nov. 21, 2005); ChevronTexaco, *La verdad sobre Texaco en Ecuador (1)* [*The Truth About Texaco in Ecuador (1)*], EL UNIVERSO, Feb. 17, 2004, at 6A (two-page color newspaper advertisement).

166. Excerpt from the Transcript of the General Commission Called by the Commission for Inspection and Political Control of the National Congress to Discuss the Texaco Case and the Damage Done in the Amazonian Region (Aug. 16, 1994), ¶ 3, Plaintiffs' Supplemental Submission (A) in Response to the Inquiry from the Court's Chambers Concerning an Impartial Environmental Audit and (B) Concerning their Rule 16 and Intervention Motions, Aguinda v. Texaco, Inc., No. 93 Civ. 7527, Ex. E (reporting a statement by the Minister of Energy and Mines to the Committee that the audit was rejected because it was incomplete).

167. Bonifaz brought the case with the law firm, Kohn, Swift & Graf.

168. Bonifaz wrote to the author in 1992:

Class action law permits a group of named plaintiffs to sue as representatives of a plaintiff class, on behalf of a large group

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> I am writing you this letter as a result of the article that was published in the Summer Issue of Oxfam America that cites your work on behalf of the Amazon inhabitants . . . . Immediately after reading the data published by you I took an interest in those who are being injured as result of the practices of American Oil Corporations in Ecuador, and contacted Manuel Pallares . . . . The purpose of this contact was to suggest that if any one there wished to bring a law suit here (Texas) to seek compensation for what is occurring, I would be interested.
>
> As you are aware Texas provides statutory forum for this type of litigation . . . . *Dow Chemical, et al. v. Castro Alfaro*, 786 S.W. 2d (Tex-App.-Dallas 1991). . . . I was born in Ecuador but have lived for the past 35 years in the United States. It is for this reason that I feel profoundly outraged for what you describe to be taking place there. To give you a little of my background . . . .
>
> I was told . . . that you may be looking for attorneys here to aid you in possible litigation on behalf of plaintiffs injured as a result of American Oil Corporations' practices in the Amazon region and would like very much to talk at great length to you about possible actions. I am in the position of being able to either advance the costs of possible litigation or obtain funds here for that purpose . . . .
>
> In any case I plan to visit Ecuador . . . . It is my intention to meet with Pallares and travel to the Oriente [Amazon region] to investigate the validity of the claims of those contacted by him . . . . I would also like to meet with you . . . .
>
> I have extensive contacts in Ecuador and have explored with them interest in pursuing the goals outlined here. I found to my surprise that those in positions of power in the previous administration . . . were either too skittish to pursue these matters, or view these issues as personal attacks since Corporate practices are apparently no different from those of the Ecuadorian Government's Petrolera.
>
> I view those currently in power as well as those associated with the so called environmental organizations there (including close relatives) to be incapable of any action due to the intractable source of their own funds. I do not place many in these groups beyond C.I.A. influence.
>
> The purpose of my trip in November is solely to pursue the matters outlined in this letter. It is my hope that you return my call so that we may discuss these issues.

Letter from Cristóbal Bonifaz to author (Oct. 20, 1992); *see also* Letter from Cristóbal Bonifaz to author (Nov. 16, 1992); Dennis Udall and Raisa Lerner, *Indigenous Peoples Move to Outflank Oil Companies*, OXFAM AMERICAN NEWS (Oxfam America, Boston, Mass.), Summer 1992, at 7.

of similarly situated people.[169] The lawsuit, *Aguinda v. Texaco, Inc.*, was an environmental tort action, based on common law claims of negligence, public and private nuisance, strict liability, trespass, civil conspiracy, and medical monitoring. It also included a claim under the Alien Tort Claims Act based on alleged violations of the law of nations.[170]

The complaint named 74 plaintiffs, mostly listed in appendices. They included fifteen Kichwa, twenty-four Secoya, and thirty-seven "immigrants" to the region (colonists).[171] No Huaorani, Cofán, or Siona were named as plaintiffs; however, the proposed class was defined geographically to also include individuals from those groups.[172] The size of the putative class was estimated to contain "at least 30,000" persons.[173] Plaintiffs

169. To proceed as a class action, the putative class must be certified by the court. FED. R. CIV. P. 23. Class action allegations in the complaint are based on Rule 23(a) and 23(b) (3). Plaintiffs' Complaint, Aguinda v. Texaco, Inc., No. 93 Civ 7527 (S.D.N.Y. Nov. 3, 1993), ¶ 29 [hereinafter *Aguinda* Complaint].

170. *Id.*.

171. The Kichwa plaintiffs, who include Maria Aguinda, live in two communities, Rumipamba and El Descanso. The Secoya are from a single community, San Pablo de Aguarico. The colonists live in Pimampiro and at locations along the road built by Texaco after indigenous Huaorani were removed from the area by missionaries with support from Texaco. Some colonists may live in areas other than the ones identified above; however, that information was not included in the complaint. *Id.*

172. The complaint alleges that the plaintiffs named in Exhibit "B" are Kichwa and Cofán "Indians"; however, no Cofán are included in the complaint. *Id.* ¶ 11; Exhibit B. In addition, it alleges that Maria Aguinda and another plaintiff, Carlos Grefa, are suing both for injuries to themselves and "as guardians of their minor child." *Id.* ¶ 14. However, Aguinda is not the guardian (or mother) of the child; her parents are Grefa and another plaintiff.

173. *Aguinda* Complaint, *supra* note 169, ¶ 30. The likelihood of certification of a single class, without subclasses, was questionable, because both colonists and indigenous groups were included in the action. In addition, the emphasis on human heath injuries (rather than shared environmental claims such as food security and damages to community properties) raises questions that can vary from person to person and potentially preclude class certification. For a recent discussion of class certification issues by the U.S. Supreme Court see Amchem Products, Inc. v. Windsor, 117 S.Ct. 2231 (1997) (affirming an order decertifying a class certified by the District Court as part of a global settlement of asbestos-related claims because requirements for commonality of issues of fact and law and adequacy of representation were not met). Class certification was not presented to the *Aguinda* court for adjudication before the case was dismissed. R

alleged that they and the class had suffered injuries to their persons and property and "are at a significantly increased risk of developing cancer as a result of their exposure" to toxic substances.[174] They sought compensatory and punitive damages and unspecified equitable relief "to remedy the contamination and spoliation of their properties, water supplies and environment."[175]

Until its recent merger with Chevron, Texaco's headquarters were located in White Plains. The complaint alleged that:

> A substantial part of the tortious acts and omissions giving rise to this Complaint took place in this judicial district. The policies, procedures and decisions relating to oil exploration and drilling in Ecuador were set and made in New York.[176]

Environmental factual allegations in the complaint were general, based largely on *Amazon Crude*.[177] Health-impact allegations were based on a visit to the region by Bonifaz in 1993, with a U.S.-based physician, and students from Harvard Law School and the Harvard School of Public Health. The physician examined twelve residents in three communities,[178] and a public heath student collected water samples for chemical analyses.[179]

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174. *Aguinda* Complaint, *supra* note 169, ¶ 51. **R**

175. *Id.* ¶ 90.

176. *Id.* ¶ 2; *see also id.* ¶ 28 (alleging that the operations were "directed, designed, controlled and conceived by defendant in the United States").

177. *Id.* ¶¶ 22-27; Kimerling, AMAZON CRUDE, *supra* note 6, at 33-56, 87. **R**

178. CENTER FOR ECONOMIC AND SOCIAL RIGHTS, *supra* note 134, at 62-63. **R**

179. A report of the visit was written by three of the students and published in 1994 by the NGO, Center for Economic and Social Rights (CESR). *See generally id.* The report helped launch CESR, which was founded by the students around the time of the visit and continues to work in Ecuador. It also includes a discussion of international human rights law; however, despite a list of dozens of "Reviewers and Advisors" (including the author of this Article), and extensive acknowledgments that include the names of other members of "CESR's mission to Ecuador," the report does not mention Bonifaz or disclose his role in initiating, financing and participating in the mission. *See id.* at 7-10, 13-18. Attorneys for the plaintiffs and some NGOs often promote the CESR report as the "Harvard" study, leading to some confusion, especially in Ecuador, about its origins. *See, e.g.*, *Cronología* [Chronology], EL COMERCIO, Oct. 26, 2003, at A6 ("study by Harvard University"); AMAZON WATCH, TEXACO'S CRUDE OPERATIONS IN THE AMAZON (undated brochure provided to the author in 2003) (alleging that "studies by a Harvard medical team, British researchers and Ecuadorian health authori-

The complaint did not identify all of the affected indigenous peoples[180] or distinguish their claims and injuries from

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ties have found eight different types of cancer" in affected communities); Plaintiffs' Attorneys and Amazon Defense Front, "Texaco's Position," http://www.texacorainforest.com/claims/index.html (website created by the Plaintiff's Attorneys and subsequently maintained as the website of Amazon Defense Front; last visited Oct 5, 2005) (study "by a team of Harvard-affiliated public health specialists").

180. The complaint alleged that "approximately eight groups of indigenous people" live in Ecuador's Amazon region but did not identify them or the groups who live in the area that defines the putative class. *Aguinda* Complaint, *supra* note 169, ¶ 38. Class allegations for indigenous named plaintiffs include "members of other indigenous communities similarly situated"; class allegations for colonist plaintiffs include "all other immigrants to this region of the Amazon who are similarly situated." *Id.* ¶¶ 19, 23, 27. R

As discussed *infra* note 181, in press releases, the attorneys typically refer generally to Amazon "tribal leaders" and "Rainforest Indians"; however, one release also states that "three indigenous communities live in the area where Texaco operated—the Cofán, the Secoya and the Siona." Press Release, Plaintiffs' Attorneys, National Ad Campaign Charges Texaco with Race Discrimination—This Time in the Amazon Rainforest: Indian Leaders Arrive in New York Urging Texaco to Clean Up Toxic Waste That's Killing Their Tribesmen and Ruining Historic Lands: New Public Health Study Confirms Increased Cancer in Areas Where Texaco Drilled and Made Billions (Sept. 23, 1999) [hereinafter Sept. 23, 1999 Plaintiffs' Attorneys' Press Release] (on file with the author). That assertion is remarkable not only because it is not true that those are the only indigenous groups in the area but also because Maria Aguinda and fourteen other named plaintiffs are Kichwa (while no Cofán or Siona are named in the complaint). The assertion may reflect political developments in the oil patch in response to the lawsuit. In the wake of press reports announcing the case, a group of colonists founded Amazon Defense Front *(Frente de Defensa de la Amazonia, "Frente,"* translated for the 1999 ad campaign as "Committee for the Defense of the Amazon"). *Frente* developed close ties with the plaintiffs' lawyers but has been criticized by many Kichwa and Huaorani for its efforts to claim representation, without authorization, of everyone who is affected by Texaco and benefit from their suffering, among other concerns. At the time of the release, it was working with officials of the Cofán, Siona, and Secoya organizations. *See* Judith Kimerling, *The Story from the Oil Patch: The Under-Represented in* Aguinda v. Texaco, HUMAN RIGHTS DIALOGUE 2:2 (Carnegie Council on Ethics and International Affairs, New York, N.Y.), Spring 2000, at 6-7. R

Ironically, the press release announced the launch of a national ad campaign charging Texaco with race discrimination in the Amazon, and the "release" of a public health study that was described, incorrectly, as a study of "indigenous populations." *See* Sept. 23, 1999 Plaintiffs' Attorneys' Press Release; "Yana Curi" Report: The impact of oil development on the health of the people of the Ecuadorian Amazon (English-language translation of first "Yana Curi" Report) (1999).

those of colonists, who are also adversely affected by the pollution and included among the named plaintiffs and putative class members. Similarly, it did not include claims based on the special rights of indigenous peoples. However, in press releases and other public relations and advocacy activities related to the case, attorneys and some NGOs that support the litigation often give the impression that all of the plaintiffs are indigenous Amazonian peoples.[181] As a result, confusion about the composition of the proposed class and class representatives has characterized many of the press reports about the case—which have been extensive—and it has commonly been described as a lawsuit brought by "Indians" or "indigenous people from the rainforest."[182]

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181. *See, e.g.*, Press Release, Plaintiffs' Attorneys, Amazon Tribal Leaders Blast U.S. Judge for Blocking Texaco Pollution Case: Vow to Appeal Latest Decision As Health Problems and Cancers in Ecuador Mount from Texaco Drilling Practices: Potential Multi-billion Dollar Liability From Lawsuit Poses Obstacle for Texaco Merger With Chevron (May 31, 2001) [hereinafter May 31, 2001 Plaintiffs' Attorneys' Press Release] (also distributed to email list serve by NGO Amazon Alliance for Indigenous and Traditional Peoples of the Amazon Basin, "Amazon Alliance," May 31, 2001) (on file with the author); Press Release, Plaintiffs' Attorneys, Federal Court Again Rebuffs Texaco's Efforts to Dismiss Indians' Billion-Dollar Lawsuit, According to Plaintiffs Lawyers; Court Expresses New Doubt on Indians' Ability to Receive Fair Trial in Ecuador in Light of Recent Military Coup: Six-Year Battle for Jurisdiction in Landmark Case Continues (Feb. 1, 2000) [hereinafter Feb. 1, 2000 Plaintiffs' Attorneys' Press Release] (also distributed to email list serve by Amazon Alliance, Feb. 8, 2000) (on file with the author); Sept. 23, 1999 Plaintiffs' Attorneys Press Release, *supra* note 180; Press Release, Amazon Defense Front, Caution Issued to Chevron Shareholders: New Ad Campaign Warns Chevron That It Must Pay Billions For Texaco's Dumping In Amazon Rainforest: Texaco's Huge Liability Poses Major Obstacle For SEC Approval Of Merger With Chevron: Texaco Again Charged With Race Discrimination (Aug. 9, 2001) [hereinafter Aug. 9, 2001 Amazon Defense Front Press Release] (also distributed to email list serve by Amazon Alliance, Aug. 9, 2001) (announcing a television ad campaign by Amazon Defense Front, described incorrectly as "a group representing more than 30,000 Ecuadorian Indians suing Texaco") (on file with the author); Amazon Defense Front, *Racial Discrimination and Texaco Chapter 2*, N.Y. TIMES, Sept. 23, 1999 (advertisement); Amazon Defense Front, *A Word of Warning to Chevron Shareholders: Texaco Comes With a Lot of Assets. And One Huge Liability*, N.Y. TIMES, May 25, 1999 (advertisement). R

182. *See, e.g.*, Paul Braverman, *Tilting at Texaco*, THE AMERICAN LAWYER, October 2001, at 98, 100-101 (describing Bonifaz as "championing the Indians" and reporting: "The plaintiffs are approximately 30,000 indigenous people . . . . about 20 of them attended the [press] conference [announcing

For example, the attorneys' press release announcing the lawsuit had four headlines:

- RAINFOREST INDIANS LAUNCH BILLION-DOLLAR LAWSUIT AGAINST TEXACO
- Claim Oil Company Ruined Their Rivers and Land in Amazon Basin of Ecuador

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the lawsuit]. Given the importance of the occasion, they wore ceremonial dress—loincloths and crowns made from parrot and toucan feathers"); Andrew C. Revkin, *Lawyers for Ecuador Indians See U.S. Judge Linked to Texaco*, N.Y. TIMES, Sept. 3, 2000, at A10 ("[A] lawsuit filed against Texaco by Ecuadorean Indians"); Brigid McMenamin, *Bring Me Your Tired, Your Poor, Your Litigious*, FORBES, Nov. 15, 1999, at 180 ("Indians in Ecuador sued Texaco"); Grant McCool, *Ads by Ecuadoran Plaintiffs Accuse Texaco of Racism*, REUTERS, Sept. 25, 1999 ("Ecuadorian rainforest Indians suing Texaco"); *El juicio a la Texaco es procedente* [*The Lawsuit Against Texaco is Duly Established*], EL COMERCIO, Oct. 6, 1998 (identifying Luis Yanza, an urban colonist and representative of Amazon Defense Front as an "indigenous official"); *Caso Texaco: la demanda fue aceptada en EE.UU.* [*Texaco Case: The Lawsuit was Accepted in the U.S.*], EL COMERCIO, Oct. 6, 1998 (lawsuit by "aboriginal Amazonian communities"); *Texaco Seeks Suit Dismissal,* N.Y. TIMES, Dec. 24, 1994 ("lawsuit by Ecuadorian Indians"); *Piden a la Texaco abrir sus archivos* [*Asking Texaco to Open its Archives*], EL UNIVERSO (Ecuador), Apr. 14, 1994 (lawsuit by "Ecuadorian indigenous people"); Raymond Colitt, *Green Cloud Hangs Over Ecuadorean Oil Sector*, FINANCIAL TIMES, Nov. 30, 1993, at 36 ("[S]everal aboriginal communities filed a civil lawsuit . . . . The Indians of various tribes are demanding . . . ."); *Ecuador: Clean-Up Time*, THE ECONOMIST, Nov. 20, 1993, at 50 ("The battle between oil companies and indigenous peoples defending their tribal grounds has moved from the Ecuadorean Amazon to New York, where a group of Indians is suing the oil company, Texaco."); *Texaco, enjuiciada* [*Texaco Sued*], EL COMERCIO, Nov. 5, 1993, at A10 (lawsuit by representatives of the "indigenous communities"); Agis Salpukas, *Ecuadorean Indians Suing Texaco*, N.Y. TIMES, Nov. 4, 1993, at D4; Editorial, *A Threat to Judicial Ethics*, N.Y. TIMES, Sept. 15, 2000, at A34 (describing plaintiffs as "indigenous people who live in the rainforest"); Editorial, *Texaco and Ecuador*, N.Y. TIMES, Feb. 19, 1999, at A20 ("a group of indigenous people who live in the rain forest are suing Texaco"); Javier Ponce, *El Estado Mestizo Contra los Indios* [*The Mestizo State Against the Indians*], HOY, Apr. 13, 1997, at 4A; David Talbot, *Rain Forest Pays the Price of Oil: Suit Claims Texaco Polluted Ecuador*, BOSTON HERALD, Aug. 29, 1999 ("settlers, along with indigenous Indians from five tribes—Cofán, Secoya, Quechua, Shuar, Huaorani—are potential plaintiffs"). *But see, e.g.,* Simón Espinosa Cordero, *Aguinda vs. Texaco*, HOY, Jan. 22, 2001 (lawsuit on behalf of indigenous peoples and settlers); Diana Jean Schemo, *Ecuadoreans Want Texaco to Clear Toxic Residue*, N.Y. TIMES, Feb. 1, 1998, at A12 (class action lawsuit by about 30,000 residents); Laurie Goering, *Rain Forest Residents Sue Texaco*, WASH. POST, July 16, 1996, at A16 (lawsuit "on behalf of Ecuador's Amazon Indians and settlers").

- Tribal Leaders to Arrive in New York Today to File Class Action Papers at US Courthouse
- "Catastrophe Worse than the Exxon Valdez," Lawyers Say[183]

The opening paragraph stated:

> Leaders of several Indian tribes in the Amazon region of Ecuador filed a groundbreaking lawsuit today charging Texaco with ruining their rivers and land, causing widespread devastation to the rainforest environment, and creating a dramatically increased risk of cancer for tens of thousands of people. The attorneys estimate the damages could exceed a billion dollars.[184]

The release did not mention that colonists were included in the action, despite the fact that they were among the named plaintiffs in the complaint and likely comprise the largest group in the putative class, perhaps even outnumbering all of the indigenous class members added together. This apparent contradiction may reflect an effort by the attorneys to define the class to include as many individuals as possible and recognition by the attorneys (and NGOs) that international press and public interest in exotic indigenous rainforest peoples is considerably greater than interest in colonist populations. The press release referred to the attorneys as "the legal team for the Amazonian Indians."[185] By referring to a legal action filed by "tribal leaders," the release also suggested, incorrectly, that the case had been coordinated with—or even initiated by—indigenous organizations, to defend the rights of indigenous peoples. In fact, it had been initiated by Bonifaz, who bypassed indigenous organizations and went into communities

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183. Press Release, Plaintiffs' Attorneys, Rainforest Indians Launch Billion-Dollar Lawsuit Against Texaco: Claim Oil Company Ruined Their Rivers and Land in Amazon Basin of Ecuador: Tribal Leaders to Arrive in New York Today to File Class Action Papers at US Courthouse: 'Catastrophe Worse than the Exxon Valdez,' Lawyers Say, (Nov. 3, 1993) [hereinafter Nov. 3, 1993 Plaintiffs' Attorneys' Press Release].

184. *Id.* The release also states: "Today's filing of the lawsuit is considered groundbreaking because it represents the first time that indigenous people of the Ecuadorian Amazon have come before a U.S. court to seek redress for harm caused abroad by a U.S. corporation." *Id.* at 3.

185. *Id.*

on his own to look for plaintiffs, evidently offending many of the indigenous people he claimed to defend.[186]

Three indigenous persons—including Elías Piyaguaje, a Secoya plaintiff—participated in press events when the case was filed. Their presence in the United States was fortuitous. They were part of a delegation that had been brought to Massachusetts from the Amazon by USAID for a leadership training course. The author encountered Piyaguaje before the trip, and he showed her a retainer form and said that he was deciding whether to sign it. He was afraid, he said, but had been told that he would not receive any "benefits" from the action unless he signed. In response, the author explained that plaintiffs in class action lawsuits seek benefits on behalf of themselves and other people who do not sign; gave him Bonifaz's phone number; and suggested that he call Bonifaz after his arrival and ask him to explain the proposed legal action. Piyaguaje called Bonifaz, who then met with the delegation. The group decided that everyone would "sign" and support the litigation. They subsequently returned to Ecuador believing that they were plaintiffs; however, only Piyaguaje was named in the complaint. He and the other two indigenous members of group—both Cofán—were taken to New York (from Massachusetts) by the plaintiffs' lawyers for the press event.[187] Since then, the lawyers have brought delegations

186. This may explain why all of the indigenous plaintiffs live in only three communities, when so many are affected, and why no (then) officials of indigenous organizations were among the plaintiffs; similarly, to this day, few (and often none) of the named plaintiffs typically participate in events for the press and public that are organized by the attorneys and their NGO supporters.

Bonifaz did, however, meet with officials of FCUNAE, the Kichwa federation based in Coca, when he visited the region. (Both of the Kichwa communities where plaintiffs live are affiliated with FCUNAE.) The federation declined to help him find plaintiffs, however, because he reportedly claimed (falsely) that he was working with the author, but had not been introduced. Despite this, when residents in one of the communities hesitated to join the action, Bonifaz reportedly convinced them to sign retainers by claiming that he was working with FCUNAE and the author. According to a Catholic priest who has lived in the region and worked with the Kichwa for decades, Bonifaz met with him and a lay worker at the mission in Coca and "tricked" them into providing information by claiming that he was working with the author.

187. In Quito, USAID officials who sponsored the leadership training course were aghast at this turn of events.

from the Amazon to the United States to attend court proceedings and press events on several occasions. Some colonists have been included in the delegations; however, press releases—written and distributed in English only—have continued to foster the impression that the case is a battle between indigenous rainforest peoples and the U.S. oil giant.[188]

Initially, the lawsuit became known in Ecuador as "the Cofán Lawsuit," a designation that surprised and amused many Cofán. A likely explanation is that a color photograph one of the Cofán (in Cofán dress) in front of the courthouse was distributed via satellite by Reuters and appeared on the front page of a leading newspaper. *See Demanda indígena contra Texaco* [*Indigenous lawsuit against Texaco*], EL COMERCIO, Nov. 5, 1993. For references to a lawsuit by the Cofán, see, for example, *Edgar Terán acusa a los abogados de Cofanes* [*Edgar Terán accuses the Cofáns' lawyers*], EL COMERCIO, Apr. 14, 1994; and *Nueva intervención de gobierno en juicio contra la Texaco* [*New government intervention in the lawsuit against Texaco*], HOY, Mar. 7, 1994.

188. For example, a delegation attended oral argument on Texaco's renewed motions to dismiss, discussed, *infra*. That press release had five headlines: "Billion-Dollar Lawsuit Between Rainforest Indians and Texaco Heading to Trial: Ecuadoran Tribal Leaders Arrive Monday To Face Down Oil Giant in U.S. Court: Say Texaco Polluted Rivers and Land, Ruining Their Centuries-Old Way of Life: In Court Papers, Texaco Finally Concedes That Class Action Case Must Stand Trial: A Real-Life "David v. Goliath Story." Press Release, Plaintiffs' Attorneys, Billion-Dollar Lawsuit Between Rainforest Indians and Texaco Heading to Trial (Feb. 1, 1999). The opening paragraph stated:

> Indian tribal leaders from the Amazon region of Ecuador arrive in New York February 1 for a courtroom face off with Texaco over their billion-dollar lawsuit charging the oil company caused widespread devastation of the rainforest environment, ruined their traditional way of life, and created a dramatically increased risk of cancer for tens of thousands of people.

Id. at 1. The release then explained that the hearing "will determine whether the tribal leaders are able to present their case to a jury of American citizens", and quoted a member of the delegation: "'Because of Texaco, we live, breathe, and eat oil everyday,' said Manuel Silva, an Ecuadoran citizen who is making the trip from deep in the Amazon in order to attend the court hearing. 'We demand that Texaco come back and clean up the damage it caused.'" *Id.* at 1-2. That was the only quote by a delegation member, and seemed carefully crafted to suggest that Silva (since deceased) was a "tribal leader"; however, he was a colonist living in Lago Agrio at the time. Similarly, a schedule of events announced that "Amazon tribal leaders in traditional dress" would arrive at the courthouse at 8:45 a.m.; described the oral argument as a "Hearing between Indians and Texaco"; and noted that attorneys and (unnamed) "tribal leaders" would show video footage and present new evidence at a press conference. A bio of Cristóbal Bonifaz was attached to the release. *Id.* at 3-5. *See also, e.g.*, Sept. 23, 1999 Plaintiffs' Attorneys Press Release, *supra* note 180 (visit to launch advertising campaign);

Moreover, although the delegations have been very effective in publicizing the case, thereby increasing public support for the rights of affected indigenous communities, they appear to have done little to help forest peoples become subjects rather than objects of their rights. In addition to public support in the United States and Ecuador, the attorneys for the plaintiffs developed considerable support for the litigation—and expectations—among affected colonists and NGOs; however, trust and support in affected indigenous communities remains limited, especially among the Kichwa and Huaorani, who comprise the largest indigenous groups affected by Texaco in terms of both population and territory.

VI. Texaco and Ecuador's Response to the Litigation

In response to the lawsuit, Texaco denied any wrongdoing and vigorously fought the legal action. In court, the company filed motions to dismiss on the grounds of international comity, failure to join indispensable parties (Petroecuador and Ecuador) and forum non conveniens.[189] In submissions to the court—both in support of the initial motions to dismiss and subsequent filings—as well as in the media, Texaco alleged that the operations had complied with Ecuadorian law and then-prevailing industry practices. Moreover, the company argued, it had not operated in Ecuador since 1990, and any legal claims should be pursued there, instead of U.S. courts.[190] In

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Robert Worth, *Just Tourists on Broadway, but Barefoot and Craving Roast Monkey*, N.Y. Times, Mar. 12, 2002, at B5 ("court appearance by Amazon Tribesmen with blow-dart guns (empty)"); Gail Appleson, *Ecuador Amazon Indians Appeal Texaco-Case Ruling*, Reuters Mar. 11, 2002 ("Rainforest Indians . . . urged a U.S. appeals court [to reinstate the lawsuit] . . . . The Indians, some of whom appeared in the Manhattan court barefoot and wearing tribal dress, are appealing a trial judge's ruling last year that the litigation should be brought in Ecuador").

189. Defendant Texaco Inc.'s Motions To Dismiss, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Dec. 28, 1993). Texaco also moved to dismiss a number of individual claims, including the claim for equitable relief and the counts based on international law, civil conspiracy, trespass and nuisance. *Id.*

190. *See generally, e.g.,* Memorandum of Law in Support of Texaco Inc.'s Motion to Dismiss Based Upon Principles of International Comity, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Dec. 28, 1993); Memorandum of Law in Support of Texaco Inc.'s Motion to Dismiss Based for Failure to Join Indispensable Parties, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y.

submissions to the court, Texaco also denied parent company control over the operations—which, as discussed *supra*, were carried out by a wholly-owned subsidiary, Texaco Petroleum Company, in a consortium initially with Gulf and subsequently with Petroecuador—alleging that Texaco Inc's only involvement in Ecuador was an "indirect investment" in a "fourth-tier subsidiary." This effort to distance the parent company from the Ecuador operations and assert that it had no role in environmental management there contradicted both the image

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Dec. 28, 1993); Memorandum of Law in Support of Defendant Texaco Inc.'s Motion to Dismiss Based Upon Forum Non Conveniens, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Dec. 28, 1993); Memorandum of Law in Support of Texaco Inc.'s Motion to Dismiss Based Upon Forum Non Conveniens, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Dec. 28, 1993); Memorandum of Law in Support of Defendant Texaco Inc.'s Motion to Dismiss Individual Claims, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Dec. 28, 1993); Appendix to Texaco Inc.'s Motions to Dismiss, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Dec. 28, 1993); Memorandum of Law in Support of Texaco Inc.'s Motions to Dismiss, Aguinda v. Texaco, Inc., No. 93 Civ.7527 (S.D.N.Y. Jan. 5, 1996); Brief for Defendant-Appellee, 97-9102(L), 97-9104(CON), 97-9108(CON) in the U.S. Court of Appeals for the Second Circuit, Gabriel Ashanga Jota v. Texaco, Inc. (Jan. 7, 1998); 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); Brief for Defendant-Appellee, 01-7756(L), 01-7758 (CON) in the U.S. Court of Appeals for the Second Circuit, Maria Aguinda v. Texaco, Inc. (Dec. 20, 2001); and press reports *supra,* note 181. In addition to legal submissions and responses to queries from the press, ChevronTexaco (previously Texaco) has issued written statements to respond to what it charges are "unsubstantiated claims" with which the plaintiffs' attorneys "have barraged the media." Texaco Statement Concerning February 1, 1999 Court Hearing: Aguinda v. Texaco & Jota v. Texaco, *supra* note 165. *See, e.g.*, *id.*; Press Release, Texaco, Texaco Responds to Allegations by Attorneys Representing Ecuadorian Plaintiffs in Lawsuit Against Texaco (Sept. 23, 1999) [hereinafter Texaco's Sept., 23 1999 Press Release] (denying allegations of race discrimination; saying that the case should be heard in Ecuador; stating that Texaco Petroleum, "a minority partner in a consortium with the Ecuadorian state oil company . . . operated in full compliance with all Ecuadorian laws and utilized prevailing internationally accepted standards and practices," has not operated the facilities for nearly a decade, and completed a remediation program in 1998 [discussed *infra*] with full approval of Ecuador; and claiming that "we have seen no credible scientific evidence to support the allegations made in the lawsuit"). ChevronTexaco has also posted a growing body of information on its website, apparently in response to the plaintiffs' attorneys' effective use of the media and web. *See* generally http://www.chevron.com; http://www.Texaco.com. **R**

that Texaco Petroleum had cultivated in Ecuador, of a leading international company, and the image commonly promoted by Texaco, Inc. in public relations materials and responses to concerned consumers and NGOs prior to the litigation, of an industry leader engaged in worldwide operations that "is committed to environmentally sound practices in the conduct of all its operations, [in Ecuador and] wherever in the world they may be."[191]

Texaco's legal submissions further alleged that environmental matters were heavily regulated by Petroecuador and Ecuador, and emphasized that Texaco Petroleum held a minority (37.5%) interest in the consortium from 1977 until

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191. Letter from J. Donald Annett, President, Texaco Environment, Health, Safety Division to Jeffrey Hunter (Mar. 29, 1992) [hereinafter Annett-Hunter Letter] (response to letter to Texaco's CEO expressing concern about "Texaco's" operations in Ecuador). The Texaco letter does not mention Texaco Petroleum or any subsidiary and states:

> One of Texaco's official corporate goals is to "actively seek ways of protecting the environment in which we live and operate." You can rest assured that our operations in Ecuador . . . were conducted in compliance with the laws of Ecuador, with industry standards of good practice, and in conformity with our own Guiding Principles and Objectives . . . . Texaco is committed to environmentally sound practices in the conduct of all its operations, wherever in the world they may be . . . . I appreciate and share your concern about damage to the rainforest . . . . I have enclosed a copy of Texaco's *Environment, Health and Safety Review* to help give you some idea of the investment in time, capital and thought Texaco is putting into environmental matters.

Id. See also, e.g., TEXACO INC, ENVIRONMENT, HEALTH & SAFETY REVIEW (1990); Letter from J. Donald Annett, President, Texaco Environment, Health, Safety Division, to S. Jacob Scherr, Director, International Program, Natural Resources Defense Council (Jan. 2, 1991) [hereinafter Annett-Scherr Letter] (responding to a letter and press conference based on *Amazon Crude*; not mentioning Texaco Petroleum and stating, "Texaco has been careful to comply with the laws of Ecuador, oil industry standards of 'good practice,' and Texaco's own Guiding Principles and Objectives"); TEXACO PUBLIC RELATIONS, *supra* note 79 (report prepared in Harrison, NY and sent by Texaco Europe to Norwegian NGO, defending practices in Ecuador and using "Texaco" and "Texpet" interchangeably; also stating that because developing nations "do not always have the technological and financial resources . . . [to improve their economy and standard of living, they] welcome foreign investment . . . [and] based on Texaco's policies, practices, expertise, technology and resources, we feel that Texaco is most qualified and capable to assist governments in developing their natural resources while protecting the environment"). R

June 1992, when its interest ended entirely. Petroecuador held "the controlling (62.5%) interest" and, the company alleged, "always played the dominant role in regulating, financing and overseeing the Consortium's operations."[192]

Initially, Ecuador's government supported Texaco's efforts to have the lawsuit dismissed. The government of President Sixto Durán Ballén argued—first in a diplomatic protest directed to the U.S. Department of State and subsequently in an amicus curiae brief —that the exercise of jurisdiction over the case would violate principles of international law and "become a serious disincentive to U.S. companies that have invested in Ecuador," thereby harming the nation's economy.[193] The diplomatic note stated that the lawsuit "could do severe harm to the Republic of Ecuador" and requested that the U.S. government advise the court that under international law, "jurisdiction over this case belongs exclusively to Ecuadorian courts."[194] The U.S. government did not act on Ecuador's protest, and Ecuador's government subsequently retained a

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192. Brief for Defendant-Appellee, 97-9102(L), 97-9104(CON), 97-9108(CON) in the U.S. Court of Appeals for the Second Circuit, Gabriel Ashanga Jota v. Texaco, Inc. (Jan. 7, 1998) at 1, 13-17.

193. Embassy of Ecuador, Diplomatic Protest from Embassy of Ecuador to U.S. Dept. of State, No. 4-2-138/93 (signed by Ambassador Edgar Terán) (Dec. 3, 1993) (unofficial translation *in* Appendix to Texaco Inc.'s Motions to Dismiss, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Dec. 28, 1993)) [hereinafter Ecuador, Diplomatic Protest]; Brief Amicus Curiae of the Republic of Ecuador, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Jan. 26, 1994) at 4.

194. Ecuador, Diplomatic Protest, *supra* note 193, at 2. The protest stated that "acceptance of jurisdiction . . . would do violence to the international procedural system." *Id.* at 1. It also disputed the plaintiffs' "suggestion" that they cannot expect a fair hearing in Ecuadorian courts, as "false and defamatory . . . . Acceptance of the argument by a U.S. court would be highly offensive." *Id.* at 2. The protest asked the State Department to advise the U.S. Department of Justice and *Aguinda* Court of the **R**

> international recognition given to the Republic of Ecuador for its rigorous protection of the environment, examples of which are the regulations protecting the Galapagos Islands, nature reserves and parks; that it recount that Ecuador has a tradition of respect for human rights generally and has taken particular care to protect the rights of minorities and indigenous people; and that Ecuador has taken decisive action to eliminate all cultivation of coca and has aggressively prosecuted anyone involved in narcotics trafficking.

Id. at 2-3. Finally, it emphasized "that the exploitation of Ecuadorian natural resources is the sovereign right of the Republic of Ecuador." *Id.* at 3.

prominent New York law firm to present an *amicus* brief in support of Texaco's motions to dismiss the lawsuit.

In its brief, the government requested 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 friendly relations between the United States and Ecuador."[195] It argued that "Ecuador's sovereign right over its natural resources is paramount"[196] and that the exercise of jurisdiction would violate the principle of international comity.[197] The government brief stressed the importance of foreign investment and oil development to Ecuador's economic policies.[198] It assured the court that the government of Ecuador "regulates its vast natural resources because it is sensitive to the threat to human and natural life presented by the development of its natural resources" and alleged that various governmental and nongovernmental organizations "monitor pollution and other environmentally harmful activity."[199]

In April 1994, District Court Judge Vincent Broderick issued a Memorandum Order that reserved decision on whether to dismiss and ordered limited discovery.[200] In dicta, the court indicated that the pursuit of individualized monetary relief for a large number of persons in a foreign country, based on events that were implemented abroad, would present "substantial difficulties," making "effective adjudication in New York problematic at best."[201] However, dismissal of any part of the

195. Brief Amicus Curiae of the Republic of Ecuador, *supra* note 193, at 12. **R**

196. *Id.* at 5.

197. *Id.* at 7-11.

198. *Id.* at 7.

199. *Id.* at 2-3.

200. Aguinda v. Texaco, Inc., No. 93 Civ.7527, 1994 U.S. Dist. LEXIS 4718, 1994 WL 142006, at *1-*2 (S.D.N.Y. Apr. 11, 1994), *adhered to in* Aguinda v. Texaco, Inc., 850 F.Supp 282 (S.D.N.Y. 1994) [hereinafter Broderick Memorandum Order]. Judge Broderick also determined that "conversion of Texaco's 12(b)(6) motions into motions for summary judgment would be appropriate" because the parties had submitted "massive" amounts of material outside of the complaint in their motion papers, which the Court was "loath to ignore." *Id.*

201. *Id.* at *2.

complaint would be contingent on Texaco's submission to personal jurisdiction in Ecuadorian courts.[202]

Judge Broderick also responded to Ecuador's argument that the exercise of jurisdiction in *Aguinda* would cause a disincentive to U.S. companies considering investment in Ecuador:

> Exercise of judicial jurisdiction over events initiated in the United States and carried out abroad (whether in Ecuador or elsewhere) is, however, country-neutral in nature and cannot encourage or discourage investment in any particular country . . . . Any disincentive caused by the exercise of jurisdiction here would not be to investment in Ecuador . . . but to conduct likely to violate applicable legal norms regardless of the site of the property affected.
>
> Developing nations such as Ecuador benefit from foreign investment but are injured by environmental pollution. As indicated by the *amicus* brief, in order to attract investment such countries often seek to create the most favorable climate possible . . . .
>
> Any differential burden imposed by or because of the situation in any particular locale, including Ecuador, may, as pointed out by the *amicus* brief, discourage such investment. For example, were this court to find that Ecuadorian courts were unable to handle fairly cases concerning events there, triggering litigation at the headquarters of an investor, investment in Ecuador might be chilled. No such finding is either made or suggested here . . . . If, on the other hand, litigation at the home site of an investor is based upon conduct initiated at that home site irrespective of where carried out, no such negative effect can be expected. Indeed, the country seeking and benefitting from investment may be relieved by such litigation of the need to offend investors by imposing some environmental or other controls which, however desirable, might be resisted by the investors. The benefit derived from external nondiscriminatory restraints against counterproductive activity is akin to

202. *Id.*

> that foreseen for large Republics in *The Federalist* No. 10 (Madison).[203]

The court also responded to Ecuador's concern about respect for its laws:

> Ecuador's *amicus* brief stresses the respect due the laws of a country concerning its own resources, cited in the Act of Rio [Rio Declaration on Environment and Development]. No conflict between Ecuadorian and other possible sources of law has been cited. Were such a conflict to arise, weight must, of course, be given to the concern quite properly articulated by the *amicus* submission.[204]

Judge Broderick ordered discovery that was limited to "events relating to the harm alleged by plaintiffs occurring in the United States" and "events occurring outside the United States to the extent the information can be furnished or secured voluntarily or through directives to parties in the United States."[205] Those issues relate to the extent to which conduct in the United States caused the alleged actionable harm and the public interest here in providing a forum for adjudication.[206] They are also relevant to the practical convenience of

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203. *Id.* at *9.

204. *Id.* The Rio Declaration provides that States have "the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." *Rio Declaration*, *supra* note 93, Principle 2. The Declaration is not legally binding, but provides evidence of customary international law. *See Aguinda*, 1994 WL 142006, at * 16 (Broderick Memorandum Order, *supra* note 200). Elsewhere in the opinion, Judge Broderick briefly discussed the declaration. In dicta, he wrote that "[a]lthough many authorities are relevant [to plaintffs' allegations of violations of the law of nations], perhaps the most pertinent" is the Rio Declaration, which "may be declaratory of what it treated as pre-existing principles just as was the Declaration of Independence." *Id.* at *6-*7. Other principles that could apply include Principles 1, 3, 4, 7, 10, 13, 16 and 22. *See Rio Declaration*, *supra* note 93. R R R

205. *Aguinda*, 1994 WL 142006, at *1.

206. There is a strong public interest here in protecting the international environment and remedying injuries in other countries that result from activities by U.S. corporations, especially when there is no alternative forum to administer justice. In addition, legal claims under U.S. law, including state common law, could arguably arise based on corporate conduct that takes place in the United States, even when events to implement it and actionable

fact-finding and litigating in the United States. Texaco moved for reconsideration of the Memorandum Order or, alternatively, for an order certifying the disputed issues for immediate interlocutory appeal. Judge Broderick granted the motion for reconsideration but adhered to the previous order, and denied the company's application for certification. The information described in the discovery order, said the court, "remains necessary for determination of Texaco's motions."[207]

In December 1994, as discovery was underway, the plaintiffs' attorneys filed a related class action lawsuit on behalf of indigenous and settler residents of Peru who allegedly have been harmed by transboundary pollution from Texaco's operations in Ecuador.[208] That case, *Gabriel Ashanga Jota v. Texaco, Inc.*, sought compensatory and punitive damages and equitable relief, including medical monitoring, the installation of reinjection facilities "in all the oil wells" once operated by Texaco in Ecuador, and "the clean-up of all remaining oil in the

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impacts occur abroad. On other hand, litigation by foreign plaintiffs, based on development activities that are carried out in a foreign country, in partnership with the government of that country, raises difficult legal, political and practical questions. U.S. courts are reluctant to assume that courts of a "sister democracy" are unable to administer justice, or open their doors to what could become a flood of litigation by foreign residents. Many federal courts have shied away from common law and international law cases. As a result, despite growing interest in transnational litigation to hold U.S. corporations like Texaco accountable for environmental and human rights injuries in developing countries, it remains to be seen whether those kinds of cases will flourish or flounder. Although promising doctrinal avenues for the cases exist, they tread on new ground. Under current U.S. law, there are formidable—but not necessarily insurmountable—doctrinal barriers to litigation. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d. Cir. 2000); Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002); Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002); Beneal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999). For a fuller discussion, see generally Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145 (1999).

207. Aguinda v. Texaco, Inc. , 850 F. Supp. 282, 283 (S.D.N.Y. 1994).

208. Plaintiffs' Complaint, Ashanga Jota v. Texaco, Inc., No. 94 Civ.9266 (S.D.N.Y. Dec. 28, 1994) [hereinafter *Ashanga Jota* Complaint]. The complaint names six adults, seventeen children, and four indigenous organizations as plaintiffs. The class is estimated to include "at least 25,000 . . . including approximately 15,000 Quichua Indians, 700 Orejone Indians, 1,000 Yagua Indians, 300 Secoya Indians, and approximately 8,000 immigrants from other parts of Peru." *Id.* ¶ 13.

Amazon region of Ecuador."[209] At the time the complaint was filed, relations between Ecuador and Peru were tense because of a long history of rivalry and a boundary dispute in the southern Amazon region.[210]

The *Ashanga Jota* Complaint echoed many of the basic allegations of the *Aguinda* Complaint, and further alleged that "due to a specific provision of Ecuadorian law, Ecuadorian courts cannot legally take jurisdiction over damages which have occurred in Peru."[211] An apparent effort to get around Texaco's efforts to convince the court to dismiss *Aguinda* on the ground of forum non conveneins in favor of litigation in Ecuador, *Ashanga Jota* was litigated together with *Aguinda*, but remained considerably less prominent than the Ecuadorians' case.[212] In another low-profile development, Petroecuador

209. *Id.* at Prayer for Relief.

210. In 1942, Ecuador lost nearly a third of its national territory when roughly one-half of its Amazon region was annexed by Peru. In 1994, Ecuador still had not conceded the loss; maps of Ecuador published in the country were required to include the annexed area. *See, e.g.*, KIMERLING, CRUDO AMAZÓNICO, *supra* note 77, at 2, 9. The boundary dispute was subsequently settled; however, the settlement remains controversial in some circles in Ecuador. **R**

211. *Ashanga Jota* Complaint, *supra* note 208, ¶ 54.c. The Complaint based alleged injuries in Peru on damages to the Napo River (which flows into Peru some 300 kilometers east of the operations). *See, e.g, id.* ¶ 93. The putative class is defined to include "all individuals who at any time from 1972 to the present have resided within two miles of the banks of the Napo River in Peru . . . and who are harmed in various ways . . . ." *Id.* ¶ 26. Surprisingly, (in view of the fact that the same attorneys represent the *Aguinda* plaintiffs), the *Ashanga Jota* Complaint also alleged that Texaco "knew or should have known that the soil of the Ecuadorian rainforest. . .consists of heavy *impermeable* clay . . . [and] that, when it dumped the 'production water' from its wells. . ., *every drop* of the toxic substances in the 'production water'. . . would flow into the Napo river and contaminate its waters." *Id.* ¶ 55 (emphasis added). Texaco has defended its practice of abandoning wastes in unlined pits by claiming—inaccurately—that soils in the area are naturally impermeable and, as discussed *supra,* although significant quantities of toxic substances have flowed into the Napo, adversely affecting water quality and aquatic life, contamination from produced water discharges also persists at many other locations in Ecuador, including in soils, swamps, lagoons, streams, ground waters, and tributaries of the Napo. **R**

212. Most people in Ecuador apparently did not even know that the same attorneys were pursuing a second lawsuit on behalf of Peruvian plaintiffs.

voluntarily dissolved its new U.S.-based subsidiary, Petroecuador Houston, on January 1, 1995.[213]

VII. Outside Court

Outside court, Texaco and Ecuador moved quickly to negotiate issues raised by the lawsuit, in what ABC News Nightline later called an "exit agreement."[214] They signed a series of agreements in 1994-1995 ("Remediation Contract").[215] Under the accord, Texaco Petroleum agreed to implement limited environmental remedial work; make payments to Ecuador for socio-economic compensation projects; and negotiate contributions to public works with municipal governments of four boom towns that sprang up around the company's operations and, in the wake of *Aguinda v. Texaco*, sued Texaco Petroleum in Ecuador. In exchange, the government of Sixto Duran Ballen and Petroecuador agreed to release and liberate Texaco Petroleum and Texaco—and their subsidiaries and successors—from all present and future claims, obligations and liability to the Ecuadorian State and national oil company "related to contamination" from the operations, "whether

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213. Petroecuador Houston was incorporated in Texas on Sept. 14, 1994 and voluntarily dissolved on Jan. 1, 1995. (Corporate Record on file with author.).

214. *Nightline: Texaco in the Amazon* (ABC television broadcast Oct. 21, 1998). The correspondent, Dave Marash, also described the area, which he visited after the remediation, as follows: "This Amazon paradise is as pocked and chipped and scratched as dinnerware at a greasy spoon." *Id.*

215. The agreements—each more detailed than the previous one—are: Republic of Ecuador, Ministry of Energy and Mines, "*Memorando de Entendimiento entre el Estado Ecuatoriano, Petroecuador y Texaco Petroleum Company* (Texpet) [Memorandum of Understanding between the Government of Ecuador, Petroecuador and Texaco Petroleum Company (Texpet)]," (Dec. 14, 1994) (signed by Gustavo Galindo Velasco, Minister of Energy and Mines; Federico Vintimilla Salcedo, Executive President of Petroecuador; Rodrigo Pérez Pallares, Legal Representative of Texaco Petroleum; and Ricardo Reis Veiga, Vice President of Texaco Petroleum); Republic of Ecuador, Ministry of Energy and Mines, "*Alcance del Trabajo de Reparación Ambiental* [Scope of the Environmental Remedial Work]" (Mar. 23, 1995) (signed by Galo Abril, Minister of Energy and Mines; Federico Vintimilla Salcedo, Executive President of Petroecuador; Rodrigo Pérez Pallares, Legal Representative of Texaco Petroleum; and Ricardo Reis Veiga, Vice President of Texaco Petroleum); Remediation Contract, *supra* note 17. The Remediation Contract "substitutes and voids" the Memorandum of Understanding and incorporates the Scope of Work as an annex. *Id.* art. IX, ¶ 6, annex "A." R

sounding in contract, tort, constitutional, statutory, or regulatory causes of action and penalties."[216] The agreement did not include a price tag; however, Texaco subsequently said that it spent forty million dollars on the remediation program.[217]

Publicly, Texaco and Ecuador vowed that the company would clean up damaged areas and compensate affected communities. However, they refused to disclose important details, including cleanup procedures and mechanisms that would evaluate their effectiveness. The negotiations were secretive; key documents were withheld from the public. Not surprisingly, the process generated considerable controversy in Ecuador because of the lack of transparency, failure to consult with affected communities, and limited scope of remedial activities. In addition, many people saw the agreement as an effort to derail the *Aguinda* lawsuit and help Texaco, a foreign company, evade responsibility for its environmental legacy. The Duran administration's support for Texaco's efforts to dismiss the case was well-known in Ecuador and had provoked a public outcry. Ambassador Terán's diplomatic protest had referred to the plaintiffs as "individuals who say they are citizens of Ecuador,"[218] appalling many Ecuadorians, who were also dismayed that their government was supporting a foreign company in a foreign land against its own citizens. By this time, officials could no longer claim that they were ignorant of the environmental and human tragedy caused by the operations.

Texaco characterized the remedial work as "voluntary."[219] This underscored the fact that, as in past environmental matters, the government failed to assume an authoritative regulatory posture with the company. Instead, it continued the pattern established during the Agra Audit, discussed *supra* Part IV, of negotiating environmental decisions with Texaco behind closed doors, without meaningful participation by affected communities, transparency, or other democratic safeguards. Not surprisingly, the final accord seemed more like an

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216. Remediation Contract, *supra* note 17, art. V. **R**

217. Texaco also reportedly dropped a $570,000,000 lawsuit against Ecuador, based on tax disputes. See *El Estado nos debe una fortuna* [*The State owes us a fortune*], EL COMERCIO, Jan. 31, 1994.

218. *See* Ecuador, Diplomatic Protest, *supra* note 193. **R**

219. *See, e.g.*, Texaco, Inc., Report on the Settlement Between Texaco Petroleum Company, the Republic of Ecuador, and Petroecuador, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S. D. N. Y. Dec. 22, 1994) at 5.

agreement between two polluters to limit their cleanup standards and lower and divide their costs than a remedial program based on a comprehensive and credible assessment of environmental conditions and measures that are needed to remedy them. After the work was completed, one experienced North American oil field worker privately described the remediation as a "face-lift."

Upon signing the Remediation Contract and "in consideration for Texpet's agreement to perform" the work outlined in the accord, Ecuador and Petroecuador committed to "release, acquit and forever discharge" Texaco Petroleum and Texaco Inc. from all claims to Ecuador and Petroecuador for "Environmental Impact arising from the Operations of the Consortium except for those related to the obligations contracted," thereby limiting Texaco's environmental liabilities to the state and its former partner to the relatively narrow scope of work set forth in the agreement.[220] As a result, before the work began, Texaco's liability and obligations to Ecuador for pollution from produced water discharges and waste pits were limited. In addition, because the scope of work did not include measures to investigate and remedy air pollution or contamination in ground and surface waters, the company was effectively absolved of any responsibility to Ecuador for those media. Similarly, the agreement effectively excused Texaco from any responsibility to Ecuador to remedy pollution from oil-soaked roads and most spill sites; to address environmental impacts of

220. Remediation Contract, *supra* note 17, art.V. "Environmental Impact" is defined as the presence or release of any solid, liquid or gaseous substance into the environment "which causes, or has the potential to cause harm to human health or the environment." *Id.* art. I, ¶ 3. Although the Remediation Contract clearly states that the Release of Claims provisions apply to present and future claims by the government and Petroecuador, and the accord does not include a hold harmless provision, ChevronTexaco now argues that, pursuant to the agreement, Ecuador and Petroecuador granted the company "a total and definitive release" from any and all liability derived from environmental impacts of the operations and the remediation program, including claims by third parties, and that any such claims should be made against the government instead of ChevronTexaco. *See, e.g.*, ChevronTexaco Answer, *supra* note 17, at 8-9, 57, 74-78, 93; ChevronTexaco, Texaco in Ecuador, "Summary of ChevronTexaco's Response to Ecuador Lawsuit" (Oct. 21, 2003) [hereinafter Summary of ChevronTexaco's Response], *available at* http://www.texaco.com/sitelets/ecuador/en/press_releases/2003-10-21_summary_of_response.asp. R R

gas flares; to assess the integrity of aging pipelines and tanks and take corrective action where needed to prevent leaks and spills; and to assess and address cumulative impacts of the operations on forest habitat, fish and other natural resources, biological diversity, the water cycle, and other ecological services of the rainforest.[221]

In addition to the initial release, the Remediation Contract obliged Ecuador and Petroecuador to release Texaco from its remaining obligations as work under the accord progressed. Upon completion of the work at each site, Texaco Petroleum agreed to notify the Ministry of Energy and Mines (MEM) in writing that its obligations at the site had been satisfied; the Ministry, which was the sole recipient of the notice, then had fifteen days to inspect the work and inform Texaco Petroleum of any "significant deviations" from the scope of work agreed to by the parties. If no such notification was made within the required time, then the work was deemed to be "accepted" by Ecuador and Petroecuador, and the release—of Texaco Petroleum and Texaco Inc—from obligations, liability, and claims became effective "immediately and permanently" for that site.[222] There was no mechanism for independent oversight of remedial activities, long term monitoring, public comment, or transparency in the approval process.

To implement the environmental work, Texaco contracted with Woodward Clyde International and Smith Environmental Technologies. They prepared a Remedial Action

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221. That said, the legality of the full and final release from liability to the Ecuadorian State (but not to Petroecuador) can be questioned, because the State cannot lawfully agree to renounce its constitutional duties, which include environmental protection. A number of Ecuadorian jurists have told the author that, in their view, the release by the State is void because it is contradicted by the Constitution; however, to date no legal proceedings have been brought in Ecuador to challenge the release. For relevant constitutional rights and duties, see 1998 Constitution, *supra* note 57, art. 3, ¶¶ 3, 4; art. 23, ¶ 6; art. 84; art. 86; art. 88; art. 91. R

222. Remediation Contract, *supra* note 17, arts. IV; I ¶ 11; V. If MEM notifies the company that the work is not acceptable, the parties have fifteen days to negotiate, to resolve the dispute, after which each party has five days to submit its position to the "Independent Technical Arbitrator" selected by the parties. *Id.* art. IV, ¶ 2. If the arbitrator sides with Texaco Petroleum and the government still refuses to accept the certification, the company can terminate the Remediation Contract, "with no further obligation to carry out" the work set forth in the accord. *Id.* art. I, ¶ 5, art. VI. ¶ 1.b. R

Plan (RAP) to supplement the scope of work outlined in the Remediation Contract. In September 1995, pursuant to the contract, the RAP was approved by Texaco Petroleum and MEM, on behalf of the government and Petroecuador.[223] The MEM official who signed the RAP—the Deputy Secretary for the Environment, Giovanni Rosanía—was a former employee of the Texaco-Petroecuador consortium.[224] At the time, Rosanía was employed by Petroecuador, on loan to MEM to head the agency's environmental unit. Despite this apparent conflict of interest, Rosanía played a central role as a public official in both environmental negotiations and implementation of the accord, including oversight and approval activities, during his tenure as Deputy Secretary. Similarly, the official who signed the RAP for Petroecuador's environmental unit,

223. Texaco Petroleum Company (Texpet), *"Plan de Acción de Reparación Ambiental para el Antiguo Consorcio Petroecuador-Texpet"* [Environmental Remedial Action Plan for the Former Petroecuador-Texpet Consortium] (prepared by Woodward-Clyde International Inc. & Smith Environmental Technologies Corp. and signed by Giovanni Rosanía Schiavone, Deputy Secretary for Environment, MEM; Patricio Maldonado V., Chief of the Environmental Protection Unit, Petroecuador; Ricardo Reis Veiga, Vice President, Texaco Petroleum; and Jean Michel Simon, Project Manager, Woodward-Clyde/Smith) (Sept. 8, 1995) [hereinafter Remedial Action Plan]; Remediation Contract, *supra* note 17, art. III ¶ 2. Texaco Petroleum had the right to terminate the Remediation Contract, with no further obligation to carry out environmental remedial work, if MEM failed to approve the Remedial Action Plan. *Id.* art. VI ¶ 1.a. **R**

224. Rosanía worked for the consortium as an employee of Petroecuador (then CEPE), reportedly for more than a decade. He subsequently held a high level post in MEM, and was rumored (among Texaco's Ecuadorian employees) to have secured that job with support from Texaco. Interview with Margarita Yépez, former social worker for Texaco Petroleum (1973-1989), in Quito, Ecuador (June 30, 2003) [hereinafter Yépez Interview June 30, 2003]. During his tenure as MEM's Deputy Secretary for the Environment, Rosanía was nick-named "*amigo de Texaco,* friend of Texaco" by some of his colleagues in Petroecuador's environmental unit. *See* Petroecuador, *La Historia Anecdótica de la Unidad de Protección Ambiental de Petroecuador Durante los Años 1992-1996* [The Anecdotal History of the Environmental Protection Unit of Petroecuador During the Years 1992-1996] (undated) (unpublished) (on file with author). On August 10, 1996, President Durán completed his term of office and Abdalá Bucaram assumed the presidency; the new administration appointed a new Minister of Energy and Mines and Deputy Secretary and, as discussed *infra* in Part VIII, declared the Remediation Contract invalid.

Patricio Maldonado, was a former employee of Texaco Petroleum.[225]

Remedial work began in October 1995 and was completed in August 1998.[226] Most of the work was carried out by subcontractors and was designed to "close" abandoned waste pits at well sites.[227] The RAP included a list of subcontractors; however, companies that did not appear on the list were also contracted. The most notorious subcontractor was a company based in Coca, Corposega S.A. The general manager of Corposega was Rafael Alvarado, a Kichwa who founded the company with four mestizo associates in 1993.[228] Alvarado is part of small group of indigenous political elites. In January 1994, he became President of FCUNAE, an indigenous federation based in Coca that is comprised of Kichwa communities on the banks of the Napo River and in the Napo basin near Coca. The Congress of community representatives that elected Alvarado was not informed about Corposega.

In January 1995, FCUNAE held another Assembly, and, again, Alvarado did not inform the assembly about Corposega. By this time, the initial agreement in the series of accords that became the Remediation Contract had been signed. After studying the agreement, the Assembly of community representatives, which is the highest authority of the federation, resolved to reject the agreement because of the narrow scope of

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225. Texaco, NEWS, *supra* note 100, at 11 (company magazine listing "employees of TEXACO" who received technical and/or administrative training carried out in Ecuador and abroad, January-April 1989). R

226. WOODWARD-CLYDE INTERNATIONAL, REMEDIAL ACTION PROJECT, ORIENTE REGION, ECUADOR 1-1 (May 2000) (prepared for Texaco Petroleum Company, White Plains, New York) [hereinafter WOODWARD-CLYDE, REMEDIAL ACTION PROJECT].

227. In addition to work at well sites and production stations, eighteen abandoned wells were plugged; some 6,000 cubic meters of hydrocarbon-contaminated soils were encapsulated at 36 sites (39 additional sites were investigated and deemed to require no action because of "natural attenuation"); and design specifications were developed for secondary containment dikes at three facilities. *Id.* at ES-2, 6-1; *see also id.* §§ 5, 6, 8; *infra* note 253 and accompanying text. R

228. Apparently Alvarado was inspired by early "cleanup" activities, described *supra* in the text following note 141, in which contaminated materials were basically gathered by hand by local workers, and buried in holes in the ground. Previously, it seemed that oil field subcontractors needed technical skills and/or expensive equipment; when he saw a cleanup near Coca, Alvarado remarked, "That is nothing; I could do that!" R

the remedies under discussion and the failure of Ecuador and Texaco to consult with affected communities.[229] Alvarado, however, spurned the resolution of the Assembly and secretly held talks with Rosanía to secure cleanup contracts for Corposega as part of the remedial program. Although details of the talks remain murky, Alvarado solicited work for Corposega using the name of FCUNAE,[230] thereby violating the norms of the federation and abusing his authority as president. In January 1996—days after completing his term as president of FCUNAE—Alvarado signed a contract with Smith International for remedial work valued at $200,000.[231] Despite considerable controversy about Corposega's practices—which reportedly included dumping diesel on weathered crude and contaminated vegetation, then burning them onsite in open fires[232]—Corposega subsequently secured additional job or-

229. FCUNAE, *Resolución de la XVI Asambléa Anual de la Federación de Comunas Unión de Nativos de la Amazonía Ecuatoriana, Compañías Petroleras No. 4* [Resolution of the XVI Annual Assembly of the Federation of Comunas Union of Natives of the Ecuadorian Amazon, Petroleum Companies No. 4] (Jan. 7-10, 1995). The document rejected by the Assembly was the Memorandum of Understanding between the Government of Ecuador, Petroecuador and Texaco Petroleum Company, *supra* note 215. **R**

230. *See, e.g.,* FCUNAE, *Oficio* [Official letter] No. 00367-FCU, Letter from Rafael Alvarado, President of FCUNAE, to Giovanni Rosanía, Chief of Petroecuador's Environmental Protection Unit (Oct. 4, 1994); FCUNAE AND CORPOSEGA, S.A., *Plan Piloto: Descontaminación, Recuperación de Áreas en Campos Petroleros Usando Técnicas de Bioremediación y Manejo Sustentable* [Pilot Plan: Decontamination, Recuperation of Affected Areas in Oil Fields Using Techniques of Bioremediation and Sustainable Management] (Oct. 1994). Rosanía headed Petroecuador's environmental unit before he was loaned to MEM, and negotiations with Alvarado apparently began during his tenure at Petroecuador. *See Memorando No. 441-PAB-94 de Giovanni Rosanía, Jefe Unidad de Protección Ambiental de Petroecuador, para Presidente Ejecutivo de Petroecuador* [Memorandum No. 441-PAB-94 from Giovanni Rosanía, Chief of Petroecuador's Environmental Protection Unit, to the Executive President of Petroecuador] (Oct. 19, 1994); *see also* Letter from Wilson Jiménez, President of Corposega, to the Manager of Petroproducción (Mar. 13, 1994).

231. *Contrato de Servicios de Remediación* [Contract for Remediation Services] cl. 3.2, Jan. 12, 1996 (entered into between Smith Int'l Corp. and Corposega S.A) [hereinafter Corposega Contract].

232. The Corposega Contract states that the work should "use the system approved by the government." *Id.* cl. 2.0. However, a subsequent provision provides that Corposega is an independent contractor and, as such, "shall alone be responsible for determining the means and methods to execute the work;" and Corposega's personnel shall be subject to review and approval by Smith, and "should be competent, qualified and cooperative." *Id.* cl. 16.1.

ders and by the end of the year had been paid $408,925 as a subcontractor in Texaco's remedial project.[233]

In addition to support from Rosanía, Alvarado's efforts to secure contracts apparently received support from some politicians, including members of Ecuador's National Congress. The company's dealings with two representatives, José Avilés and Hector Villamil, were particularly controversial.[234] Avilés and Villamil represented Napo and Pastaza provinces, respectively, and were part of a small group of indigenous political elites. An audit of Corposega in October 1996 revealed that, among other irregularities, Alvarado diverted more than 52 million *sucres* (approximately $16,300 at the time) of company funds—apparently monies from Texaco—to pay import taxes for two Toyota sports utility vehicles for Avilés and Villamil. In addition, he distributed more than 31 million *sucres* (approximately $9700) in "loans" to the two men and other politicians.[235] In December 1996, Avilés and Villamil were removed from office by Ecuador's Congress—along with eleven other

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The contract also includes a hold harmless provision, in favor of Smith, Woodward-Clyde and Texaco Petroleum, and a requirement to comply with all applicable laws and regulations. *Id.*, cl. 10.1, 17.1. In addition, the contract includes a confidentiality clause, barring the subcontractor from disclosing information about the remedial work it undertakes without permission from Smith, except as required by a "legal or administrative authority." *Id.* cl. 13.1.

233. Letter from John Sjostrom, Smith Int'l Corp., to Galo Cargua Silva, Corposega S.A. (Oct. 28, 1996); Corposega list of Income, Corposega S.A. (undated) (on file with author); Certification of Work by Smith International Corp. (Mar. 28, 1996) (on file with author). Corposega is no longer in business.

234. *See, e.g., Remediación: la plata se fue a otro lado* [*Remediation: the Money Went Elsewhere*], EL COMERCIO, Dec. 17, 1996; *Negocio salpica a diputados* [*Congressional Representatives Have Egg on Their Face from Business*] HOY, Dec. 12, 1996, at 3A; *Descalificarían a diputados* [*Congressional Representatives Could be Disqualified*], HOY, Dec. 12, 1996.

235. Letter from Victor Ruiz, Chief of Audits, Nuñez & Assocs. to Galo Cargua Silva, General Manager, Corposega S.A. (Oct. 31, 1996), ¶¶ 5, 6, annex (also naming Fredy Estrella, an alternate Congressperson; Nelson Chimbo, mayor of Archedona; and Chimbo's wife). Cargua Silva requested the audit after replacing Alvarado as General Manager of Corposega. He subsequently wrote to Avilés, Villamil, and Chimbo, asking them to return the monies. Letter from Galo Cargua Silva, Manager of Corposega S.A., to José AvilésJosé Avilés Huatatoca, Representative for the Province of Napo (Nov. 5, 1996); Letter from Galo Cargua Silva, Manager of Corposega S.A., to Hector Villamil Gualinga, Representative for the Province of Pastaza

representatives—in an unrelated corruption scandal that charged the legislators with mismanagement of public funds.[236] In the wake of the scandal, Texaco Petroleum's legal representative in Ecuador, Rodrigo Pallares, told a leading newspaper that the company "ha[d] nothing to do with the management of monies" and that it was aware of complaints about Corposega's work but had contracted the company "because of political pressures."[237]

For FCUNAE, the experience with Corposega was injurious. In addition to adverse environmental impacts from the company's remedial activities, the federation itself was weakened, which in turn weakened its members, especially vis a vis Texaco, Petroecuador, and other oil companies. The communities that comprise FCUNAE felt betrayed by Alvarado; he had abused his power as an official and violated their internal norms by using the federation's name for personal gain, and without authorization from the base communities. Their efforts to work together, as a federation, to defend their rights and secure a remedy for the damages created by Texaco and continued by Petroecuador effectively ended, and it was several years before they began to come together again to resume work on the issue (although some communities continued to work without support from federation officials). FCUNAE's criticism of Texaco's remedial program was effectively silenced—by one official. In addition, efforts by the federation to participate in the *Aguinda* lawsuit, to try to make it responsive to the needs and aspirations of affected communities, en-

(Nov. 5, 1996); Letter from Galo Cargua Silva, Manager of Corposega S.A., to Nelson Chimbo, Mayor of the Municipality of Archidona (Nov. 5, 1996).

236. *See Aferrados hasta el último minuto* [*Obstinate until the last minute*], HOY (Apr. 18, 1997); *La Contraloría desenreda parte de telaraña* [*The Comptroller unravels part of the cobweb*] HOY (Apr. 17, 1997); *Trece Diputados tramitaron aportaciones* [*Thirteen Congressional Representatives handled contributions*], UNIVERSO (Apr. 17, 1997) (Ecuador).

237. *Remediation: the money went elsewhere*, *supra* note 234. *Cf. Todo viene de* **R**
Petroproducción [*It all comes from Petroproducción*], BLANCO Y NEGRO 3:116 at p.2 (*Hoy* magazine) (July 14, 1996) (reporting that Pallares recognized that there have been technical problems with work by subcontractors and quoting him as saying, "in the case of Corposega, the idea was to help the communities of the Amazon"; also reporting that Corposega was the cheapest subcontractor but, according to Pallares, "it is not an economic problem").

ded.[238] Externally, FCUNAE's image was sullied; internally, in the communities, the trustworthiness of federation officials and indigenous politicians was questioned. Alvarado subsequently apologized to the federation for his misdeeds, but FCUNAE still has not fully recovered.

According to Woodward Clyde's final report to Texaco, a total of 250 pits and seven spill areas at 133 well sites were investigated under the remedial program.[239] This meant that hundreds of well sites and waste pits (at both production stations and well sites) were omitted from the scope of work, as was most offsite contamination at all of those locations.[240] Remedial action was taken at 168 of the locations, using "a combination of traditional oil field and innovative remediation technologies."[241] At eighty-nine locations, no further action was taken, either because chemical sampling indicated that it was not required under the terms of the RAP or because Petroecuador had changed the conditions at the site.[242] According to Wilma Subra, a chemist with experience in oil field

238. Disclosure: the author has worked with FCUNAE since 1989, in various capacities, and represented the federation during early efforts to participate in the litigation and make it responsive to the affected communities. A full discussion of those activities is beyond the scope of this Article.

239. WOODWARD-CLYDE, REMEDIAL ACTION PROJECT, *supra* note 226, at ES-1. The sites are located in ten fields. *Id.* at 3-1. R

240. Texaco drilled 339 wells during its tenure as operator. At the time the company's contract with Ecuador ended in 1992, the assets of the consortium included sixteen production fields with a total of 316 operating wells, 18 central production stations, 6 base camps and associated pipelines. WOODWARD-CLYDE, REMEDIAL ACTION PROJECT, *supra* note 226, at ES-1. The Woodward-Clyde report does not state how many waste pits were used by Texaco; a reasonable estimate that includes open and abandoned pits is at least 657. *See* Petroecuador, *Análisis de la Unidad de Protección Ambiental de Petroecuador (UPA) Respecto a la Operación y al Plan de Remediación Ambiental (RAP) de Texaco en el Ecuador* [Analysis by the Environmental Protection Unit of Petroecuador of the Operation and Remedial Action Plan (RAP) of Texaco in Ecuador] 5 (May 7, 1997) [hereinafter Petroecuador UPA Report on Operations and Remediation] (632 waste pits); WOODWARD-CLYDE, REMEDIAL ACTION PROJECT, *supra* note 226, at 3-2 (reporting that 25 waste pits that had not been identified prior to the remedial work were found at well sites during the project). R R

241. *Id.* at ES-1.

242. *Id.* 3-3, tbl. 3-1.

remediation in the United States who reviewed the final report, "they really did not do much."[243]

The general procedure at the waste pits was to first remove debris and the cap of crude oil from the surface of the pit, and then evacuate the remaining liquids into the environment. The debris was washed onsite and burned. The crude was delivered to Petroecuador. According to Woodward-Clyde, approximately 28,000 barrels were treated and recycled into production pipelines.[244] The remainder, an undisclosed amount, was dumped into two cement-lined holes in the ground at a production station and capped—a practice that is comparable to burying toxic wastes in unsecured landfills, because the facilities cannot be expected to prevent the release of contaminants into the environment over the long term or detect when migration in ground water begins.[245]

According to Woodward-Clyde, liquids from the pits were sampled and, if needed, treated to standards before discharge.[246] However, a number of witnesses and reports say that at many locations, contaminated liquids were dumped into rivers and streams without proper sampling and treatment. Those witnesses and reports also indicate that, at a number of locations, waste pits containing high levels of petroleum were backfilled without removing or treating the oil; crude oil that was removed from waste pits, and contaminated soils and vegetation, were buried in unlined holes in the ground and dumped in the environment, including at locations in nearby forests; crude oil and contaminated vegetation were burned in open fires; toxic chemicals were thrown into waters, killing fish; workers were badly treated; workplace

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243. Telephone Interview with Wilma Subra, President, Subra Co., in New Iberia, La. (Oct. 27, 2000) [herinafter Subra Interview II]. Subra is currently a 'MacArthur Genius,' recognized by the John D. and Catherine T. MacArthur Foundation for her work with communities in oil fields in Louisiana. The MacArthur Foundation, Complete List of MacArthur Fellows, *available at* http://www.macfound.org/programs/fel/complete_list_4.html (last visited Oct. 21, 2005).

244. WOODWARD-CLYDE, REMEDIAL ACTION PROJECT, *supra* note 226, at ES-1. **R**

245. Apparently, the landfills do not have double liners beneath the wastes, or groundwater sampling and leachate collection systems. Woodward-Clyde described them as "cement vaults" with "impermeable multilayered caps." *Id.*

246. *Id.* at 3-4 to 3-10.

safety norms were violated; and equipment and resources were reduced to save money. In addition, MEM field monitors were reportedly given false information at some locations; prevented from entering some sites to observe remedial work; and some work that was challenged by monitors was nonetheless accepted and approved by MEM supervisors without corrective action.[247]

247. As noted, this paragraph is a synthesis of a number of reports and witnesses. *See, e.g.*, Petroecuador UPA Report on Operations and Remediation, *supra* note 240, at 8-10; Petroecuador, *Memorando* [Memorandum]-301-PAB-96 (May 7, 1996); Petroproducción, *Oficio* [Official Letter] No. 3325 AMB-96 (June 19, 1996); Petroecuador, *Memorando* [Memorandum] No. 342-PAB-96 (May 27, 1996); Petroecuador, *Observaciones Sobre Tratamiento de Piscinas* [Observations About Treatment of Waste Pits] (May 6, 1996) (chart attached to Memorandum No. 342-PAB-96); *Denuncia de Mauricio Alfredo Narvaez Lanza* [Denunciation by Mauricio Alfredo Narvaez Lanza], Orellana Province (Apr. 28, 1996) (denunciation by former employee of Corposega); General René Vargas Pazzos, *La Responsibilidad de Texaco ante el Ecuador* [Texaco's Responsibility to Ecuador] (paper presented to forum in Quito, Jan. 18, 2001); Ministry of Energy and Mines, Office of the Deputy Secretary for Environmental Protection, *Evaluación del Cumplimiento del Contrato Entre El Gobierno Ecuatoriano y la Compañía Texpet*, [Evaluation of Compliance with the Contract between the Ecuadorian Government and the Company Texpet] (Jan. 23, 1998) [hereinafter MEM SPA Evaluation of Remedial Works]; Ministry of Energy and Mines, *Informe de la Comisión Especial Conformada Para Analizar y Evaluar Los Trabajos de Reparación Ambiental Que Ejecuta La Compañía Texaco en el Oriente Ecuatoriano* [Report of the Special Commission to Analyze and Evaluate the Environmental Remediation Works Carried Out by the Company Texaco in the Ecuadorian Amazon] (Sept. 23, 1996) [hereinafter Report of the Special Commission]. The Special Commission—created by MEM's Deputy Secretary for Environmental Protection, Hugo Jara Roman, and comprised of representatives of his unit, Petroecuador's Environmental Unit, Petroproducción, MEM's National Directorate of Hydrocarbons, and the NGO *Fundación Natura*—also accused Texaco of "unethical and immoral practices in its relations with State Entities and natural persons." A number of denunciations were reported, including: denunciations by Texaco that government oversight personnel were not permitted by Petroecuador to travel to Houston and Miami using "scholarships" that had been requested by one of them (Medardo Vargas) and approved by "the Company Texaco"; that oversight official Medardo Vargas received a computer from Texaco; charges by subcontractors that three government oversight officials received or requested payments to approve remedial work; and allegations by one subcontractor that Texaco "economically bribed various public officials who negotiated the [Remediation] Contract." *Id.* at 11-13. The final conclusion of the Report of the Special Commission states: "Under the criteria that the first objective of an environmental remediation is the protection of human R

MEM's Giovani Rosanía responded to the some of those critiques in 1996, in an interview with a leading newspaper. He claimed that the subcontractors were required to comply with technical standards for cleaning pits that are "much stricter that [those used in] Canada and the United States," and he added that twenty-seven years of contamination cannot be cleaned up in five months. He did not deny that wastes had been buried in holes in the ground, but said that the holes are small and covered with geotextile. Rosanía also agreed with allegations that some sites had been re-contaminated but blamed Petroecuador for dumping wastes in the pits at night.[248]

According to the Woodward-Clyde report, after liquids were evacuated from the pit, composite soil samples were taken from the pit bottom and sides to determine whether soils and sludge needed remedial action before backfilling the pit. If the level of Total Petroleum Hydrocarbons (TPH) was 5,000 mg/kg (ppm) or greater, they sampled again, ostensibly to evaluate the potential for hydrocarbons to leach from soils and contaminate ground water. However, according to Wilma Subra, the leachate testing protocol that was used is a "notoriously poor" procedure for that type of assessment, because "everyone knows it does not work on oily wastes." As a result, decisions under the program to fill pits without remedying contaminated soils and sludge are not scientifically credible.[249]

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life and conservation of natural resources . . . [the Remediation Contract] does not fulfill, or cover the ends for which it was made . . . ." *Id.* at 12.

248. *Mejor lo Dejábamos Ahí* [*It Would Have Been Better to Leave it as it Was*], BLANCO Y NEGRO 3:116, 4-5 (July 14, 1996). Texaco's representative in Ecuador, Rodrigo Pallares, told *Hoy* that "jealousy" was behind the negative reports by monitors and Petroecuador's production subsidiary (Petroproducción), "because they were not taken into account during negotiations or implementation of the agreement"; however, he also acknowledged problems with subcontractors that did not comply with technical specifications. *Id.* at 6. According to the news report, "Texaco feels excessive pressures around it, above all from special interests that, by its criteria, seek to get the maximum economic cut from Texaco and blame it for all that is bad." *Id.*

249. Subra described use of the protocol—Toxicity Characteristic Leachate Procedure (TCLP)— in oily wastes to determine the need for remedial action as a "sham." Subra Interview II, *supra* note 243. According to Subra, the action level (for remedial action) of 5,000 mg/kg TPH in soils was set conservatively when compared with oil field cleanups (but not with hazardous waste site cleanups) in the United States; however, the work was performed so that Texaco did not necessarily have to meet the standard. In **R**

As a general matter, covering waste pits with dirt without removing or treating contaminated soils and sludge is equivalent to burying them in an unsecured landfill, where they can continue to leach into the environment and contaminate ground water.[250]

According to Woodward-Clyde, at sites where soils were remedied, contractors mixed contaminated soils with sand or silica-based chemical products, meant to encapsulate, solidify, or otherwise stabilize the soils onsite, and thereby prevent the migration of contaminants in the environment.[251] However, according to Subra, testing should have been done to confirm the effectiveness of the remedial work; however, this was not done, and, as a result, there is no evidence that all of the contaminated material was stabilized. In addition, there is no evidence that any stabilization that was achieved will last. Because of the presence of hydrocarbons in the soils—which are prone to leaching—and the heavy rains in the region, Subra is skeptical about the effectiveness of the stabilization technologies described in the Woodward-Clyde report.[252]

In addition to work at well sites, treatment facilities for produced water injection systems were designed and installed for three production stations. A conveyance pipe was also installed for each system, to transport produced water from the station to a well that Petroecuador converted into an injection well.[253] If properly implemented, injection of produced water

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addition, even taking the defects of the procedure into account, Subra says that the analytical results are "not credible"; with so many initial hits at such high levels, the leachate testing procedure should have found higher levels and triggered action at more sites, "unless the method was doctored, for example, by filtering the samples before analysis." Subra also criticized the program for failing to analyze soil samples for heavy metals, and for taking too few samples in the pits. Describing the chemical sampling program generally, Subra commented, "they really did it 'on the cheap.'" *Id.*

250. This is also true for contaminated wastes that are buried in holes and covered with geotextile. *See, e.g.*, Tirza S. Wahrman, *Agent Orange in Newark: Time for a New Beginning*, 29 SETON HALL L. REV. 89, 93 (1998) (discussing how the placement of a thin geotextile fabric over contaminated soil did not prevent leakage of waste into a nearby river).

251. WOODWARD-CLYDE, REMEDIAL ACTION PROJECT, *supra* note 226, at 3-8 - 3-9. R

252. Subra Interview II, *supra* note 243. R

253. The stations are Aguarico, Atatcapi and Guanta, with handling capacities of 6,000 barrels/day (b/d), 2,000 b/d and 1,000 b/d, respectively. WOODWARD-CLYDE, REMEDIAL ACTION PROJECT, *supra* note 226, at 7-4 to 7-8. R

could lead to significant improvements in environmental protection. However, the capacity of the three systems is relatively small when compared with the total volume of produced water that is generated in the fields developed by Texaco: 9,000 barrels/day (equal to 378,000 gallons/day) out of a total produced water waste stream of roughly 100,000 barrels/day (4.2 million gallons/day).[254]

In addition, although injection has long been a common waste disposal practice for produced water in the United States,[255] experience here shows that injection wells can become fountains of contamination—both in underground freshwater aquifers and above ground in soils and waters—if they are not properly designed, installed, operated, maintained, and monitored.[256] One important concern is corrosion; oil field brine corrodes injection wells and can escape into freshwater aquifers. Activity by sulfate-reducing bacteria can also cause corrosion. As a result, Petroecuador must be prepared to spend substantial amounts of money on maintenance activities—including chemical additives to control cor-

254. The 100,000 barrels/day total is from the Woodward-Clyde report. *Id.* at 7-1. The total is up from 3.2 million gallons/day in December 1989, and can be expected to continue to rise. As oil fields age, they typically produce less oil and more brine.

255. In the United States, the practice was used as early as 1928. Beginning in 1969, reports in technical journals raised concerns about the environmental impact of unregulated injection of oil field and other wastes. Problems and concerns included groundwater contamination, well blowouts and earthquakes. MACFADDIN, *supra* note 112, at 119. In 1974, Congress passed the Safe Drinking Water Act. Section 300h directed EPA to establish minimum regulatory requirements for state underground injection programs. Regulations, known as the Underground Injection Control Regulations (UIC), were first promulgated in 1980. 40 C.F.R. § 14. R

256. Serious pollution problems have been documented in many states where re-injection is practiced. *See, e.g.*, U.S. Environmental Protection Agency, Mid-Course Evaluation of the Class II Underground Injection Control Program: Final Report of the Mid-Course Evaluation Workgroup (Aug. 22, 1989); U.S. General Accounting Office, GAO/RCED-89-97, Underground Waste Disposal (1989). In addition to known contamination, the critical question of long-term confinement of injected wastes remains unanswered. Not enough is known about the behavior of injected wastes. Once injected, they are removed from control and management, and subsurface migration to ground or surface waters cannot be accurately monitored. Kimerling, *International Standards*, *supra* note 40, at 383. R

rosion and bacteria—to ensure the continued proper operation of the injection systems.[257]

The most commonly cited best practice for injection systems is to reinject wastes into the same formation from which they were removed; however, this is not always possible, so wastes may also be injected into another deep formation. The receiving formation should be located below freshwater aquifers and geologically isolated from them. The Woodward-Clyde report does not relate the depth of receiving formations or provide other information that is needed to assess the environmental effectiveness of the systems, perhaps because the injection wells were installed by Petroecuador, and the scope of work did not include an environmental assessment of the systems.

In addition to environmental work under the Remediation Contract, Texaco provided two payments of $1 million each for social compensation projects. The first was paid to MEM in November 1995 and was earmarked for projects by two Kichwa federations, FCUNAE, discussed above, and FOISE (now FOKISE, Federation of Kichwa Organizations of Sucumbíos Ecuador), which is based in Lago Agrio.[258] The fund was ostensibly destined to rehabilitate damaged areas and support community-based development and use of renewable natural resources.[259] The genesis of the fund is unclear; FCUNAE and FOKISE did not participate in negotiations between Texaco and Ecuador, sign or ratify the Remediation Contract, or release the company from liability to them for the operations. The decision to select the Kichwa federations as the only beneficiaries of the fund—and exclude Huaorani, Cofán, Siona, Secoya, and colonist organizations—is not explained in the agreement. Information about expenditures from the fund is also incomplete and continues to be a source of concern in communities affiliated with FCUNAE.

MEM's Deputy Secretary for the Environment presides over administration of the fund, and FCUNAE and FOKISE

257. Telephone Interview with Marvin B. Rubin, Engineering Branch Chief, Effluent Limitations Guidelines Program, Office of Water, USEPA, in Washington, D.C. (Mar. 21, 2001).

258. Republic of Ecuador, Ministry of Energy and Mines, *Acta de Entrega-Recepción* [Act of Delivery-Reception], Quito (Nov. 15, 1995).

259. Remediation Contract, *supra* note 17, annex A, ¶ VII.A. R

cannot withdraw monies without his written authorization.[260] According to former federation officials, MEM initially threatened to freeze distributions from the fund if they supported the *Aguinda* lawsuit, even though that was not a condition of the Remediation Contract.[261] For a few years, MEM approved a number of expenditures, for federation salaries, administrative expenses, trucks, outboard motors, furniture, computers, and a speed boat; in addition, FCUNAE rehabilitated its office. However, apparently no environmental restoration or community development projects were undertaken with support from the fund, and residents of affected communities, especially communities affiliated with FCUNAE, increasingly complained about the lack of information about use of the monies, the failure of the payments to provide them with any benefits, and the divisiveness it promoted. Some $690,000 reportedly remained in the fund when the bank holding the money closed in 1999, amidst a wave of bank failures and corruption scandals that rocked the nation.[262]

The second million-dollar payment was earmarked for construction of four educational centers and medical dispensaries to be administered by UNICEF. However, UNICEF was not consulted during negotiations between Texaco and Ecuador and declined to accept the monies. Subsequent plans called for a committee led by MEM's Deputy Secretary for the Environment to administer the project.[263] After some initial

260. Republic of Ecuador, Ministry of Energy and Mines, No. 332, arts. 1.a., 5 (May 9, 1996).

261. Interview with Bolívar Andi, former President of FCUNAE, Alejandro Noteno, then-President of FCUNAE, and Orlando Grefa, then-President of FOISE, in Quito, Ecuador (Apr. 23, 1997). As discussed *infra*, Ecuador subsequently supported the lawsuit, and during that time MEM did not condition payments on withholding support from the case. Interview with Jorge Alban, Deputy Secretary for Environmental Protection, MEM, in Quito, Ecuador (Jan. 5, 1998).

262. The bank, Banco de Azuay, held the funds in two accounts: $431,290 was earmarked for FCUNAE and approximately $250,000 was earmarked for FOISE. Interview with Luciano Mamallacta, former President of FCUNAE, in Napo River, Ecuador (Oct, 28, 2003). In 2005, at least some of the monies were reportedly recovered by federation officials.

263. The committee also includes representatives of MEM's National Hydrocarbon Directorate, Petroecuador, FCUNAE, and FOISE. Interview with Manuel Muñoz, Deputy Secretary for Environmental Protection, MEM, in Quito, Ecuador (July 31, 1998). The million dollars was reportedly delivered to MEM's environmental unit in 1998, after efforts to get Ecuador's Armed

construction, the work stalled and reportedly has not been completed at any of the facilities.

The Remediation Contract also provided for delivery of a small plane to the Catholic Capuchin Mission in Coca. However, the Mission had not been consulted and refused to accept the plane. In a letter to MEM, it also protested the introduction of its name into the Contract without "previous conversations or consent"; expressed support for demands by indigenous and settler organizations that Texaco assume full responsibility for the pollution and other damages it had caused; and expressed disagreement with the remedial agreement because it failed to ensure an adequate cleanup and repair of the company's environmental injuries, and thus would not bring about a "real improvement in living conditions for those who are truly affected by the damages."[264]

In response, Texaco Petroleum agreed to purchase a small plane to be shared by four indigenous organizations: FCUNAE, FOISE, OPIP (Organization of Indigenous Peoples of Pastaza) and ONHAE (Organization of the Huaorani Nation of the Ecuadorian Amazon). In December 1996, the company executed an agreement with the four federations confirming the sale of a single engine Cessna aircraft to them for less than two dollars (5,000 *sucres*) and releasing Texaco Petroleum from liability for the craft.[265] The plane was delivered to

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Forces and the United Nations Development Program to administer the project both failed. The Remediation Contract does not specify a value for the project; instead it obliges Texaco Petroleum to finance construction of four educational centers with medical dispensaries; two river ambulances; a small plane; environmental education materials; and health promoter programs. Remediation Contract, *supra* note 17, annex A, ¶ VII.B. The value was subsequently set at one million dollars, excluding the plane. R

264. Aguarico Apostolic Vicarate, Letter from Father Jose Miguel Goldaraz, Vicar General, to Galo Abril, Minister of Energy and Mines (May 11, 1995).

265. *Compra Venta de Aeronave* [Purchase Sale of Aircraft] (Dec. 9, 1996) (notorized purchase-sale agreement declared by Texaco Petroleum Company, represented by Dr. Rodrigo Pérez Pallares; Cesar Domingo Cerda Vargas, in legal representation of OPIP; Armando Dilo Boya Baihua, legal representative of ONHAE; Bolívar Teodoro Andi Dias Natanael, legal representative of FCUNAE; Pascual Cesar Tapuy Calapucha, legal representative of FOISE). Unlike the Remediation Contract, Ricardo Reis Veiga (identified in other documents as Vice President of either Texaco Petroleum, Texaco Inc. or ChevronTexaco), did not execute the agreement with the federations.

OPIP because it was the only federation with capacity to pilot and maintain the craft, and it has become a source of conflict between the federations that persists to this day.

In the final provision for socio-economic compensation, Texaco Petroleum pledged to "continue negotiations" with the municipalities of Lago Agrio, Shushufindi, Joya de los Sachas, and Francisco de Orellana (Coca) "to establish participation" by the company in projects to provide drinking water and/or sewage systems.[266] The four municipalities had sued Texaco Petroleum in Ecuador in the wake of news reports about the *Aguinda* lawsuit, seeking cleanup and compensation. The negotiations—with local politicians—were secretive and, like the negotiations with Ecuador's central government, caused considerable controversy and concern.

On May 2, 1996, as a result of the negotiations, Texaco Petroleum signed five agreements with municipal and provincial officials. Under the agreements, the company made a series of payments: to the municipalities, ostensibly to help finance "social interest" public works, and to the office of the Prefect of Sucumbíos Province, for "social interest . . . ecoproduction projects."[267] Coca and Lago Agrio each re-

266. Remediation Contract, *supra* note 17, art. VII.C. **R**

267. *Contrato de Transacción, Liberación de Obligaciones, Responsabilidades y Demandas Celebrado Entre la Municipalidad de Lago Agrio y la Compañía Texaco Petroleum Company* [Settlement Agreement, Liberation of Obligations, Responsibilities and Claims Concluded by the Municipality of Lago Agrio and Texaco Petroleum Company] (May 2, 1996); *Contrato de Transacción, Liberación de Obligaciones, Responsabilidades y Demandas Celebrado Entre la Municipalidad de Shushufindi y la Compañía Texaco Petroleum Company* [Settlement Agreement, Liberation of Obligations, Responsibilities and Claims Concluded by the Municipality of Shushufindi and Texaco Petroleum Company] (May 2, 1996); *Contrato de Transacción, Liberación de Obligaciones, Responsabilidades y Demandas Suscrito Entre la Municipalidad de la Joya de las Sachas y la Compañía Texaco Petroleum Company* [Settlement Agreement, Liberation of Obligations, Responsibilities and Claims Signed by the Municipality of Joya de las Sachas and Texaco Petroleum Company] (May 2, 1996*); Contrato de Transacción, Liberación de Obligaciones, Responsabilidades y Demandas Suscrito Entre la Municipalidad del Cantón Francisco de Orellana (Coca) y la Compañía Texaco Petroleum Company* [Settlement Agreement, Liberation of Obligations, Responsibilities and Claims Signed by the Municipality of Francisco de Orellana (Coca) and Texaco Petroleum Company] (May 2, 1996*); Contrato de Transacción, Liberación de Obligaciones, Responsabilidades y Demandas Celebrado Entre la Prefectura Provincial de Sucumbíos y la Compañía Texaco Petroleum Company* [Settlement Agreement, Liberation of Obligations, Responsibilities and

ceived three billion *sucres* (worth approximately 1.5 million dollars at the time); Shushufindi received 2,353,682,782 *sucres* (worth approximately 1.15 million dollars); La Joya de los Sachas received 2 billion *sucres* (worth approximately 1 million dollars); and the office of the Prefect of Sucumbíos received one billion *sucres* (worth approximately a half million dollars).[268] Reportedly, some public works in urban population centers were supported with monies from the settlements. However, no public works or environmental remedial measures appear to have been funded in indigenous communities or rural settler communities, and the destiny of most of the monies remains murky.

In exchange for the payments, the municipalities agreed to withdraw their lawsuits and release Texaco Petroleum and Texaco Inc. "from any responsibility, claim, request, demand or complaint, be it past, current or future" related to activities by the companies in their jurisdiction.[269] The Province of Sucumbíos agreed to a similar release. Although not as carefully drafted as the releases signed by Ecuador and Petroecuador, which explicitly state that they apply to claims by those public entities, there is no evidence that municipal and

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Claims Concluded by the Office of the Prefect of Sucumbíos Province and Texaco Petroleum Company] (May 2, 1996) [hereinafter Settlement Agreements with Municipal and Provincial Officials]. The representatives of the parties are as follows: for Texaco Petroleum, Ricardo Reis-Veiga (Vice President) and Dr. Rodrigo Pérez Pallares (Agent); for Lago Agrio, Professor Raul Avilés Puente (Acting Mayor) and Attorney Manuel Chávez Chávez (Attorney-Councilman); for Shushufindi, Agronomist Jorge E. Cajas Garzon (President) and Attorney Ángel Erazo Ordóñez (Attorney-Councilman); for Joya de las Sachas, Adolfo Barcenas Mejía (President) and Dr. Isabel Fraga Villareal (Attorney-Councilwoman); for Coca, Daniel David Pauker Gutiérrez (President) and Dr. Juan Fernando Alcocer Beltrán (Attorney-Councilman); for Sucumbíos, Elicéo Azuero (Prefect) and Dr. Wilma Salazar Jaramillo (Attorney-Councilwoman). The payment to the the Prefect was contingent on the execution of settlement agreements with the suing municipalities in Sucumbíos Province.

268. Quantities in *sucres* are from the settlement agreements. Conversions into dollars are from Affidavit of Dr. Aldolfo Callejas Ribadeneira (Dec. 28, 1998), ¶ 3, *in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of Its Renewed Motion to Dismiss, *supra* note 67, vol. 2, Ex. 13 [hereinafter Callejas Affidavit I]. Copies of the settlement agreements are attached to Callejas Affidavit I. **R**

269. Settlement Agreements with Municipal and Provincial Officials, *supra* note 267. **R**

provincial officials had authority to relinquish or extinguish claims of third parties, or that they purported to do so. Nonetheless, ChevronTexaco now claims (in litigation in Ecuador) that the agreements released the company from all liability "related to the environmental effects that might have been caused" in the respective political jurisdictions, and, as a result, indigenous and settler plaintiffs "have no right to make claims against the company."[270] Based on those agreements, and the release of liability by Ecuador and Petroecuador, the company now argues that "all matters related to the environment . . . have been resolved by the competent authorities. It is, therefore, a violation of all legal principles of any civilized society governed by laws, to attempt to once again debate over an issue that was concluded to the satisfaction of the Government."[271]

For residents of the Amazon who have been injured by Texaco's operations, the Remediation Contract led to a cleanup boom in the oil patch, and a series of secretive negotiations and agreements between Texaco and politicians and en-

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270. ChevronTexaco Answer, *supra* note 17, ¶ I.9. The Answer is in response to a lawsuit by some of the *Aguinda* plaintiffs (and two new plaintiffs) in Lago Agrio that seeks funds for environmental remediation but does not seek indemnification for affected residents. However, the language used by ChevronTexaco is broad and—although it could be read to object only to claims for environmental remedies—appears to invoke the releases to object to any claims by any person for any relief. The Lago Agrio lawsuit is discussed briefly *infra* Parts X.C.2, X.C.3 and XII. *See also, e.g.*, *id.* at 57, 93; Press Release, ChevronTexaco, ChevronTexaco Responds to Allegations by Plaintiffs' Lawyers in Rainforest Lawsuit (Oct. 31, 2002); ChevronTexaco Oct. 21, 2003 Press Release, *supra* note 67, at 2; Summary of ChevronTexaco's Response, *supra* note 220, at 2. In "Summary of ChevronTexaco's Response to the Ecuador Court," the company refers to the agreements with municipal and provincial politicians as "agreements with local communities." *Id.* This is misleading because indigenous and rural settler populations in affected areas are organized into *comunas*, *centros*, cooperatives, and family groups, and the term "community" is used to refer to those groups, and not to urban population centers or political jurisdictions. The use of the term by ChevronTexaco implies that the company negotiated agreements with affected rural grassroots populations when, in fact, all negotiations and settlement agreements in Ecuador excluded community representatives and, instead, were conducted behind closed doors with politicians and bureaucrats, known locally as "authorities." As with national political elites, most municipal and provincial authorities have limited legitimacy and are commonly perceived as susceptible to corruption. R R R

271. ChevronTexaco Answer, *supra* note 17, at 57. R

gineers who purported to defend their environment and promote their well-being—but did not allow them to participate in decisionmaking or take their views into account.[272] In the end, despite considerable activity, most affected residents felt that they did not benefit from the remediation program. Pollution was not cleaned up, and environmental problems were not resolved. At many sites, it seemed that contaminated materials had simply been covered with dirt or moved from one location to another; closed waste pits continue to leak; crude oil that was removed from pits is not secure; and Petroecuador continues to pollute. Many families still do not have clean water or enough food, concern about health problems continues to grow, and new social divisions and allegations of corruption have emerged.

VIII. The First Dismissal of *Aguinda v. Texaco*

In March 1995, while discovery was underway, Judge Broderick passed away. *Aguinda v. Texaco* was reassigned, ultimately to Judge Jed Rakoff. In November 1996, Judge Rakoff granted Texaco's motion to dismiss, agreeing with the company and Ecuador that the "Ecuadoran-centered" case did not belong in U.S. courts. In a brief opinion, he also directed the plaintiffs to "face the reality" that the power of U.S. district courts "does not include a general writ to right the world's wrongs."[273]

Judge Rakoff cited three grounds for dismissal. The first was international comity, a doctrine of deference to the acts of

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272. A Capuchin priest described what the remediation program and *Aguinda* litigation looked like from Coca in a fax to the author in November 1995:

> We are concerned about the silence surrounding the lawsuit against Texaco. We are sending this fax so that you can let us know how things are going there [in order to inform the people]. Here, things are not good. The groups (companies) that do cleanups are multiplying, without doing monitoring or knowing anything. It gives the impression of something mounted to do a "cleanup" without anyone being responsible in the end. Lately Texaco is giving away Christmas "candies" to indigenous federations and municipal governments . . . . Meanwhile, there is no news from Bonifaz. It is like he has been swallowed up by the earth. Nothing appears in the press like before. You already know what our concerns are about him and the way he is carrying out all of this . . . .

273. Aguinda v. Texaco, Inc., 945 F. Supp. 625, 627-28 (S.D.N.Y. 1996).

a foreign state, when that recognition is neither required, as an absolute obligation, nor extended as mere courtesy. The second was forum non conveniens, a doctrine that allows a court to dismiss an action that could be litigated in a different court for the convenience of the parties and in the interest of justice. The third was dismissal under Rule 19(b) of the Federal Rules of Civil Procedure, the failure to join indispensable parties, on that ground that participation in the litigation by Ecuador and Petroecuador was necessary to afford plaintiffs the full scope of equitable relief they sought.[274]

In response, Ecuador—which had a new President, Abdalá Bucaram—reversed its opposition to the lawsuit and joined the plaintiffs in asking the court to reconsider the dismissal. In a letter accompanying the motion, Ecuador's Attorney General, Leonidas Plaza Verduga, stated that the intervention "does not under any concept damage the sovereignty of the Republic of Ecuador, instead it looks to protect the interests of indigenous citizens" affected by the defendant's operations.[275] Ecuador and Petroecuador also moved to intervene as parties aligned with the plaintiffs, based on alleged expenditures on medical care for citizens "afflicted with petroleum diseases."[276] They sought compensatory and punitive damages, restitution, equitable relief, and litigation costs.[277]

Attorney General Plaza also wrote to U.S. Attorney General Janet Reno to express "deep sorrow" over the Court's treatment of Ecuador's citizens, saying it had "unjustly and illegally" discriminated against them as foreigners under the forum non conveniens doctrine. Plaza cited the Treaty of Peace,

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274. *Id.*; *see also* FED. R. CIV. P. 19(a).

275. Letter of Leonidas Plaza Verduga, Attorney General of Ecuador, to Judge Jedd [sic] Rakoff (Dec. 18, 1996).

276. Intervenor-Plaintiffs the Republic of Ecuador and Petroecuador's Complaint, *in* Notice of Motion to Intervene Pursuant to Fed.R.Civ.P. 24, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Dec. 20, 1996), Ex. A [hereinafter Ecuador Complaint]; *see also* Memorandum of Law in Support of Motion to Intervene, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Dec. 20, 1996); Plaintiffs' Motion for Reconsideration of the Court's Opinion and Order of November 12, 1996, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Nov. 26, 1996); Plaintiffs' Supplemental Submission in Further Support of Their Motion for Reconsideration of the Court's Opinion and Order of November 12, 1996, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Dec. 20, 1996).

277. Ecuador Complaint, *supra* note 276, at 6. **R**

Friendship, and Navigation, which obliges Ecuador and the United States to provide each other's citizens with reciprocal access to their courts,[278] and asked Reno to submit a written note to Judge Rakoff "informing" him about the treaty obligation.[279] Plaza also announced that the Remediation Contract was invalid under Ecuadorian law because proper procedures had not been followed before signing the accord.[280]

In a follow-up letter to Attorney General Reno, apparently in response to a request for additional information about the case, Ecuador's new U.S.-based attorneys asked the Jusitice Department to intervene in the litigation. On behalf of Plaza, the letter also registered a "strong objection" to recent actions by U.S. embassy officials in Quito that, according to Plaza, were intended "to affect the outcome" of the lawsuit, in favor of Texaco, and "improperly influence" Ecuador's exercise of its rights in court.[281] A letter from the U.S. Ambassador to Ecuador, Leslie Alexander, to a U.S. NGO was attached, in which he responded to allegations that Embassy officials had tried to discourage Ecuador from intervening in the case. The letter insisted that the U.S. government "has no role or position with regard to the lawsuit," but expressed strong support for the Remediation Contract and admitted to questioning Plaza's "attempt" to invalidate the agreement:

> The reason for [the Charge d'affaires] Mr. Strubble's call on the Attorney General was to discuss the Ecuadorian government's apparent attempt to invalidate an agreement it reached with Texaco in 1994 on environmental remediation . . . . It is my understanding that the agreement was reached by mutual consent between two former partners in order to divide the

278. *See* Treaty of Peace, Friendship, Navigation and Commerce, June 13, 1939, U.S.-Ecuador, art. 13 (1891), 7 Bevans 296, 300.

279. *See* Letter from Leonidas Plaza Verduga, Attorney General of Ecuador, to Janet Reno, U.S. Attorney General (Jan. 15, 1997) (trans. by OMNI Interpreting & Translation Network), at 5. The letter also cited international human rights provisions that guarantee all persons the rights to equal protection of the law and recourse to courts. *Id.* at 3-4.

280. Specifically, a favorable report from Ecuador's Attorney General was not obtained before signing the Contract, as required (according to Plaza) by the Law of Hydrocarbons. Letter from Bedcock, Levine & Hoffman LLP and Boudreau and Dahl, P.C., Attorneys for the Republic of Ecuador and Petroecuador, to Attorney General Janet Reno (Jan. 22, 1997), at 4.

281. *Id.* at 9.

> costs of remediation in rough proportion to the benefits received by the respective partners from the operations that caused the damage. We would question an attempt by either party to unilaterally abrogate a valid contract. If any changes . . . are required, they should be arrived at by mutual consent.[282]

The letter also admitted that the Embassy had offered the disputable legal "observa[tion]" that since Petroecuador was the majority stockholder in the consortium, it "would logically be responsible for the majority of any damages assessed in the New York lawsuit," but the letter denied asking Ecuador to "disassociate itself" from the case.[283]

In February 1997, a political crisis erupted in Ecuador amidst popular protests against neoliberal economic measures, and the constitutionally-elected President, Abdalá Bucaram, was voted out of office for "mental incapacity" by a simple majority of the National Congress.[284] Bucaram had served only six months of his term and refused to step down, dubbing the move a "Congressional coup." Until the military stepped in to broker a political deal, three individuals claimed to be President. The other two were the President of the Congress, Fabián Alarcón, who presided over the ouster, and the Vice President, Rosalía Ortega. Each contender based his or her claim on the Constitution and pledged to uphold democracy and the rule of law. However, no one turned to Ecuador's

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282. Letter from Leslie Alexander to Melina Selverston, *supra* note 40; *see also* Letter from J. Curtis Struble to Melina Selverston, *supra* note 40 (admitting that he sought a meeting with Plaza to discuss the Remediation Contract; denying that he discouraged involvement by Ecuador in the litigation; stating, "the Embassy does not hold a position on the New York lawsuit," but does hold a position on the Remediation Contract "in that we have a position on the sanctity of contractual obligations" and the objection to "this attempt at contract invalidation through politically-motivated legal artifice was entirely proper"). R R

283. *Id.* For a discussion of U.S. law relating to joint and several liability among joint tortfeasors, see REST 3D TORTS-AL § 15 (2005) (liability of multiple torfeasors for indivisible harm). For a discussion of issues in U.S. law relating to contribution and apportioning fault among joint tortfeasors, see Gail A. Forman, *Comparative Negligence and Joint and Several Liability*, 1 J. LEGAL ADVOC. & PRAC. 199; 18 AM. JUR. 2D .*Contribution* § 10 (2005).

284. Judith Kimerling, *Oil Development In Ecuador and Peru: Law, Politics and the Environment,* in AMAZONIA AT THE CROSSROADS: THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 73, 80 (Anthony Hall ed., 2000). Criticism of rampant corruption also played a role in the ouster.

courts to interpret the law or resolve the dispute, which demonstrated the continued frailty of the nation's democratic institutions, including the weakness and low stature of the judiciary. The crisis was resolved by naming Ortega as interim President, to be succeeded, within days, by Alarcón.[285]

Soon after the crisis subsided, Judge Rakoff ruled that Ecuador's motion to intervene was not sufficiently precise. In view of the tumultuous—and "well-publicized"—changes in Ecuador's government, he asked the new government to clarify its position by providing "fresh written assurances" that if Ecuador still desired to intervene, it was "expressly prepared to waive sovereign immunity and submit fully to the jurisdiction of this court (including jurisdiction over any counterclaims and cross-claims that may be filed against Ecuador . . .)."[286]

In response, Ecuador's new Attorney General, Milton Alvara Ormaza, wrote a letter to Judge Rakoff "ratifying" Ecuador's "participation" in the case in support of the plaintiffs, "in order to procure the necessary indemnification" to remedy environmental damages caused by Texaco. The letter stated that the case did not threaten Ecuador's sovereignty because it was a private matter involving the exercise of personal rights by Ecuadorian citizens and assured the Court that Ecuador would execute and enforce its judgment, pursuant to international law. However, the letter also said that Ecuador would not "participate or assume any responsibility in any other trial" and further stated that the government would "allot the entire value of the indemnification" to remediation projects and works in the Amazon, in the event of a favorable judgment for

285. *Id.* at 80-81. The crisis followed some 12 years of relatively stable government, but continued the historic pattern of political instability in Ecuador. To date, no elected president since Durán has completed his constitutional term of office. Even during Durán's term, the country experienced considerable political volatility: some two dozen ministers were replaced; the National Congress censured several ministers and dismissed the President and two Magistrates of the Supreme Court; and the Vice President, Alberto Dahik, resigned and fled the country after being implicated in a major corruption scandal. IACHR Report on Ecuador, *supra* note 31; U.S. Dep't of Commerce, Country Commercial Guide, Ecuador FY 2000, ch. II, p.3 [hereinafter Ecuador Commercial Guide]. R

286. Aguinda v. Texaco, Inc., No. 93 Civ 7527 (S.D.N.Y. Mar. 25, 1997).

the plaintiffs.[287] The ambiguity in the letter may reflect confusion in Ecuador about the law of sovereign immunity and the nature of the government's participation in the litigation. Although the decision by the Bucaram government to support the plaintiffs in their lawsuit was well-known, most people apparently did not realize that Ecuador and Petroecuador had moved to intervene as plaintiffs and requested damages and other relief for the State.[288]

In a memorandum of law in response to the letter, counsel for the *Aguinda* plaintiffs argued that the ratification of Ecuador's motion to intervene constituted an express and, alternatively, implied waiver of sovereign immunity. The government, they said, had "clearly subjected itself to the jurisdiction of the Court, including for adjudication of any counterclaims filed by Texaco."[289] In statements to the Ecuadorian press, however, in the weeks preceding the date of the letter, an attorney for the *Aguinda* plaintiffs stated that Ecuador did not have to "concern itself" with a limited waiver of sovereign immunity "because the plaintiffs and their lawyers have committed in legal documents not to sue Ecuador."[290]

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287. Republic of Ecuador, Office of the Attorney General of the State, OF.DP.97.1379, Letter from Milton Alvara Ormaza, Attorney General of Ecuador, to Judge Jed Rakoff, U.S. District Court (Apr. 25, 1997).

288. In addition, a credible source in the Alarcón government told the author that, in his efforts to convince the new government to support the position of its predecessor in the litigation, plaintiffs' attorney Cristóbal Bonifaz offered to ensure that the government would administer the winnings of the lawsuit; that report, however, was denied by Bonifaz's co-counsel.

289. Plaintiffs' Memorandum of Law in Response to the Republic of Ecuador's Submission, Aguinda v. Texaco, Inc., No. 93 Civ.7527 (S.D.N.Y. May 12, 1997).

290. The statement was by Cristóbal Bonifaz. *No hay peligros: Bonifaz* [*There are no dangers: Bonifaz*], Hoy (Apr. 14, 1997). In another interview, he said he had presented "notarized documents [to the government], in which the indigenous people reject any legal action against the State"; if the court finds Petroecuador to be responsible along with Texaco, "we will not accept" the percentage allocated to Petroecuador. *Entrevista, Petroecuador no será perjudicada* [*Interview, Petroecuador will not be prejudiced*], El Comercio, Apr. 22, 1997. The Kichwa plaintiffs, however, told the author that they were not aware of the "notarized documents" and had not authorized counsel to relinquish any rights against Ecuador or Petroecuador. A request for a copy of the "notarized documents" was rebuffed by plaintiffs' counsel.

In August 1997, Judge Rakoff denied Ecuador's motion to intervene as untimely and prejudicial to Texaco. To allow it now, he wrote, because of electoral changes and shifting viewpoints would make a "mockery and a sham" of finality in litigation and the orderly administration of justice.[291] Judge Rakoff also agreed with Texaco that Ecuador's letter to the court did not constitute a clear waiver of sovereign immunity, and ruled that Ecuador could not place limitations on its participation in the case and intervene for the limited purposes of mitigating problems in executing a judgment and helping to obviate the problem of international comity. Moreover, even if Ecuador was willing to subject itself to possible claims in order to intervene, it no longer had a legal interest warranting intervention because Ecuador and Petroecuador had entered into a formal settlement with the defendant "releasing it from all liabilities it may have to these would-be interveners."[292]

Ecuador and the plaintiffs appealed to the U.S. Court of Appeals for the Second Circuit. In its appellate brief, the Alarcón government sought limited participation in the litigation in order to facilitate document discovery, mitigate international comity concerns, and assist in implementing any equitable remedy imposed on Texaco. It did not pursue the Bucaram government's effort to sue Texaco, dropped Petroecuador as a participant, and explicitly stated that Ecuador "does not agree to subject itself to suit by Texaco" in the action.[293] This policy change to support the plaintiffs in the *Aguinda* litigation—which began with the Bucaram government but was consolidated by Alarcón—was an extraordinary development. It was the result of media interest in Ecuador, public outrage over the Duran government's support for a foreign company against its own citizens, pressure from some members of the National Congress, and tenacious lobbying, led by the NGOs *Acción Ecológica* and Amazon Defense Front.

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291. Aguinda v. Texaco, Inc., 175 F.R.D. 50, 51 (S.D.N.Y. 1997).

292. *Id.* at 51-53; *see also* Memorandum of Texaco Inc. In Response to the Republic of Ecuador's April 25, 1997 Letter to the Court, Aguinda v. Texaco, Inc., No. 93 Civ.7527 (S.D.N.Y. May 12, 1997) at 1-2. The court also denied the plaintiffs' motion for reconsideration. On August 13, the court entered judgment dismissing the Peruvian plaintiffs' case, *Ashanga Jota v. Texaco, Inc.*

293. Brief of Proposed Intervenor-Appellant the Republic of Ecuador, Aguinda v. Texaco, Inc., 97-9104, 97-9108(CON), submitted to the U.S. Court of Appeals for the Second Circuit, (Nov. 24, 1997), at 4.

At the same time, Ecuador apparently yielded to pressures to reverse the Bucaram government's decision to repudiate the Remediation Contract. Officials denounced the negotiation process that led to the agreement, the agreement itself, and the work performed under it.[294] Notwithstanding that, they privately said that—however unfortunate—Ecuador had to honor the accord, and all contracts, in order to attract needed foreign investment.

In 1998, the Second Circuit vacated the dismissal of *Aguinda* and the related action by Peruvian plaintiffs and remanded them for further proceedings. The three-judge panel held that dismissal on the grounds of forum non conveniens and international comity was erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador. It also held that the District Court's reasoning regarding the failure to join an indispensable party did not support dismissal of all of the plaintiffs' claims; instead, it sufficed only to support dismissing claims that sought to enjoin activities currently under Ecuador and Petroecuador's control.[295] The appellate court instructed the lower court to reconsider the issues in light of Ecuador's changed litigating position. With regard to intervention by Ecuador, the Second Circuit agreed with Judge Rakoff that Ecuador may not place limits on its intervention and that the motion to intervene was insufficient because it did not include a full waiver of sovereign immunity. The Second Circuit instructed Ecuador to promptly advise the district court what role it sought, what claims it proposed to

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294. *See, e.g.*, MEM SPA Evaluation of Remedial Works, *supra* note 247, at 9-11. The report, signed by MEM's Deputy Secretary for Environmental Protection, found that "enormous environmental remediation tasks remain" and concluded: "the governmental authorities that signed said [Remediation] Contract were not in the habit of defending the national interest and as a result the Contract is unsatisfactory. Unfortunately . . . [this office] does not have authority to make decisions other than to simply look out for the proper and rigorous execution of said Contract." *Id.* The report also concluded that the operations "should be an example for Ecuador of what should not be done in the petroleum industry." *Id.* at 9-10. It recommended that a "process be initiated to determine the liabilities of the authorities who did not defend . . . the national interest," as well as additional remedial work. *Id.* at 11. **R**

295. Jota v. Texaco, Inc., 157 F.3d 153,162 (2d Cir. 1998) (*vacating* Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996)). "Jota" is the second last name of the first named plaintiff in the Peruvians' lawsuit.

make if permitted to intervene, and whether it proposed to revise its position on sovereign immunity.[296] In response to the appellate ruling, Texaco agreed to be sued in Ecuador and renewed its motions to dismiss the lawsuits.[297]

In Ecuador, however, a new law known as "Law 55" stripped Ecuador's courts of jurisdiction over cases when an Ecuadorian national brings the same claim in a foreign court.[298] The law was passed in 1998, reportedly under pressure from the powerful shrimp industry. Shrimp cultivators had sued fungicide manufacturers—whose products are used on nearby banana plantations—in U.S. courts, but the suits were dismissed under the forum non conveniens doctrine, in favor of litigation in Ecuador.[299] Law 55 represented an effort to return those cases to U.S. courts and circumvent forum non conveniens by ensuring that Ecuador's courts do not offer an alternative forum when plaintiffs prefer to sue in the United States. Law 55 raised the specter that if the court in New York

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296. *Id.* at 163. The Second Circuit also instructed the District Court to independently reconsider the factors relevant to a forum non conveniens dismissal, rather than simply relying on the analysis in a similar case by other plaintiffs in another lawsuit, Sequihua v. Texaco, 847 F. Supp. 61 (S.D. Tex. 1994). *Id.* at 159.

297. 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), at 1-2, 5; Transcript of Civil Cause for Status Conference before the Honorable Jed S. Rakoff, United States District Judge, *Ashinga* (sic) Jota vs. Texaco, Inc., Docket No. CV-94-9266, New York, New York (Nov. 17, 1998), at 7; Texaco Inc.'s Notice of Agreements in Satisfying Forum Non Conveniens and International Comity Conditions, Aguinda v. Texaco, Inc., *in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motions to Dismiss, *supra* note 67, vol. 3, Ex. 18; Texaco Inc.'s Notice of Agreements in Satisfying Forum Non Conveniens and International Comity Conditions, Ashanga Jota v. Texaco, Inc., *in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motions to Dismiss, *supra* note 67, vol. 3, Ex. 19. R R

298. *Ley Interpretiva de los artículos 27, 28, 29 y 30 del Código de Procedimiento Civil para los casos de Competencia Concurrente Internacional* [Interpretive Law for articles 27, 28, 29 and 30 of the Code of Civil Procedure for cases of Concurrent International Jurisdiction], R.O. No. 247 (Jan. 30, 1998) [hereinafter Law 55].

299. *See* Ciba-Geigy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111 (Fla. Dist. Ct. App. 1997); Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279 (11th Cir. 1999).

refused to adjudicate *Aguinda* and sent it to Ecuador, the courts there might refuse to accept it.

IX. Political Turmoil in Ecuador: Reopening the Record

In 1998, Ecuador elected a new president, Jamil Mahuad. The Mahuad government announced that it was neutral regarding the *Aguinda* lawsuit; however, within weeks of assuming power, it quietly signed off on the Texaco "remediation." In a document called "The Final Act," the new government certified that Texaco Petroleum had fully performed its obligations under the Remediation Contract, and "released, absolved and discharged forever" Texaco Petroleum and Texaco Inc. from any claim or complaint by Ecuador and Petroecuador "for reasons related to the obligations acquired" by Texaco Petroleum in the Contract.[300] Significantly, The Final Act was first disclosed in the *Aguinda* proceedings when a letter from the Ambassador of Ecuador was presented to Judge Rakoff to respond to the questions posed by the Second Circuit. Written in English, it stated that Ecuador regarded the litigation as a matter between private parties which, as confirmed by the Second Circuit, did not require intervention by Ecuador. Furthermore, the letter indicated that Ecuador was not willing to waive sovereign immunity and "be subject to rulings by Courts in the United States" and that, by virtue of The Final Act, Ecuador had released Texaco Inc. and its subsidiaries from claims by the government and Petroecuador "con-

300. "*Acta Final* [Final Act]" art. IV (Sept. 30, 1998) (Ecuador) (signed by Patricio Ribadeneira, Minister of Energy and Mines; Ramiro Gordillo, Executive President of Petroecuador; Luis Albán Granizo, Manager of Petroproducción; Ricardo Reis Veiga, Vice President of TEXPET; and Rodrigo Pérez, Legal Representative of TEXPET). The release included all agents, servants, employees, officers, attorneys, indemnitors, guarantors, heirs, administrators, executors, beneficiaries, successors, predecessors, principals, and subsidiaries. *Id.* In addition to legal questions about the validity of the Remediation Contract and constitutional questions about the full release from liability to the State, the legality of the Final Act can be questioned under Article 88 of Ecuador's Constitution. That provision, which entered into effect in 1998, before the Final Act was executed, guarantees participation by affected communities in decisionmaking by the State that can affect the environment, and the corollary right to information. 1998 Constitution, *supra* note 57, tit. III, ch. 5, §2, art. 88. **R**

cerning the obligations acquired under the Remediation Contract."[301]

In January 1999, Ecuador's U.S.-based attorneys submitted an affidavit by Ecuador's Attorney General, stating that Ecuador should not have participated in any capacity in the lawsuit since it is a private matter. However, because previous officials had participated:

> the Republic now deems it appropriate to continue its *limited participation* just in attending (through its attorneys), conferences and other proceedings in this Lawsuit only and to the extent necessary to protect environmental remedies, if this Court imposes such remedies, in conjunction with the policy of the Ecuadorian government to protect the environment and consequently the citizens of the Republic. The Republic does this as part of an international trend . . . .[302]

The affidavit then asserted Ecuador's "only, sole and definitive position." Ecuador did not wish to be a party; was not willing to waive sovereign immunity; would accept any decision by the court as to whether it has jurisdiction (but would not accept or agree to be treated as a party); would execute any judgment against Texaco under the authority of Ecuador's courts; would provide any information requested by the court; and would, in the event of a settlement or judgment for the plaintiffs, "do its best to have the plaintiffs invest the necessary amount, with the assistance of the Environmental Affairs Ministry, in remedies to the ecology" of areas affected by "the sole technical administration of Texaco." In addition, the affidavit informed the court about Law 55, which would "prohibit Ecuadorian courts from hearing this case" but might be challenged as unconstitutional in Ecuador's courts at any time.[303] The following month, the *New York Times* published an editorial urg-

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301. Embassy of Ecuador, Letter from Ivonne A. Baki, Ambassador of Ecuador to the United States, to Honorable Jed S. Rakoff (Nov. 11, 1998). Similarly, the Final Act entered the public domain because of the litigation; Texaco subsequently included a copy in submissions to the Court. *See* Veiga Affidavit, *supra* note 67, ¶ 17, Ex. D. R

302. Declaration of Ramón Jiménez Carbo, Attorney General of Ecuador (Jan. 5, 1999), submitted with Affidavit of Ronald C. Minkoff, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Jan. 11, 1998).

303. *Id.*

ing Judge Rakoff to "allow the case to be heard in the only forum that can provide a fair trial and enforce penalties," an American court.[304]

In January 2000, Ecuador was in the headlines again, due to another political crisis. The national indigenous organization, CONAIE (Confederation of Indigenous Nationalities of Ecuador), organized massive protests against economic austerity measures, adoption of the U.S. dollar as Ecuador's currency, and other concerns. Amidst the protests, President Mahaud was overthrown and replaced by a military-civilian junta, comprised of an army colonel, Lucio Gutiérrez, the president of CONAIE, Antonio Vargas, and a former Supreme Court judge, Carlos Solorzano. Within hours, however, in the early dawn, after discussions with U.S. officials, the military withdrew support from the triumvirate and ceded power to the Vice President, Gustavo Noboa Bejarano.[305] Noboa became Ecuador's fifth president in four years.[306]

The events in Ecuador—together with a recent Second Circuit decision affirming a lower court's refusal to enforce a judgment by the Supreme Court of Liberia because of failures in the administration of justice there—prompted Judge Rakoff, *sua sponte*, to consult a report by the U.S. State Department on human rights in Ecuador. The Second Circuit in the Liberia case had expressly approved the lower court's reliance on human rights reports by the State Department, known as

304. *See* Editorial, *Texaco and Ecuador*, *supra* note 182. **R**

305. U.S. officials reportedly threatened to cut foreign aid and discourage investment if power was not restored to the elected government. Solorzano and Vargas opposed dissolution of the junta and denounced the military, led by General Carlos Mendoza, for betraying Ecuador's indigenous population. Monte Hayes, *Ecuador Vice President Takes Power*, ASSOCIATED PRESS, Jan. 23, 2000; Interviews with Sister Elsie Monge, Executive Director, Ecumenical Human Rights Commission (CEDHU), New York (Mar. 25, 2001) and Quito (July 1, 2003); *see also* Larry Rohter, *Ecuador Coup Shifts Control to No. 2 Man*, N.Y. TIMES, Jan. 23, 2000, at A1.

306. In 2002, Colonel Lucio Gutiérrez was elected President of Ecuador in a surprising victory for his new political party. Gutiérrez campaigned on a reformist, populist platform, with support from CONAIE and other social organizations; that support, however, divided indigenous politicians and contributed to divisions within indigenous organizations. By 2003, many people who had supported Gutiérrez complained that he had abandoned his reformist campaign promises in favor of neoliberal economic policies. In 2005, Gutiérrez was forced out of office and replaced by the Vice President, Alfredo Palacio.

"Country Reports" and required every year pursuant to statute.[307] The most recent Ecuador report stated that "[t]he most fundamental human rights abuse in Ecuador stems from shortcomings in its politicized, inefficient and corrupt legal and judicial system."[308]

After reading the report, Judge Rakoff reopened the *Aguinda* record. In a Memorandum Order, he explained that the court could not "ignore without further inquiry a statement from a department of the U.S. Government that so fully casts doubt on the independence and impartiality of the principal courts to which the defendant seeks to remit" the case.[309] He noted that the plaintiffs had initially raised serious questions about corruption in Ecuador's courts and possible intimidation by the military, but then "appeared to effectively abandon those points."[310] He invited the parties and Ecuador to supplement the record with any additional submissions they "wish[ed] to make regarding whether the courts of Ecuador and/or Peru might reasonably be expected to exercise a modicum of independence and impartiality if these cases were dismissed in contemplation of being refiled in one or both of those forums."[311] Subsequently, he asked the U.S. Attorney to contact the State Department to request a clarification of the scope of the statement in the Ecuador Country Report.[312]

In September 2000, while awaiting a decision, the plaintiffs asked Judge Rakoff to disqualify himself from further proceedings in *Aguinda* and *Ashanga Jota* because they learned that he had attended "an all expense paid resort trip and 'seminar' sponsored by The Foundation for Research on Economics & the Environment (FREE)" at a ranch in Montana, and "FREE is funded partially by Defendant Texaco, Inc"; in addition, Texaco's former Chairman of the Board, Alfred

307. Bridgeway Corp. v. Citibank, 201 F.3d 134, 144 (2d Cir. 2000), *aff'g*, 45 F. Supp. 2d 276 (S.D.N.Y. 1999).

308. Aguinda v. Texaco, Inc., No. 93 Civ. 7527, No. 94 Civ. 9266, 2000 U.S. Dist. LEXIS 745, at *8-9 (S.D.N.Y. Jan. 31, 2000) (quoting U.S. Dep't of State, Ecuador Country Report on Human Rights Practices for 1998 (Feb. 26, 1999) [hereinafter Ecuador Country Report for Practices in 1998]).

309. *Id.* at 9.

310. *Id.* at 6.

311. *Id.* at 9.

312. Letter from Jed S. Rakoff, United States District Judge, to Edward Scarvalone, Assistant United States Attorney (May 9, 2000).

DeCrane, was "one of the principal speakers at the 'seminar'" The plaintiffs' recusal motion also cited the "inordinate amount of time" during which the cases had been "held in abeyance" by the Judge "in spite of the fact that his prior decisions dismissing the cases were overturned" by the Second Circuit.[313] Judge Rakoff denied the motion to recuse, saying that he did not know that FREE had "apparently received some minor portion of its funding from Texaco," that the seminar he attended was not funded by Texaco, and that he had not discussed the case there.[314] Plaintiffs then petitioned the Second Circuit for a Writ of Mandamus directing Judge Rakoff to recuse himself. The Court of Appeals denied the petition,[315] and plaintiffs petitioned for rehearing en banc. On May 29, 2001, the Second Circuit denied the petition for rehearing. The following day, Judge Rakoff dismissed *Aguinda* and *Ashanga Jota* for the second time, in a blistering opinion, discussed below.

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313. Motion for Disqualification and Supporting Memorandum of Law, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Sept. 1, 2000). The motion was prompted by an op-ed in *The New York Times* by Abner Mikva, a former chief judge of the U.S. Court of Appeals for the District of Columbia. Affidavit of Counsel Cristóbal Bonifaz (Aug. 31, 2000), *in* Motion for Disqualification and Supporting Memorandum of Law, Aguinda v. Texaco, Inc., No. No. 93 Civ. 7527 (S.D.N.Y. Sept. 1, 2000) ¶¶ 2-4. The op-ed criticized free trips by federal judges "to resort locations for legal seminars paid for by corporations and foundations that have an interest in federal litigation on environmental topics. . .[and] devoted to so-called environmental education." Abner Mikva, Editorial, *The Wooing of Our Judges*, N.Y. TIMES, Aug. 28, 2000, at A17.

314. Aguinda v. Texaco, Inc., 139 F. Supp. 2d 438, 439 (S.D.N.Y. 2000). The ruling was criticized in an editorial by *The New York Times* calling on the federal judiciary to "tighten . . . ethical prohibitions on accepting money and gifts from private interests bent on influencing judicial thinking." Editorial, *A Threat to Judicial Ethics*, N.Y.TIMES, Sept. 15, 2000, at A34. The Editorial cited Mikva's observation that "the fairness and impartiality of the federal judiciary are already being seriously undermined by allowing . . . judges to accept free vacations at posh resorts," and argued that the ruling in *Aguinda* "underscored" the "need for reform." *Id.* It described Judge Rakoff's argument that "his acceptance of the travel gift was within existing rules" as "a hair-splitting explanation that does not remove qualms about his judgment or impartiality." *Id.*

315. *See* Aguinda v. Texaco Inc., 241 F.3d 194, 198 (2d Cir. 2001)

X. The Second Dismissal and the Court's Forum Non Conveniens Analysis

Judge Rakoff's second dismissal of *Aguinda* and *Ashanga Jota* was based on the doctrine of forum non conveniens finding in favor of litigation in Ecuador. The cases, he concluded, have "everything to do with Ecuador and nothing to do with the United States."[316] The court also held that dismissal was not precluded by Law 55 or the presence of a claim under the Alien Tort Claims Act.[317]

Forum non conveniens is a common law doctrine that allows a court to decline to exercise jurisdiction over a case when it believes that the case should be tried in a different court, in the interest of justice and for the convenience of the parties.[318] It is a "discretionary device permitting a court in

316. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

317. The court qualified the *Aguinda* dismissal to provide that it would resume jurisdiction in any action pursued in good faith in Ecuador but dismissed by a court of last review under Law 55. *Id.* at 547. In April 2002, while plaintiffs' appeal of the dismissal was pending, Ecuador's Supreme Court declared Law 55 unconstitutional. Constitutional Tribunal, *Resolución No. 037-2001-TC* [Resolution No. 037-2001-TC] (Apr. 30, 2002). Attorneys for the plaintiffs and Ecuador argued that the decision does not apply to *Aguinda*. Letter Submission from Ronald C. Minkoff to Rosann B. MacKechnie, Clerk of the Court, U.S. Court of Appeals for the Second Circuit (May 14, 2002); Letter Submission from Cristóbal Bonifaz, to Rosann B. MacKechnie, Clerk of the Court, U.S. Court of Appeals for the Second Circuit (cover letter dated March 4, 2002; affidavit of service dated May 13, 2002). The Second Circuit ruled that it "need not determine the issue of the scope of Law 55, as the district court qualified its dismissal . . . ." *Aguinda*, 303 F.3d at 477.

318. Forum non conveniens became firmly established in U.S. federal courts in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). According to Wright and Miller, it has "only a limited continuing vitality in federal courts" because, since 1948, if the more convenient forum is another federal court, the case may be transferred there under 28 U.S.C. § 1404(a). 15 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3828 (2d ed. 1986). *Gilbert* was decided a year before the transfer statute was adopted and held that it was permissible for a federal court to dismiss an action by a Virginia plaintiff against a defendant doing business in Virginia for a fire that occurred in Virginia. Today, that action could be transferred to a federal court in Virginia and dismissal "would not be proper." *Id.* Notwithstanding, the *Gilbert* framework for forum non conveniens analysis continues to be followed by federal courts. *See, e.g.*, Piper Aircraft v. Reyno, 454

rare instances to 'dismiss a claim even if the court is a permissible venue with proper jurisdiction.' "[319]

When a federal district court considers a motion to dismiss for forum non conveniens, it must first determine whether an adequate alternative forum exists.[320] If an alternative forum exists, the court balances a number of private and public interest factors to determine which forum is more convenient. The burden of proof rests on the defendant "to establish that an adequate alternative forum exists and then to show that the pertinent factors 'tilt[ ] strongly in favor of trial in the foreign forum.' "[321] As a general rule, "the plaintiff's choice of forum should rarely be disturbed,"[322] and the moving party must convince the court that "trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of proportion to plaintiff's convenience.' "[323]

Relevant private interest factors include:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate . . .; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[324]

Relevant public interest factors include: administrative problems associated with court congestion; the interest of each jurisdiction in the dispute, including the local interest in having localized controversies decided at home; familiarity with the law that will govern the action; avoiding problems in conflict of laws and the application of foreign law; and the fair-

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U.S. 235 (1981); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100 (2d Cir. 2000).

319. *Wiwa*, 226 F.3d at 100 (2d Cir. 2000) (quoting PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir.1998)).

320. *Piper*, 454 U.S. at 254 n.22; *Gilbert*, 330 U.S. at 506-07.

321. *Wiwa*, 226 F.3d at 100 (quoting R. Maganlal & Company v. M.G. Chem. Co., 942 F.2d 164, 167 (2d Cir. 1991)).

322. *Gilbert*, 330 U.S. at 508.

323. *Piper*, 454 U.S. at 241; *see also* WRIGHT & MILLER, *supra* note 318, § 3828 ("The burden on a defendant moving to dismiss in favor of a foreign court . . . is a strong one."). **R**

324. *Gilbert*, 330 U.S. at 508.

ness of imposing jury duty on residents of a jurisdiction that has little to do with the controversy.[325]

Because the grant or denial of a motion to dismiss on the ground of forum non conveniens is generally committed to the discretionary power of the district court, appellate courts have limited powers of review. Application of the doctrine will not be overturned unless the lower court abused its discretion or failed to use the correct legal standards.[326] In *Aguinda* and *Ashanga Jota*, Judge Rakoff ruled that courts in both Ecuador and Peru provide alternative forums, and that the balance of private and public interest factors "tips overwhelmingly in favor of dismissal," and "indeed, virtually mandates dismissal in favor of Ecuador, or if any plaintiff prefers, Peru."[327]

This Part examines the application of the forum non conveniens doctrine by the district court. It concludes that application of the doctrine and the decision to dismiss *Aguinda* was colored by a series of detailed but questionable factual assumptions, including erroneous and unsupported findings about the history of litigation in Ecuador's courts, and rulings on disputed material facts related to decisionmaking and control of the operations that caused the alleged injuries. It further concludes that the balancing of private and public interest factors by the court was uneven and did not take into account a number of factors that favor plaintiffs' choice of a U.S. forum. As a result, although application of the doctrine is clearly convenient for the defendant, it is significantly less convenient for plaintiffs and a major gamble for the interest of justice.

Specifically, in determining that an adequate alternative forum exists, the court found that several plaintiffs had already recovered judgments against Texaco Petroleum and Petroecuador in Ecuador's courts for claims arising out of the facts alleged by the *Aguinda* plaintiffs. As explained below, this finding is clearly erroneous. A related finding, that Ecuadorian oil field workers have won personal injury lawsuits against Texaco Petroleum based on claims of alleged negligence, is

325. *See Piper,* 454 U.S. at 241; *Gilbert*, 330 U.S. at 508-09.

326. *See, e.g.*, *Piper*, 454 U.S. at 257. The appellate court can reverse if the district court overlooked relevant considerations in the analysis. *See Wiwa*, 226 F.3d at 99-100; *see also* WRIGHT & MILLER, *supra* note 318, § 3828 n.51-53. R

327. *Aguinda*, 142 F. Supp. 2d 534, 548, 554 (S.D.N.Y. 2001). Consideration by the court of a Peruvian forum was limited.

not supported by evidence in the litigation record before the court and is contradicted by the historical record. A third major finding—that the description of systemic deficiencies in Ecuador's legal and judicial systems by the U.S. State Department in its Country Report on human rights in Ecuador is largely limited to cases involving confrontations between the police and political protestors—is also erroneous.

Other related findings—that there is no evidence of impropriety by Texaco or any member of the Consortium in any prior judicial proceeding in Ecuador and that numerous cases are presently pending against multinational corporations without evidence of corruption—are of limited probative value. The parsed language of the findings appears to evade concerns related to discrimination against indigenous peoples and the culture of impunity in the oil fields. Although the court's focus on the litigation record in Ecuador is understandable, as is its preference to avoid reliance on generalized allegations of corruption, legal precedents to support the court's sanguine view of litigation in Ecuador simply do not exist.

Another finding, that Ecuador had recently taken steps to further the independence of its judiciary, is accurate; however, the effectiveness of the steps had not been demonstrated. Similarly, the finding that there is little chance of undue influence in lawsuits by *Aguinda* plaintiffs because they will be subject to public and political scrutiny is speculative and sanguine. Finally, the finding that other U.S. courts have found Ecuador to be an adequate forum is supported by case law, but it offers little reassurance because it appears to reflect the relatively light burden on defendants to show the existence of an alternative forum under the forum non conveniens doctrine and does not indicate whether plaintiffs in the cited cases have in fact obtained a remedy. In this case, the notion implicit in the court's analysis—that environmental lawsuits in Ecuador against ChevronTexaco and Petroecuador could somehow be insulated from the social and political context in which they operate and enjoy immunity from systemic deficiencies in the legal and judicial system—is implausible.

The balancing of private and public interest factors by the court, to determine whether the presumption in favor of plaintiffs' chosen forum should be overcome, was similarly colored by questionable factual assumptions. Although a number of undisputed facts were used to support the legal analysis, the

court also relied, repeatedly, on Texaco's version of disputed facts related to decisionmaking and control of the operations. Specifically, the court ruled that: (1) no one from Texaco or anyone else operating out of the United States made any material decisions or was involved in designing, directing, guiding, or assisting the activities that caused the pollution; (2) all relevant decisions and practices were managed and directed in Ecuador; (3) environmental standards and practices were heavily regulated by the government of Ecuador; and (4) Texaco's only involvement was an indirect investment in a fourth tier subsidiary. While not determinative, in and of themselves, of the legal issues in the forum non conveniens determination, there is no question that the factual rulings were a material element of the analysis and decision to dismiss the case.

Although a number of uncontested private and public interest factors favor litigation in Ecuador and were properly considered by the court, Judge Rakoff appeared to excuse consideration of countervailing considerations that favor a U.S. forum—or summarily discount and dismiss them—on the basis of those remarkable factual findings. As a result, application of the forum non conveniens doctrine was colored by factual rulings that—while not fully developed in the litigation record—were nonetheless disputed by the plaintiffs. In addition, the findings are contradicted by both the historical record, discussed above, and the image cultivated by Texaco before it was sued, of corporate environmental responsibility and technical know-how for the operations in Ecuador.

A. *The Adequate Alternative Forum Analysis*

The burden on a moving defendant to establish that an adequate alternative forum exists is not exacting and "[o]rdinarily. . .will be satisfied when the defendant is 'amenable to process' in the other jurisdiction."[328] However, in "rare circumstances" when "the remedy offered by the other forum is clearly unsatisfactory," it may not be an adequate alternative.[329] If, as in *Aguinda,* the defendant is not amenable to process in the alternative forum, the requirement can generally be satisfied by a stipulation by the defendant to voluntarily sub-

328. *Piper,* 454 U.S. at 255 n.22 (quoting *Gilbert,* 330 U.S. at 506-7).
329. *Id.*

mit to the jurisdiction of the foreign forum.[330] Dismissals conditioned on a defendant's consent to jurisdiction can also include a condition that the foreign court must in fact exercise jurisdiction, as well as additional conditions, such as an agreement to waive statutes of limitation, facilitate discovery, translate documents, make witnesses available, and satisfy judgments by the foreign court.[331]

In *Aguinda,* Judge Rakoff found that Texaco had provided the needed commitment—to accept service of process in Ecuador and waive for 60 days after the date of dismissal "any statute of limitations-based defenses that may have matured" since the case was filed—after the remand by the Second Circuit.[332] In response to plaintiffs' argument that the commitments applied only to the named plaintiffs and did not extend to members of the putative class, the court stated, "this is not a reasonable reading of the commitments."[333] To alleviate "any doubt, however," Judge Rakoff directed Texaco to inform the court in writing within three business days if it did not agree to extend the commitments to all members of the class, in which case the court would re-open the lawsuit.[334]

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330. *See, e.g., Aguinda,* 142 F. Supp. 2d at 539 (S.D.N.Y. 2001); DiRienzo v. Philip Servs. Corp., 232 F.3d 49, 57 (2d Cir. 2000), *vacated*, 294 F.3d 21 (2d Cir. 2000).

331. *See* WRIGHT & MILLER, *supra* note 318 n.15 (citing Garrett J. Fitzpatrick, Reyno*: Its Progeny and Its Effects on Aviation Litigation*, 48 J. AIR L. & COM. 539, 542 (1983); *see also, e.g.*, Ioannidis/Riga v. M/V Sea Concert, 132 F. Supp. 2d 847, 864 (D.C. Ore. 2001); Cheng v. Boeing Co., 708 F.2d 1406, 1409 (9th Cir. 1983), *cert. denied*, 464 U.S. 1017 (1983); Mizokami Bros. of Arizona, Inc. v. Mobay Chemical Corp., 660 F.2d 712, 719 (8th Cir. 1981); *cf.* Yan Wong v. United Airlines, Inc. 2001 WL 30192, *2 (D.C. La. 2001) (suit stayed to prevent plaintiff from being unable to obtain relief if defendant obtains dismissal of the foreign action on jurisdiction or venue grounds). **R**

332. *Aguinda,* 142 F. Supp. 2d at 539 (citing Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, *supra* note 190, at 12-13); Texaco Inc.'s Notice of Agreements in Satisfying Forum Non Conveniens and International Comity Condition, *supra* note 297; Transcript of Argument on Renewed Motions to Dismiss before the Honorable Jed S. Rakoff, United States District Judge, Aguinda v. Texaco, Docket No.: CV-93-7527, (S.D.N.Y. Feb. 1, 1999), at 5 [hereinafter Feb. 1, 1999 *Aguinda* Transcript]. The court further noted that Texaco had "provided identical assurances with respect to a Peruvian forum, should any of the Peruvian residents in *Ashanga* prefer that forum." *Aguinda*, 142 F. Supp. 2d at 539. **R** **R**

333. *Id.*

334. *Id.*

1. *Plaintiffs' Objections to an Ecuadorian Forum*

The court then reviewed and rejected several objections raised by the plaintiffs to the adequacy of an Ecuadorian forum. The first was that Ecuador's courts are unreceptive to tort claims. That argument, said the court:

> [r]ather remarkably . . . ignores the undisputed evidence that certain members of the putative *Aguinda* class, as well as three affected Ecuadorian municipalities, have already brought tort actions in the Ecuadorian courts, on some of the very claims alleged here, against TexPet [Texaco Petroleum], Petroecuador and other present or former members of the Consortium, AND HAVE, IN SOME OF THESE CASES, OBTAINED TORT JUDGMENTS IN PLAINTIFF'S FAVOR. [Citations to affidavits submitted by Texaco omitted.][335] Likewise, although unrelated to the particular claims here made, numerous Ecuadorian oilfield workers have brought personal injury suits against Texpet in Ecuador based on claims of alleged negligence and have prevailed in several of these cases. [Citation to affidavit by Texaco Petroleum representative omitted].[336]

The court then questioned the methodology of a study by plaintiffs' "'legal expert' [finding] that 'very few such actions are filed'" in Ecuador's courts, and again relied on the evidence cited above to conclude that "any speculation about the Ecuadorian courts' alleged unreceptiveness to tort cases is put to rest by the undisputed evidence, *supra*, that tort claims

335. The cited affidavits are: Affidavit of Dr. Vicente Bermeo Lanas (Nov. 12, 1998), ¶ 13, *in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of Its Renewed Motions to Dismiss, *supra* note 67, vol. 3, Ex. 14 [hereinafter Bermeo Affidavit]; and Affidavit of Dr. Rodrigo Pérez Pallares (Nov. 11, 1998), ¶ 4, Ex. A, *in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of Its Renewed Motions to Dismiss, *supra* note 67, vol. 3, Ex. 15 [hereinafter Pérez Affidavit]. Those citations are followed by a "see also" citation to: Callejas Affidavit I, *supra* note 268, ¶¶ 2-5, Exs. A-D; and Reply Affidavit of Dr. Adolfo Callejas Ribadeneira (Jan. 22, 1999), ¶¶ 3-4, Ex. A, *in* Texaco Inc.'s Reply 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. 25, 1999), Ex. 1 [hereinafter Callejas Affidavit II]. *Aguinda*, 142 F. Supp. 2d at 539-40. R R R

336. *Aguinda*, 142 F. Supp. 2d at 539-40 (emphasis added).

based on the very occurrences here at issue have been successfully prosecuted in the Ecuadorian courts."[337]

A review of the record, however, shows that none of the lawsuits relied on by the court resulted in a final judgment and recovery for the plaintiff. The only case in which a plaintiff won a tort judgment—an action by the municipal government of Joya de los Sachas against Petroecuador and its insurer for damages caused by an oil spill from a former Texaco production station in 1992—was overturned on appeal.[338] In October 1998, Ecuador's Supreme Court ruled that the local civil court, where that action had been filed, should not have allowed the case to proceed under provisions of the Code of Civil Procedure that provide for summary oral proceedings. The Supreme Court vacated the entire proceeding and assessed costs of five million *sucres* (then worth $918) for the defendants' attorneys, to be paid by the lower court judge who adjudicated the case and the judges of the intermediate appellate court (The Superior Court of Justice of Tena) who signed the majority opinion upholding the lower court's judgment in favor of the plaintiff.

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337. *Id.* at 540. The study by plaintiffs' expert, Professor Alberto Wray, was based on a five-year review of the Supreme Court docket. Wray concluded that the "lack of significant presence of non-contractual cases [no more than twenty-five out of 6448 cases], cannot be attributed to the nonexistence of individuals affected by negligence or intentional acts of others, but rather to the lack of confidence" in the judicial system. Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint, Aguinda v. Texaco, Inc., No. 93 Civ.7527 (S.D.N.Y. Jan. 11, 1999), at 7 (quoting Affidavit of Professor Alberto Wray, ¶ 8, *in* Exhibits in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss the Complaint, Aguinda v. Texaco, Inc., No. 93 Civ.7527, vol. 1, Ex. 4 (S.D.N.Y. Jan. 11, 1999)). Judge Rakoff noted that Wray supplied "little explanation or description of his methodology . . . [and his conclusion] appears to be based on nothing more than a tenuous inference from the fact that in Ecuador (as in the United States) few tort cases reach the nation's Supreme Court." *Aguinda,* 142 F. Supp. 2d at 540.

338. Similarly, as discussed below, plaintiffs in labor lawsuits against Texaco Petroleum prevailed in inferior courts in two (out of 625) cases; however, both judgments were overturned on appeal. Telephone Interview with Margarita Yépez, Former Social Worker for Texaco Petroleum (1973-1989), in Quito, Ecuador (Feb. 23, 2004) [hereinafter Yépez Interview Feb. 23, 2004]. No judgments from the labor lawsuits were included in submissions to the *Aguinda* court.

Although a translation of the Supreme Court's decision was included in exhibits submitted by Texaco to the *Aguinda* court, the affidavit that accompanied the judgment and described the case (given by Texaco Petroleum attorney Adolfo Callejas Ribadeneira) did not mention the assessment against the judges and stated, inaccurately, that the Supreme Court "ordered that it [the case] be refiled in the appropriate legal form."[339] No information was included about subsequent litigation; however, exhibits submitted to Judge Rakoff by the plaintiffs included an affidavit by the attorney who represented Joya de los Sachas in the lawsuit. That affidavit stated that municipal officials decided not to pursue the case after the judgment was overturned because they concluded that "it is impossible to win an action of that sort," for even if they won again in the local court, the judgment would not survive appeal by Petroecuador to superior courts in Quito, due to the company's political influence there.[340] As a result, the legal claim was apparently abandoned and no recovery collected.

The lawsuits based on the "very occurrences" at issue in *Aguinda* and referred to by Judge Rakoff fall into two groups. Three cases, involving five colonists—apparently members of

339. Callejas Affidavit I, *supra* note 268, ¶ 4. Instead, the Supreme Court held that "[t]he right by which the plaintiffs believe they are aided in suing before the competent judges is expressly preserved." Oral Summary Proceeding, Municipality Joya de las Sachas v. Petroecuador (Supreme Court of Justice, Court of Administrative Litigation, Oct. 28, 1998) File No. 1254, No. 172-97 (Ecuador), *translated in id.* at Ex. L. Texaco's final memorandum to the *Aguinda* Court in support of its motions to dismiss referred to the 23-billion-sucre judgment (then worth approximately ten million dollars, according to Texaco) without stating that it had been overturned on appeal, in support of the argument that "The Litigation Record in Ecuador Proves That *Aguinda* and *Jota* Plaintiffs Can Obtain Fair Hearings in Their Home Courts." Texaco Inc's Reply Memorandum of Law in Response to the Court's Memorandum Order of January 31, 2000 at 8-9, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Apr. 24, 2000). **R**

340. Sworn Statement by Mr. Luis Tobar Sánchez (Mar. 27, 2000), ¶ 9, *in* Plaintiffs' Exhibits (Volume II) in Support of Plaintiffs' Reply Memorandum of Law in Further Response to This Court's January 31, 2000 Memorandum Order, Aguinda v. Texaco Inc., No. 93 Civ. 7527, (S.D.N.Y. Apr. 21, 2000), Ex. 33. Plaintiffs' counsel directed the *Aguinda* Court's attention to the decision by Joya de los Sachas to abandon the claim in a memorandum. Plaintiffs' Reply Memorandum in Further Response to This Court's January 31, 2000 Memorandum Order, Aguinda v. Texaco Inc., No. 93 Civ. 7527, (S.D.N.Y. Apr. 21, 2000), at 5-6.

the putative *Aguinda* class—were filed in 1997;[341] a fourth was filed by another colonist in 1999.[342] Those lawsuits may well serve as test cases for tort law and the administration of justice in Ecuador; however, it would be premature to conclude that they have been "successfully prosecuted" because no judgments have been issued, even by a court with original jurisdiction. The second group of cases cited by the *Aguinda* Court are the four lawsuits filed by municipal governments against Texaco Petroleum, discussed above (in Part VII).[343] Those cases were settled and withdrawn prior to adjudication, in the wake of the Remediation Contract negotiated by Texaco and the government of Sixto Duran Ballen. In Ecuador, the outcomes of those cases are generally regarded as the result of political processes, not judicial proceedings. Indeed, rather than providing evidence of accountability in the oil fields or advances in the administration of justice, the settlements and resulting payments to municipal officials are seen by many people as part of a strategic effort by Texaco to undermine *Aguinda* and curry favor among political elites for the company's limited remedial program.

As a result, the evidence in the record does not support the *Aguinda* court's finding that plaintiffs who have already brought tort actions in Ecuadorian courts, "on some of the very claims alleged . . . [in *Aguinda*] have, in some of these cases, obtained tort judgments in plaintiffs' favor."[344] Not a

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341. Callejas Affidavit I, *supra* note 268, ¶ 5, Exs. M-O). R

342. Callejas Affidavit II, *supra* note 335, ¶ 3, Ex. A. The affidavit also reports "numerous claims for personal injury and property damage filed by individuals against Petroecuador as results of an oil refinery explosion" and pipeline spill in the coastal region. *Id.* ¶ 4. R

343. The court refers to lawsuits by "three affected Ecuadorian municipalities"; however, the reference appears to be to the group of (four) municipal lawsuits filed against Texaco Petroleum by Coca, Lago Agrio, Shushufindi, and Joya de los Sachas, discussed *supra* in Part VII and reported to the *Aguinda* court in Callejas Affidavit I, *supra* note 268, ¶¶ 2-3, Exs. A-D (copies of the complaints), Exs. E-I (copies of settlement agreements with municipal governments and the Prefect of Sucumbíos). R

344. *See Aguinda,* 142 F. Supp. 2d at 539. As discussed above, the record clearly shows that the municipal lawsuits against Texaco Petroleum were settled prior to adjudication, and the private cases had not yet been adjudicated. With regard to tort actions based on claims that are similar to, but distinct from the claims alleged in *Aguinda,* the record clearly shows that the judgment against Petroecuador in favor of Joya de los Sachas was overturned on appeal; and the "claims" against Petroecuador based on the fire and spill

single (standing) tort judgment in plaintiffs' favor appears in the record—either for "the very claims here alleged"[345] in *Aguinda* or for similar ones—notwithstanding the voluminous materials submitted by Texaco and apparently relied on by the court.[346] Moreover, the record shows that every such tort law-

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in the coastal region had not yet been adjudicated. No other tort lawsuit against Texaco Petroleum, Petroecuador, or any other member of the Consortium was cited or otherwise explicitly identified in the record, and the affidavits cited by Judge Rakoff in support of the court's finding contain the (contradictory) information summarized above. See, Pérez Affidavit, *supra* note 335; Callejas Affidavit I, *supra* note 268, ¶¶ 3-5; Callejas Affidavit II, *supra* note 335. R R

The record does, however, contain another affidavit submitted by Texaco and cited by Judge Rakoff, which includes vague allegations that apparently influenced the court's finding. Dr. Vicente Bermeo Lanas alleged that "[m]any citizens have obtained judgments against the Government and Petroecuador in connection with injuries from environmental contamination due to oil exploration" and "all such judgments" have been paid; and "Ecuadorian citizens have obtained numerous judgments against private entities in connection with injuries caused by oil exploration." Bermeo Affidavit, *supra* note 335, ¶¶ 11, 13. (The court cites paragraph thirteen of the Bermeo Affidavit. *Aguinda*, 142 F. Supp. 2d at 539). However, not a single judgment or legal action is cited in that affidavit (or elsewhere in the record) to substantiate those bald assertions; in addition, neither judgments (or cases) against Texaco Petroleum nor judgments (or cases) based on *Aguinda*-type claims (or any claims arising out of operations by the Consortium) are specifically alleged by Bermeo. R

Another affidavit submitted by Texaco and cited by the court, by Texaco Petroleum's representative in Ecuador, states that "many lawsuits and administrative proceedings have been prosecuted against Texpet in Ecuador," including claims for personal injury and property damage, and including "matters . . . where the plaintiffs received judgments." Pérez Affidavit, *supra* note 335, ¶ 4. However, as discussed below, the affidavit does not specifically allege that any plaintiff has won a judgment against the company for a personal injury or property damage claim, and the list of "such lawsuits and proceedings" attached to the affidavit does not include information or evidence that would support such an allegation. *See id.* ¶ 4, Ex. A; *infra* notes 348-55 and accompanying text. R

345. *Aguinda,* 142 F. Supp. 2d at 539.

346. Judge Rakoff may have based the erroneous finding on an exaggerated statement by Texaco in a memorandum, that plaintiffs' argument overlooked "prior tort cases against TexPet, Petroecuador, and other companies in Ecuador resulting in judgments and settlements in favor of plaintiffs in similar personal injury and environmental cases . . . ." Texaco Inc.'s Reply Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, *supra* note 335, at 6; *see also* Texaco Inc.'s Supplemental Memorandum of Law in Response to the Court's Memorandum Order of January 31, 2000, Aguinda v. Texaco Inc., R

suit that is explicitly identified therein was either settled by Texaco (and withdrawn by the plaintiff) prior to adjudication or had not yet been adjudicated by the court with original jurisdiction. The only tort judgment in favor of a plaintiff in the record—in a lawsuit by a municipality against Petroecuador and its insurer based on claims that were similar to some of the allegations in *Aguinda*—was vacated on appeal by the Supreme Court, which also assessed costs for the defendants' attorneys against the judges who ruled in the plaintiff's favor.

In addition to lawsuits based on the "very occurences" at issue in *Aguinda*, Judge Rakoff cited a third group of cases as evidence of the viability of tort suits in Ecuadorian courts: lawsuits against Texaco Petroleum by "numerous" Ecuadorian oil field workers. Those cases are described as "personal injury suits . . . based on claims of alleged negligence" unrelated to the particular claims in *Aguinda*, and according to the court, plaintiffs "have prevailed" in "several" of the cases.[347] The affidavit cited by Judge Rakoff in support of that finding, by Texaco Petroleum's representative in Ecuador, Rodrigo Pérez Pallares, is vague; however, it does not appear to support the court's finding.

The affidavit refers to two groups of legal actions. The first group is described by Pérez in general terms: "many lawsuits and administrative proceedings have been prosecuted against Texpet in Ecuador," including claims for personal injury and property damage, and "matters which Texpet disputed where the plaintiffs received judgments."[348] A list prepared by Pérez of "such lawsuits and proceedings" is attached to the affidavit as "Exhibit A" and was cited by the *Aguinda* court.[349] The two-part list, however, does not cite or otherwise clearly identify any tort judgments in favor of Ecuadorian oil field workers (or any other plaintiff) against the company. This is not surprising because, despite Judge Rakoff's remarkably precise finding, the apparently carefully-crafted affidavit, quoted above, does not specifically allege that any oil field

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No. 93 Civ. 7527, (S.D.N.Y. Mar. 10, 2000) at 17 ("Ecuadorian residents have obtained judgments against TexPet, the Government, PetroEcuador and private entities for environmental claims relating to oil exploration.").

347. *Aguinda*, 142 F. Supp. 2d at 540 (citing Pérez Affidavit, *supra* note 335, Exs. A, B). *See also* Pérez Affidavit, *supra* note 335, ¶¶ 4-5, Exs. A, B. **R**

348. Pérez Affidavit, *supra* note 335, ¶ 4. **R**

349. *Id.* ¶ 4, Ex. A.

worker—or other plaintiff—has won a *judgment* against the company in an Ecuadorian court for a personal injury or negligence-based claim.[350]

Indeed, no judgment by a court against the company on any claim is cited in the list, which includes columns entitled "Docket No.," "Case Name," and "Description" but does not disclose the outcome of any of the listed proceedings—or even indicate whether a judgment was rendered by a court of law. The list also fails to identify the precise judicial forum(s) where the cases were filed and, if applicable, adjudicated. The "docket numbers" on the list are of little informative value be-

350. The language in the affidavit is suggestive but vague, and leaves important details undisclosed. It states: "Many lawsuits and administrative proceedings have been prosecuted against Texpet in Ecuador, including both claims by individuals, for damage o [sic] their property and person from Texpet's oil exploration, and fines by Ecuadorian authorities for environmental violations. These include matters which Texpet disputed, where the plaintiffs received judgments and which Texpet paid. Attached as Exhibit A is a list I prepared of such lawsuits and proceedings." Pérez Affidavit, *supra* note 335, ¶ 4. Important details that were not disclosed (by Pérez or other submissions, except for the lawsuits discussed in this Article, which did not result in any judgments for a plaintiff) include: the outcome of listed proceedings; citations to court judgments and administrative determinations; the identity of the court; and the docket number assigned by the forum. R

Notwithstanding those omissions, the allegations by Pérez were apparently tweaked by attorneys for Texaco in a memorandum that may have influenced the *Aguinda* court's findings. In a section entitled, "Statement of the Facts," the Memorandum asserted that "Litigation Against TexPet and Other Companies Demonstrates that Plaintiffs Can Pursue Their Claims Without Bias or Corruption." Texaco Inc.'s Supplemental Memorandum of Law in Response to the Court's Memorandum Order of Jan. 31, 2000, Aguinda v. Texaco Inc., No. 93 Civ. 7527, (S.D.N.Y. Mar. 10, 2000), at 5. In support of the assertion, the memorandum stated:

> Dr. Rodrigo Pérez Pallares, who has practiced law in Ecuador for 31 years and currently serves as TexPet's legal representative in Ecuador, stated in his . . . Affidavit that '[m]any lawsuits and administrative proceedings have been prosecuted against TexPet in Ecuador,' including environmental claims by individuals where plaintiffs ultimately received judgments that TexPet paid.

Id. at 6. The "Argument" section of the memorandum repeats the assertion: "The record demonstrates that Ecuadorian residents have obtained judgments against TexPet, the Government, PetroEcuador and private entities for environmental claims relating to oil exploration." *Id.* at 17 (citations to affidavits by Pérez and others omitted). As discussed below, not a single judgment by an Ecuadorian court is cited in the record to support those assertions.

cause they apparently refer to Texaco's private docket, rather than to a docket number assigned by a court or administrative body.[351]

In addition, most of the listed proceedings (a group of 619 lawsuits that are listed separately at the end of the exhibit) are explicitly described as "labor claims." The only proceedings described by Pérez as claims for alleged "environmental damages" or "personal injury and property damage" are the municipal and settler lawsuits discussed above.[352] Most of the remaining proceedings relate to financial claims. Five proceedings are described as "labor indemnities;" however, there is no indication that personal injury or negligence claims were

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351. For example, the lawsuits against Texaco Petroleum by the municipalities of Coca, Joya de los Sachas, Lago Agrio, and Shushufindi were each filed in different (local) inferior civil courts, but those courts are not identified on the list, and the "docket numbers" on the list do not correspond with the numbers assigned to the cases by the respective courts. *Cf.* Pérez Affidavit, *supra* note 335, Ex. A; Callejas Affidavit I, *supra* note 268, ¶ 3, Exs. E-H (settlement agreements with plaintiff municipalities). The failure by Texaco to identify the court(s) where the listed proceedings allegedly went forward, or include any relevant legal documents or official docket numbers in the company's voluminous submissions (except for documents attached to Callejas Affidavit I, *supra* note 268, and Callejas Affidavit II, *supra* note 335, related to the lawsuits, discussed above, by municipalities and colonists in the putative *Aguinda* class) makes it difficult, and perhaps impossible to locate additional information, outside the record, to determine whether the listed proceedings support the vague allegations in paragraph four of the Pérez Affidavit, quoted above and cited by Judge Rakoff. *See Aguinda*, 142 F. Supp. 2d at 539-40. Specifically, those omissions make it difficult to independently verify whether any plaintiffs have won judgments against Texaco Petroleum, and if so, to clarify the types of legal claims and plaintiffs involved in such actions. Regardless, a close examination of the evidence in the record shows that Judge Rakoff's more specific finding, that various plaintiffs have "obtained tort judgments" and "prevailed" in personal injury suits against Texaco Petroleum in Ecuadorian courts, is not supported by a single citation to a specific judgment in the record. *Id.* R R

352. Pérez Affidavit, *supra* note 335, Ex. A. In twenty (out of sixty-seven) proceedings in the first section of the list, Texaco Petroleum is identified as the plaintiff. One case, "Sam Whitney vs. Texpet," is described as "[d]estruction of a banana crop." *Id.* However, no outcome is reported; the apparent date of the action, 1975, pre-dates Ecuador's return to democratic constitutional rule; and the plaintiffs' name suggests that he may not be a resident of the oil fields. Although residents of the oil fields cultivate bananas for subsistence purposes, Ecuador's banana industry is based on plantations concentrated in the coastal region, including areas near the trans-Ecuadorian pipeline and export terminal built by Texaco. R

involved and, again, no information is included about outcome of the cases.[353] According to Margarita Yépez, who worked as a full-time social worker for Texaco Petroleum from 1973-1989 and "was responsible for helping solve the workers' conflicts in family, health, legal, economic, and work-related problems,"[354] a number of Ecuadorian workers were injured or killed on the job during Texaco's tenure as operator; however, all related claims were covered by the company's insurance and resolved through her office without resort to litigation. Yépez recalls a small number of lawsuits against Texaco Petroleum by oil field workers who had been discharged by the company, based on labor law and contract claims. None of those cases involved personal injury or negligence claims, and all of them were either settled or won by the company, or abandoned by the plaintiff. According to Yépez, no Ecuadorian oil field worker has ever sued Texaco Petroleum in Ecuador's courts and prevailed, to her knowledge, and no specific cases are cited or otherwise explicitly identified by Texaco in the record to demonstrate otherwise.[355]

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353. *Id.*

354. Yépez Declaration, *supra* note 73, ¶ 1 at 1. R

355. Yépez Interview Feb. 23, 2004, *supra* note 338. As discussed below, Yépez and more than six hundred co-workers sued Texaco Petroleum in Ecuador after the company turned over the operations to Petroecuador and discharged most of its workforce, based on breach of contract claims; her case is still pending. According to Yépez, the insurance claims for accidental death and injury processed through her office included claims by employees of both Texaco and sub-contractors, and a few claims by third parties. *Id.* *See also* Pérez Affidavit, *supra* note 335, ¶¶ 4, 5, Exs. A, B. Another case listed by Pérez is described as "[i]ndemnities for death of her husband (a former Contractor Pilot) in a plane accident." *Id.* However, there is no evidence that this was a tort suit (and according to Yépez, aviation and other worker injuries were treated as labor and contract claims), and no information is included about the outcome of the proceeding. The only other reference in Exhibit A to claims by oil field workers is a proceeding by "approx. 500" former Texaco Petroleum employees, described as an "[a]ttempt to nullify the Texpet Collective Settlement Agreement." *Id.* Again, there is no suggestion that personal injury or negligence-based claims were involved, and no information about the outcome is included. Although the description of the proceeding is vague, it apparently refers to a criminal action based on charges of collusion between Texaco, Petroecuador and Ecuador, to prejudice Texaco Petroleum employees when that company turned over the operations to Petroecuador. *See id.* at Ex. A. According to Margarita Yépez, who was a plaintiff in that action, the lawsuit was withdrawn by the plaintiffs' attorney despite objections by some plaintiffs; in return, Texaco Petroleum R R

The second group of lawsuits identified in the Pérez Affidavit, and cited by the court are a group of some 650 lawsuits, described by Pérez as claims by former employees "for additional benefits." No judgment in favor of a plaintiff is alleged in the affidavit; however, Pérez states that "600 such cases . . . have been settled."[356] Those cases, says Pérez, were listed in a "prior affidavit;" however, the 619 cases listed at the end of Exhibit A (referred to above) and described as "labor claims," also appear to be part of the same group of lawsuits. A list of fifty pending suits—that had not yet been settled—was attached to the Pérez Affidavit as "Exhibit B," and even though the exhibit clearly states that all of the cases are "labor suits,"[357] Judge Rakoff cited the list in support of his finding that "numerous" Ecuadorian oil field workers have "prevailed" in "personal injury suits . . . based on claims of alleged negligence." No other evidence—except for the list of proceedings in Exhibit A, discussed above—was cited in support of that finding.[358] As a result, the basis for the court's description of those lawsuits as negligence-based personal injury actions is unclear, and not only lacks unambiguous support in the record, but also is contradicted by information that does appear in the record, and is cited by the court, clearly identifying the great majority of the cases as labor lawsuits. Similarly, the finding by the court that plaintiff oil field workers "prevailed" in "several" tort lawsuits against Texaco Petroleum is not supported by a single judgment in the record.

According to Margarita Yépez, who is a plaintiff in one of the labor lawsuits in Ecuador but has not settled with the company, the labor claims arose when Texaco turned over the Trans-Ecuadorian Pipeline System and field operations to Petroecuador (in 1989 and 1990, respectively) and fired most of its Ecuadorian workforce. The discharged workers claimed

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agreed to negotiate settlements in individual (civil) labor lawsuits by the same plaintiffs (and attorney) based on related claims. Yépez Interview Feb. 23, 2004, *supra* note 338. Those lawsuits, discussed *infra* this Part, were based on contract claims, and are apparently among the (650) cases described by Pérez in paragraph 5 of his affidavit as claims for "additional benefits." Pérez Affidavit, *supra* note 335, ¶ 5, Exs. A, B. **R** **R**

356. *Id.*

357. *Id.* ¶ 5, Ex. B (list entitled "Pending Labor Suits as of November 19, 1998").

358. *See Aguinda*, 142 F. Supp. 2d at 540.

that Texaco did not comply with the severance payment provisions in their collective bargaining agreement, and most of them—some 625 former employees—sued the company for breach of contract. A second (considerably smaller) group of labor lawsuits was filed by Petroecuador employees who had been placed in Texaco Petroleum by the national oil company (pursuant to the agreement with Ecuador to transfer oil field technology and train workers in the state company) and had worked there long enough to benefit from the labor contract. None of the cases involved personal injury or negligence claims, and, to date, no final judgment has been issued against Texaco Petroleum in any of the cases.[359]

In the group of 625 lawsuits by former employees, Yépez recalls that some thirty plaintiffs lost to Texaco Petroleum in the inferior courts; two plaintiffs initially won their cases, but both judgments were overturned on appeal. As a result, the plaintiffs became increasingly discouraged and, according to Yépez, withdrew their lawsuits in exchange for payments that were considerably lower that the value of their claims. In December 2003, Yépez and two other plaintiffs—whose lawsuits were filed in 1991 but had not yet been adjudicated by the courts with original jurisdiction—submitted a human rights petition to the Inter-American Commission on Human Rights charging Ecuador with violations of their right to a remedy on their labor claims.[360]

Finally, in further support of the *Aguinda* court's determination that plaintiffs' contention that Ecuador's courts are unreceptive to tort claims "is entirely without foundation," Judge Rakoff cited recent decisions by courts in the United States

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359. Yépez Interview Feb. 23, 2004, *supra* note 338. The majority of the workers continued to work in the oil fields, as employees of Petroecuador. R

360. *Id.; Petición a la Comisión Interamericana de Derechos Humanos* [Petition to the Inter-American Commission on Human Rights] (Dec. 3, 2003). According to Yépez, in one case where a lower court judgment for the plaintiff was overturned on appeal, the appellate judge approached the plaintiffs' attorney while the appeal was pending, and asked what he would give her to rule in favor of the plaintiff; Texaco, she reportedly said, had offered her a car. After the judge decided the case—in favor of the company—she was seen with a new car that matched the description (color and make) she had given the attorney. Despite the suspicious circumstances surrounding the appellate decision, the plaintiff could not prove that the legal process had been corrupted and, as a result, took no action based on the suspected corruption. Yépez Interview June 30, 2003, *supra* note 224. R

finding Ecuador to be an adequate forum to adjudicate tort claims.[361] Among other factors, those cases may reflect the understandable reluctance of judges in the United States to sit in judgment of the courts of a "sister democracy,"[362] as well as the relatively light burden on defendants to show the existence of an alternative forum under the forum non conveniens doctrine. However, no information was provided about the outcome of those claims in Ecuador and whether plaintiffs in the cited cases have in fact obtained an impartial hearing and meaningful remedy in Ecuador's courts.[363]

Plaintiffs' second objection to the adequacy of Ecuador's courts—that the courts do not recognize class action lawsuits—was also addressed and rejected by the *Aguinda* court. Similarly, the court found plaintiffs' procedural concerns unpersuasive.[364] The court's conclusion, that Ecuadorian law "provides adequate procedural safeguards and the remedy available . . . is not so inadequate as to amount to no remedy at

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361. *Aguinda*, 142 F. Supp. 2d at 540.

362. *See Aguinda*, 1994 WL 142006 at *2.

363. The cases cited are as follows: Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1359-61 (S.D. Tex. 1995); Ciba-Giegy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111, 1117 (Fla. Dist. Ct. App. 1997); and Sequihua v. Texaco, Inc., 847 F. Supp. 61, 64 (S.D. Tex. 1994). *Aguinda*, 142 F. Supp. 2d at 540.

364. Procedural "restrictions" raised by plaintiffs include: testimony by plaintiffs is not admissible; plaintiffs' experts cannot testify; oral cross-examination is not permitted; witnesses cannot be compelled to testify; and the maximum fine for disobeying a judicial order is $180. Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint, *supra* note 337, at 9. Plaintiffs also argued that claims based on environmental contamination must be filed with administrative agencies, and if the agency fails to act, only the government (and not Texaco) could be sued in a court of law. However, those assertions are dubious, and were disputed by experts for Texaco and rejected by Judge Rakoff as "a typically conclusory opinion from Professor Wray, who cites no authority to justify his conclusions." *Aguinda*, 142 F. Supp. 2d at 542. R

A practice that appears relevant but was not raised in plaintiffs' brief is that Ecuadorian courts allow *ex parte* communications between judges and parties. Similarly, there are no procedures to ensure transparency and, in practice, legal proceedings are generally characterized by a lack of transparency. *See* Unsworn Declaration by Dr. Ernesto López Freire Subject to Penalty of Perjury (Mar. 3, 1994) ¶¶ 8, 10, *in* Brief Amicus Curiae for FCUNAE and OINCE, *supra* note 65, Ex. 5; Ecuador Commercial Guide, *supra* note 285, Ch.II.A., 3. R R

all,"[365] conforms with the standard in federal forum non conveniens law and was supported by citations to cases and the record; but begs the basic, and more difficult, question relating to the practice of law in Ecuador and the gap between legal ideals, expressed in paper laws and procedures, and the social and political realities.[366] That crucial issue, however, had been raised by Judge Rakoff *sua sponte* after being abandoned by the plaintiffs, and it was to that issue that the court next turned its attention.

2. *Independence and Impartiality*

After President Mahuad was forced out of office by extraconstitutional means, the *Aguinda* court invited renewed consideration of whether Ecuador's courts could exercise the "modicum of independence and impartiality" necessary to an adequate alternative forum.[367] In response, lengthy submissions were received not only from the parties but also—at the request of Judge Rakoff—from the U.S. Department of State. In addition, Ecuador's Attorney General submitted a declaration, stating that the Government of Ecuador was "aware of problems the judicial system faces . . . [but has been and is] making concerted efforts to improve the administration of justice with assistance of governmental and nongovernmental institutions," including the World Bank.[368]

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365. *Aguinda*, 142 F. Supp. 2d at 542 (quoting DiRienzo v. Philip Servs. Corp., 232 F.3d 49, 57 (2d Cir. 2000)).

366. *See Aguinda*, 142 F. Supp. 2d at 540-43.

367. Aguinda v. Texaco, Inc., No. 93 Civ. 7527, Ashanga Jota v. Texaco, *Inc.*, No. 94 Civ. 9266, 2000 U.S. Dist. LEXIS 745, at *5 (Jan. 31, 2000); *see also Aguinda*, 142 F. Supp. 2d at 543-46.

368. Declaration of Dr. Ramón Jiménez Carbo, Attorney General of Ecuador, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Apr. 5, 2000), ¶ 1. Curiously, a copy of the declaration (drafted in English) and letter from Jiménez to Ecuador's attorneys in the United States, with instructions to submit the declaration, were received by Texaco's attorneys from their counsel in Ecuador before the declaration was filed. *See* Letter from George Branch, Esq., King & Spalding, to Joseph C. Kohn, Esq., Kohn, Swift & Graff, P.C. (Apr. 6, 2000). The Declaration by the Noboa government appeared to consolidate the Mahuad government's retreat from the robust support shown by the Alarcón and Bucaram governments for the *Aguinda* plaintiffs' choice of forum, but stopped short of overt support for Texaco's motions to dismiss. At oral argument on Texaco's renewed motions to dismiss, Ecuador's U.S.-based lawyer stated that "the government's position now is that it is up to the Court" to decide whether the case should go forward in New York or Ecua-

The court, however, summarily dismissed most of the submissions, stating that they "proved of little use . . . since they largely consisted of broad, conclusory assertions as to the relative corruptibility or incorruptibility of the Ecuadorian courts with scant reference to specifics, evidence, or application to the instant cases."[369] Looking "beyond gross generalizations to relevant particulars," the court found:

> There is not the slightest indication, in any of the papers submitted on this issue, of any impropriety on the part of Texaco or any of its affiliates, or indeed on the part of any present of former member of the Consortium, with respect to any judicial or administrative proceeding of any kind in Ecuador.[370]

In effect, then, the court summarily dismissed an ample body of relevant evidence in the record on the basis of the absence of (highly particularized) evidence from the record. A review of the evidence shows significant agreement among a wide range of governmental and nongovernmental authorities—disputed only by Texaco's attorneys and experts—that Ecuador's judicial and legal systems are characterized by systemic and persistent deficiencies, notwithstanding repeated bouts of recognition of shortcomings by public officials and efforts at reform.[371] Those general conclusions are consistent

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dor; he also reaffirmed the government's willingness to provide documents and information to the court if the case proceeds. Feb. 1, 1999 *Aguinda* Transcript, *supra* note 332, at 59, 61. In response to a direct question from the bench, he stated the government's view that courts in Ecuador could provide an adequate forum, except to the extent that Law 55 might preclude litigation; however, Ecuador had no official position on the constitutionality or applicability of Law 55 to the *Aguinda* plaintiffs. *Id.* at 59-64. R

369. *Aguinda*, 142 F. Supp. 2d at 544.

370. *Id.*

371. *See, e.g.*, Plaintiffs' Previously Submitted Exhibits in Support of Their Memorandum of Law Responsive to This Court's January 31, 2000 Memorandum Order, *supra* note 65; Plaintiffs' Exhibits (Volume II) in Support of Plaintiffs' Reply Memorandum of Law in Further Response to This Court's January 31, 2000 Memorandum Order, *supra* note 340; Plaintiffs (New) Exhibits in Support of Their Memorandum of Law Responsive to This Court's January 31, 2000 Memorandum Order, Aguinda v. Texaco, Inc., No. 93 Civ.7527 (S.D.N.Y. Mar. 9, 2000); Kimerling, *Rights, Responsibilities, and Realities*, *supra* note 64, at 297-306, cited in Plaintiffs' Memorandum of Law Responsive to This Court's January 31, 2000 Memorandum Order, Aguinda v. Texaco, Inc., No. 93 Civ.7527 (S.D.N.Y. Mar. 9, 2000) at 13; Letter from Paolo Di Rosa, Attorney Advisor, Office of the Legal Advisor, U.S. Dep't of R R R

with a number of additional studies and reports in the historical record and with anecdotal evidence from many sources in Ecuador.[372] The *Aguinda* court's demand for highly particularized evidence sets a burdensome and arguably impossible standard for these plaintiffs, especially in view of the lack of transparency in Ecuador's legal and judicial systems, the difficulty of proving corruption in specific cases, and the failure of the discovery order to facilitate access by plaintiffs' counsel to this type of information.

The "relevant" evidence cited by the court was limited to affidavits by Texaco's experts stating that "numerous" cases are pending against multinational corporations in Ecuador's

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State, Western Hemisphere Affairs, to Edward Scarvalone, Esq., Assistant U.S. Attorney (June 8, 2000), submitted by Edward Scarvalone for Mary Jo. White, United States Attorney, to The Honorable Jed. S. Rakoff, United States District Court, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y.) [hereinafter Dep't of State Letter Submission]; Texaco's Appendix of Rebuttal Exhibits in Support of its Reply Memorandum of Law, Aguinda v. Texaco, Inc., No. 93 Civ.7527 (S.D.N.Y. Apr. 24, 2000); Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motions to Dismiss, *supra* note 67; Texaco Inc.'s Supplemental Appendix of Exhibits in Support of its Supplemental Memorandum of Law, Aguinda v. Texaco, Inc., No. 93 Civ.7527 (S.D.N.Y. Mar. 10, 2000). Some of the evidence is discussed below. R

372. *See, e.g.*, *No a la Reorganización de Función Judicial* [*No to the Reorganization of the Judiciary*], EL COMERCIO, Sept. 12, 1991 (reporting seven reorganizations of the Judiciary between 1970 and 1988, and eighteen Constitutions since Ecuador became a republic in 1830); "*¿Cambió la justicia?* [*Did Justice Change?*], EL COMERCIO, Feb. 13, 1994 and Feb. 21, 1994 (reporting on constitutional reforms of the Judiciary enacted in 1992); *Cambio Total en la Función Judicial* [*Complete Change in the Judicial Branch*], EL TELÉGRAFO, Oct. 4, 1994 (proposed constitutional reforms of the Judiciary); *Alianza contra la corrupción* [*Alliance against Corruption*], EL COMERCIO, Jan. 25, 1995; CORKILL & CUBITT, *supra* note 11; AMERICAS WATCH & THE ANDEAN COMMISSION OF JURISTS, HUMAN RIGHTS IN ECUADOR (1988); United Nations Latin American Institute for the Prevention of Crime and Treatment of the Delinquent (ILANUD), "*Informe De Investigación Sobre las Necesidades de Capacitación de los Jueces Penales Del Ecuador* [Report of Investigation of Training Needs for Criminal Judges in Ecuador] (1991); LAURA CHINCHILLA & DAVID SCHODT, FLA. INT'L UNIV., THE ADMINISTRATION OF JUSTICE IN ECUADOR (1993); Franco Sánchez Hidalgo, *Reflexiones sobre la Ley Orgánica de la Función Judicial* [*Reflections on the Organic Law of the Judiciary*], 37 (Tomo II) RUPTURA 73 (1994); Corral, s*upra* note 97; Ordóñez Espinosa, *supra* note 97; Miguel Macías Hurtado, *La Función Judicial Ecuatoriana ante la Modernización y el Miedo* [*Judical Branch Before Modernization and Fear*] 37 (Tomo II) RUPTURA 65 (1994). R R

courts—and the absence of evidence of allegations of "corruption of the judiciary . . . [by] any of those corporations"[373]—and an optimistic view of the most recent efforts at judicial reform, led by Ecuador's then-President, "a former law school dean," and the reorganized Supreme Court that took office in 1997.[374] In addition, the *Aguinda* court repeated its erroneous finding, discussed above, that plaintiffs have won tort judgments against Texaco Petroleum and Petroecuador in Ecuador, in order to both rebut the evidence in the record of systemic deficiencies in the administration of justice, and support the court's reliance on the absence of evidence of "any impropriety" by Texaco or Petroecuador:

> Indeed, as previously mentioned, TexPet and Petroecuador have already been sued in Ecuador on some of the same or related claims by some of the same or related plaintiffs as are involved here, and several of these suits have resulted in judgments involving substantial payments to certain of the plaintiffs [citations to Texaco's exhibits omitted].[375]

Finally, the court again cited decisions by other courts in the United States finding Ecuador to be an adequate alternative forum and noted that no case has "held to the contrary since Ecuador became a democratic constitutional republic in 1979."[376] With respect to the specific claims at issue in *Aguinda*, the court noted that they were subject to continuing public scrutiny and political debate in Ecuador, and specu-

373. *See Aguinda*, 142 F. Supp. 2d at 544.

374. See *id.* at 544-45. The court acknowledged that "no one claims the Ecuadorian judiciary is wholly immune to corruption, inefficiency, or outside pressure." *Id.* at 544. It also stated that "[t]he failure of the military coup of January 21, 2000 reaffirmed Ecuador's insistence on democratic, civilian control of its institutions." *Id.* However, the court appeared to disregard the fragile nature of Ecuador's democracy and its volatile political history, discussed above (and illustrated during the *Aguinda* litigation by the ousters of democratically-elected presidents by extra-constitutional means in 1997 and 2000, and the shifting positions taken by successive governments in the litigation); the repeated failure of previous judicial reforms to establish an independent judiciary; and the limited political legitimacy of public institutions and political elites generally. Recent events, discussed *infra* Part XII (Epilogue) show that the court's optimistic view of reform efforts led by Noboa and the (then) Supreme Court was premature.

375. *Aguinda*, 142 F. Supp. 2d at 544.

376. *Id.* at 545.

lated: "Given such public scrutiny . . . , even the possibility that corruption or undue influence might be brought to bear if this litigation were pursued in Ecuador seems exceedingly remote."[377]

a. Vaca Affidavit

In addition to citing Texaco Petroleum attorney, Adolfo Callejas, for the (repeated) erroneous proposition that plaintiffs have won judgments in Ecuador on "some of the same or related claims,"[378] and for the absence of "the slightest indication . . . of any impropriety" by Texaco or Petroecuador in any judicial or administrative proceeding, the court cited another affidavit submitted by Texaco, by Dr. Ricardo Vaca Andrade. At the time, Vaca chaired the judicial disciplinary committee of Ecuador's National Judicial Council. The Council was created in 1998 to reform the administration of the court system and combat corruption by disciplining judges and judicial employees. Judge Rakoff noted that Vaca had "successfully litigated numerous cases against TexPet" while in private practice and also cited him for the proposition that "Ecuadorian courts do not give preferential treatment to multi-national companies like Texaco."[379]

Interestingly, the court's citations to Vaca's affidavit did not include a reference to the paragraph describing his work

377. *Id.*

378. *Id.* Specifically, the court cited Callejas Affidavit I, *supra* note 268, ¶¶ 2-5, Exs. A-K. All of the actions referred to in those paragraphs are discussed above, and none of them resulted in a final judgment in favor of a plaintiff. Paragraphs 2 and 3 of the affidavit report the four municipal lawsuits and settlements, with copies of supporting legal documents, including the settlement agreements, attached as Exhibits A-I. Paragraph 4 reports the lawsuit by Joya de los Sachas against Petroecuador (in which a judgment for the plaintiff was vacated on appeal), and paragraph 5 reports the first three lawsuits by colonists against Texaco Petroleum (which had not yet been adjudicated). Exhibit J is a copy of the complaint in the lawsuit by Joya de las Sachas against Petroecuador (described in paragraph 4), and Exhibit K is a copy of the lower court judgment in that case, in favor of the plaintiff. Interestingly, Exhibit L to the affidavit is not cited by Judge Rakoff but is clearly relevant; it contains a copy of the Supreme Court decision vacating the judgment contained in Exhibit K (and cited by the *Aguinda* court), and assessing costs against the judges who issued and affirmed the cited judgment. *See* Callejas Affidavit I, *supra* note 268, ¶¶ 2-5, Exs. A-L. R

379. *Aguinda,* 142 F. Supp. 2d at 544.

with the disciplinary committee, which stated that the committee had imposed 166 sanctions on judges and judicial employees during its first sixteen months of activity. The numbers, which include dismissals, suspensions, fines, and warnings between December 21, 1998, and March 30, 2000, were offered by Vaca to show "continuous and efficient control of the Administration of Justice in Ecuador to fight corruption."[380] However, these same numbers arguably also show that corruption is widespread and even epidemic in the court system, a point the court did not address. Instead of citing Vaca's numbers, Judge Rakoff quoted a paragraph from the State Department's Human Rights Country Report for Ecuador (describing practices in 1999) about the activities of the disciplinary committee (headed by Vaca), indicating that the committee had removed four judges, two court employees, and "a number of minor officials."[381] In 2003, Vaca was forced off the disciplinary committee and National Judicial Council by the Supreme Court for "insulting" the Supreme Court by publicly accusing it of corruption.[382]

The affidavit by Vaca was not cited by Judge Rakoff in his analysis of tort litigation in Ecuador, perhaps because Vaca

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380. Affidavit of Dr. Ricardo Vaca Andrade (Mar. 30, 2000), ¶ 4, *in* Texaco Inc.'s Appendix of Rebuttal Exhibits in Support of Its Reply Memorandum of Law, *supra* note 371, at Ex. 22 [hereinafter Vaca Affidavit]. The numbers are: 32 dismissals, 29 suspensions, 71 fines, and 34 warnings. No information is provided about the specific cases or litigants that may have also been implicated in the corruption (or other judicial misconduct) that led to the sanctions. R

381. *Aguinda,* 142 F. Supp. 2d at 545 (quoting U.S. Dep't of State, Ecuador Country Report on Human Rights Practices for 1999 (Feb. 25, 2000) [hereainfter Ecuador Country Report for Practices in 1999], at 5). The court offers the quotation as evidence of "vigorous steps" by the Noboa Government and reorganized Supreme Court "to further the independence and impartiality of the judiciary." *Aguinda,* 142 F. Supp. 2d at 545. However, the full context of the quotation indicates that serious deficiencies remain, despite efforts to reform the courts since 1992. For example, the opening statement of that section states: "The Constitution provides for an independent judiciary. In practice, however, the judiciary is susceptible to outside pressure." Ecuador Country Report for Practices in 1999 at 6.

382. Telephone Interview with Dr. Ernesto López, in Quito, Ecuador (Feb. 17, 2004). López is a former president of the Tribunal of Constitutional Guarantees; he represents a group of indigenous plaintiffs in a lawsuit filed in Tena (Ecuador) in 2003 against ChevronTexaco and Texaco Petroleum, discussed *infra.*

claimed only to have litigated "various labor lawsuits . . . in the tribunals and courts" during the 1970s. His claim to have "won . . . virtually all of them" is confusing—as is the citation to that paragraph by Judge Rakoff in this section of the opinion—because the cases Vaca describes apparently predate Ecuador's return to democracy in 1979. Elsewhere in the opinion, the court noted the significance of that transition, reasonably implying that the administration of justice by Ecuador's courts prior to the resumption of constitutional rule is distinguishable from the determination at hand.[383] As a result, irrespective of the credibility of Vaca's vague allegation that he "won" numerous (unidentified) labor lawsuits against Texaco Petroleum during the 1970s, the affidavit clearly does not support the proposition that plaintiffs have won "several . . . judgments involving substantial payments" in Ecuador on "some of the same or related claims"[384]; nor does it appear to answer the more general query of whether Ecuador's current judicial system can administer justice independently and impartially.

b. U.S. State Department Human Rights Country Report

Remarkably, Judge Rakoff's analysis of the administration of justice misquoted the State Department's Human Rights Country Report for Ecuador. The court apparently reviewed reports published in both 1999 and 2000, describing human rights practices during 1998 and 1999, respectively. Both reports state that "[t]he most fundamental human rights abuse stems from shortcomings in the politicized, inefficient, and corrupt legal and judicial system."[385] However, the report on practices in 1999 was quoted by the court as as "describ[ing]

383. *See Aguinda*, 142 F. Supp. 2d at 543-44.

384. *See Aguinda,* 142 F. Supp. 2d at 544. The citation by the court is unclear, and may have been offered only to support the proposition that Texaco has been sued in other kinds of actions without "any impropriety." *Id.* Notwithstanding, it appears to have little, if any, probative value. Vaca did not cite or identify any cases to support his litigation claims, and the list of actions prepared by Pérez for his affidavit, discussed above, includes only three labor proceedings in the 1970s, all before 1979. In addition, Vaca's vague allegations about winning labor lawsuits are inconsistent with Margarita Yépez's experience, discussed above, which began in 1973, the same year that Vaca says he received his law degree. Yépez Interview Feb. 23, 2004, *supra* note 338; Vaca Affidavit, *supra* note 380. R

385. *See* Ecuador Country Report for Practices in 1999, *supra* note 381, at 1-2; Ecuador Country Report for Practices in 1998, *supra* note 308, at 1. R R

Ecuador's legal and judicial systems as 'politicized, inefficient and *sometimes* corrupt' so far as certain 'human rights' practices are concerned."[386]

The mis-quotation is especially troubling because the same statement was quoted by Judge Rakoff—correctly—on two prior occasions, and the litigation record suggests that the court allotted appreciable attention to considering its proper meaning. In a query to the Department of State following the decision in 2000 to reopen the *Aguinda* record to receive submissions related to the administration of justice, Judge Rakoff quoted the statement and requested a written clarification as to its "scope":

> In particular, one impetus for the Court's Order [to reopen the record] . . . was the statement in the State Department's 1998 Human Rights Country Report for Ecuador that "(t)he most fundamental human rights abuse (in Ecuador) stems from shortcomings in the politicized, inefficient, and corrupt legal and judicial system." This statement is repeated in the . . . [report on practices in 1999] issued on February 25, 2000. However, all the examples given in these reports to support these statements involve situations substantially different from the cases currently before this Court (which involve civil claims of environmental damage), and consequently it is difficult to assess to scope of the statements or their applicability here . . . . Accordingly, the Court would appreciate any written clarifications the State Department could give as to the scope of the statements . . . [and/or any information] in writing on the question of whether the courts of Ecuador (and/or possibly Peru) would be able to adjudicate the above-captioned cases in a fair and impartial manner.[387]

A copy of the 2000 Order was enclosed with the query. That Order also quoted the statement, correctly, describing it as "a primary conclusion" of the human rights report and commenting:

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386. *Aguinda*, 142 F. Supp. 2d at 545 (emphasis added).

387. Letter from Jed. S. Rakoff, U.S. District Judge to Edward Scarvalone, Assistant U.S. Attorney (May 9, 2000) (on file with the author).

> While the evidence set forth in the report in support of this strong statement largely relates to criminal cases, the Court does not believe that, even in the very different context of the instant lawsuits, it can ignore without further inquiry a statement from a department of the U.S. Government that so fully casts doubt on the independence and impartiality of the principal courts to which the defendant seeks to remit these cases.[388]

The response by the State Department to the court's query did not backpedal on the "strong statement" and doubts it "so fully casts" on the independence and impartiality of Ecuador's courts; nor did it corroborate Judge Rakoff's intimations that legal proceedings based on environmental claims could somehow be distinguished from the proceedings and circumstances that caused the State Department to describe the "legal and judicial system" in Ecuador as "politicized, inefficient and corrupt." In a letter submission to the court, the State Department forwarded copies of the most recently published Country Reports for Ecuador and Peru (describing practices in 1999), and answered Judge Rakoff's "specific[ ]" query as to "whether the observations [in the reports] . . . extend both to the criminal and civil courts,"[389] explaining:

> By way of preface, it bears noting that United States Embassies abroad do not, as a matter of course in the exercise of their functions, engage in an exhaustive review of the host nation's judicial system in civil cases. At the same time, the views set forth by the Department of State in those portions of the Humans Rights Reports that discuss the judicial system of a given country are not based exclusively on information from the criminal court system, and are not by design or definition limited to the criminal area; rather, they reflect conclusions drawn from the totality of the Embassy's exposure to, and analysis of, the host country's judicial system generally.

388. Aguinda v. Texaco, Inc. No. 93 Civ. 7527, No. 94 Civ. 9266, 2000 U.S. Dist. LEXIS 745, at *9 (S.D.N.Y. Jan. 31, 2000).

389. Dep't of State Letter Submission, *supra* note 371. R

> Accordingly, . . . the Department of State regards the relevant Human Rights reports as an authoritative reference source.[390]

The *Aguinda* court's query to the State Department can arguably be seen as an invitation to distinguish *Aguinda* and environmental damage claims generally from the "strong statement" in the reports ascribing serious and systemic deficiencies to Ecuador's courts and legal system. After the State Department declined to do so, Judge Rakoff evidently took on that task himself, apparently even to the point of editing the statement. In addition to mis-quoting the State Department, the court added a qualifier to the statement, and a new interpretation that limits its scope to a narrow class of cases:

> While the State Department nonetheless continues to describe Ecuador's legal and judicial systems as "politicized, inefficient and sometimes [sic] corrupt" as far as certain "human rights" practices are concerned, *see* 2000 Country Report at 1, this is based, as the Country Reports make clear, on cases largely involving confrontations between the police and political protestors. *Id.*[391]

The qualifier added by the court—limiting shortcomings in Ecuador's legal and judicial systems to "certain 'human rights'" practices and more specifically, "primarily to cases of confrontations between the police and political protestors"[392]—is not made "clear" in the reports[393] as the court con-

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390. *Id.*

391. *Aguinda*, 142 F. Supp. 2d at 545. The court then stated: "By contrast, *not one* of the cases described by the [reports] . . . as evidence of such conclusions remotely resembles the kind of controversy here at issue." *Id.*

392. The quotation paraphrasing the court's finding is from the Second Circuit opinion upholding the dismissal. Aguinda v. Texaco, Inc., 303 F.3d 470, 478 (2d Cir. 2002).

393. The misquoted statement appears in the introduction to the Country Report, in a summary of human rights problems. The summary in the cited report, on practices in 1999, reads:

> There continued to be serious problems in the Government's human rights record. There were isolated instances of extrajudicial killings. Police tortured and otherwise mistreated prisoners and detainees, and prison conditions remained poor. Persons subject to arbitrary arrest and prolonged detention is a problem. Once incarcerated, persons may wait years before being convicted or acquitted unless they pay bribes. More than one-half of the prisoners

tends, but rather is contradicted by most of the cases included in the reports. It is also at odds with both the clarification submitted to the court by the State Department and the court's initial thesis, expressed in the 2000 Order reopening the record, that the "strong" statement "largely relates to criminal cases."[394] In addition, the court's conclusion is contradicted by a more detailed report on human rights in Ecuador, issued in 1997 by an international human rights monitoring organ and tribunal, the Inter-American Commission on Human Rights of the Organization of American States (IACHR).[395] Portions of the IACHR's report were submitted by the plaintiffs to the court, including a chapter entitled "The Right to Judicial Recourse and the Administration of Justice in Ecuador," which found that "many violations of fundamental rights stem from deficiencies in the administration of justice," and "the performance of the judiciary" is widely recognized in Ecuador as "a serious problem, with consequences which affect

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> in jail have not been sentenced formally. The Government failed to prosecute and punish human rights abusers. The most fundamental human rights abuse stems from shortcomings in the politicized, inefficient, and corrupt legal and judicial system. The Government infringed somewhat on press freedom, and some self-censorship continues. On several occasions throughout the year, the Government declared or extended states of emergency that limit freedom of assembly and movement, and it ordered participants in nationwide strikes back to work. Violence and pervasive discrimination against women, indigenous people, and Afro-Ecuadorians also remain problems. Child labor is a problem. Mob violence and killings persist. In 1998, the Government decreed an ambitious National Human Rights Plan with the goal of "preventing, eradicating, and sanctioning" human rights violations in the country. The three branches of government, as well as the independent Ombudsman's office and a number of nongovernmental organizations (NGO's) contributed to this plan.

Ecuador Country Report for Practices in 1999, *supra* note 381, at 1-2. For the statement in the report on practices in 1998, see Ecuador Country Report for Practices in 1998, *supra* note 308, at 1. **R** **R**

394. Aguinda v. Texaco, Inc., No. 93 Civ. 7527, No. 94 Civ. 9266, 2000 U.S. Dist. LEXIS 745, at *9 (S.D.N.Y. Jan. 31, 2000).

395. *See generally* IACHR Report on Ecuador, *supra* note 31. The report is based on IACHR's "ongoing work of monitoring [human rights] developments and processing" cases, as well as a visit to Ecuador in November 1994, and focuses primarily on events in 1992-1996. *Id.* at 1. **R**

the realization of a wide range of rights and freedoms guaranteed by the American Convention [on Human Rights]."[396]

There is no question that confrontations between political protesters and security forces are a recurrent and serious human rights problem in Ecuador, and that related violations are compounded by serious shortcomings in the judicial system. The Country Report quoted by the court, for example, includes a case in which security forces opened fire on indigenous protestors in the Andes region, killing one person and injuring scores of others.[397] However, that scenario is clearly not the only—or even the predominant—scenario for human rights violations described in the report. In addition, no judicial proceedings were reported by the State Department in connection with those events or other "cases" involving confrontations between police and political protestors.[398] As a result, the court's reference to such "cases" is misplaced as the State Department is describing systemic deficiencies in Ecuador's legal and judicial system and uses the term "case" broadly, to refer to instances that involve human rights violations even when victims do not sue (or are otherwise involved in judicial proceedings). In contrast, the court appears to concentrate its discussion on the litigation record in the courts.[399]

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396. *Id.* at 27; *see also id.* at 29 (summarizing judicial reforms that began in 1992, and reporting that "[n]onetheless, serious problems remain and continue to impair the ability of individuals to exercise their right to judicial protection"). The report is 128 pages; portions were submitted to the court in Plaintiffs' (New) Exhibits in Support of Their Memorandum of Law Responsive to This Court's January 31, 2000 Memorandum Order, *supra* note 371 at Ex. 3. **R**

397. Ecuador Country Report for Practices in 1999, *supra* note 381. **R**

398. *See id.* at 3, 5-8.

399. If the *Aguinda* court's use of the term "case" here (describing "cases" involving confrontations between police and political protesters) is meant to describe the litigation record in Ecuador's courts, then it has no support in the Country Report. In the Report, use of the term "case" does not necessarily mean that the judicial branch is directly involved and, in practice, many "cases" of human rights violations committed by actors who are not judicial officials do not lead to formal judicial proceedings because victims and their families lack confidence in Ecuador's courts and economic resources to pursue their claims. Telephone Interview with Sister Elsie Monge, Executive Director, Ecumenical Human Rights Commission (CEDHU), in Quito, Ecuador (Feb. 29, 2004). Some confusion about the court's use of the term is reflected in the Second Circuit opinion affirming the dismissal. *See* Aguinda v. Texaco, Inc., 303 F.3d 470, 478 (2d Cir. 2002).

The cases identified in the Country Report that clearly involve judicial proceedings are not related to confrontations between police and political protesters and, as a result, do not fall within the narrow class of cases defined by the *Aguinda* court. For example, the "Putumayo 11" case involved the torture of a group of *campesinos* (family farmers) who were rounded up by the military after a patrol by the armed forces of Ecuador and Colombia was ambushed by the Colombian guerilla group, FARC (Revolutionary Armed Forces of Colombia). Although the history of the case—and three other cases cited in the Country Report that had been presented to IACHR—is not described in detail, there is nothing to suggest that any of them fall within the narrow class of cases and rights violations defined by the *Aguinda* court.[400] Other cases mentioned in the Country Report that directly involve judicial proceedings include reports about judges and judicial employees who were sanctioned by the new Judicial Council, (briefly discussed above); they, too, do not involve confrontations between police and political protestors.[401]

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400. In fact, the IACHR cases—and most others in the report—did not involve confrontations between police and political protestors. Ecuador Country Report for Practices in 1999, *supra* note 381, at 5; OAS, IACHR, *Informe* [Report] 99/00, *Caso* [Case] No. 11.868, Carlos Santiago and Pedro Andrés Restrepo Arismendy (Ecuador) (Oct. 5, 2000); Juan Clímaco Cuellar v. Ecuador, Case 11.478, Inter-Am. C.H.R., Report No. 19/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2001); Suárez Rosero Case, 1997 Inter-Am. Ct. H.R. (ser. C) No. 35 (Nov. 12, 1997); Benavides Cevallos Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 38 (Jun. 19, 2005). Petitioners to IACHR must first exhaust domestic legal remedies. Rules of Procedure of the Inter-American Commission on Human Rights, arts. 28, 31. R

Other "cases" reported by the State Department, of violations that took place in 1999 but clearly did not involve confrontations between political protestors and police (or include reports of litigation in the courts), include hundreds of arrests during a state of emergency that was "imposed to stem a soaring crime rate"; the arrest, beating and robbery of a human rights advocate by police (which did not occur in connection with a confrontation with protestors); and cases involving torture with electric shocks, cigarette burns and psychological threats, described as "most[ly]" cases in which "the police appeared to have abused such persons during investigations of ordinary street crime." Ecuador Country Report for Practices in 1999, *supra* note 381, at 4-6. R

401. The report states that two judges and two court employees were removed "for their role in the release of suspected drug traffickers," and a third judge was "sanctioned for improper conduct in a banking scandal." *Id.* at 6.

Another class of cases in the Country Report that involve judicial proceedings are "many instances [in which] the [criminal detention] system was used as a means of harassment in civil cases in which one party sought to have the other arrested on criminal charges."[402] No specific cases are cited in the report; however, the plaintiffs' submissions to the court include a reference to a case that similarly illustrates how the judicial system can be used to harass and try to debilitate environmental defenders. The plaintiffs offered as a "specific example of judicial impropriety" the case of Angel Shingre, as reported in an affidavit by professor Napoleón Saltos. Although the information in the submission is incomplete—for example, the role of Petroecuador is not clear—it nonetheless provides a chilling example of a case in which "the judicial system is used to debilitate organizations and persecute" persons who defend local community interests and the environment in the oil fields.[403]

Shingre was a colonist in the area developed by Texaco, a member of the putative *Aguinda* class, and part of a new network of community environmental promoters. Locally, he was

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402. *Id.* at 5. Ecuador allows preventive detention. As a general matter, the report states: "Even when the police obtain a written arrest order, those charged with determining the validity of detention often allowed frivolous charges to be brought, either because they were overworked or because the accuser bribed then." *Id.*

403. The affidavit by Professor Saltos was highlighted in a plaintiffs' memorandum. The memorandum refers to "the oil company" but does not identify the company. The affidavit names Petroproducción, but does not explain that Petroproducción is the Petroecuador subsidiary that operates the fields developed by Texaco. Neither document explains that the spill was caused by the failure of an aging pipeline that was built by Texaco (and operated at the time by Petroproducción); identifies Shingre as a member of the putative *Aguinda* class; or links his case to the class of cases reported in the Country Report. *See* Plaintiffs' Memorandum of Law Responsive to This Court's January 31, 2000 Memorandum Order (Mar. 9, 2000), *supra* note 371, at 12; *Corruption and Racism in the Ecuadorian Judicial System*, Declaration of Napoleón Saltos Galarza 9 [hereinafter Saltos Declaration], *in* Plaintiffs' (New) Exhibits in Support of Their Memorandum of Law Responsive to This Court's January 31, 2000 Memorandum Order, *supra* note 371, at Ex. 24. The author's account is based on a series of conversations with Shingre. **R** **R**

Another case where criminal prosecution may have been used to harass a party in a civil suit (a tort action by Mariana Alemida against Maxus Energy and a subcontractor, Andrade Gutiérrez, for damages to Almeida's ecotourism business and property in Sucumbíos Province) is briefly discussed in Kimerling, *Rights, Responsibilities, and Realities*, *supra* note 64, at 371-72. **R**

well-known as a *campesino* leader who worked tirelessly to denounce oil field pollution and promote and defend environmental rights. In 1998, an aging pipeline—built by Texaco but operated by Petroecuador—burst and contaminated his farm. At the time of the spill, Shingre was in Tena, some seven hours away from the farm by bus. Like other residents of the oil fields, Shingre did not have access to financial resources or legal services to pursue a lawsuit against Petroecuador, but he denounced the spill to the company and demanded a cleanup.

Petroecuador offered a settlement of one million *sucres* (then worth $183.60), but Shingre refused to accept the money. In response, the company gave him an ultimatum: take the money and keep quiet or go to jail for sabotaging the pipeline. Shingre continued to demand an environmental remediation, and despite proof that he was not present when the spill occurred, including a bus ticket in his name and witnesses who were with him in Tena, Petroecuador pursued a criminal action against him, based on trumped-up charges that he had deliberately caused the spill on his property in order to obtain financial compensation. Shingre was eventually acquitted for lack of evidence, but the criminal proceeding caused substantial financial and other hardship to him and his family; his children, for example, missed a year of schooling because their father could not pay for books and other expenses.

On November 4, 2003, Shingre was shot and killed in Coca by a hired assassin. At the time, he was Coordinator of the Environmental Rights Office (*Oficina de Derecho Ambiental*, ODA), founded in Coca in 2001 to help oil field residents defend their environmental rights. According to press reports, the local prosecutor quickly ruled out the possibility that "any oil company" was involved in the murder; however, Shingre's family and friends suspect that the decision to limit the investigation was based on political considerations rather than legal ones. They have called for a full investigation and punishment of the murderers but are not confident of obtaining justice in Ecuador's legal and judicial system.[404] In addition, they are

404. *See Tres detenidos en el caso de la muerte de Angel Shingre* [*Three persons detained in the case of the death of Angel Shingre*], EL COMERCIO, Nov. 14, 2003; *La Familia Shingre pide seguir en la indagación* [*The Shingre Family asks to continue the investigation*], EL COMERCIO, Nov. 17, 2003. Two men have been

concerned that the murder could reinforce the culture of impunity in the oil fields and increase pressures on local residents to settle environmental grievances with oil companies quickly, on terms offered by the companies, which typically are limited to financial payments and which leave pollution unremedied.[405]

As for the general discussion of the administration of justice in the Country Report, the State Department begins by acknowledging efforts by Ecuador to reform the courts—the the most recent of which were highlighted by the *Aguinda* court—but is notably less sanguine than Judge Rakoff:

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prosecuted for the murder: the man who shot Shingre (who was on vacation from his job in the Block 16 oil fields at the time); and the man who drove the taxi used in the murder. Both men were convicted and sentenced to sixteen years in jail. Others were also apparently involved, as "intellectual authors," but it is not yet clear how many and, to date, no such charges have been brought. The assassin reportedly confessed to police that he was paid to kill Shingre and initially linked "*petroleras*" to the payment; however, he subsequently changed his story, to blame the family of Ulbio Vargas, a colonist and neighbor of Shingre, who had a long history of conflict with Shingre related to Vargas' support for activities by *petroleras* in their community. The term "*petroleras*" refers both to oil companies and people who work for them. According to a witness who was interviewed by the author on the day of the murder—but reportedly was not considered credible by the police—Shingre's dying words included, "the *petroleras* killed me." *See Acta de Versión* [Minutes of Formal Statement], Alfret Humberto Taquez España (Nov. 11, 2003); *Acta de Versión* [Minutes of Formal Statement], Nelson Norton Narvaez Méndez (Nov. 12, 2003). Shingre's family and friends do not belive that the murder was related to the *Aguinda* litigation, but strongly suspect that he was killed because of his work with local communities as an environmental defender.

405. According to the President of ODA, ODA has tried to convince national and local authorities to take legal action to enforce environmental law in the oil fields, including through judicial proceedings; however, despite numerous legal claims, no public official has been willing to pursue an enforcement action against an oil company. Moreover, officials have repeatedly tried to discourage residents who are injured by pollution from pursuing complaints, by encouraging—and even pressuring—them to settle claims and grievances on terms offered by the companies, and forgo not only legal proceedings but also prolonged negotiations that seek meaningful environmental remedies. Their basic message to people who complain is that although contamination exists, it is best not to get involved in legal proceedings because oil is the only source of wealth for the State, and it benefits many Ecuadorians; some also say that challenging oil companies would put their jobs at risk. Telephone Interview with Diocles Zambrano, President, Environmental Rights Office, in Coca, Ecuador (Mar. 7, 2004).

> The Constitution provides for an independent judiciary. In practice, however, the judiciary is susceptible to outside pressure. Despite efforts begun in 1992 to depoliticize and modernize the court system, the judiciary continues to operate slowly and inconsistently. Judges reportedly rendered decisions more quickly or more slowly depending on political pressure of the payment of bribes. However, delay is the norm . . . .[406]

A similar gap between constitutional ideals and political realities is reported for the legal ideal of equal protection. Despite longstanding prohibitions in Ecuador's Constitution against discrimination, and important new reforms in the 1998 Constitution that include protections for the rights of indigenous peoples, the Country Report states that "indigenous people" nonetheless "face significant discrimination."[407]

c. Inter-American Commission on Human Rights Report

The IACHR report similarly found that indigenous peoples suffer from discrimination in Ecuador and specifically noted that "a frequent complaint concerns treatment of indigenous inhabitants within the judicial system."[408] The Human Rights Commission included a recommendation in its report that "public officials, particularly those involved in the administration of justice and law enforcement, receive appropriate training to respect the rights of indigenous individuals, and appropriate supervision to ensure that public services are performed in a non-discriminatory manner."[409] Notwithstanding that evidence and allegations by plaintiffs' counsel of "particu-

406. Ecuador Country Report for Practices in 1999, *supra* note 381, at 6. R

407. *Id.* at 10; *see also id.* at 2 ("pervasive discrimination against women, indigenous people, and Afro-Ecuadorians also remain persistent problems").

408. IACHR Report on Ecuador, *supra* note 31, at 99. IACHR also affirmed that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states." *Id.* at 104 (quoting Yanomami Report, Resolution No. 12/85, Case No. 7615 (Brazil), March 5, 1985, printed in Annual Report of the IACHR 1984-85, OEA/Ser.L/V/II.66, doc. 10, rev.1 (Oct. 1, 1985), at considerandum, ¶ 9); *see also id.* at 115 ("special protections for indigenous peoples may be required for them to exercise their rights fully and equally . . . [and] to ensure their physical and cultural survival"). R

409. *Id.* at 115.

lar prejudice against indigenous people" in the judicial system,[410] the *Aguinda* court did not directly address the issue of discrimination against indigenous peoples in its opinion. Instead, the court cited affidavits by Texaco's attorneys and experts—and the absence of allegations in the record of corruption in pending lawsuits against multinational corporations—for the finding that "Ecuadorian courts do not give preferential treatment to multi-national companies like Texaco."[411] The court also noted in a footnote that the (then) Second Vice President of Ecuador's Congress is the leader of a political party that has "its primary support" from "[i]ndigenous groups."[412]

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410. Plaintiffs' Memorandum of Law Responsive to This Court's January 31, 2000 Memorandum Order, *supra* note 371, at 12-13.

411. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 544 (S.D.N.Y. 2001). This hairsplitting finding not only has limited support in the record and skirts the issue of discrimination against indigenous peoples, but also appears to ignore related evidence in the record that raises allegations of bias and corruption in judicial proceedings involving oil companies. For example, the decision by Joya de los Sachas to abandon its claim against Petroecuador in 1998 was based on the belief that superior courts, including the reorganized Supreme Court, would be biased in favor of the oil company. Sworn Statement by Mr. Luis Tobar Sánchez, *supra* note 340. *See also* **R**
E-mail Declaration by Isabela Figueróa Sabbandini to Cristóbal Bonifaz (Mar. 24, 2000), *in* Plaintiffs' Exhibits (Volume II) in Support of Plaintiffs' Reply Memorandum of Law in Further Response to This Court's January 31, 2000 Memorandum Order, *supra* note 340, Ex. 35 (alleging that a subsidiary **R**
of the U.S-based oil company ARCO was "aggressively violating," with impunity, an injunction prohibiting the company from attempting to negotiate with communities affiliated with the indigenous Shuar federation FIPSE without authorization by FIPSE; that ARCO did not participate in proceedings in the lower court, but subsequently appealed the injunction to the Tribunal of Constitutional Guarantees (TGC), which was required by statute to adjudicate the case within ten days, but five months had passed without a decision; and that a high level MEM official had stated privately that the injunction could make it difficult for ARCO to comply with timetables in its contract with Ecuador, but "the problems would be solved" because the judgment would be modified by TGC, and the Executive Branch "knew of decisions of the Court before they were pronounced"); Saltos Declaration, *supra* note 403, at 9 (describing the criminal prosecution of Angel Shingre, **R**
discussed above, as a "specific example of judicial impropriety"; also alleging widespread corruption and racism in the judicial system, and accusing judges of favoring oil companies generally).

412. *Aguinda*, 142 F. Supp. 2d at 546 n.2. *Cf.* Ecuador Country Report for Practices in 1999, *supra* note 381, at 12 ("Despite their growing political in- **R**

The IACHR report also concurred with the State Department's general description of systemic shortcomings in Ecuador's courts, and cited "pervasive delay" and "corruption" as problems that impede "the right to judicial protecion."[413] With specific regard to human rights in the oil fields, related to conditions of severe environmental pollution, IACHR reiterated that the "right to access judicial remedies is the fundamental guarantor of rights at the national level" and reported, with apparent concern, that "[i]ndividuals and NGOs have indicated to the Commission that, for various reasons, judicial remedies have not proven an effective means for individuals threatened by environmental pollution to obtain redress."[414] In notably strong language, IACHR further concluded:

> The norms of the inter-American human rights system neither prevent nor discourage development; rather, they require that development take place under conditions that respect and ensure the human rights of the individuals affected. As set forth in the Declaration of Principles of the Summit of the Americas: "Social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly."
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> As the Commission observed at the conclusion of its observation in loco [which included a visit to the area

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fluence . . . Indians continue to suffer discrimination at many levels of society.").

413. IACHR Report on Ecuador, *supra* note 31, at ii-iii (submitted to the court *in* Plaintiffs' (New) Exhibits in Support of Their Memorandum of Law Responsive to This Court's January 31, Memorandum Order, *supra* note 371, at Ex. 3) (also citing "scarcity of resources" as a contributing factor). *See also id.* ch. III. Like the State Department, IACHR was less sanguine than Judge Rakoff about efforts to reform the courts. The report briefly summarized reforms undertaken in 1992 and 1996, and noted that new proposals were under study, but stated: "Nonetheless, serious problems remain and continue to impair the ability of individuals to exercise their right to judicial protection." *Id.* at 28. The right to judicial protection is recognized in Inter-American human rights law in the American Convention on Human Rights, Nov. 22 1969, 1144 U.N.T.S. 143 (ratified by Ecuador in 1977) at arts. 8 and 25, and the American Declaration of the Rights and Duties of Man, arts. II, XVII, and XVIII, O.A.S. Official Rec., OEA/ser.L./V./II.23, doc. 21 rev. 6 (1948). **R** **R**

414. IACHR Report on Ecuador, *supra* note 31, at 94. **R**

> developed by Texaco]: "Decontamination is needed to correct mistakes that ought never to have happened." Both the State and the companies conducting oil exploitation activities are responsible for such anomalies, and both should be responsible for correcting them. It is the duty of the State to ensure that they are corrected.[415]

Recommendations by the international human rights body included the implementation of measures "to ensure that access to justice is more fully afforded to the people of the interior [Amazon region]," as well as measures to remedy and prevent pollution in the oil fields and ensure that all persons have the

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415. *Id.* The chapter on human rights in the oil fields was not included in plaintiffs' submissions to the court, but included a discussion of links between human rights and the environment, and a number of important findings. For example, it reported that "[t]he information received and analyzed by the Commission, as well as the data and insights gathered during its on site observation, have largely substantiated the concerns voiced by the affected population." *Id.* at 78. Local concerns reported by IACHR include severe pollution that contaminates water supplies, causes health problems and risks, and hinders the ability of affected populations to feed their families, and the failure of Ecuador's government to regulate and supervise activities by both Petroecuador and its licensee companies. *Id.* at 79-80. IACHR also noted that "in recent years, the Government has taken certain legislative and policy measures to address the effects of oil development"; however, "notwithstanding the existence of an emerging corpus of environmental regulation, little implementation or enforcement has been taken." *Id.* at 84-85. The analysis of relevant human rights law stated that "the right to have one's life respected is not . . . limited to protection against arbitrary killing." *Id.* at 88. Among other conclusions, IACHR emphasized the importance of access to judicial remedies:

> Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being. In the context of the situation under study, protection of the right to life and physical integrity may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights. The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse . . . . The right to access judicial remedies is the fundamental guarantor of rights at the national level.

Id. at 92-93.

right to participate in decisions that concern their environment.[416]

Clearly, then, both the cases in the State Department Country Report and the IACHR's analysis teach that, rather than being limited to an insular class of cases, human rights violations arise in Ecuador under a variety of scenarios, with consequences that affect a wide range of rights. A common thread running through them is the failure of judicial and other public officials to investigate, prosecute, and punish wrongdoers. This failure of the legal and judicial system compounds the rights violations, and contributes to a culture of impunity, wherein abuses of power and violations of the law are commonly tolerated if the perpetrators have enough economic and/or political power. Justice is selective, and it appears that only the poor and the powerless must comply with the law.

In Ecuador, the culture of impunity is reflected in a popular saying, "*la ley es para los de poncho*, the law is for those with a poncho," a reference to indigenous populations in the Andes region, who are *not* above the law. In Amazonia, oil development has reflected and reinforced this culture of impunity, plainly manifest in the comment reported *supra*, Texaco (and Petroecuador) "*manda*, give the orders."[417] Beginning with Texaco and continuing to this day, the development of Amazon crude has been characterized by gross inequities in economic and political power; abuse of power and assertions of raw power;[418] legal inequities and disregard for the rights of indigenous peoples and the poor; the absence of environmental regulation and accountability; callousness toward the welfare of local populations and the rainforest environment; and a markedly disproportionate distribution of the burdens and benefits of development.

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416. *Id.* at 94.

417. *See supra* Part II.C.

418. Recent examples of the assertion of raw power, without any apparent basis in the law (by the post-Texaco generation of oil companies) include a number of incidents in which companies confiscated film and/or water samples collected for chemical analysis from oil field residents and environmental investigators, at locations outside fenced facilities. A common example is the operation of roadblocks by private security firms hired by oil companies. *See, e.g*, Kimerling, *Rights, Responsibilities, and Realities*, *supra* note 64, at 360. R

d. Futher Evidence in the Record

In addition to the human rights reports by the State Department and IACHR, further evidence in the record similarly shows that Ecuador's legal and judicial systems are characterized by serious and systemic deficiencies that are not limited to "cases involving confrontations between the police and political protestors." For example, the State Department's submission included a copy of the most recently published Country Commercial Guide for Ecuador. The guide is prepared annually by the U.S. Embassy with assistance from several U.S. government agencies, "to provide guidance on the commercial environment in the host nation."[419] It describes Ecuador's judicial system as "dysfunctional," and states that long term reform is "desperately needed."[420] Another section echoes the language in the State Department human rights reports that prompted Judge Rakoff to seek additional information about Ecuador's courts, stating: "[t]he judiciary is independent but suffers from politicization and from inefficiency and corruption."[421] Finally, the guide cautions investors about corruption in the courts and other public institutions, and the related gap between paper laws and legal realities:

> Ecuador has laws and regulations to combat official corruption, but they are rarely enforced. Illicit payments for official favors and theft of public funds take place frequently . . . . Dispute settlement procedures are made more difficult by a lack of transparency in the court system and the openness of many judges to bribery . . . . Government officials and candidates for office often make an issue of corruption and try to expose the misdeeds of political opponents. Politically motivated corruption scandals are a feature of every presidential administration and

419. Dep't of State Letter Submission, *supra* note 371. The State Department submitted the most recent guides for Ecuador and Peru, "in an effort to be as responsive as we can to the judge's inquiry." *Id.* The submission explained that the guides "contain brief sections describing the court system and analyzing corruption issues," and directed the Court's attention to the relevant pages. *Id.* R

420. Ecuador Commercial Guide, *supra* note 285, ch. II.A., at 3, *in* Dep't of State Letter Submission, *supra* note 371, tab C. The report describes Ecuador's public sector generally as "grossly inefficient." *Id.* at 2. R R

421. *Id.* ch. III.C, at 5.

> featured prominently in the ouster from office of vice president Alberto Dahik in 1995 and president Abdalá Bucaram in 1997 and the preventive detention of former president Fabián Alarcón in 1999. High-profile cases rarely have led to convictions since realignment of political forces often results in amnesties.[422]

In addition to providing evidence of widespread corruption, the reference in the commercial guide to political influence in judicial proceedings related to high profile corruption scandals also casts doubt on Judge Rakoff's optimistic premise that "public scrutiny in Ecuador" would seen to render "even the possibility" of "corruption or undue influence . . . exceedingly remote" in lawsuits by *Aguinda* plaintiffs.[423] As a general matter, the cautionary notes to investors—for activities in a country that links economic policy to foreign investment, enjoys strong economic and political ties with the United States, and where investment is generally encouraged by the authors of the guide—as well as the description of Ecuador's judicial system as "dysfunctional," are consistent with the clarification in the State Department submission to the *Aguinda* court that deficiencies in the administration of justice described in the

422. *Id.* ch. VII.G, at 7-8; *see also id.* ch. VII.L., at 13-14 (warning investors that a "cumbersome and corrupt legal system may make it difficult to enforce property and concession rights" and "Ecuadorians involved in business disputes can sometimes arrange for their opponents, including foreigners, to be jailed pending resolution of the disputes"); *id.* ch. VII.C., at 4.

423. *See Aguinda*, 142 F. Supp. 2d at 545; *see also* Texaco Inc.'s Reply Memorandum of Law in Response to the Court's Memorandum Order of January 31, 2000, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Apr. 24, 2000) at 3-7. Although public scrutiny and media interest in litigation can help promote fairness in judicial proceedings, primarily by influencing the politics related to a case, that influence does not appear to be sufficient to overcome other political and economic influences when the stakes are high and/or interested parties enjoy substantial economic and/or political power. Each of the high profile corruption cases cited in the guide prompted considerable public attention and outrage in Ecuador; despite that, related legal proceedings were reportedly tainted by external influences. A few other cases that demonstrate the failure of public scrutiny and outrage to ensure the impartial administration of justice were reported in plaintiffs' submissions; the most prominent relate to a banking scandal and series of bank closings that wiped out hundreds of millions of dollars of depositors' funds, including many life savings, amidst allegations of fraud and corruption. *See* Saltos Declaration, *supra* note 403, at 5-7. R

human rights reports reflect systemic problems rather than a distinct, aberrant class of cases.

In addition to evidence from U.S. government sources and IACHR, a national plan adopted by the government of Ecuador in 1999 to combat corruption (National Plan) also shows that deficiencies in the judicial and legal systems are not limited to isolated cases, and that, instead, they reflect broader, systemic problems in politics, governance, and public institutions. Entitled "Toward Achieving National Honesty," the National Plan describes corruption as "systematized"—a "thousand-faced monster" that affects "all" Ecuadorian and foreign residents, with "pervasive effects that have not only placed important obstacles to the consolidation of democracy but have, beyond that point, threatened democratic stability."[424] The need for long-term systemic reform is also clearly appreciated, in order to combat corruption in politics, state agencies (including Petroecuador), and the courts.[425]

The National Plan attributes an "accelerated escalation of corruption" in Ecuador to both public and private actors and expresses concern about the corrosive social impact of abuse of power and corruption in public administration, and the related loss of ethical values in Ecuadorian society.[426] It explicitly acknowledges "distrust" of the judicial system, and identifies "[b]iased justice, lack of credibility on its performance, [and] political appointees among judges" as causes of corrup-

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424. Ecuador, Anti-Corruption National Plan, Toward Achieving National Honesty (1999), *in* Plaintiffs' (New) Exhibits in Support of their Memorandum of Law Responsive to this Court's January 31, 2000 Memorandum Order, *supra* note 371, Ex. 6, at 1, 3, 7, 9. The plan also describes corruption in Ecuador as a "lethal wound which impairs the . . . conditions which are at the core of democracy." *Id* at 7. **R**

425. *Id.* at 9-10, 15-24.

426. *See id.* at 5 ("The private sector's complicity has caused the institutionalization of administrative corruption and the fact that it has achieved alarming levels. Alarming is the fact that such common corruption is generating a spiral of social disintegration."); *id.* at 7-8 ("Our society has been excessively losing the cultivation of ethical values. It is so commonplace nowadays to accept irregularity as the norm with which one has to live side by side."); *id.* at 18, 22. The plan also appears to recognize a role by foreign businesses in promoting corruption, by calling for the punishment of "external bribery" as strictly as "internal bribery among first-world countries." *Id.* at 14.

tion.[427] Among the "most visible effects of corruption" identified in the National Plan are "[u]nfairness and inequality in judicial resolutions" and "[c]orruption accepted as a way of life and as a synonym of success; immorality in the means used to acquire wealth."[428] Finally, in stark contrast to the *Aguinda* court's narrow view of the ambit of shortcomings in Ecuador's legal and judicial systems, the government document acknowledges an "institutional and political crisis" in the nation; attributes it "to a great degree, to the way in which corruption has undermined the efficiency and credibility" of public institutions and politics; and observes that "ethical values have deteriorated to such magnitude that they are constraining people's participation and rendering them the passive and powerless spectators of corruption."[429]

Although the *Aguinda* court's focus on the litigation record in Ecuador is understandable, as is its preference to avoid reliance on generalized allegations of corruption in favor of a particularized inquiry into litigation against corporations like the defendant, legal precedents in Ecuador to support the

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427. *Id.* at 12 (also citing the "lack of independent controls" and "scanty professionalism"). *See also id.* at 10-11 ("unscrupulous politicians have intervened in the designation" of judicial and other authorities, "limiting in this way their objectiveness and independence to the extreme that these same organizations have been 'used' to combat political opponents and to absolve the corruption of their benefactors"). The main problems identified in the administration of justice are:

> Slow processing of lawsuits which are based on written procedures and which must fulfill outdated, contradictory and unused legal dispositions . . . [which also] generate confusion. Manual systems for [dockets] . . . ; lack of independent action on the part of magistrates and judges who have, in some instances, acted under the influence exerted by several powerful political and economic groups, including as of late, some professional law offices dealing with singularly important cases; common practices of concussion and bribery on the part of officials and employees within the juridical system. . .; the lack of timely, unrestricted and transparent information accessible to all interested parties; and the high and arbitrary costs implied in initiating legal actions and maintaining lawsuits . . . .

Id. at 19-20.

428. *Id.* at 12-13. Additional effects include "political manipulation . . . in the selection of judges"; "[l]ack of confidence and of respect to orderliness and the laws"; and "[i]nternal and external deterioration of the government's image, with the ensuing negative impact on its leadership." *Id.*

429. *Id.* at 23.

court's sanguine view of litigation there simply do not exist. As discussed above, the finding by the court that several plaintiffs have recovered judgments against Texaco Petroleum and Petroecuador for claims arising out of the facts alleged by plaintiffs in *Aguinda* is clearly erroneous. The related finding that Ecuadorian oil field workers have won personal injury lawsuits against Texaco Petroleum based on claims of alleged negligence is not supported by the litigation record and is contradicted by the historical record. Finally, the finding that the State Department's description of generalized deficiencies in Ecuador's legal and judicial systems is largely limited to cases involving confrontations between the police and political protestors is also erroneous, and suggests a lack of candor by the court.

B. *Private and Public Interest Factors—Degree of Deference and Material Facts*

After determining that Texaco had carried its burden of proving that an adequate alternative forum exists, the *Aguinda* court then considered whether the defendant had also demonstrated that "the ordinarily strong presumption favoring plaintiff's chosen forum is countered by the private and public interest factors set out [by the Supreme Court] in *Gilbert*, which weigh so heavily in favor of the foreign forum that they overcome the presumption for plaintiffs choice of forum."[430] The court noted that in some circumstances, the choice of forum by a foreign plaintiff "deserves less deference";[431] however, the Second Circuit does not apply that standard "when a treaty with a foreign nation accords its nationals access to our courts equivalent to that provided to American citizens."[432] In the case of Ecuador, the court found that "it appears" that such a treaty exists, and assumed *arguendo* that the *Aguinda* plaintiffs' choice of forum carried "a strong presumption of validity that may only be overcome by a balance of relevant factors that heavily favors dismissal . . . ."[433]

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430. *Aguinda*, 142 F. Supp. 2d at 547 (quoting DiRienzo v. Philip Servs. Corp., 232 F.3d 49, 56-57 (2d Cir. 2000)).

431. *Id.* (quoting Piper Aircraft v. Reyno, 454 U.S. 235, 256 (1981)).

432. *Id.* (quoting Blanco v. Banco Industrial de Venezuela, *S.A.*, 997 F.2d 974, 981 (2d Cir.1993)).

433. *Id.* at 547.

After determining the proper degree of deference to plaintiffs' choice of forum, however, the court's analysis of private and public interest factors appeared to give little consideration to the interests and allegations that would support that choice. Instead, the analysis concentrated on the disadvantages of litigation in the plaintiffs' chosen forum and the advantages of litigation in the defendant's preferred forum. In addition, the court repeatedly relied on Texaco's version of disputed facts relating to decisionmaking and control of the operations; as a result, the analysis was colored by factual assumptions that—while not fully developed in the litigation record—are clearly contradicted by the historical record and the portrait of the operations cultivated by Texaco prior to the lawsuit.

Unlike Judge Broderick, Judge Rakoff did not convert Texaco's motions to dismiss into motions for summary judgment.[434] As a result, the court was not required to resolve disputed factual issues in favor of the plaintiffs, as the nonmoving party, or even to view factual evidence and ambiguities in the light most favorable to them. Counsel for the plaintiffs, however, did not raise that issue—by arguing reliance or law of the case—either during proceedings before Judge Rakoff or on appeal.[435]

Some of the facts used by Judge Rakoff to support the court's legal analysis were uncontested. For example, the court noted that there were no allegations of injury to persons, property, or commerce in the United States. Instead, plaintiffs alleged that "they 'have or will suffer property damage, personal injuries, and increased risk of disease'" in Ecuador (and Peru).[436] The court also noted that the government of Ecuador, through Petroecuador, acquired a minority stake in the Consortium in 1974, became the operator in 1990, and acquired full ownership in 1992, and that no member of the

434. *See Aguinda*, 1994 WL 142006, at *1; *Aguinda,* 850 F. Supp. 282, 284.

435. For a comparison of summary judgment motions with other pretrial motions see 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2713 (3d ed. 1998). *See also In re* Complaint of Am. President Lines, Ltd., 890 F. Supp. 308, 314 (S.D.N.Y. 1995) (discussing when a motion for forum non conveniens may proceed as one for summary judgment).

436. *Aguinda*, 142 F. Supp. 2d at 537 (quoting *Aguinda* Complaint, *supra* note 169, ¶ 11). R

Consortium (Texaco Petroleum or Ecuador) was a party to the suit.[437]

Other facts, however, were in dispute. One significant area of dispute—intertwined with the merits of the case—related to control of the operations, and the litigation record included contending allegations by Texaco and the plaintiffs. The plaintiffs alleged that the harmful operations were "directed, designed, controlled and conceived" by Texaco in the United States[438] and that the government of Ecuador relied on Texaco to transfer responsible oil field technology and did not question technical decisions made by the company.[439] The defendant alleged that Ecuador, as "the regulator and majority owner" of the Consortium, played the dominant role in designing and controlling the challenged operations, including strict environmental supervision;[440] that no one in Texaco Inc. or the United States staffed the operations or made any relevant operational decisions; and that Texaco Inc's only interest—and role—was its investment in the minority share of a fourth tier subsidiary, Texaco Petroleum.[441]

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437. *Id.*

438. *Aguinda* Complaint, *supra* note 169, ¶ 28; *see also id.* ¶ 2. R

439. *See, e.g.*, Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint, Aguinda v. Texaco, Inc., No. 93 Civ.7527, (S.D.N.Y. Jan. 11, 1999) at 3-6.

440. Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, *supra* note 190, at 8. R

441. *See, e.g.*, *id.* at 1, 7-8. Texaco also alleged that the operations took place on lands that are owned by Ecuador, and that "virtually all" land in the Amazon region, including lands "for which plaintiffs demand money damages and equitable relief," are owned by the State. *Id.* at 1, 11. Those allegations are not true; as discussed *supra* in Part II.B, Ecuador has granted legal (surface) land titles to indigenous peoples and colonists, and by the time the litigation began, most affected lands—including locations where facilities are sited—were no longer claimed by the State. Plaintiffs' counsel, however, did not contest those allegations.

Texaco's contract with Ecuador provided that "necessary" land expropriations and easements "will be effectuated" by MEM; however, to lawfully expropriate or establish easements, the government must follow special procedures that include notification of affected landowners and compensation. *See* 1973 Production Contract, *supra* note 60, at cl. 43.1; *Codigo de Procedimiento Civil* [Code of Civil Procedure], art. 815, R.O. No. 687 (May 18, 1987), amended by the Law of Cassation, R.O. No. 192 (May 19, 1993); Ecuador 1979 Constitution, *supra* note 95, at tit. III, sec. II, art. 47; Ecuador 1998 Constitution, *supra* note 57, at tit. III, ch. IV, art. 33. To date, the au- R R R

While not determinative, in and of itself, of legal questions in the forum non conveniens determination, the factual issue of how decisions were made (i.e., by whom and where) about the oil field technology and practices that caused the pollution and gave rise to plaintiffs' claims is clearly a material element of the court's analysis and decision to dismiss the case. The assertion—treated as fact by the court—that Ecuador and Ecuadorians had virtually exclusive control over the relevant decisions and activities, and that neither employees of Texaco nor any one else operating out of the United States played a meaningful role in designing, guiding, directing, or assisting the operations, is a recurring theme in the opinion. It is evident in the court's introductory statements and synthesis of the holding[442] and plays a prominent—and arguably pre-

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thor has not found any evidence to indicate that lands were expropriated for use by the Consortium. In submissions to the court, Texaco based its sweeping allegations of land ownership on Ecuador's Law of *Tierras Baldías* (Empty Lands), which pre-dated most land titles to indigenous peoples but served as a basis—along with the Law of Colonization of the Amazon Region—for the award of land titles to colonists in the putative class. *See*, Kimerling, *Disregarding Environmental Law*, *supra* note 77, at 856; IACHR Report on Ecuador, **R**
supra note 31, at 102. Apparently, some operations began before land titles **R**
were awarded (but while indigenous peoples and some settlers had property rights under Ecuadorian law as land possessors); other operations were carried out on lands titled to residents but without securing permission from the landowners. The human rights report by IACHR states that Ecuador informed the Commission in 1997 that "the processes of 'directed colonization,' and the consideration of large tracts of the Amazon basin as '*tierras baldías*' may be considered superceded," and the policy of land distribution is "now based on free market principles of the economic system." IACHR Report on Ecuador, *supra* note 31, at 100. *See also id.* at 113 (reporting that **R**
three million hectares in the Amazon region had been titled indigenous peoples by 1994); *id.* at 107 (reporting recognition of 679,130 hectares in favor of the Huaorani by 1990); *id.* at 111 (Texaco-Gulf Consortium built a road through a 9,000-acre area titled to the Cofán at the time). In the 1996 dismissal of *Aguinda*, the court based the decision to dismiss for failure to join Ecuador and Petroecuador in part on the misconception that Ecuador "owns much, if not all, of the affected lands." Aguinda v. Texaco, Inc., 945 F. Supp. 625, 627 (S.D.N.Y. 1996), *reconsid. denied*, 175 F.R.D. 50 (S.D.N.Y. 1997), *vacated sub nom.*, Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998). The 2001 dismissal asserts that the challenged practices "were initiated several decades ago, on lands owned by the Republic of Ecuador." Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001).

442. *See Aguinda,* 142 F. Supp. 2d at 537. (stating, "[b]ecause Texaco has carried its burden . . . and because the record establishes overwhelmingly that these cases have everything to do with Ecuador and nothing to do with

eminent—role in the court's consideration of both private and public interest factors.

C. *Consideration of Private Interest Factors*

The court's analysis of private interest factors begins by identifying a number of considerations that "weigh heavily in favor of an Ecuadorian forum."[443] An Ecuadorian court could view the premises; the plaintiffs reside in Ecuador or nearby areas of Peru; their injuries were sustained there; "all" relevant property and medical records are located there; "virtually all witnesses to the manner in which such injuries occurred reside there"; and according to an "essentially unrebutted showing" by Texaco, the records of decisions taken by the Consortium are also located there, along with "the primary evidence supporting defendant's defenses including evidence bearing on the key roles of Petroecuador and . . . Ecuador."[444]

1. *Witnesses and the Nexus between the Operations and the United States*

The factors cited by the court are clearly relevant, and many are undisputed. However, the assertion that "virtually all witnesses to the manner" in which the injuries occurred reside in Ecuador appears exaggerated because a number of expatriate (non-Ecuadorian) oil field workers witnessed relevant operations over the years, and few likely reside in Ecuador. Those expatriate witnesses include senior Texaco Petroleum personnel and employees of other subsidiaries and departments of Texaco Inc., as well as employees of oil field services subcontractors, who worked temporarily in Ecuador, either for a period of years or for the duration of a specific project or assignment. Their role in the operations not only casts doubt on the court's conclusion that there are virtually no witnesses in the United States, but also provides evidence that the opera-

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the United States, the Court grants the motion and dismisses the cases on the ground of forum non conveniens"; also stating that the Government of Ecuador, "either directly or through . . . PetroEcuador, regulated the Consortium from the outset . . . . Texaco's only interest consisted of its indirect investment in Texaco Petroleum Company . . . [a] fourth-tier subsidiary . . . , which initially operated the petroleum concession . . . and held varying interests in the Consortium until 1992.").

443. *Id.* at 548.

444. *Id.*

tions were part of an international corporate enterprise, managed from the United States, rather than an isolated Ecuadorian operation. Similarly, although considerable documentary evidence is undoubtedly located in Ecuador, the finding by the court that "the documentary and testimonial evidence of the allegedly negligent acts and decisions . . . resides in Ecuador"[445] appears to rest on the assumption that no relevant decisions, direction, or other material acts or omissions occurred in the United States.

As a general matter, many—sometimes most—operations in the oil fields (except routine field activities, administration and management) are carried out by subcontractors who are hired and supervised by the company operating the field. These operations can include a number of activities relevant to the plaintiffs' claims in *Aguinda*, such as well drilling and workovers, which generate significant quantities of toxic wastes, and pipeline and other production facility design and construction. Design and construction projects have direct and immediate environmental impacts, in addition to establishing basic environmental standards for future operations, including both standards and practices for ongoing waste management at production stations and well sites, and acceptable levels of risk for accidental spills from pipelines and tanks.

As a result, environmental decisionmaking in the oil fields is integrally related to design decisions which, in turn, depend on engineering and budget decisions. Although proper implementation and operation, and ongoing maintenance, monitoring, and corrective action throughout the life of the operations are also essential elements of environmental protection, basic standards and practices are set during the design phase of a project, regardless of whether a new, retrofitted, or reconstructed facility is involved. The failure to integrate environmental considerations into project planning and design constitutes a fateful omission that can be expected to cause significant environmental consequences in the field.[446]

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445. *Id.* (citing affidavit by Daniel J. King, attorney for Texaco). In addition, environmental torts are commonly litigated in U.S. courts without physically viewing the premises.

446. According to a number of expatriate oil field workers who have spoken with the author (in Ecuador and Peru) about environmental decisionmaking and practices, operations personnel in the field "rule the jungle,"

The litigation record developed by the plaintiffs is lean but not empty. It shows considerable attention by Texaco to financial details, including clear procedures requiring multiple approvals in the United States for Texaco Petroleum's annual budget, off-budget expenditures and contracts with subcontractors,[447] and use of expatriate personnel—U.S. nation-

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but the final word in determining levels of environmental protection rests with the "budget-makers."

447. *See, e.g.*, Contract Approval Check List, Apr. 25, 1973 (Bischoff Ex.2), *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y), vol. 2, Ex. 31 (instructions for approvals of contracts); Texaco, Memorandum from Bischoff (Coral Gables) to Palmer (New York), Jan. 18, 1979 (Bischoff Ex. 14) (requesting approval for $900 expenditure to purchase two calculators) and Texaco Petroleum, Memorandum from Martinez (Quito) to Bischoff (Coral Gables), Feb. 14, 1978 (Bischoff Ex. 16) (requesting approval to purchase a file cabinet estimated to cost $65), *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, vol. 2, Ex. 30; Texaco, Letter from R.B. Palmer (New York) to John McKinley (New York), Sept. 13, 1976 (requesting approval for the "Ecuadorian Division" to solicit bids for subcontract for construction of well roads and locations (Shields Ex. 17) and Texaco, Letter from R.B. Palmer (New York) to John K. McKinley (New York), Dec. 28, 1996 (Shields Ex. 18) (requesting permission for the "Ecuadorian Division" to enter into contract for construction of well roads and locations) and Telegram from Shields (Coral Gables) to Texpet (Quito), Jan. 3, 1977 (Shields Ex. 19) (advising Texpet that approval has been granted to enter contract for construction of well roads and locations), *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, vol. 2, Ex. 32; Texaco, Five Page Document from Savage to Bischoff, Mar. 28, 1989 (Bischoff Ex. 7) and Texaco, Letter from W.K. Savage to Maurice F. Granville, (White Plains) Mar. 24, 1980 (Bischoff Ex. 44), *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, vol. 2, Ex. 34 (distribution checklist and request for approval to solicit bids for contract to provide drilling rig); Texaco, Estimate No. 816 submitted to Mr. F.A. Seamans for R.C. Shields for approval (Coral Gables and New York), Sept. 24, 1974 (Shields Ex. 4), *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, vol. 3, Ex. 35 (request for approval to drill infield development well; retained in New York, and Texpet, Quito advised by Coral Gables not to begin any work or incur expenditures until "you hear from this office"); Bischoff Deposition Excerpts, *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, vol. 2, Ex. 24; Memorandum from R.J. Evans (Houston) to Roland M. Routier (New York), July 27, 1973 (Bischoff Ex. 10), *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, vol. 3, Ex. 46 (requesting "Executive approval" to enter into contract for pipeline construction, and inform-

als—in Texaco Petroleum's Ecuador office to supervise accounting.[448] Although documentary evidence about relevant engineering and design decisions is limited, an affidavit by General René Vargas Pazzos, a key petroleum policymaker in Ecuador's government and national oil company from 1973-1977, when crucial start-up decisions were made,[449] states that "all [of] the blueprints and plans for the perforation of wells, the construction of oil pipelines and production stations had legends on then which indicated that they originated in the United States."[450] The affidavit further states that the U.S.-

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ing that the "Engineering Advisory Committee recommended to the Management Committee that the contract be awarded" and the "Management Committee has concurred"); and Memorandum from R.M. Bischoff (Coral Gables) to R.W. Olbrich (Houston), Jul. 30, 1973 (Bischoff Ex. 23), *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, vol. 3, Ex. 48 (including intructions to bidders for pipeline construction contract, requiring bids to be written in English and submitted to and, "if necessary, clarified" with personnel in Houston, and providing that the contract "shall be interpreted in accordance with" New York state law).

448. *See* Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, Aguinda v. Texaco Inc., No. 93 Civ. 7527 (S.D.N.Y. Feb. 18, 1994), at 36 (in response to plaintiffs' interrogatories, ten out of thirteen individuals listed as Texaco Petroleum "accounting personnel" are U.S. nationals, while only two are Ecuadorian).

449. Basic standards and practices for waste management at well sites and production stations were established in the initial years of the operations and remained unchanged throughout Texaco's tenure in Ecuador, even at newer facilities. The failure of Texaco to improve environmental protection during that period is a significant omission that evinces an international double standard of environmental protection. For example, as discussed above, U.S. EPA has generally prohibited the discharge of onshore exploration and production wastes into waters of the United States since 1979; in Ecuador, when Texaco turned over the operations to Petroecuador in 1990, they discharged more than 3.2 million gallons of produced water wastes into the environment every day. *See supra* notes 117-118 and accompanying text. R

450. Statement of General René Vargas Pazzos, ¶ 12 (Nov. 22, 1995) [hereinafter Vargas Affidavit], *in* Exhibits in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss the Complaint, *supra* note 337, at Ex. R 14. In 1973, Vargas was assigned by the Military Government to work in the new national oil company, as Administrative Manager; in 1974, he was promoted to General Manager. In 1976-1977, he was Minister of Natural Resources (now Minister of Energy and Mines). *Id.* ¶¶ 2, 3, 5. As a result of those duties, Vargas had "complete inside knowledge of the roles" of the government and Petroecuador during that period. *See id.* ¶¶ 4, 7. Subsequently, he continued to follow developments in the oil industry and in

based company "was constantly bringing technicians" to Ecuador to provide guidance and advice in the field.[451]

In addition, Vargas testified in the affidavit that officials in the government and Petroecuador assumed that Texaco was using "first rate technology" in Ecuador—the same technology used by Texaco and other international companies in the United States and around the world.[452] "No one" in the government or Petroecuador "ever questioned" Texaco's technical decisions and practices, including environmental practices, because they did not have the knowledge to do so. As a result, Ecuador's participation in the operations was limited to control of "sales" and production rates, and regulation was limited to production rates, pricing, and profits.[453] Finally, Vargas testified that although Ecuador signed the production contract with Texaco's subsidiary in Coral Gables, it was "completely clear" to the government that "it was the parent company, Texaco Inc., which would be providing its experience in such an important development in Ecuador."[454]

Vargas's basic allegations—that technical designs and practices, including environmental practices, were brought to Ecuador from the United States by the U.S.-based multinational and that Ecuadorian officials did not have sufficient knowledge to question the company's technology-related designs, decisions, and practices—are supported by other affidavits in the record. Former Texaco Petroleum employee Galo Troya stated in an affidavit that all "instructions" for company

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1984, he became a Four-Star General and Commander in Chief of the Armed Forces. *Id.* ¶¶ 2, 4. An interview with General Vargas is cited *supra* in Part III.C. In the interview his recollections were consistent with the affidavit; in addition, he expressed remorse for the State's treatment of indigenous peoples in Amazonia.

451. *Id.* ¶ 16. The affidavit also states that Ecuadorian nationals held "secondary positions" in Texaco Petroleum, while "administrative positions of importance . . . were occupied by North American Citizens." *Id.*

452. *Id.* ¶¶ 13, 14, 21.

453. *Id.* ¶¶ 13-21. The affidavit states that the "only time technical discrepancies were generated" was when an independent financial audit found that cathodic protection had not been installed during construction of the Trans-Ecuadorian Pipeline, even though Texaco apparently "claimed" it as a $40 million expense. *Id.* ¶ 17. Those allegations have environmental as well as financial and ethical implications; cathodic protection is commonly used to mitigate corrosion in pipelines and thereby reduce the risk of spills. *Id.*

454. *Id.* ¶ 9; *see also id.* ¶¶ 19, 21.

personnel were initially written in English, and, as a result, when Ecuadorian workers organized a union in 1973, "one of the first requests" made by the union to the company was to "send us all the instructions translated into Spanish."[455] Manuel Navarro, who worked in MEM and CEPE in the 1980s and was the founding chief of Petroecuador's environmental unit—established in 1989 when CEPE was reorganized into Petroecuador—testified in a written declaration that, as the operator, Texaco "designed, built and managed" all production and transportation facilities belonging to the Consortium.[456] He further stated that, as the operator that pioneered oil development in Ecuador, Texaco "transferred its technology" to Petroecuador and "trained national technicians"—without any environmental considerations—and was not subject to environmental regulation by the Ecuadorian authorities because of their lack of awareness.[457] Margarita Yépez, who worked as

455. Oath of Mr. Galo Troya (Jan. 26, 1996), ¶ 7, *in* Plaintiffs' Previously Submitted Exhibits in Support of Their Memorandum of Law Responsive to This Court's January 31, 2000 Memorandum Order, *supra* note 65, at Ex. C. Troya worked for the company in 1970-1974. His affidavit also states that the oil field technology was "created and put into practice" by Texaco, under the direction of employees who were U.S. nationals; and that no one in Ecuador was able "to have any opinion or to contradict any action" by those employees because they did not have "any knowledge of the technology for extracting petroleum" at that time. *Id.* ¶ 6. R

456. Navarro Declaration, *supra* note 65, ¶¶ 1-2 (copy resubmitted *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, *supra* note 447, at Ex. 40; and *in* Plaintiffs' Previously Submitted Exhibits in Support of Their Memorandum of Law Responsive to This Court's January 31, 2000 Memorandum Order, *supra* note 65, at Ex. P). R R

457. *Id.* ¶¶ 3-4; *see also* Oath Given by Luis Arturo Araujo (Jan. 26, 1996), *in* Plaintiffs' Previously Submitted Exhibits in Support of Their Memorandum of Law Responsive to This Court's January 31, 2000 Memorandum Order, *supra* note 65, at Ex. E. Araujo, an Ecuadorian soldier and personal assistant to seven Armed Forces officers who were based in the Amazon and served as the senior contact between Texaco and the government in 1968-1974, concurred with many of Vargas' basic allegations. He declared that: no one in the government or Armed Forces had sufficient knowledge at the time to question Texaco's expertise; the government permitted the company "to introduce whatever technology it deemed adequate"; all decisions were made by senior Texaco employees who "frequently came" from the United States; and government representatives involved in the operations did not realize that the waste management practices were harmful to human health and the environment. *Id.* ¶¶ 4, 7-18. R

a social worker for Texaco Petroleum from 1973-1989, testified in a written declaration that the company's Ecuadorian personnel were trained by the employer and were not "warned" about risks to human health or the environment, or given "instructions" for environmental protection. Indeed, they were so "unaware of environmental damage" at the time that "when oil spills took place (and they were not rare)," employees—often with the knowledge of senior managers—"covered up the facts . . . [because they] were worried about the economic consequences of production losses for the company and the Ecuadorian state."[458] Yépez also testified that the operations were closely supervised by U.S.-based personnel in Texaco's Latin America/West Africa Division.[459]

The litigation record also includes significant, albeit incomplete, documentary evidence of participation by expatriate pipeline engineers and other personnel from specialized departments and subsidiaries of the parent company, who were based in the United States but worked on particular projects or assignments related to the operations in Ecuador when the need arose.[460] For example, the Trans-Ecuadorian

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458. Yépez Declaration, *supra* note 73, ¶ 7, at 3 (copy resubmitted in Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, *supra* note 447, at Ex. 27; and Exhibits in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss the Complaint, *supra* note 337, at Ex. 8.) Yépez also attested to Texaco's political influence. *Id.* ¶ 6, at 3. **R** **R** **R**

459. *See id.* ¶ 2, at 1-2; *supra* note 83 and accompanying text. Yépez is among the handful of former employees who have not settled their labor lawsuits against Texaco Petroleum.

460. This helps explain the distinction, evident in some documents, between engineering and design personnel, and operations personnel. The latter were based in Ecuador and—except for senior supervisors who were predominantly U.S. nationals—included mostly Ecuadorian nationals who had no prior experience in the oil industry but received on-the-job training and supervision from Texaco. Most of the former were expatriates who were temporarily assigned to projects related to the Ecuador operations. *See, e.g.*, Memorandum from R. J. Evans (Houston) to R. M. Bischoff (Coral Gables), Oct. 12, 1973 (Bischoff Ex. 25), *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, *supra* note 447, at vol. 3, Ex. 36; The Texaco Pipe Line Company, Memorandum from R. J. Evans (Houston) to R. C. Shields (Coral Gables), July 2, 1975 (marked as Shields Ex. 24 in Confidential statement on the record of Robert C. Shields, Aguinda v. Texaco, Inc., No. Civ. 7527 (S.D.N.Y. Aug. 23, 1995 and Aug. 24, 1995) [hereinafter Shields Deposition]); World Bank Ecuador Pipeline Reconstruction Project, *supra* note 124 at 21. **R** **R**

Pipeline was built by a U.S.-based subcontractor, Williams Brothers, and Texaco Inc's Houston-based pipeline subsidiary, Texaco Pipeline Inc., was involved in designing[461]—and likely supervising—the project.[462]

Subsequently, when problems arose from a leak in a tank in Lago Agrio and damage to a (secondary) pipeline bridge across the Napo River, an expert from Texaco Pipeline's Engineering Division in Houston was sent to both locations in Ecuador, to investigate and solve the tank problem, and "supervise the revamping" of the pipeline bridge.[463] The record shows that the trip was coordinated by senior executives based in the Coral Gables headquarters of Texaco Inc's Latin America/West Africa Division; a document submitted by the plaintiffs to the court states that "[e]xecutive approval" for the trip was "obtain[ed]" by the office of the President of the Division, who also held positions as the President and a Director of Texaco Petroleum at the time, and received a report prepared by the pipeline expert promptly after he returned to Houston.[464]

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461. *See* Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, *supra* note 448, at 40-42 (also stating that "[v]arious repairs, modifications and extensions" of the Trans-Ecuadorian Pipeline had taken place). At the time, the pipeline subsidiary was known as The Texas Pipe Line Co. *Id.* at 41. R

462. The pipeline crosses an area with significant seismic activity and unstable terrain. As discussed *supra* in Part III, during the time it was operated by Texaco Petroleum (1972-1989), that line alone spilled more oil than the Exxon *Valdez*. As dicussed *infra* in Part X.E, an opportunity to re-route a portion of the pipeline in 1987, to bypass the high-risk area and significantly reduce the risk of future spills, was forfeited for economic reasons, based on a recommendation by Texaco.

463. The Texas Pipe Line Company, Memorandum from R.W. Olbrich to R.M. Bischoff (Houston, Dec. 24, 1974) [hereinafter Shields Ex. 42], *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, *supra* note 447, vol. 3, Ex. 37; The Texaco Pipe Line Company, Memorandum from C. Wagner to Roy W. Olbrich (Houston, Dec. 24, 1974), marked as Shields Ex. 43, *in* Shields Deposition, *supra* note 460. The U.S.-based firm that built the pipeline, Harbert Construction, made the pipeline repairs "according to recommendations" from Clear Span Bridges & Structures, Inc.; the repairs were inspected by the supervisor from Texaco Pipeline. *Id.*. R R R

464. Shields Ex. 42, *supra* note 463; *see also* Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, *supra* note 448, at 17-21 (identifying executive officers R R

In another example, after a leak caused a fire in a pump station in the Trans-Ecuadorian Pipeline System, two electricians from Texaco Pipeline were sent from Houston to Ecuador to "thoroughly check"[465] the electrical panels and sequence functions in all of the pump stations, and their "detailed" recommendations were evidently implemented in Ecuador.[466] In addition, the pipeline subsidiary rewrote a section of its safety rules in response to the incident and, in a memorandum prepared for senior executives in Texaco Inc's corporate headquarters in New York, Texaco Petroleum's Chairman of the Board—who was also Vice President of Texaco Inc. Latin America/West Africa Division at the time—reported to his supervisor in the parent company that the revised "instructions are now being followed in the Trans Ecuadorian Pipeline, and are being issued to other areas."[467] The memorandum—which responded to a request from New York for "answers" to detailed questions about safety procedures, the results of the electrical inspection, possible anomalies that could affect a particular valve, vibration meter readings, and whether the supervisor at the pump station was "adequately knowledgeable and responsible"[468]—also reported that the station supervisor, an employee of the U.S.-based subcontractor that built the pipeline, Williams Brothers, had been "released" because of the incident, and that Texaco Petroleum was increasing supervision of the operating personnel.[469]

The level of interest and concern by Texaco's New York and Coral Gables offices in safety procedures and engineering

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and directors of Texaco Petroleum), 55-58 (identifying executive officers of Texaco Inc. Latin America/West Africa Division).

465. Texaco, Memorandum from R.B. Palmer to R.C. Shields (New York, May 25, 1973), at 2 [hereinafter Shields Ex. 40], *in* Plaintiffs' Appendix of Affidavits, Documents and Other Authorities in Opposition of Texaco's Motions to Dismiss, *supra* note 447, vol. 3, Ex. 38. **R**

466. Texaco, Memorandum from R.C. Shields to R.B. Palmer (Coral Gables, June 22, 1973), at 3 [hereinafter Shields Ex. 39], marked as Shields Ex. 39 *in* Shields Deposition, *supra* note 460. **R**

467. *Id.* at 5; *see also* Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, *supra* note 448, at 20, 57; Shields Deposition, *supra* note 460, at 233. **R**

468. Shields Ex. 40, *supra* note 465, at 1-2. **R**

469. Shields Ex. 39, *supra* note 466, at 5-6 (also stating that Texaco Petroleum "has had total responsibility for operation of the system" since it was built with "technical assistance" from Texaco Pipeline Inc.). **R**

details that could affect operation of the pipeline—and the transportation of Amazon crude to market—contrasts sharply with the apparent apathy toward practices and procedures that caused pollution and other environmental injuries but did not interfere with production. In 1982, Texaco Inc.'s Chairman and Chief Executive Officer distributed a "Texaco Environmental Policy" document to all "Heads of Departments, Divisions, and Subsidiaries," with instructions to Department and Division heads to "ensure that employees at all levels are aware of this policy and of the environmental implications of their actions and decisions."[470] The policy, which according to the directive "must be followed in all of our operations," was built on "the Company's principle of obeying all laws and being a good corporate citizen in communities where we operate both at home and abroad." It included a number of general principles and objectives which, if implemented, could have led to improved environmental performance in the Ecuador operations and could have significantly eased the injuries at issue in *Aguinda*.[471] Notwithstanding that, the then-President of Texaco's Latin America/West Africa Division—and Chairman of the Board of Texaco Petroleum—testified in a deposition that he had no recollection of the policy statement or any action by the Division to implement the directive in Ecuador.[472] He acknowledged that the instruction to follow the policy in "all of our operations" encompassed operations by Texaco Petroleum and other subsidiaries of the parent, but speculated:

> Now, I may have thought that since we had spent so much time and energy—when I say "we," I mean Texaco Petroleum Company—energy in cooperation with the government of Ecuador and with CEPE to

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470. Texaco Inc., Texaco's Environmental Policy, with cover directive from John K. McKinley, Chairman and Chief Executive Officer, to Heads of Departments, Divisions and Subsidiaries (White Plains, Dec. 2, 1982) *in* Exhibits in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss the Complaint, *supra* note 337, at Ex. 20. R

471. *Id.* For example, the policy called for effective "environmental procedures and equipment"; employee training; and monitoring "to ensure compliance" with the policy and governmental requirements. *Id.*

472. Deposition of Robert M. Bischoff, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Aug. 17 and Aug. 18, 1995), at 196-200, 221 [hereinafter Bischoff Deposition]; *see also* Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, *supra* note 448, at 17, 55. R

> make sure that the environment was protected, that it would have been a duplication to have forwarded this information [the Texaco Environmental Policy] to Texaco Petroleum Company.[473]

When external concerns about environmental policy and performance in Ecuador arose, however, and were pressed on Texaco in the United States, Ecuador, and Europe, U.S.-based personnel—including technical, legal, and executive staff—played a significant role in developing and implementing responses on behalf of both Texaco Petroleum and the parent company. For example, during the environmental audit by HBT Agra (discussed *supra* in Part IV), two of the four individuals who "had significant involvement" on behalf of Texaco Petroleum in the Technical Committee that directed and supervised the audit were based in Coral Gables.[474] Both individ-

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473. Bischoff Deposition, *supra* note 472, at 197-99; *cf.* Yépez Declaration, *supra* note 73; Navarro Declaration, *supra* note 65, ¶¶ 3-4; Vargas Affidavit, *supra* note 450. In addition, there is some discovery evidence that environmental concerns were minimized. *See, e.g.*, Texaco, Memorandum from Roland M. Routhier to M. Howard Wilson (New York, June 4, 1976) (marked as Ex. 37 in Shields Deposition, *supra* note 460) (relaying information about a Trans-Ecuadorian pipeline spill caused by a landslide resulting from heavy rains, and stating that the pipe is badly buckled but not parted; that "leakage is slight" and "14,000 bbls [barrels, equal to 588,000 gallons] of oil will be lost due to drainage from the nearest valve"; and "[e]nvironmental damage will be negligible due to size of leak and swiftness and volume of river"). R R R R

474. Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, *supra* note 448, at 14. Only one of the four was based in Quito; the other was based in Colombia. *Id.* The document also identified individuals based in New York and Texas who were involved in inquiries related to environmental performance in Ecuador. *Id.* at 44-45, 47-48. For example, in 1992 Texaco Petroleum commissioned an internal environmental audit by the California-based firm, Furgo-McClelland; one individual, based in Houston, was identified as the "principal" who "assisted" the auditor. Four persons—based in New York—were identified as being "involved" in Texaco Inc.'s response to allegations made by Natural Resources Defense Council based on *Amazon Crude*, and the related documents were reported to be in Coral Gables. In 1991, Texaco Petroleum commissioned a LANDSAT remote sensing study of deforestation; one individual from Coral Gables and two individuals from Houston were identified as being "involved" in the study. *Id.* at 44-47. *See also, e.g.*, Annett-Hunter Letter, *supra* note 191; Letter from Peter J. Dowd, Vice President Public Relations, Texaco Inc. Corporate Communications Division, to Anne Zore, Boycott Edition, Co-op News (June, 2, 1994) [hereinafter Dowd-Zore Letter]; TEXACO PUBLIC RELATIONS, *supra* note 79, at 9. R R R

uals are U.S. nationals, and both became officers and/or directors of Texaco Petroleum while the audit project was underway,[475] indicating that senior expatriate personnel based in the United States participated in, and likely supervised, environmental decisionmaking at that critical juncture.

In addition to personnel based in the United States, Texaco Petroleum's top managers and operations and field supervisors in Ecuador were predominantly expatriates who—like expatriates employed by subcontractors—were typically assigned to work in Ecuador on a temporary basis and could be transferred by their employer to a number of different locations during their career. Similarly, Texaco Petroleum's corporate officers were predominantly U.S. nationals, based in the Coral Gables headquarters of the parent company's Latin America/West Africa Division. At least some of those executives were experienced oil field engineers and, like senior personnel based in Ecuador, could work for the Texaco corporate family in a number of different divisions, subsidiaries, and countries during their career. The most senior executives in Coral Gables apparently also held senior management and/or director positions in the parent company, in addition to being directors of Texaco Petroleum.[476] One former Texaco Petroleum Chairman of the Board—who also served as President, and then Chairman, of Texaco Inc.'s Latin America/West Africa Division while at the helm of Texaco Petroleum—described people who work in the oil industry as "half gypsy," and testified that he had moved sixteen times during his career.[477]

According to Texaco's responses to plaintiffs' interrogatories, 82 out of 85 former and present officers and directors of

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475. *See* Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, *supra* note 448, at 14, 18, 20. R

476. *See id.* at 16-27, 36-38, 54-58. The responses allege that "only some" officers and directors of Texaco Petroleum were "actually involved in operations in Ecuador." *Id.* at 17. However, Texaco Petroleum was not involved in any other operations. Bischoff Deposition, *supra* note 472, at 213. R

477. *Id.* at 189. *See also id.* at 152-54, 200 (describing another senior executive of Texaco Petroleum and Texaco Inc. Latin America/West Africa Division as "one of these oilfield gypsies" who is "well-qualified" and has "been willing to go" whenever "the need has arisen"); Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, *supra* note 448, at 17, 55. R

Texaco Petroleum were U.S. nationals, with 78 of them located in the United States at the time of the response—mostly in Florida, New York, Texas and Connecticut—and only one located in Ecuador. Only two former corporate officers—one of whom was also a director—were Ecuadorian nationals, but neither was located in Ecuador at the time of the response.[478]

Similarly, only two out of eleven individuals who held the top management positions in Ecuador—the Quito-based division manager and managing director—were Ecuadorian nationals, and only one was located in Ecuador at the time of the response. Six of those individuals were U.S. nationals, one was German, and one was British.[479] No Ecuadorian nationals were hired as senior supervisors of field operations, while forty-two U.S. nationals were assigned to those positions, which included assistant managers for operations and pipeline; superintendents of operations, pipeline, and drilling; assistant superintendents of operations, drilling, and pipeline; and camp administrators for drilling and operations.[480] In addi-

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478. *Id.* at 17-21. Some former officials are deceased and are not included in the numbers. Similarly, 129 of 137 officers and directors of Texaco Petroleum's predecessors in interest, Texas Petroleum Company and Texaco del Ecuador, were U.S. nationals, with 117 located in the United States and none in Ecuador at the time of the response; only two were Ecuadorian nationals, with one located in Ecuador and the location of the other unknown. *Id.* at 21-27.

479. *Id.* at 37. The nationality of one of the eleven was not identified. Three individuals were located in the United States at the time of the response; one was in Venezuela; one was in Indonesia; one was in Trinidad and Tobago; one was in Colombia; one was in Bolivia; and two were deceased. *Id.*

480. *Id.* at 36-38. In addition to U.S. nationals, three Canadians, one German, one Colombian, one Dutch and one British national held those jobs. Only three of the individuals who held those posts were in Ecuador at the time of the response; fourteen were in the United States, and twenty-one apparently could not be located. All of the camp administrators for drilling and operations were U.S. nationals, and are included in the totals in the text. Local assistants to managers and camp administrators were Ecuadorian nationals. *Id.* at 36-39. Ten of thirteen individuals listed as "accounting personnel" were U.S. nationals, while two were Ecuadorian. By contrast, all eight individuals listed as "environment, health and safety personnel" were Ecuadorian nationals. However, the word "environment" does not appear in any job titles—three were security officers, three were medical doctors, and two were safety supervisors. *Id.* at 36, 39-40.

The absence of expatriate environmental personnel based in Ecuador is revealing when compared with the extensive use of experienced expatriate

tion to casting doubt on the court's conclusion that "virtually all witnesses to the manner in which . . . [the alleged] injuries occurred reside" in Ecuador,[481] these numbers show extensive reliance by Texaco Petroleum on Texaco Inc.'s human resources—"half gypsy"[482] personnel—both to supervise the field operations and fill senior management positions, and indicate that the operations in Ecuador were part of a global corporate enterprise managed by the parent company, rather than an isolated Ecuadorian activity.

The distinction between expatriate and national oil field personnel is also evident in a number of contracts with subcontractors for highly technical oil field activities, such as well drilling and servicing, which include provisions requiring subcontractors to staff specified positions with expatriate personnel.[483] As with Texaco's expatriate workforce, those individu-

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personnel to both (1) supervise pipeline and oil field operations and camps, and (2) fill senior management and accounting positions. The contrast between Texaco's neglect of environmental protection and training and its demanding standards for cost control and administration is also reflected in a comment to the press by the manager of the Petroecuador subsidiary that took over the oil field operations, in which he pledged to "safeguard Texaco's administrative systems." *Texaco ha cumplido* [*Texaco has complied*], Hoy, June 6, 1992; *Ecuador respeta los contratos* [*Ecuador respects contracts*]," Hoy, June 6, 1992.

481. *See Aguinda*, 142 F. Supp. 2d at 548.

482. The quote is from Bischoff Deposition, *supra* note 472, at 189. **R**

483. For example, the contract between Texaco Petroleum and Intairdrill Ltd. for drilling services—which was approved by "Texaco" in 1990—includes a list of rig crew and supporting personnel to be supplied by the contractor. The rig crew is divided into "expatriate" and "national" positions. Expatriate personnel include toolpushers, tourpushers, and mechanics (unless the parties agree that a "qualified national mechanic" can fill that position), for a total of eight positions on location and relief. National personnel include tourpusher assistants, derrickmen, floormen, motormen, welders, patio crew and patio crew foreman, for a total of 28½ on location and relief. All "supporting personnel" on the list—area superintendent, mechanic and electrician—should be expatriates. Texaco Petroleum Company, Letter from Warren D. Gillies (Quito) to Dr. W.P. Doyle (Coral Gables), June 4, 1990, forwarding Contract MC-E-P-1199 for signature by the Chairman of the Board, at Contract Ex. F, marked as Doyle Ex. 10 at Depositon of William P. Doyle, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Aug. 3, 1995) [hereinafter Doyle Deposition]. The contract also provides that Texaco Petroleum "shall have the right to instruct and direct [the] Contractor as to the method of obtaining the desired results" and requires the Contractor to comply with Texaco Petroleum's safety regulations and applicable Ecuadorian requirements, in addition to meeting USGS and

als are experienced oil field workers who travel regularly and can be sent by their employer to work as technicians and on-site supervisors in a number of different countries during their career, many of whom are U.S. nationals. As a result, although many witnesses to activities that caused the injuries at issue in *Aguinda* reside in Ecuador, there are also many who do not, including most of Texaco Petroleum's senior executives, managers, and supervisors of field operations; engineers and employees of other Texaco subsidiaries and divisions who worked temporarily with or for Texaco Petroleum; and expatriate employees of subcontractors. Those witnesses could be located in the United States or in oil fields anywhere in the world. Because few have likely remained in Ecuador, and many of their employers and families are based in the United States, use of their testimony would favor a U.S. forum. In addition, as a general matter, the role of those employees in managing, supervising, designing, and guiding activities in Ec-

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U.S. OSHA safety standards for the rig, blowout prevention equipment, and drilling. *Id.* ¶ 4.1, Exs. B, C. The contract further states that the "agreement [is] made and entered into in Coral Gables, Florida"; that it "shall be interpreted in accordance with the laws of the State of New York, U.S.A. except for matters necessarily governed by the laws of Ecuador"; and, in the event of disagreement between the parties, they "shall submit the same to arbitration in accordance with the rules then prevailing of the American Aribtration Association." *Id.* at Preamble, ¶ 5.4. *See also, e.g.*, Contract MC-E-520 (entered into between Texaco Petroleum and Pool Americas on Nov. 10, 1978), marked as Ex. 55 *in* Bischoff Deposition, *supra* note 472, Exs. G, C, ¶ 5.4 (contract for well completion, workover and service, requiring contractor to supply one expatriate field superintendent for each one or two rigs, one expatriate tool pusher with relief for each rig, and two expatriate tour pushers with relief for each rig; listing safety regulations that include rules for fire and blowout prevention, but not for environmental protection; and providing that the agreement shall be governed by New York State law, except for "matters which are necessarily governed by the laws of Ecuador," and that disputes between the parties shall be settled by arbitration "in accordance with rules of the American Arbitration Association"). **R**

The Aguinda plaintiffs argued that "TexPet never had an Ecuadorian President or Chairman and held its Board meetings in the United States," and that "the convenience of a New York forum also is underscored by the fact that several of its contracts relating to oil production . . . call for the application of New York law or for related disputes to be filed in New York," but did not discuss requirements for expatriate personnel in some contracts or the use of expatriate personnel in senior positions in Texaco Petroleum in Ecuador. *See* Plaintiffs' Memorandum of Law Responsive to This Court's January 31, 2000 Memorandum Order, *supra* note 371, at 2-3. **R**

uador demonstrates the transnational nature of the operations and contradicts the court's basic premise that they "have nothing to do with the U.S."

In addition to knowledge about operations in Ecuador, experienced expatriate oil field workers could also testify about environmental practices in other locations, which—although not necessarily decisive—could be relevant to the issue of whether Texaco used a proper level of care. Regardless of whether common law or Ecuadorian law is applied to the *Aguinda* claims, disputes between the parties about the reasonableness—or "suitability"—of the challenged conduct can be expected.[484] Indeed, both Texaco and the plaintiffs have ef-

484. Ecuador's Civil Code is based on Roman law and the Napoleonic Code, but includes a number of provisions establishing general rights and obligations that are comparable to common law tort principles in the United States. However, it remains to be seen how—and whether—those provisions will be particularized and applied by courts to environmental disputes in specific cases. For a discussion of relevant Civil Code provisions, *see* Kimerling, *Rights, Responsibilities, and Realities*, *supra* note 64, at 323-24, 351-57. In addition, Texaco's contract with Ecuador required the company to adopt "suitable" measures to protect the environment, but did not define the term or identify any particular measures. 1973 Production Contract, *supra* note 60, cl. 46.1. Since 1982, Ecuador's Law of Hydrocarbons has required oil companies to conduct operations in accordance with international practice "in matters of preservation of the rich fisheries and farming industry," in addition to complying with national environmental law. *See* Law of Hydrocarbons, *supra* note 37, art. 31(t). Although no particular "international practices" are specified, the provision reflects a national policy interest in international environmental parity for at least some oil field practices. That policy interest has surged since public outcry over Texaco's environmental practices began; however, considerable confusion remains about the meaning and application of international oil field standards in Ecuador. *See generally* Kimerling, *Rio + 10*, *supra* note 57; *see also* Kimerling, *International Standards*, *supra* note 40. As a result, testimony about oil field practices in locations other than Ecuador can be expected to be relevant to inquiries based on Ecuadorian law. In the United States, the principle that compliance with environmental regulations per se—or with (private) "industry standards"—does not provide a shield from civil liability for damages or regulatory remedial requirements is a fundamental tenet of common law and administrative environmental law. *See, e.g.*, ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 304-06 (1992). This principle recognizes that the basic purpose of civil liability law is to make the injured party whole and deter tortious conduct, and that much environmental regulation is remedial—and, therefore, necessarily retroactive—in nature. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9657 (2000).

fectively raised that issue in legal proceedings and the court of public opinion, by relying on comparisons with oil field practices in the United States and around the world to support their contending allegations. Attorneys for the plaintiffs claim that the Ecuador operations fell short of "reasonable industry standards" and long-standing standards and practices in the United States.[485] Texaco's corporate officials have long defended the operations by claiming that they complied with "oil industry standards of 'good practice' "[486] and "prevailing internationally accepted standards and practices."[487] More recently, in the answer to a new lawsuit filed in Lago Agrio by some of the *Aguinda* plaintiffs after the New York case was dismissed, ChevronTexaco also alleged that the challenged practices meet U.S. environmental standards.[488] The need for testimony related to those allegations about oil field practices in locations other than Ecuador favors a U.S forum.

2. *Deficiencies in Ecuador's Legal and Judicial System*

In addition to the location of expatriate witnesses, other private interest factors favor the plaintiffs' choice of a U.S. forum but were not considered by the court. One such set of factors relates to the disparate impacts of deficiencies in Ecuador's legal and judicial system. Regardless of whether Ecuadorian courts are "inadequate" under the standard of a forum non conveniens analysis—which requires only a "modicum of

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485. Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint, *supra* note 337, at 3-6. *See also, e.g.,* Feb. 1, 1999 *Aguinda* Transcript, *supra* note 332, at 44-48; Feb. 1, 2000 Plaintiffs' Attorneys' Press Release, *supra* note 181; Nov. 3, 1993 Plaintiffs' Attorneys' Press Release, *supra* note 183. R R R

486. Annett-Scherr Letter, *supra* note 191. R

487. Texaco's Sept., 23 1999 Press Release, *supra* note 190. *See also, e.g.*, Dowd-Zore Letter, *supra* note 472; TEXACO PUBLIC RELATIONS, *supra* note 79, at 3, 9; ChevronTexaco, Texaco in Ecuador: Background, *supra* note 165. R R R

488. ChevronTexaco Answer, *supra* note 17, ¶¶ II.B.1.4, .1.5, .1.6, .1.7(b), .1.8, II.B.2.2. The allegations are quoted *supra* note 114. Unlike the plaintiffs, Texaco did not emphasize those allegations in submissions to the *Aguinda* court; instead, it stressed the allegedly dominant role of Ecuador and Petroecuador—and limited role of the defendant—in the operations. *Cf., e.g.,* Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, *supra* note 190, at 1-3, 5-12; Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint, *supra* note 337, at 3-6, 14-15, 16, 18. R R R R

independence and impartiality"[489]—the plaintiffs' private interests strongly favor a U.S. forum because the likelihood of obtaining a fair hearing and remedy and the general ease of litigation are significantly greater in the United States for a number of reasons. For example, the lack of transparency in Ecuador's legal system, coupled with limited discovery devices, give ChevronTexaco a greater relative advantage in an Ecuadorian forum because it will be considerably more difficult for plaintiffs to gain access to evidence that is controlled by—or already available to—the defendant.[490] In addition, for indigenous plaintiffs, proceedings in a U.S forum are less likely to be colored by racism and discrimination than in Ecuador, where the risk of discriminatory treatment is significant. Similarly, although legal proceedings in the United States can also be influenced by political considerations and unequal access to economic resources to pay for litigation, in Ecuador the roles of money and politics in judicial proceedings are considerably more prevalent. At the same time, disparities in political and economic power are more pronounced: in a nation of glaring inequities, indigenous communities and *campesinos* in the Amazon are cash poor and politically marginalized, while Texaco is enormously wealthy and politically connected, influential, and experienced. In a U.S. forum, the impact of those disparities is likely to be reduced.

In addition, the plaintiffs have an interest in avoiding the uncertainties of untested litigation in Ecuador, including the risk of special difficulties due to ChevronTexaco's status as a foreign company. As a general matter, litigation will be more difficult there because of the unprecedented nature of the legal action, as a mass environmental tort and an action against a foreign national. Precedents for those kinds of cases already exist in the United States, and offer a roadmap, or at least guidance, to plaintiffs when they litigate in U.S. courts. In Ecuador, possible legal avenues for plaintiffs' claims are ample but unclear, and the experience of Ecuadorian judges and attorneys with environmental lawsuits is limited. Choosing one ave-

489. *Aguinda*, 142 F. Supp. 2d at 545-46.

490. Although Texaco stipulated to the use of discovery developed in *Aguinda*, that discovery was limited and did not include the merits of the case. *See* Stipulation and Order, Aguinda v. Texaco, Inc., No. 93 Civ.7527 (S.D.N.Y. June 21, 2001); *Aguinda*, 1994 WL 142006, at *1 (ordering limited discovery).

nue instead of another can be costly, not only in economic terms but also because it can render time-consuming litigation wasteful and delay or even deny plaintiffs a remedy, as illustrated by the Joya de los Sachas lawsuit against Petroecuador.[491]

Indeed, unforeseen and inconsistent requirements and applications of the law have already emerged in litigation by plaintiffs from the putative *Aguinda* class, which not only are making litigation in Ecuador more burdensome but also could preclude some plaintiffs from obtaining a hearing and adjudication of their claims in the alternative forum. After the Second Circuit upheld the second dismissal of *Aguinda*, two groups filed lawsuits in Ecuador. The first case, managed by attorneys for the *Aguinda* plaintiffs, was filed against ChevronTexaco in May 2003 in the Superior Court of Justice of Nueva Loja (Lago Agrio, in Sucumbíos Province) with forty-six of the named plaintiffs from *Aguinda* and two new plaintiffs from the putative class. The second case, against ChevronTexaco and Texaco Petroleum, was presented to the Superior Court of Justice of Tena (in Napo Province) in July 2003, by ninety indigenous plaintiffs selected by thirty-one Kichwa and Huaorani communities who came together in the wake of the final dismissal to pursue a community-based, indigenous lawsuit.[492] Ecuador's superior courts have both appellate and original jurisdiction, and jurisdiction of the Tena court extends beyond Napo Province to include Orellana because the latter, more remote province does not have a superior court. As a result, the Tena court is the same court that had intermediate appellate jurisdiction in the environmental lawsuit

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491. As discussed *supra* Part X.A.1, in that case the Supreme Court overturned a judgment for the plaintiff after years of litigation on the ground that the lower court had not applied the proper procedural provisions, thereby discouraging the plaintiff from pursuing the claim and penalizing the judges who had allowed the unprecedented environmental action to proceed.

492. *See* Plaintiffs' Complaint Addressed to the President of the Superior Court of Justice of Nueva Loja (Lago Agrio), Maria Aguinda Salazar v. ChevronTexaco Corp. (filed May 7, 2003) (on file with author) [hereinafter Lago Agrio Complaint]; Plaintiffs' Complaint Addressed to the President of the Superior Court of Justice of Tena, Moi Vicente Enomenga Mantohue v. ChevronTexaco Corp. and Texaco Petroleum Co. (filed July 30, 2003) (on filed with author) [hereinafter Tena Complaint]. The lawsuits are briefly discussed *infra* Part XII (Epilogue).

against Petroecuador by Joya de los Sachas, which was overruled—and its judges fined—by the Supreme Court in 1998.

Within a month, the President of the Tena court rejected the complaint by the indigenous plaintiffs on two grounds, both of which surprised their Ecuadorian counsel and neither of which has emerged as a problem for plaintiffs in Lago Agrio. The first ground was procedural: the court held that because one of the defendants, ChevronTexaco, resides in the United States, the plaintiffs should have accompanied their Spanish-language complaint with a certified English-language translation.[493] The second ground was jurisdictional: because affected lands owned by the plaintiffs' communities extend beyond Orellana and Napo provinces to include some (but less) land in Sucumbíos and Pastaza provinces, the judge ruled that the Tena court was not competent to adjudicate any of the claims.[494] Plaintiffs appealed to the plenary of the court, two

493. H. Superior Court of Justice of Tena, Presidency, For Plaintiff Dr. Ernesto López Freire (Aug. 26, 2003) (on file with author); H. Superior Court of Justice of Tena, Presidency, For Plaintiff Dr. Ernesto López Freire (Sept. 2, 2003) (on filed with author). The plaintiffs in Tena are represented by Dr. Ernesto López; the author is assisting in the case, in addition to representing plaintiffs and their communities outside court. According to López, who has reviewed the litigation record in Lago Agrio, the complaint in that action was filed in Spanish, without an English-language translation. Plaintiffs in Tena subsequently submitted a certified translation of their complaint to the Tena court.

494. H. Superior Court of Justice of Tena, Presidency, For Plaintiff Dr. Ernesto López Freire (Aug. 26, 2003) (on file with author); H. Superior Court of Justice of Tena, Presidency, For Plaintiff Dr. Ernesto López Freire (Sept. 2, 2003) (on file with author). Plaintiffs in Lago Agrio include individuals from two provinces (Sucumbíos and Orellana), and their complaint seeks monies for environmental remediation in both provinces. Ecuador's (new) Law of Environmental Management provides that when environmental damage occurs in more than one province, the president of the superior court with jurisdiction in any location where damage occurs is competent to adjudicate the case. *Ley de Gestión Ambiental* [Law of Environmental Management], R.O. No. 245 (July 30, 1999) (Ecuador), arts. 41-43. *See also* Tena Complaint, *supra* note 492, ¶ IV.2 and Lago Agrio Complaint, *supra* note 492, ¶ V.3.c. (basing jurisdiction on that law). The Secretary Reporter of the Tena court subsequently told a leading national newspaper that the lawsuit was rejected "because of jurisdiction." The plaintiffs, he said, could file a new lawsuit, but "must sue according to territory. Because there are several provinces, they should sue in each one of them." *La Corte no acepta otra demanda contra Texaco* [*The* Court *does not accept another lawsuit against Texaco*], EL COMERCIO, July 16, 2004. That interpretation of Ecuadorian law not only conflicts with the application of the (same) law by the court in Lago Agrio,

judges who reportedly were "students" of the president of the court,[495] and they upheld the dismissal.[496] Plaintiffs then appealed to Ecuador's Supreme Court; however, it is not clear whether the Supreme Court has appellate jurisdiction because, technically, no lawsuit exists under Ecuadorian law since the court with original jurisdiction refused to open the case.[497] In addition, that Supreme Court no longer exists; in December 2004, most of the judges were removed and replaced with allies of the (then) President, and in April 2005 that court was disbanded in the midst of a political crisis. After

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which accepted a bi-provincial case, but also presents special hardships for—and arguably discriminates against—the Kichwa and Huaorani, whose territorial boundaries do not correspond to political provincial boundaries and who, as a result, would appear to have no competent forum in Ecuador to fully adjudicate their claims. A requirement to segment their claims according to provincial boundaries and pursue three separate lawsuits (in three fora, in three distant locations) would understate the gravity of their injuries and claims, and erect a burdensome—and possibly insurmountable—barrier to litigation because of the financial and human resources that would be needed to litigate the claims.

495. Interview with Patricia Tuza, in Tena, Ecuador (Oct. 21, 2003).

496. H. Superior Court of Justice of Tena, Civil Lawsuit No. 714-2003 (Oct. 29, 2003) (upholding the decision by the President of that Court to abstain from adjudicating the lawsuit, and further stating that the plaintiffs "have not clarified or completed their complaint" as required by the President of the Court) (on file with author).

497. *See* Plaintiffs' Petition for Recourse of Cassation (Nov. 5, 2003) (on file with author). Under applicable procedures, plaintiffs present the complaint to the court of original jurisdiction but do not serve the defendant. The judge reviews the complaint, and if the elements of the action are present, the court formally initiates the proceeding and summons the defendant. In the Tena case, the court refused to process the complaint so, technically, no legal proceeding exists. The Supreme Court has appellate jurisdiction to review lower court judgments in lawsuits but may not have jurisdiction to overrule the Tena court because arguably no judgment exists.

Despite the fact that the defendants were not served with a complaint and the case was not publicized, Texaco learned of the action, including the name of plaintiffs' counsel, and reportedly visited the offices of the Tena court on at least three occasions before the President of the court rejected the complaint. According to a paralegal hired by plaintiffs' counsel in Tena—which was necessary because neither plaintiffs nor their attorney reside there—a Quito-based attorney for Texaco visited the court with a local lawyer to "inquire" about the action filed by López. Plaintiffs suspect foul play.

seven months without any Supreme Court, a new court was installed on November 30, 2005.[498]

3. *Special Due Process Needs of Absent Class Members*

Another private interest factor that favors a U.S. forum relates to the special due process needs of absent class members in mass environmental tort litigation. Although the *Aguinda* court explicitly ruled that the absence of a class action mechanism did not render Ecuador's courts inadequate, the opinion seemed to focus on the interest of plaintiffs in gaining access to a forum, and did not consider the advantages of class action procedures for absent class members. In U.S. federal courts, Rule 23 of the Federal Rules of Civil Procedure, which establishes the class action device, is cognizant of the potential for overzealousness and includes procedures that are designed to protect the interests and due process rights of persons who are purportedly represented in a lawsuit, but do not participate in the proceedings. In Ecuador, group litigation is new and untested, and although basic principles of due process are recognized under Ecuadorian law, clear procedures and precedents to protect third parties who may be affected by litigation are not well developed. The impact of dismissing *Aguinda* in favor of litigation in Ecuador on indigenous communities whose rights and environment may be affected by litigation there is uncertain. Ironically, the need for transparency in judicial proceedings and other due process mechanisms to protect their rights and interests favors a U.S. forum. Although this factor raises a host of complicated issues that are beyond the scope of this Article, events related to the lawsuit in Lago Agrio indicate that it is not simply a theoretical concern.[499]

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498. *See infra* Part XII (Epilogue).

499. Attorneys for the plaintiffs in Lago Agrio told people in Ecuador that only the named plaintiffs in *Aguinda* could avail themselves of the ruling by the U.S. court "ordering" ChevronTexaco to submit to Ecuador's courts; as a result, direct participation in the case is limited to forty-six individuals from that group who agreed to continue the litigaton, and two additional plaintiffs. The plaintiffs live in only two indigenous and two colonist communities. However, the Complaint alleges injuries that extend far beyond the plaintiffs, to include "devastating impacts" on the Cofán, Huaorani, Kichwa, Secoya and Siona peoples (as well as colonists). Lago Agrio Complaint, *supra* note 492, ¶ III.4. *See also id.* ¶ III.2 (alleging injuries to residents in R

4. *Justice Delayed*

Finally, the *Aguinda* court did not take into account the inconvenience to plaintiffs of starting over in Ecuador's courts after nearly eight years of litigation and the prejudice to their interests from further delay in securing a remedy. Instead, in the discussion of public interest factors the court speculated that "the well-known congestion of American dockets is undoubtedly greater than that of less litigious societies like Ecuador," and because "the history of mass tort class litigation" in U.S. forums does not "inspire confidence" in terms of "engendering inordinate delays . . . it seems more likely that the individual plaintiffs . . . would obtain any recovery to which they are entitled much faster by bringing the kind of individualized actions that have already been brought against TexPet in Ecuador and successfully prosecuted to completion there."[500] The court's apparent reliance on general disdain for class action tort litigation to favor litigation in Ecuador seems inappropriate, especially in light of evidence in the record indicating that "delay is the norm" in Ecuador's courts;[501]

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locations where no plaintiffs reside); ¶ III.8 (alleging that 75% of the population have lost crops and 94% of families have lost animals, especially cattle, pigs and chickens). No particularized injuries to any of the plaintiffs (or their communities) are alleged.

Although the Complaint does not seek leave of the court to represent absent parties, the request for relief is presented by plaintiffs "as members of the affected communities and as guardians of those communities' recognized collective rights." *Id.* ¶ VI. However, no relief is requested directly for the plaintiffs or affected communities. Instead, the lawsuit seeks a judicial determination of the costs of a comprehensive environmental remediation, and an order directing ChevronTexaco to pay the full amount to a local NGO, Amazon Defense Front (*Frente*), which would then "apply" the funds for the ends determined in the judgment. Efforts by Kichwa and Huaorani communities to get meaningful information from *Frente* and the plaintiffs' lawyers about plans and/or proposals for environmental remediation in locations that could affect them—and assert their rights to participate in decisionmaking processes about their claims and remedies—have been rebuffed. *See infra* Part XII (Epilogue).

500. *Aguinda*, 142 F. Supp. 2d. at 552.

501. Ecuador Country Report for Practices in 1999, *supra* note 381, at 6. **R** *See also* IACHR Report on Ecuador, *supra* note 31, ch. 3. At the time of the **R** court's decision, seven years and seven months had passed since the suit began; by the time the dismissal was upheld on appeal, the issue of whether to litigate in plaintiffs' chosen forum had been litigated for nearly nine years. *See, e.g.*, *Aguinda* Complaint, *supra* note 169, at 1; Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996); Aguinda v. Texaco, Inc., 142

the lack of evidence to support the finding that tort litigation against Texaco Petroleum has been "successfully prosecuted to completion there"; and the long-standing and compounding nature of plaintiffs' injuries.[502]

Although the analysis of private interest factors asserted by plaintiffs' counsel in the litigation record is disappointing, the analysis by the court did not appear to take *any* of them into account. Instead, the court admonished the plaintiffs for failing to prove that Texaco had directed the operations from the United States, and appeared to use that premise to summarily dismiss any countervailing private interest considerations that might favor a U.S. forum:

> By contrast [to Texaco's showing that evidence resides in Ecuador], what, if anything occurred in the United States? While plaintiffs continue to allege in conclusory fashion that Texaco directed the Consortium's oil operations from the United States, they have wholly failed, despite years of discovery, to adduce competent evidence to support this assertion. On the contrary, the record before the Court, when scrutinized in terms of admissible evidence, establishes overwhelmingly that Texaco's only meaningful involvement in the activities here complained of was its indirect investment in its fourth-tier subsidiary, TexPet, which is not a party here and which conducted its participation in the activities here complained of almost exclusively in Ecuador.
>
> The record before the Court also clearly establishes that all of the Consortium's key activities, including the decisions and practices here at issue, were managed, directed, and conducted by Consortium employees in Ecuador. By contrast, no one from Texaco or, indeed, anyone else operating in the United States, made any material decisions as to the Consor-

F.Supp.2d 534 (S.D.N.Y. 2001); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).

502. The *Aguinda* court's reliance on court congestion in the United States as a factor in favor of litigation in Ecuador also appears misplaced in light of Guidi v. Inter-Continental Hotels Corp., 224 F.3d 142, 146-47 (2d Cir. 2000).

> tium's activities and practices that are at issue here.[503]

In support of those sweeping findings, the court relied exclusively on deposition testimony by six high-level employees and former employees of the defendant and an affidavit of Texaco Petroleum, executed by Ricardo Reis Viega.[504] Interestingly, Veiga's affidavit related a brief history of the consortium ownership and transfer of operations to Petroecuador, and included vague allegations of government "approval" and "regulatory control,"[505] but, unlike the deposition testimony cited by the court,[506] did not allege that the relevant decisions

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503. *Aguinda*, 142 F. Supp. 2d at 548 (citations omitted).

504. *Id.* Five of the deponents were officers of Texaco Petroleum, in addition to working as officers or managers in Texaco Inc.'s Latin America/West Africa Division. Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, *supra* note 448, at 54-58; Affidavit of Daniel J. King, King & Spalding, Counsel for Texaco Inc. (Jan. 7, 1995), ¶ 15, *in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motion to Dismiss, *supra* note 67, vol 1, Ex. 1. For the affidavit, see Veiga Affidavit, *supra* note 67. Veiga also apparently worked for both Texaco Petroleum and Texaco Inc. Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, *supra* note 448, at 14; Letter from Van Ekambaram, Ph.D, Project Manager, Woodward-Clyde, to Ricardo Reis Veiga, Vice President-Office of the General Counsel, Texaco Inc. (May 5, 2000). R R R R

505. Veiga Affidavit, *supra* note 67, ¶¶ 4 (concession agreement with Ecuador authorized exploration and production); 5 (Texaco Petroleum operated with "Government approval"); 6 (Texaco Petroleum developed fields "[a]t the request and approval of the Ecuadorian government, and subject to the government's regulatory control"; also alleging that the company "helped" build the Trans-Ecuadorian Pipeline subject to the requirement that it "be constructed 'in accordance with specifications approved by the Government . . . and under official control of costs and techniques by the Government.'"). R

506. *See* Deposition of William C. Benton, *excerpted in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motions to Dismiss, *supra* note 67, vol. 1, Ex. 3, at pp. 170-84, 202, 206; Deposition of William P. Doyle, *excerpted in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motions to Dismiss, *supra* note 67, vol. 1, Ex. 5 ,at 101, 104, 109, 168, 251-52; Deposition of Robert M. Bischoff, *excerpted in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motions to Dismiss, *supra* note 67, vol. 1, Ex. 6, at 219; Deposition of Robert C. Shields, excerpted in Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motions to Dismiss, *supra* note R R R

and practices were "managed" and "directed" in Ecuador. Similarly, the affidavit did not state that no one from Texaco Inc. or Texaco Petroleum offices in the United States "made any material decisions."[507] It identified Houston as Texaco Pe-

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67, vol. 1, Ex. 8, at 57, 136, 142, 184-85; Deposition of Denis York LeCorgne, *excerpted in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motions to Dismiss, *supra* note 67, vol. 1, Ex. 9, at 72-73; Deposition of Richard K. Meyers, *excerpted in* Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motions to Dismiss, *supra* note 67, vol. 2, Ex. 11, at 149-151. R R R

507. *See generally* Veiga Affidavit, *supra* note 67. This is not surprising because Veiga himself evidently played a significant role in management decisions while based in the United States. For example, he was based in Coral Gables when he represented Texaco Petroleum on the Technical Committee that directed and oversaw the environmental audit by HBT Agra, and he became an officer and director of the company while that work was underway. *See supra* notes 474-75 and accompanying text. Although design decisions challenged by plaintiffs pre-date the audit, the confirmation of significant involvement by a senior U.S.-based executive in the Technical Committee is significant because it provides evidence of specific direction and supervision that directly bears on the continuing nature of many of plaintiffs' injuries. In addition, it provides some general evidence that oversight and supervision by senior U.S.-based executives was not limited to general oversight of expenses and revenues unrelated to environmental decision-making, as asserted by the court. R

After the audit, Veiga evidently maintained a management role in environmental negotiations with Ecuador and Petroecuador. He signed the Remediation Contract, discussed *supra* Part VII, in his capacity as Vice President of Texaco Petroleum. Remediation Contract, *supra* note 17. He also signed the more detailed Remedial Action Plan and the Final Act, as well as the five settlement agreements with local and provincial government officials, discussed *supra* Part VII. *See supra* notes 215, 223, 267, 300. At some point, he evidently became an officer of Texaco Inc. and was transferred to the parent company's corporate headquarters in New York. In correspondence that post-dates Texaco's responses to interrogatories (which list some corporate officials) and is not included in the litigation record, Woodward-Clyde submitted the Final Report for the Remedial Action Project to Veiga in New York, and addressed him as "Vice President of Texaco Inc. Office of the General Counsel." Letter from Van Ekambaram to Ricardo Reis Veiga, *supra* note 504. Around the same time, the author saw Veiga at a shareholders' meeting, and he introduced the parent company's New York-based General Counsel to her as "my boss." After Texaco's merger with Chevron, Veiga became a Vice President of ChevronTexaco. *See* ChevronTexaco Oct. 21, 2003 Press Release, *supra* note 67. R R R

Texaco's responses to interrogatories—which were verified by Veiga—also identified Veiga as a principal, from Coral Gables, "involved" in a 1992 response by Texaco Petroleum to environmental allegations presented to the nongovernmental International Water Tribunal in the Netherlands; and

troleum's "principal place of business" and stated that the subsidiary "conducted business in Ecuador."[508]

The *Aguinda* court acknowledged evidence presented by plaintiffs that "from time to time" other subsidiaries and departments of the parent company provided "technical or other assistance" to Texaco Petroleum in Ecuador.[509] However, the significance of that evidence was summarily dismissed: "The record is clear that all these services were limited to providing specific technical analyses requested by the Consortium to help implement design and other decisions previously reached in Ecuador . . . ."[510] Similarly, the evidence of budgetary and financial controls was reduced to "the obvious fact that Texaco, as a corporate parent, exercised some general oversight over the expenses and revenues of its subsidiaries."[511]

5. *Ability to Join Additional Parties in Ecuador*

After discarding the plaintiffs' allegations and "effort to establish a meaningful nexus" between the United States and their claims,[512] the court concluded its consideration of private interest factors by citing an additional factor in favor of dismissal, predicated on another, related finding of fact that was vigorously advocated by Texaco and disputed by the plaintiffs:

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as a principal, from Coral Gables, "involved" in preparing the Texaco document, "Texaco and Ecuador: Setting the Record Straight," which was sent by Texaco Europe's New York-based President to a Norwegian NGO. Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, *supra* note 448, at 45, 48. **R**

508. Veiga Affidavit, *supra* note 67, ¶ 2. This seems significant in the context of a forum non conveniens motion because Texaco Petroleum—a Delaware corporation—was apparently used by the parent company to carry out the Ecuador operations, and did not operate anywhere else at the time. *See id.*; Bischoff Deposition, *supra* note 472, at 213. Presumably, then, all of the subsidiary's activities in Houston were linked to the operations in Ecuador. According to ChevronTexaco, the government of Ecuador required that the 1973 Production Contract be signed with Texaco Petroleum "due to being a company incorporated in . . . [the United States], which, according to the Republic of Ecuador, was a guarantee of the operation's seriousness and solvency." ChevronTexaco Answer, *supra* note 17, ¶ II.A.1.7. **R** **R** **R**

509. *Aguinda*, 142 F. Supp. 2d at 549.

510. *Id.*

511. *Id.*

512. *Id.* at 550.

> Finally, in any fair balancing here of the relevant "private interests," reference must again be made to the glaring facts that neither the Government of Ecuador nor PetroEcuador, the state-run oil company that owns the Consortium and had primary control of it through much of the relevant time period, are parties to the instant suits, whereas they could be joined in any similar suit brought in Ecuador.[513]

Reliance on that factor—that Ecuador and Petroecuador could be joined in litigation in Ecuador but not in the United States[514]—not only rests on a factual ruling based on self-serving allegations by the defendant, that Ecuador effectively controlled relevant aspects of the operations and the company did not make environmental decisions,[515] but also now appears misplaced. In its answer to the complaint in the lawsuit in Lago Agrio, ChevronTexaco raised a number of defenses, including defenses related to Ecuador's and Petroecuador's role in the operations, but evidently decided not to implead them in the legal action. Instead, ChevronTexaco and Texaco Petroleum subsequently filed an arbitration claim in New York,

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513. *Id.* at 550-51.

514. *See id.* at 551. The Second Circuit opinion upholding the dismissal also cited that factor as "significant." *Aguinda,* 303 F.3d at 479.

515. In support of the statement, the court cited two affidavits: Bermeo Affidavit, *supra* note 335, which states that Ecuadorian law allows citizens to sue Ecuador and Petroecuador; and Callejas Affidavit I, *supra* note 268, which states that Petroecuador was successfully impleaded by Texaco Petroleum in one of the municipal lawsuits. *Aguinda,* 142 F. Supp. 2d at 551; Bermeo Affidavit, *supra* note 335,¶ 11; Callejas Affidavit I, *supra* note 268, ¶ 2. R R R

Notably, the court did not cite the general allegation in the Bermeo Affidavit that "Ecuador regulates the Environmental Consequences of hydrocarbon production," perhaps because the information offered in support of the allegation can be read to imply that there was no effort at regulation until 1984; that initial efforts were not successful; and that the government was not statutorily directed and authorized to conduct environmental monitoring until 1993, after Texaco's contract had ended. *See* Bermeo Affidavit, *supra* note 335, ¶ 10 (stating that an environmental agency was established in MEM in 1984; that MEM created a "new environmental department" in 1990; that (undated) regulations have been issued; that under a 1993 law, the government is responsible for "monitoring" hydrocarbon activities "to ensure that damages do not result"; and that the current (1998) Constitution "provides that the State will guarantee 'the right to live in an environment free of contamination' "). R

seeking "to enforce their rights" under the Consortium's joint operating agreement and require Petroecuador to indemnify "all fees, costs and expenses incurred by ChevronTexaco and TexPet related to the pending litigation . . ., including any final judgment that may be rendered against ChevronTexaco in Ecuador."[516]

6. *Balancing Private Interests*

Remarkably, the "balancing" of private interests by the *Aguinda* court did not acknowledge a single factor in favor of the plaintiffs' chosen forum. Although a number of uncontested private interest factors clearly favor an Ecuadorian forum, the court apparently excused any consideration of countervailing private interests on the basis of sweeping—and disputed—factual findings. Although the use and analysis by plaintiffs' counsel of the discovery allowed by Judge Broderick

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516. Press Release, ChevronTexaco, ChevronTexaco and Texaco Petroleum Company File Arbitration Claim to Enforce Petroecuador's Obligations Under Joint Operating Agreement: Claim Asserts Petroecuador Required to Pay All Costs Associated With Lawsuit Against ChevronTexaco in Ecuador (June 15, 2004), *available at* http://www.texaco.com/sitelets/ecuador/en/press_releases/2004-06-15_file_arbitration.asp. For defenses asserted in the lawsuit in Lago Agrio related to Ecuador and Petroecuador's role in the operations, see ChevronTexaco Answer, *supra* note 17 at 91-94. **R** For arguments by Texaco to the *Aguinda* court related to the ability to implead Ecuador and Petroecuador in an Ecuadorian forum, *see, e.g.,* Texaco Inc.'s Memorandum of Law in Support of its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, *supra* note 190, **R** at 31-32 (arguing that "[a] defendant's inability to implead non-parties weighs heavily in favor of dismissal"; that Ecuador and Petroecuador "are subject to suit and have been sued in Ecuador for similar claims"; and alleging that "it is doubtful that a trial here could provide Texaco with due process given Ecuador's and Petroecuador's preeminence in the activities at issue. . . ."); Feb. 1, 1999 *Aguinda* Transcript, supra note 332, at 23-24 (contending: "one of the most important factors here is impleader. Petroecuador can and will be brought into these lawsuits if they are filed in Ecuador. This is not an abstraction. Texaco Petroleum was sued in 1994 and '95 . . . [and] petitioned the Ecuadorian court to join them and the court did. You can't try these cases without having Petroecuador present. It just almost is a matter of fundamental fairness . . . ."). The post-dismissal arbitration claim not only raises questions about Texaco's candor with the *Aguinda* court, but also makes a mockery of the company's general argument that litigation in New York—as a defendant—would be inconvenient.

is disappointing,[517] the exclusive reliance by Judge Rakoff on self-serving allegations by the defendant to make factual rulings that go to the heart of plaintiffs' claims—without live testi-

517. For example, Plaintiffs cited only two discovery documents in their memoranda in opposition to Texaco's renewed motions to dismiss, although they quoted the Vargas Affidavit and cited the Yépez Declaration. Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint, *supra* note 337, at 2, 5-7. Plaintiffs' reply memorandum simply alleged that "all the decisions . . . were supervised and financed by the parent company" in the United States and refered the court to a memorandum they had submitted in 1996. Memorandum in Support of Plaintiffs' Reply to Defendant's Motion to Dismiss the Complaint, Aguinda v. Texaco Inc., No. 93 Civ. 7527 (S.D.N.Y. Jan. 25, 1999) at 2. R

At oral argument, Judge Rakoff asked Plaintiffs to specify "the decisions that you claim and can support . . . [which] were taken in White Plains by Texaco, as opposed to the fouth-level subsidiary down in Ecuador." Feb. 1, 1999 *Aguinda* Transcript, *supra* note 332, at 48-49. In response, plaintiffs' counsel stated: "I did not concentrate in the brief on the decision-making, because we have already filed in this court in a prior filing." *Id.* at 49. When pressed, he said: "the heart of this case is the decision to dump the water production [produced water], a decision that perhaps may not be on a piece of paper: Don't dump the water production. I think that would be stupid to put that in writing. I think that the decision was, turn your back and make the money . . . ." *Id.* After referring to deposition testimony by "the guy . . . the vice-president of Texaco, Inc." who, when asked about "the water production" was interrupted by Texaco's attorney because it went to the merits of the case, and stating that Vargas would testify that Ecuadorian officials "trusted" the company and "thought they were doing what they were doing everywhere in the world," Plaintiffs' counsel referred the court to their 1996 brief, and Judge Rakoff promised to "take a look." *Id.* at 49-51.

In the decision to dismiss, the court repeatedly rebuked the plaintiffs for failing to prove their allegations that Texaco designed and directed the operations from the United States, but appeared to concentrate on the document and deposition evidence and did not mention the affidavits and declarations (submitted by the plaintiffs) by Ecuadorians who were involved in the operations. *Aguinda*, 142 F. Supp. 2d at 548 (quoted *supra*); *id* at 548-49 ("plaintiffs rely on conjecture or irrelevancy—as well as misstatement and miscitation [footnote omitted] to try to supplant what their evidence wholly fails to show"); *id.* at 538 ("plaintiffs, after taking numerous depositions and obtaining responses to no fewer than 81 document requests and 143 interrogatories, were unable to adduce material competent evidence of meaningful Texaco involvement in the misconduct complained of—to the point that plaintiffs essentially stipulated as much"); *id.* at 550 ("The simple fact of the matter is that, after having deposed numerous Texaco witnesses and reviewed tens of thousands of Texaco documents in an effort to establish a meaningful nexus between the United States and the decisions and practices here complained of, plaintiffs have come up bone dry . . . .").

mony or supporting documentation[518]—is also disappointing, and evidently consequential.

Despite considerable gaps in the record, for the purpose of a forum non conveniens motion, there is no question that many evidentiary roads lead to activities in Coral Gables, Houston, and New York,[519] and a number of private interest factors favor litigation in plaintiffs' chosen forum. In addition, there is significant—albeit incomplete—evidence that the harmful operations were part of an international corporate enterprise that relied on the parent company's technical expertise, financial and human resources, and image as a U.S.-based multinational corporation. Notwithstanding the limitations of the plaintiffs' showing, they raised genuine issues of material fact, and there can be little doubt that if the court had questioned the defendant's self-serving allegations, and viewed the disputed facts and ambiguities in a light move favorable to plaintiffs, that approach—while not necessarily leading to a different outcome on the motion to dismiss—would have materially altered the analysis of private interest factors by the court.

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518. For example, the court cited a total of eleven pages of deposition testimony by four Texaco managers for the proposition that the record "clearly establishes that all of the Consortium's key activities, including the decisions and practices here at issue, were managed, directed, and conducted by Consortium employees in Ecuador." *Aguinda*, 142 F. Supp. 2d at 548.

519. At times, the court seems to blend the issue of parent liability with consideration of whether a nexus exists between the United States and the *Aguinda* claims. *See id.* at 549-50. The legal standard for establishing parental control for the purpose of parent liability is an exacting one and, had the litigation proceeded, it likely would have presented a formidable—but not necessarily insurmountable—challenge to the plaintiffs. However, it would not be appropriate to resolve such a complex legal issue in the context of a forum non conveniens motion, and Judge Rakoff does not purport to do so. At the same time, the court does not explicitly address the role of Texaco Petroleum personnel based in the United States, although the broad finding that "no one from Texaco or, indeed, anyone else operating in the United States made any material decisions" apparently encompasses the subsidiary's senior U.S.-based executives. *See id.* at 548. Although Texaco Petroleum was not a defendant in the lawsuit, the role of those executives—and their relations with junior mangers and personnel based in Ecuador and senior executives in the parent company—is relevant to both the disputed facts used by the court to support the decision to dismiss, and to a determination of parent liability at the proper juncture.

D. *Consideration of Public Interest Factors*

The balancing of public interest factors by the *Aguinda* court was similarly lopsided. A number of significant factors that favor an Ecuadorian forum were considered, but countervailing factors that favor litigation in U.S. courts were either not taken into account, or discounted and dismissed based on Texaco's (disputed) allegations about control of the challenged conduct. For example, the undisputed and substantial local interest in Ecuador in the controversy was properly considered; however, after acknowledging a public interest in the United States in "not permitting its companies to participate in such [alleged] misconduct," the court discounted and summarily dismissed that substantial public interest:

> [T]he uncontested role of the Government of Ecuador in authorizing, funding, and profiting from these activities necessarily lessens the United States' interest in the litigation while further increasing that of Ecuador.
>
> On any fair view of the evidence so far adduced in this case, the alleged preference given by the Consortium to oil exploitation over environmental protection was a conscious choice made by the Government of Ecuador in order to stimulate its economy. The public interest of the United States in second-guessing those decisions is modest indeed. While plaintiffs allege that the piping and waste disposal practices used to implement this choice were "negligent" (in the sense of causing more environmental harm than other, more expensive alternatives . . .), they have not adduced anything but conclusory statements to suggest that the Government of Ecuador was unaware of the trade-off; and, in any case, whether or not the Government of Ecuador was or was not aware of these alleged consequences can only be determined, in any meaningful way, if the litigation is brought in Ecuador, where (as noted) the Government of Ecuador can be joined as a party.[520]

The footnote by the court contains an excerpt from the 2001 Ecuador Commercial Guide, discussed *supra* in Part

520. *Id.* at 551 (footnote omitted).

X.A.2.d. It states that Ecuador was an agrarian country until the 1970s when oil development fueled a decade of rapid growth "that financed expanded public services, state enterprises, infrastructure, and import-substitution manufacturing."[521] The Report (and footnote) do not mention environmental policy,[522] and no other authority or evidence is cited by the court for the remarkable finding that Ecuador made a "conscious choice"—apparently when the oil boom began—to stimulate its economy at the expense of environmental protection.[523]

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521. *Id.*

522. *See generally* Ecuador Commercial Guide, *supra* note 285. The sections of the guide that discuss issues related to the administration of justice and corruption in Ecuador (discussed *supra* in Part X.A.2.d) were not mentioned in the court's opinion. **R**

523. The assertion that Ecuador made a "conscious choice" to permit the pollution that gave rise to plaintiffs' claims appears to embellish Texaco's generalized allegations that Ecuador and Petroecuador controlled environmental decisionmaking. Texaco's allegations essentially rest on the undisputed history of ownership and operation of the Consortium assets, and the fact that Ecuador and Petroecuador approved the operations (including plans and costs) and had general regulatory powers. The material dispute arises because Texaco's allegations fail to take into account the limited scope of actual regulation by Ecuador and, specifically, the environmental law and policy vacuum; the special role (and power) of Texaco as operator of the Consortium; the reliance by Ecuador and Petroecuador on Texaco to transfer oil field technology to Petroecuador and train Ecuadorian technicians; the significance of that reliance for environmental standards and practices in the oil fields; and the ignorance of Ecuadorian authorities about environmental issues at the time.

The only other authority for the court's finding that Ecuador regulated and controlled the conduct at issue in the litigation appears in the introduction to the opinion, and is limited to: (1) the 1998 decision by the Second Circuit overturning the first *Aguinda* dismissal, *Jota*, 157 F.3d at 156 (reporting, in a detailed outline of the procedural history of the case, "evidence presented by Texaco suggesting that the Republic had been heavily involved in the drilling operations and had eventually become the sole operator," but not purporting to make or cite findings of fact); (2) the affidavit of Texaco Petroleum by RicardoVeiga (Veiga Affidavit, *supra* note 67), summarized *supra* notes 504-08 and accompanying text; (3) an exhibit to that affidavit, entitled "Chronological Overview: Key Dates," which includes key dates in the history of the ownership and operation of the Consortium and the settlements with Ecuador and four municipalities, and describes the presidential decree that promulgated the 1973 Production Contract as, "Presidential Executive Decree gives government full regulatory and supervisory authority over Consortium operations"; and (4) a page from the Deposition of William Benton, a former manager of Texaco Inc.'s Latin America/West Africa Divi- **R**

No further consideration was given to the public interest in not permitting U.S. companies to "participate in such misconduct," despite the importance of that interest and the considerable—and long-standing—interest in the United States in the challenged conduct generally and the *Aguinda* lawsuit in particular.[524] In addition, no consideration was given to possible benefits to Ecuador from litigation in Texaco's home country. Judge Broderick had identified two such possible benefits in dicta in his decision reserving judgment on Texaco's motions to dismiss: relieving developing nations like Ecuador "of the need to offend [foreign] investors by imposing . . . controls which, however desirable, might be resisted by the investors;" and deterring harmful pollution and conduct by investors that violates applicable legal norms.[525]

Similarly, in discussing public interest factors related to applicable law, Judge Rakoff summarily asserted that Ecuadorian law would apply to most or all of the claims and concluded that "[b]ecause the courts of Ecuador are in the best position to find and apply their own law, this factor weighs significantly in favor of dismissal."[526] The court did not consider the possible application of common law to conduct that occurred in the United States or the application of international law to the plaintiffs' claim under the Alien Tort Claims Act. Moreover, although properly cognizant of difficulties that the application of Ecuadorian law would present to a U.S. court

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sion and officer and director of Texaco Petroleum, stating that Petroecuador was the majority owner of the Consortium while he worked in Ecuador. *See Aguinda*, 142 F. Supp. 2d at 537; *Jota*, 157 F.3d at 156; Veiga Affidavit, *supra* note 67, ¶¶ 2, 3, 6-10 and Ex.B; Deposition of William C. Benton, *supra* note 506, at 201; Defendant Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Concerning Forum Non Conveniens Issues, *supra* note 448 at 17, 55. Those documents do not support the far-reaching factual assertions by the court, which were also disputed by the plaintiffs and contradicted by the historical record. R R R

524. That interest is reflected in the extensive press coverage of the disclosures in *Amazon Crude* and the *Aguinda* litigation; *The New York Times* editorial urging the court to adjudicate the case; attention to the operations by U.S.-based NGOs and some public officials; letters from consumers to Texaco; and other activities that began when the tragedy was first publicized around 1990 and continue to this day.

525. *See Aguinda*, 1994 WL 142006, at *21.

526. *Aguinda*, 142 F. Supp. 2d at 552. The court apparently assumed that no tortious conduct had occurred in the United States, and that plaintiffs' international law claim would not survive a motion to dismiss. *See id.* at 553.

and jury, the *Aguinda* court did not consider the difficulties that possible applications of U.S. law would present to courts in Ecuador. As discussed above, ChevronTexaco has raised legal issues in the lawsuit in Lago Agrio that go beyond traditional applications of Ecuadorian law, by alleging that challenged practices meet U.S. environmental standards, in addition to complying with industry standards and practices, international practices, and legal standards in "other countries."[527] Because environmental law in the United States is complex and dynamic—and most oil field regulation varies from state to state—those allegations can be expected to present special, and unprecedented challenges to Ecuadorian lawyers and judges,[528] who have limited (if any) experience with environmental law.[529]

In addition, ChevronTexaco has raised issues of U.S. law in Lago Agrio by asserting defenses that turn directly on U.S. law. Remarkably, the "Principal Defense" in the company's answer to the plaintiffs' complaint (Answer) is that Ecuador's courts do not have jurisdiction over ChevronTexaco, because it "is not the [legal] successor of Texaco Inc." and has never acted in Ecuador or "subjected itself in any manner whatsoever to the jurisdiction of the Judiciary of the Republic of Ecuador."[530]

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527. ChevronTexaco Answer, *supra* note 17, ¶¶ II.B.1.4, .1.5, .1.6, .1.7(b), .1.8, II.B.2.2. R

528. In addition, no international environmental regulations apply to oil exploration and production activities and national environmental law and regulation in Ecuador are not well developed. As a result, despite significant public and policy interest in achieving international environmental parity in the oil fields, there is considerable confusion in Ecuador about the source and substance of international and foreign standards and practices, even among environmental officials with regulatory responsibilities. *See generally* Kimerling, *Rio + 10*, *supra* note 57; Kimerling, *International Standards*, *supra* note 40. R R

529. A related challenge can be expected when environmental remedies are crafted, because of the lack of experience in Ecuador with both environmental law and environmental protection measures, including pollution prevention and proper remedial investigation and cleanup.

530. ChevronTexaco Answer, *supra* note 17, ¶¶ I.1, IV.1. The Answer alleges that Texaco Inc. survived the "legal act known as the 'merger between Texaco Inc. and Chevron'" without losing "its legal personhood," and "is a completely independent company from ChevronTexaco Corporation, that continues to exist . . . [and operate] according to the laws of the State of Delaware, United States of America." *Id.* ¶¶ I.2-.3. As a result, plaintiffs'

Similarly, the Answer asserts that ChevronTexaco is not bound by the Second Circuit decision in *Aguinda*, "which orders" Texaco Inc.—but not ChevronTexaco Corporation—to subject itself to Ecuadorian jurisdiction and waive any statutes of limitations claims that matured between the date the case was filed in New York and one year after the final dismissal.[531] A subsequent paragraph repeats that contention and goes further. It notes that the *Aguinda* decision was issued after the "legal act known as 'the merger between Texaco Inc. and Chevron,'" but does not mention ChevronTexaco, and asserts: "therefore neither the Court's decisions nor the agreements [stipulations] that Texaco Inc. may have reached in virtue of said judicial ruling are applicable."[532]

The Answer also quotes Judge Rakoff's 2001 opinion, and arguably implies that the case was dismissed on the merits because plaintiffs could not prove their "false" claim of "subordinate connection" between Texaco Inc. and Texaco Petroleum.[533] Finally, in a claim that likely will turn on Ecuadorian law but contradicts Texaco's assurances to the *Aguinda* court that legal avenues for the plaintiffs' claims exist in Ecuador, the Answer alleges that:

> [P]laintiffs have no right to make claims for supposed and denied damages to the environment, from which the Government of the Republic of Ecuador, the Municipalities in which the concession areas were located and the majority partner in the Consortium . . . have already exempted the operator company,

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allegation that Texaco's obligations transferred to ChevronTexaco by virtue of the merger "lacks legal basis." *Id.* ¶ I.2; *see also id.* ¶ I.4. In addition, the Answer states that because ChevronTexaco is not a successor to Texaco or Texaco Petroleum, it "does not have in its possession any document that it must contribute as documentary evidence," except for certifications granted by the Secretary of State of Delaware regarding the "incorporation and legal existence" of Texaco Petroleum; the "incorporation, current legal existence and merger" of Texaco Inc. and a subsidiary of Chevron; and the "incorporation, current legal existence and name change of ChevronTexaco." *Id.* ¶ IV.5.9.

531. *Id.* ¶ I.4; *see also id.* ¶ IV.3.4. The Answer also misrepresents the Second Circuit ruling, by stating that it requires Texaco Inc. to subject itself to Ecuadorian jurisdiction "for that same one-year period" that the statute of limitations is tolled. *Id.* ¶ I.4.

532. *Id.* ¶¶ I.2, I.8.

533. *Id.* ¶ I.8.

> Texaco Petroleum Company (Texpet), Texaco Inc. and their successors or predecessors.[534]

The *Aguinda* court concluded its forum non conveniens analysis by rejecting the plaintiffs' argument that the balance of the *Gilbert* factors should be "re-weighed" in light of their claim under the Alien Tort Claims Act.[535] That statute provides a federal forum to aliens suing for violations of the law of nations, and arguably evinces a special public interest in the United States in providing a forum for litigation of those kinds of claims. "Whatever the abstract merits or demerits" of the argument, the court stated, "it is of little relevance to this case, for two reasons."[536] The first reason was that plaintiffs' international law claim "lacks any meaningful precedential support and appears extremely unlikely to survive a motion to dismiss."[537] Although a full discussion of that complex legal issue is beyond the scope of this Article, the appropriateness of resolving it in the context of a forum non conveniens motion appears questionable, especially in view of the apparent openness of Judge Broderick to the claim.[538] The second ground for declining to consider a special public interest in providing a forum for international law violations rested on the court's factual ruling, discussed above:

> [T]he discovery already taken in this case has established overwhelmingly that no act taken by Texaco in the United States bore materially on the pollution-creating activities of which plaintiffs complain. This is not a case, then, where the United States was specially used as a base from which to direct violations of

534. *Id.* ¶ I.9. *See also id.* ¶¶ IV.4.1 (claiming lack of jurisdiction as defense to the lawsuit against ChevronTexaco in Lago Agrio); *id.* ¶¶ IV.4.3 (denying that ChevronTexaco is the successor of Texaco Inc, as defense to the lawsuit in Lago Agrio); *cf.* ChevronTexaco Oct. 21, 2003 Press Release, *supra* note 67; and Summary of ChevronTexaco's Response, *supra* note 220 (claiming release of liability based on releases obtained by Texaco Inc. and Texaco Petroleum from Ecuador, Petroecuador and municipal and provincial authorities). The releases from liability are discussed *supra* notes 216, 220-24, 269-71, 300 and accompanying text, and should not apply to claims by third parties; however, final adjudication of that issue by Ecuador's courts could be years away. **R**

535. *Aguinda,* 142 F. Supp. 2d at 552.

536. *Id.*

537. *Id.*

538. *See Aguinda,* 1994 WL 142006.

> international law on some foreign site. Conversely, the actions in question occurred overwhelmingly in Ecuador . . . . The United States therefore has no special interest . . . in providing a forum for plaintiffs pursuing an international law action against a United States entity that plaintiffs can adequately pursue in the place where the violation actually occurred.[539]

Similar to the private interest factors, the court held that the public interest factors "overwhelmingly support" an Ecuadorian forum "in preference to" a forum anywhere in the United States.[540] Although a number of public interest factors clearly favor litigation in the defendant's preferred forum, the *Aguinda* court seemed to make its determination without giving serious consideration to countervailing public interests that favor the plaintiffs' chosen forum. As with the private factor analysis, the court based its uneven appraisal on the apparently unquestioned acceptance of self-serving allegations by the defendant denying responsibility for environmental protection in Ecuador and attempting to erect a firewall between the parent company and the challenged operations. Those allegations—and the related factual rulings by the court that Ecuador's government effectively controlled environmental decisionmaking, and no one from the United States played a meaningful role in the acts and omissions that caused the harmful pollution—go to the heart of the plaintiffs' claims and were disputed in the litigation record. In addition, they are contradicted by the historical record, including the history of conflicting assertions by senior Texaco managers outside court of corporate environmental responsibility and technical know-how for the operations.[541]

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539. *Aguinda,* 142 F. Supp. 2d at 553.

540. *Aguinda,* 142 F. Supp. 2d at 551.

541. *See, e.g., supra* note 191 and accompanying text. The sharp differentiation between Texaco and Texaco Petroleum is also at odds with some documents and deposition testimony which indicates that corporate legal lines within the Texaco corporate family were not so clear in practice. *See, e.g.,* Shields Ex. 17, *supra* note 447 (internal Texaco Inc. document referring to Texaco Petroleum Company as "the Ecuadorian Division"); Shields Ex. 18, *supra* note 447 (internal Texaco document referring to Texaco Petroleum Company as "the Ecuadorian Division"); Memorandum from R.J. Evans (Bellaire, Texas) to R.M. Bischoff (Coral Gables), Dec. 7, 1977, marked as Bischoff Ex. 27 *in* Bischoff Deposition, *supra* note 472 (referring to Texas Pipeline Company, another subsidiary of Texaco Inc., as a "Department of Texaco"); R R R

E. *"The Two Faces of Texaco"*[542]

The portrait of Texaco's role in the oil frontier in Ecuador painted by the *Aguinda* court is dramatically different from the experience of Amazonian peoples and other Ecuadorians. It also seems irreconcilable with the portrait cultivated by Texaco during its tenure in Ecuador—the triumphalist chapter in the history of oil development there—of a partnership for development led by the U.S.-based multinational corporation that would benefit all Ecuadorians and catapult the nation out of poverty and "underdevelopment," into modern times.

As discussed above, the court's finding that no one from Texaco or the United States played a meaningful role in designing, directing, guiding, or assisting the operations that caused the oil field pollution is based exclusively on allegations and deposition testimony by senior corporate officials and attorneys during the course of the litigation. Those alle-

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Bischoff Deposition, *supra* note 472, at 12, 20, 37, 84-85, 94-95, 97, 152-54, 159-61, 207; Shields Deposition, *supra* note 460, at 20-21, 72-83, 254, 259, 261-63, 318-23; Doyle Deposition, *supra* note 483, at 22, 25-30, 62, 238. In addition, Texaco reported earnings from Texaco Petroleum in a consolidated form, "grouped by the division primarily responsible" for the subsidiary, Texaco Latin America/West Africa. *See, e.g.*, Texaco Inc., Annual Report (Form 10-K), at 37 (Mar. 13, 1990); Texaco Inc., Annual Report (Form 10-K), at 34 (Mar. 21, 1989); Texaco Inc., Annual Report (Form 10-K), at 31 (Mar. 25, 1988) (also reporting that "[f]rom its headquarters in Coral Gables, Florida, Texaco Latin America West Africa oversees producing, refining and marketing operations in a total of 55 courtries spread through the Caribean, Central and South America and Africa"). R R R

542. The title of this section is borrowed from an article published by *The New York Times* after senior Texaco executives were caught on tape disparaging African Americans and apparently plotting to destroy documents demanded in a discrimination lawsuit. *See* Kurt Eichenwald, *The Two Faces of Texaco*, N.Y. TIMES, Nov. 10, 1996, § 3, at 1 (reporting that "the right race discrimination policies were on the books but not always practiced on the job"); Kurt Eichenwald, *Texaco Executives, On Tape, Discussed Impeding a Bias Lawsuit*, N.Y. TIMES, Nov. 4, 1996, at A1. That class action lawsuit against Texaco Inc. alleged a "pattern and practice of racial discrimination" in employment practices. Plaintiffs Complaint, Roberts v. Texaco, 94 Civ. 2015 (S.D.N.Y. June 30, 1994), ¶20. For more than two years, Texaco denied the allegations and vigorously fought the lawsuit. Disclosure of the tape prompted a public outcry and made it untenable for the company to continue to deny allegations of racial bias; within two weeks, Texaco agreed to the largest settlement ever in a race discrimination case (more than $140 million, in addition to remedial measures). *See* Kurt Eichenwald, *Texaco to Make Record Payout in Bias Lawsuit*, N.Y. TIMES, Nov. 16, 1996, at A1.

gations sought to distance the parent company from the operations in Ecuador and deny any role in environmental management there. At the same time, they sought to portray Ecuador's government as both the dominant partner in the Consortium and its regulator—and the environmental decisionmaker and monitor in the oil frontier. The allegations—which were accepted, apparently without question, by the *Aguinda* court—represented a marked change from the image promoted by Texaco prior to the litigation in response to external concerns about oil development in the Amazon rainforest, that of an industry leader engaged in worldwide operations, "committed to environmentally sound practices in the conduct of all its operations, [in Ecuador and] wherever in the world they may be."[543] It is also at odds with the image long promoted by Texaco's wholly-owned subsidiary in Ecuador: of a leading U.S. company with operations in dozens of countries around the globe, that transferred international, "world class" oil field technology and business administration skills to Ecuadorian nationals, and designed, financed, built, and operated the infrastructure that quickly came to dominate Ecuador's economy and development aspirations.[544]

The international, triumphalist (pre-litigation) face of Texaco is aptly illustrated by the words of the company to the Ecuadorian public in 1990, on the occasion of the transfer of the challenged field operations to Texaco's junior partner and student, Petroecuador. In a half-page advertisement in a leading newspaper, the headline read: "Texaco, 25 years preparing Ecuadorian hands to manage our patrimony."[545] Notably, the advertisement does not mention Texaco Petroleum and refers

543. Annett-Hunter Letter, *supra* note 191. **R**

544. The documents described in this section are not included in the litigation record but offer a candid, contemporaneous view of relevant issues in the company's own words.

545. *Texaco, 25 años preparando manos Ecuatorianas para manejar nuestro patrimonio* [*Texaco, 25 years preparing Ecuadorian hands to manage our patrimony*], EL COMERCIO, June 15, 1990 (paid advertisement by Texaco); *see also Se va la Texaco* [*Texaco leaves*], HOY (June 6, 1992) (reporting Texaco's departure from Ecuador on the occasion of the expiration of the 1973 Production Contract; referring to the reversion to the State of "all of the infrastructure installed by the *foreign* company" during its 28 years in Ecuador [emphasis added]; and quoting a statement by the General Manager of a Petroecuador subsidiary, that "[t]hrough the work of the company [Texaco] in the 1960s and 1970s Ecuador entered the modern world").

only to "Texaco." Two photographs appear below the headline. The left-hand side contains an industrial image from the oil fields, of wellheads and stacked sections of pipeline in a muddy clearing. Underneath, a small caption reads: "25 years ago, Texaco established the bases of our petroleum history." A larger caption, in bold print, says: "1965, Texaco shares its technology with Ecuador." Beneath, the text explains: "During its 25-year presence in the country, Texaco has trained more than 700 Ecuadorians in technical and administrative areas of the petroleum industry. Thanks to this transfer of technology, the specialized services of many compatriots are required in other parts of the world."[546]

The photograph on the right-hand side is a portrait (head shot) of an Ecuadorian oil field worker, wearing a hard hat with the Petroecuador logo. His hand is lifted to the logo as if protecting his eyes—as he looks contentedly and determinedly into the sun—but it also suggests a salute. The caption underneath reads: "Texaco collaborated with the nation, by training more than 700 petroleum experts in technical and administrative areas." A date with a caption in bold print and larger letters complements the date on the left-hand side and reads: "1990, The generation of Ecuadorian technical experts." Underneath, the explanation reads:

> With the help of Texaco, a company known around the world, Ecuador enjoys today its petroleum resources that, without doubt, have contributed to improvements in the standard of living of all Ecuadorians. We believe that the union between Texaco and the people of Ecuador is and can continue to be positive so that, together, we can continue forging the welfare of the future.

In the lower corner of the page, bracketing those words, the Texaco logo appears—apparently on the move—with the words, "25 Years, Texaco, A positive union with Ecuador."[547]

Both the industrial image from the oil fields and suggested motion of the Texaco logo are reminiscent of the image promoted by the company and its corporate culture in Ecuador before disclosures of shocking pollution in the oil fron-

546. Texaco, *25 years preparing Ecuadorian hands to manage our patrimony*, *supra* note 545. **R**

547. *Id.*

tier prompted international concern and condemnation, and placed environmental issues on the petroleum policy agenda there. The company's "can-do," "get-the-oil" macho culture took pride in Texaco's technological prowess, efficiency, and international prestige, and saw nature and the rainforest environment as an adversary to be conquered. A news magazine published by Texaco Petroleum and distributed to its Ecuadorian workforce in 1989, and a speech by the company's top Quito-based executive on the occasion of the expiration of the 1973 Production Contract illustrate that corporate culture.

The speech, by Warren Gillies, Managing Director of Texaco Petroleum and a U.S. national, was reported by a major newspaper as follows:

> [Gillies said:] "You, the petroleum workers, are the direct beneficiaries of our work together for 28 years; your country and every one of you have grown doing this labor, the petroleum will eventually run out, but the memories of difficult work, of goals achieved, of old companions, of the satisfaction of having triumphed in the hostile environment of the Oriente [Amazon region], will always remain with every one of you," he affirmed with emotion.
>
> Warren D. Gillies said that Texaco "leaves you with our sincere desire for a future that brings days filled with challenges in order to continue testing your capacity, and at the end of those days, great successes to fill your hearts."
>
> According to the top representative of Texaco, through the years, the teacher has been replaced by the student and they have come to be true partners, referring to the Ecuadorian technicians, and he affirmed his confidence that the work for which both have struggled and sweat to establish, will go forward. "The workers of many years ago have been converted over time into experts, technically and professionally recognized abroad, as dedicated and capable of confronting and overcoming any task," he said.[548]

548. *Dejamos las obras en buenas manos* [*We leave the infrastructure in good hands*], HOY, June 8, 1992.

The company magazine was printed in Ecuador but produced with "direction and editing" by the "Department of Public Affairs of Texaco."[549] It describes Texaco as "a serious and efficient" company, with operations worldwide: "when we sign a contract it is to fulfill it; because of this our image is beloved and respected in 74 countries of the world, where TEXACO maintains its operations."[550] Another page contains bar graphs showing production costs and the number of employees over time and says, in large letters: "This is how Texaco is . . . An Efficient and Productive Company."[551] The brief text includes the statement, "we have demonstrated our sincere desire to transfer technology to the national employees, training them for the complex tasks of the petroleum industry and gradually reducing expatriate personnel."[552]

A short news article about recent repairs to the Trans-Ecuadorian Pipeline opens with a telling quotation by Simón Bolívar, the revolutionary general and beloved hero of the South American fight for independence from Spain. Attributed to Bolívar, but with no further citation, it says: "If nature opposes our designs, we will fight against her and we will defeat her."[553] The quote is followed by a day-by-day account, beginning with the automatic shutdown of pipeline operations in response to a drop in pressure—indicating that the line has been breached and is spilling oil—and ending when the pumps are turned on, and operations resume, after replacing 120 meters of pipeline.[554] The break was caused by a landslide, and the account conveys a sense of urgency to the work—in order to resume operations—and a battle by Texaco's technical experts, "toiling without rest" to complete the repairs, undeterred by "a hellish climate . . . and environment full of deafening noises produced by nature, motors and the voices of command."[555] The article does not mention the oil that spilled out of the line into the environment or any efforts to contain,

549. Texaco, NEWS, *supra* note 100, at i. **R**

550. *Artículo de Fondo* [*Leading Article*], *in* Texaco, NEWS, *supra* note 100, at 1. **R**

551. *Id.* at 33.

552. *Id.*

553. *Reparación del Oleoducto Transecuatoriano* ("*Repair of the Trans-Ecuadorian Pipeline*") *in* Texaco, NEWS, *supra* note 100, at 31. **R**

554. *Id.* at 31-32.

555. *Id.* at 32.

clean, or otherwise respond to the spill. The term, "*trabajos de limpieza* (cleaning tasks)" is used but refers to clearing soils and debris, so that heavy equipment can reach the work site.[556]

As discussed above, during the time that Texaco operated the Trans-Ecuadorian Pipeline (1972-1989), thirty major spills dumped an estimated 19.23 million gallons of oil into the environment.[557] The pipeline crosses an area with significant seismic activity and unstable terrain, located on the eastern slopes of the Andes, in the watershed of the Amazon Basin, and more than half of the total spillage has been attributed to breaks in that portion of the line.[558] The repairs reported in Texaco's magazine evidently occurred in that high risk area,[559] some two years after an opportunity to re-route the pipeline—to bypass the unstable terrain and significantly reduce the risk of future spills—was forfeited, based on a recommendation by Texaco.

In 1987, a major spill occurred in the high risk area when the pipeline was ruptured by two earthquakes and major landslides. Reconstruction was financed by a loan to Ecuador from the World Bank. The Memorandum and Recommendation of the President of the Bank to the Executive Directors for approval of the proposed loan offers a window on how operations in Ecuador were managed, and indicates that alternative routes were considered at that time, but economic factors prevailed over environmental considerations, based on guidance from Texaco.

Significantly, the World Bank document does not mention Texaco Petroleum Company; instead, it uses the term "Texaco" to refer—without distinction—to Texaco Petroleum and other Texaco subsidiaries and divisions slated to work on the project. In addition to Texaco Petroleum, at least two other affiliates of Texaco Inc. assumed significant roles: Texaco Pipeline Inc. and Texaco Inc. Purchasing Division, both

556. *Id.* at 31-32; *see also, e.g.*, Texaco, NEWS, *supra* note 100, at 3-7 (detailing the operations and continuous care to maintain production, with no mention of environmental protection).

557. *See supra* notes 123-124 and accompanying text. R

558. Republic of Ecuador, Ministry of Energy and Mines, General Directorate for the Environment (DIGEMA) Proposes a Need to Incorporate Contingency Plan for the Trans-Ecuadorian Pipeline System (SOTE), *supra* note 73, at 5. R

559. *See id.*; *Repair of the Trans-Ecuadorian Pipeline*, *supra* note 553, at 31. R

based in Houston. The description of the "Project Organization" reports that Petroecuador "designated Texaco as project manager" for the pipeline reconstruction component of the loan, and that "Texaco will staff the project with expatriates from its Houston headquarters as well as pipeline operations personnel from the Consortium."[560] In a subsequent section, the document notes that negotiations for the construction contract are already underway with "the lowest evaluated bidder (Willbros, USA)"—the U.S.-based subcontractor that built the pipeline—but explains that "Texaco" will "act as both project engineer and procurement agent." The recommendation also appears to rely on the collective—and integrated—experience and stature of the Texaco corporate family to assent to an arrangement (agreed to by Petroecuador and Texaco) for selecting suppliers and subcontractors: "Given the urgency of the project and Texaco's unique qualifications to take quick and effective actions required, this arrangement is appropriate."[561] Similarly, the project's budget lists "engineering and management" to be "provided by Texaco" as "Technical Assistance."[562] With regard to design alternatives and decisions for the reconstruction, the document indicates that Texaco's guidance was followed and that an opportunity to significantly reduce the risk of future spills was forfeited because economic concerns prevailed:

> Because of the area's unfavorable geology and seismicity, and the rough and unstable terrain conditions along the damaged stretches of the pipelines, Texaco carried out a detailed analysis of four possible alignments for the reconstruction of the lines . . . . [Only the fourth route involving a detour through flatter terrain] would significantly reduce seismic and geological risk, but would increase costs by as much as US$70 million and completion time by at least 13 months. Texaco therefore recommended that, in view of the urgent need to reinstate oil production, immediate reconstruction of the lines follow the original alignment, but that concurrently a study be un-

560. World Bank Ecuador Pipeline Reconstruction Project, *supra* note 124, at 21.

561. *Id.* at 22.

562. *Id.* at 18-19.

> dertaken to assess in detail the technical/economic feasibility of building another line along the fourth route as a long-term back-up option . . . . A pipeline construction expert hired by the Bank concurred with this approach.[563]

Texaco (and ChevronTexaco) has attributed "the great majority" of the spilled oil to "natural causes."[564] However, nature did not build—and reconstruct—a pipeline, and fill it with crude oil, in unstable terrain in an area with significant seismic activity. Although the documents discussed in this section (the advertisement, magazine and World Bank loan recommendation) were not included in submissions to the *Aguinda* court, they offer a contemporaneous portrait of Texaco that clearly contradicts the portrait of the defendant in the decision to dismiss the lawsuit. Indeed, the divergence is so great that it raises additional serious questions about Judge Rakoff's application of the forum non conveniens doctrine and further demonstrates that the basic determination by the court—that the plaintiffs' claims have "nothing to do with the United States"—cannot reasonably be reconciled with the historical record.

F. *Summary and General Observations*

Judge Rakoff's second dismissal of *Aguinda,* on the ground of forum non conveniens in favor of litigation in Ecuador, is convenient for the defendant, but is significantly less convenient for the plaintiffs, and a major gamble for the interest of justice. After determining that the plaintiffs' choice of forum carried a strong presumption of validity, the court seemed to disparage that choice and repeatedly relied on allegations by the defendant to make factual findings that favored litigation in the defendant's preferred forum. Although a number of uncontested facts were also used by the court to support the legal analysis and decision to dismiss, application of the forum non conveniens doctrine was nonetheless colored by a series of questionable factual assumptions, including erroneous and unsupported findings about the litigation record in Ecuador's courts, and rulings on disputed material

563. *Id.* at 17.

564. TEXACO PUBLIC RELATIONS, *supra* note 79, at 7; *see also, e.g.*, Dowd-Zore Letter, *supra* note 474. R R

facts related to decisionmaking and control of the operations, intertwined with the merits of the case. In addition, the balancing of private and public interest factors by the court was lopsided and did not take into account a number of factors that favor the plaintiffs' choice of a U.S. forum. Although litigation of the *Aguinda* claims in Texaco's homeland would undoubtedly raise a number of practical, political, and legal challenges, U.S. courts have experience with complex civil litigation and remedies and generally, are in a better position to provide an impartial hearing and adequate judicial remedy than courts in Ecuador.

Specifically, in determining that an adequate alternative forum exists, the court found that several plaintiffs have already recovered judgments against Texaco Petroleum and Petroecuador in Ecuador's courts for claims arising out of the facts alleged by the *Aguinda* plaintiffs, a finding that is clearly erroneous. A related finding, that Ecuadorian oil field workers have won personal injury lawsuits against Texaco Petroleum based on claims of alleged negligence, is not supported by evidence in the litigation record before the court, and is contradicted by the historical record. A third major finding, that the description of generalized and systemic deficiencies in Ecuador's legal and judicial system by the U.S. Department of State in its Country Reports on human rights is largely limited to cases involving confrontations between the police and political protestors, is also erroneous and suggests a lack of candor by the court.

Related findings—that there is no evidence of impropriety by Texaco or any member of the Consortium in any prior judicial proceeding in Ecuador and that numerous cases are pending against multinational corporations without evidence of corruption—are of limited probative value in the absence of meaningful information about the outcomes of those proceedings. The parsed language of the findings appears to evade concerns related to discrimination against indigenous peoples in Ecuador and the culture of impunity in the oil fields. In addition, corruption is notoriously difficult to prove and commonly goes unreported, even when parties are convinced that it has influenced judicial proceedings. Finally, many plaintiffs in Ecuador do not receive an adjudication of their claims, illustrating the truth of the adage, "justice delayed is justice denied," and support for the *Aguinda* court's findings is limited

to self-serving affidavits by Texaco Petroleum attorneys and experts. Although the court's focus on the litigation record in Ecuador is understandable, as is its preference to avoid reliance on generalized allegations of corruption, legal precedents to support the court's sanguine view of litigation in Ecuador simply do not exist. As a general matter, final judgments and evidence of compliance with court-ordered remedies would provide far better measures of the adequacy of an Ecuadorian forum than the bald, conclusory, and vague assertions that abound in Texaco's submissions, including affidavits cited by the court.

Despite a multitude of submissions by Texaco, including ample—but vague—allegations about the litigation record in Ecuador, a gaping hole remains: no final judgment by a court of law in favor of a plaintiff against an oil company based on environmental injuries, or against Texaco (or Texaco Petroleum) in any lawsuit was submitted by the defendant. The only judgment in the record in favor of a plaintiff—an action by a municipality against Petroecuador and its insurer for damages caused by an oil spill from a former Texaco facility—was vacated on appeal by Ecuador's Supreme Court, which also assessed costs for the defendants' attorneys against the judges who ruled for the plaintiff in the unprecedented environmental action. The *Aguinda* court's demand for highly particularized evidence of corruption in order to defeat a motion for which the defendant bears the burden of proof sets a burdensome and arguably impossible standard for these plaintiffs, especially considering the difficulty of proving corruption in specific cases, the lack of transparency in Ecuadorian courts, and the failure of the discovery order to facilitate access by plaintiffs to that type of information. The absence of judgments in the record to support Texaco's conclusory allegations is more revealing than the absence of evidence of corruption by Texaco and other multinationals in specific lawsuits.

Another finding—that Ecuador had recently taken steps to further the independence of its judiciary—is technically accurate. However, the effectiveness of those steps had not been not demonstrated, and recent events show that the *Aguinda* court's optimistic view was premature. The court's expectations turned a blind eye to the historical and political context of the reform efforts, including the repeated failure of previous reforms to establish an impartial judiciary and combat cor-

ruption generally. Similarly, the finding that there is little chance of corruption or undue influence in lawsuits by *Aguinda* plaintiffs because they will be subject to public and political scrutiny is speculative and sanguine. In addition, it is contradicted by both the historical record and references in the litigation record to judicial proceedings related to high profile corruption scandals that prompted considerable public outrage, but were nonetheless reportedly tainted by external influences. Finally, the finding that other U.S. courts have found Ecuador to be an adequate forum is supported by case law, but offers little reassurance because it appears to reflect the relatively light burden on defendants to show the existence of an alternative forum under the forum non conveniens doctrine, and does not indicate whether plaintiffs in the cited cases have in fact obtained an impartial hearing and adequate remedy in Ecuador's courts.

Both the historical record and the *Aguinda* litigation record make it clear that the road to judicial reform—and the rule of law—in Ecuador will be long and difficult. In the oil frontier in Amazonia, law and politics continue to be characterized by gross inequities that favor oil company interests at the expense of indigenous peoples, *campesinos*, and the environment. The notion, implicit in the court's analysis, that environmental lawsuits against ChevronTexaco and Petroecuador in Ecuador could somehow be insulated from the social and political context in which they operate, and enjoy immunity from systemic deficiencies in the legal and judicial systems, is implausible. Although not necessarily impossible, plaintiffs' prospects for an impartial hearing and adequate judicial remedy in the alternative forum are tenuous at best, and any litigation efforts in Ecuador will disproportionately favor ChevronTexaco for reasons external to—and inconsistent with—the rule of law.

The balancing of private and public interest factors by the *Aguinda* court, to determine whether the presumption in favor of plaintiffs' chosen forum should be overcome, was similarly colored by detailed but questionable factual assumptions. Although a number of undisputed facts were used to support the legal analysis, the court also relied, repeatedly, on Texaco's version of disputed facts relating to decisionmaking and control of the technology and practices that caused the pollution that gave rise to the plaintiffs' claims. Specifically, the court

ruled that (1) no one from Texaco or anyone else operating out of the United States made any material decisions, or was involved in designing, directing, guiding, or assisting the activities that caused the pollution; (2) all relevant decisions and practices were managed and directed in Ecuador, and had nothing to do with the United States; (3) environmental standards and practices were heavily regulated by the government of Ecuador; and (4) Texaco's only involvement in the operations was an indirect investment in a fourth tier subsidiary. While not determinative in and of themselves of the legal issues in the forum non conveniens determination, there is no question that these factual rulings were material elements of the court's analysis and decision to dismiss the lawsuit.

Although a number of uncontested private and public interest factors clearly favor litigation in the defendant's preferred forum, and were properly considered by the court, Judge Rakoff appeared to excuse any consideration of countervailing considerations that favor the plaintiffs' chosen forum—or summarily discount and dismiss them—on the basis of those remarkable factual findings. As a result, application of the forum non conveniens doctrine to dismiss *Aguinda* was colored by factual rulings that—while not fully developed in the litigation record—were nonetheless disputed by the plaintiffs. In addition, the findings are contradicted by both the historical record and the image cultivated by Texaco before it was sued, of corporate environmental responsibility and technical know-how for the operations.

Although the use and analysis by plaintiffs' counsel of the discovery allowed by Judge Broderick is disappointing, the exclusive reliance by Judge Rakoff on self-serving allegations by the defendant—those denying responsibility for environmental protection in Ecuador and attempting to erect a firewall between the parent company and the challenged operations—to make factual rulings that go to the heart of the plaintiffs' claims, without live testimony or supporting documentation, is also disappointing, and consequential. Notwithstanding the limits of their showing, the plaintiffs raised genuine issues of fact, and there can be little doubt that if the court had questioned the defendant's self-serving allegations and viewed the disputed facts and ambiguities in a light more favorable to the plaintiffs, that approach—while not necessarily leading to a different outcome on the motion to dismiss—would have ma-

terially altered the analysis of both private and public interest factors.

Despite considerable gaps in the litigation record, for the purpose of a forum non conveniens analysis, there is no question that many evidentiary roads lead to the United States, and a number of private and public interest factors favor litigation in the plaintiffs' chosen forum. In addition, there is significant—albiet incomplete—evidence that the harmful operations were part of an international corporate enterprise that relied on the parent company's technical expertise, financial and human resources, and image as a U.S.-based multinational corporation. The *Aguinda* court's ruling that the operations have "everything to do with Ecuador and nothing to do with the United States" is effectively a legal fiction. Instead of equitably serving the convenience of the parties and the interest of justice, application of the forum non conveniens doctrine to dismiss *Aguinda* and deny the plaintiffs a day in court in Texaco's homeland represents an abdication of responsibility by the legal and judicial systems of the United States. As a result, this decision can be expected to reinforce and help perpetuate the culture of impunity in the oil fields.

XI. The Second Appeal

The plaintiffs appealed the dismissal to the Second Circuit Court of Appeals. In August 2002 the appellate court—reviewing the forum non conveniens determination by the district court for an abuse of discretion—upheld Judge Rakoff's second dismissal of *Aguinda* (and *Ashanga Jota)*, with one modification. Because class action procedures are not available in Ecuador and plaintiffs' counsel represented that they would be required to obtain signed authorizations for each individual plaintiff—estimated at 30,000 persons in Ecuador and 25,000 in Peru—the Second Circuit extended the time allowed by the district court for plaintiffs to sue in the alternative forum exempt from claims of preclusion. It directed the lower court to modify its ruling "to make dismissal conditioned on Texaco's agreement to waive defenses based on statutes of limitations for limitation periods expiring between the date"

the cases were filed and one year—rather than 60 days—after the final judgment of dismissal.[565]

Although the appellate court did not repeat all of the detailed factual rulings discussed in this Article, it quoted Judge Rakoff's general finding that *Aguinda* has "everything to do with Ecuador and nothing to do with the United States" and apparently relied on some of the more specific findings to reject the plaintiffs' appeal.[566] For example, in reviewing the determination of an adequate alternative forum, the Second Circuit cited the erroneous finding that "several plaintiffs have recovered judgments against TexPet and PetroEcuador for claims arising out of the very facts here alleged."[567] It also cited cases in which other U.S. courts found Ecuador to be an adequate forum for tort litigation, as well as and a second questionable finding by Judge Rakoff: Texaco's "unrebutted evidence of other types of successful tort claims brought in Ecuadorian courts, including personal injury claims by Ecuadorian oilfield workers against Texpet."[568] In rejecting the plaintiffs' allegations that Ecuador's courts are "subject to corrupt influences and incapable of acting impartially," the appellate court summarized six findings by the lower court, and added: "We cannot say that these findings were an abuse of discretion."[569]

The Second Circuit's limited discussion of private interest factors noted several types of evidence located in Ecuador, and then repeated a basic finding of the lower court in a more

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

566. *Id.* at 476.

567. *Id.* at 477.

568. *Id.* at 478.

569. *Id.* The findings listed by Second Circuit are: "(1) no evidence of impropriety by Texaco or any past member of the Consortium in any prior judicial proceeding in Ecuador; (2) there are presently pending in Ecuador's courts numerous cases against multinational corporations without any evidence of corruption; (3) Ecuador has recently taken significant steps to further the independence of its judiciary; (4) the State Department's general description of Ecuador's judiciary as politicized applies primarily to cases of confrontations between the police and political protestors; (5) numerous U.S. courts have found Ecuador adequate for resolution of civil disputes involving U.S. companies; and (6) because these cases will be the subject of close public and political scrutiny, as confirmed by the Republic's involvement in the litigation, there is little chance of undue influence being applied." *Id.*

measured tone: "By contrast, plaintiffs have failed to establish that the parent Texaco made decisions regarding oil operations in Ecuador or that evidence of any such decisions is located in the U.S."[570] The appellate court also found it "significant" that Ecuador and Petroecuador could be joined in a lawsuit in Ecuador.[571] To the extent that evidence exists in the United States, the Second Circuit found that the plaintiffs' concerns were "partially addressed by Texaco's stipulation to allow use of the discovery already obtained" and by defense counsel's agreement during oral argument that "Texaco would not oppose further discovery in Ecuador that would otherwise be available in the U.S.,"[572] an agreement that ChevronTexaco now says does not apply to the litigation in Ecuador.[573]

The public interest factors were not discussed by the appellate court; instead, the court listed the *Gilbert* factors and then held that "the district court was within its discretion in concluding that the public interest factors tilt in favor of dis-

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570. *Id.* at 479.

571. *Id.* Significantly, ChevronTexaco has not impleaded Ecuador or Petroecuador in the Lago Agrio lawsuit and, instead, commenced an arbitration proceeding against Petroecuador in New York, seeking to require Petroecuador to indemnify all fees, expenses, and judgments incurred by ChevronTexaco and Texaco Petroleum in the litigation. *See supra* note 516 and accompanying text. **R**

In October 2004, Ecuador and Petroecuador sued ChevronTexaco, Texaco Petroleum, and the American Arbitration Association (AAA) in New York State Supreme Court (the state trial court), seeking to stay the arbitration claim. Defendants removed the case to federal district court. That court dismissed the action insofar as it named AAA as a party defendant. The plaintiffs filed an amended complaint; ChevronTexaco and Texaco Petroleum counterclaimed, alleging breach of contract and failure to indemnify an implied agent, and seeking damages as well as injunctive and declaratory relief. In March 2005, the court temporarily stayed the arbitration proceedings until the plaintiffs' motions for a permanent stay were decided or until further order by the court. In June 2005, plaintiffs' motion for summary judgment was denied; plaintiffs' motion to dismiss the counterclaims was granted in part, denied in part, and reserved in part pending supplemental briefing on the law of Ecuador as it applies to counterclaims based on the release of liability by Ecuador and Petroecuador pursuant to the 1995 Remediation Contract and The Final Act (discussed *supra* Parts VII and IX). Republic of Ecuador v. ChevronTexaco Corp., 376 F.Supp.2d 334 (S.D.N.Y. 2005).

572. *Aguinda*, 303 F.3d at 479.

573. *See supra* note 530 and accompanying text.

missal."[574] In a footnote, the court declined to rule on whether the Alien Tort Claims Act encompasses the environmental claims in *Aguinda* or whether it expresses a strong U.S. policy interest in providing a forum for litigation. Even if those legal arguments were accepted, said the note, the private and public interest factors would nonetheless require the appellate court to uphold the judgment of the district court.[575]

XII. EPILOGUE: TWO LAWSUITS AGAINST CHEVRONTEXACO IN ECUADOR

News that the litigation in Texaco's homeland had ended disappointed many people in Ecuador. But in a new spin the plaintiffs' lawyers declared victory, calling the outcome a landmark decision that, for the first time, ordered a giant oil company to submit to the authority of national courts in a developing country.[576] They vowed to continue the lawsuit in Lago Agrio. However, notwithstanding representations to the *Aguinda* court that, in the event of dismissal, plaintiffs could not bring the case as a class action,[577] and an explicit ruling that the conditions of dismissal apply to all members of the putative class,[578] plaintiffs' counsel spread the word in Ecuador that a single "class action" lawsuit would be filed there, and that only named plaintiffs from *Aguinda* could avail them-

574. *Aguinda*, 303 F.3d at 480.

575. *Id.* The Second Circuit also found plaintiffs' argument that Judge Rakoff should have recused himself "to be without merit." *Id.*

576. *See, e.g.*, Kevin Koenig, *ChevronTexaco on Trial*, WORLD WATCH, Jan.-Feb. 2004, at 10, 11 (repeating a number of contentions by the plaintiffs' lawyers, including a statement by John Bonifaz that, "[t]o the best of our knowledge . . . this is the first [case] 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.").

577. *See, e.g.*, Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint, *supra* note 337, at 7-10; *Aguinda*, 303 F.3d at 478 (conditioning dismissal on agreement by Texaco to waive defenses based on any statute of limitations expiring between the date the case was filed and one year after dismissal, because timely claims were brought on behalf of 55,000 plaintiffs and, in Ecuador, "because class action procedures are not recognized, signed authorizations would need to be obtained from each individual plaintiff").

578. *See Aguinda*, 142 F. Supp. 2d at 539.

selves of the ruling by the U.S. court and be named in the complaint.

In May 2003, forty-six of the *Aguinda* plaintiffs and two additional plaintiffs filed a new lawsuit against ChevronTexaco in the Superior Court of Justice of Nueva Loja (Lago Agrio). In July 2003 a second lawsuit, against ChevronTexaco and Texaco Petroleum, was filed in the Superior Court of Justice of Tena by ninety plaintiffs selected by thirty-one Kichwa and Huaorani communities. The decision by the indigenous communities to pursue their own lawsuit reflects the growing consciousness that indigenous peoples and the poor have legal rights in the oil frontier, and that Texaco and other rich and powerful oil companies have obligations to them and must answer to a higher authority—surprisingly radical ideas there, that have been fostered, in part, by *Aguinda*.[579] The decision also reflects widespread discontent at the grassroots level with the conduct of the litigation and activities (outside court) by the plaintiffs' attorneys and their NGO supporters that claim to champion the rights of the affected communities but exclude them from decisionmaking processes. Two major concerns relate to environmental remedies that might result from the litigation and a possible settlement of the *afectados'* (affected peoples') claims without their consent. In addition, for many indigenous communities, the appropriation of their name without authorization is deeply offensive, compounded by their belief that the lawyers and NGOs are using their name and suffering for private gain.

A related grievance, and longstanding complaint of indigenous peoples throughout Amazonia, is their exclusion from decisionmaking by outsiders—governments, companies, environmental NGOs, and others—that affects them. In this case, decisions about the conduct of the lawsuit in Lago Agrio could affect not only the territories and natural resources of the Huaorani and Kichwa but also their legal rights.

Aguinda v. Texaco created an unprecedented opportunity for justice and environmental improvements in the oil patch.

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579. The growing awareness that affected populations have legal rights has also been advanced by developments in international and Ecuadorian law that recognize some collective rights of indigenous peoples. *See e.g.*, 1998 Constitution, *supra* note 57, tit. III, ch. 5, § 1; ILO Convention 169, *supra* note 56. **R**

Although most of the people whose rights are being defended were surprised and puzzled when they first heard about the legal action—after it was announced to the media in New York and publized by the press in Ecuador—the case struck a chord. The allegations echoed longstanding grievances of large numbers of indigenous peoples and *campesinos* who have been affected by Texaco's operations, and the litigation elevated their cries for "decontamination" and a healthy environment to new levels of national and international attention and prestige. Potent ideas spread: affected populations have rights, and oil companies are subject to a higher, public authority, independent of engineers, soldiers, and politicians. The introduction of the principle of equality before the law was revolutionary and resonated deeply. With a lawsuit in Texaco's homeland, many people hoped that their voices would finally be heard.

Class action litigation can be an effective vehicle to change corporate behavior and obtain compensation and other remedies for large groups of claimants. However, in cases like *Aguinda,* it can be difficult to identify an appropriate class and provide class members with meaningful information and input into the conduct of the litigation. That situation raises a host of ethical and legal challenges; in this case, the failure of the plaintiffs' attorneys to adequately address those issues and promote "clarity and transparency in the process" has generated considerable confusion and concern in the oil patch, which continues to this day.[580]

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580. *Aguinda* has generated substantial interest both in the oil patch and among the news media, academics, activists, attorneys, and oil companies; however, it is not well understood by many people, including people in affected communties. For example, there has been considerable confusion about the identity of class representatives and members of the proposed class and, consequently, about who could expect to benefit from the litigation and have a voice in its conduct. The complaint, which names the class representatives, was never translated into Spanish and distributed. During early organizing attempts, when a group of local leaders—who mistakenly thought they were plaintiffs because they had "signed" with the lawyers—requested the names of the (other) plaintiffs, the lawyers refused to provide the information, telling them that the names could not be published because it would endanger the plaintiffs' lives.

Moreover, in activities and accounts of the litigation, the people whose rights are purportedly being defended often appear as props, or backdrops to a distant drama in which the central actors are outsiders: lawyers, NGOs,

The plaintiffs in the new lawsuit in Lago Agrio live in four communities: one Secoya and one colonist community in Sucumbíos Province, and one Kichwa and one colonist community in neighboring Orellana Province. However, allegations of injury extend far beyond those plaintiffs and their communities to include all affected areas in the two provinces, and the request for relief is presented "as members of the affected communities and as guardians of those communities' recognized collective rights."[581] The "affected population"—whose rights are allegedly being asserted—includes "the five indigenous peoples of the area," the Cofán, Huaorani, Kichwa, Secoya and Siona, as well as colonists.[582] However, no Cofán, Huaorani, or Siona are included among the plaintiffs, and no relief is requested directly for the affected communities or indigenous peoples—or even for the plaintiffs.

Instead, the lawsuit seeks a judicial determination of the costs of a comprehensive environmental remediation—including removal of all pollution that threatens human health and the environment, restoration of natural resources, and medical monitoring—and an order directing ChevronTexaco to pay the full amount to a local NGO, Amazon Defense Front (*Frente de Defensa de la Amazonia, "Frente"*), which would would then "apply" the funds to the ends determined in the judgment. The complaint also claims a ten percent share of the remedial monies for the plaintiffs, but requests that those funds also be paid to *Frente*.[583] Remarkably, the decision to award the relief to the NGO—which is not a plaintiff—was apparently made by the lawyers, without consulting the plaintiffs

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and government officials. But outside the courtroom and media limelight, the lawsuit has a life of its own, in the remote Amazon region where its legacy will be direct and enduring. Local residents have struggled to understand the litigation and make it responsive to their aspirations. A full discussion of the history of the lawsuit in the oil patch—a promising but cautionary tale—is beyond the scope of this Article. For some early developments, s*ee* Kimerling, *The Story from the Oil Patch*, *supra* note 180, at 6. Disclosure: As a North American lawyer who has worked in the affected region since 1989, and whose book, *Amazon Crude*, is seen there as the basis for allegations in the case, the author has been drawn into grassroots politics surrounding the litigation; at the time this Article was written, she represented the Tena plaintiffs and their communities outside Ecuador's courts. **R**

581. Lago Agrio Complaint, *supra* note 492, ¶. VI. **R**

582. *Id.* ¶ III.

583. *Id.* ¶ VI.

and affected communities. At least some of the named plaintiffs did not know about the decision until after the author read the complaint and was surprised by the request for relief.[584]

Frente was founded in 1994 by a group of colonists in Lago Agrio, to establish a local instituion to administer monies from the *Aguinda* lawsuit.[585] Led by an *urbano* (urban colonist),[586] Luis Yanza, *Frente* has developed close ties with the plaintiffs' lawyers and some external NGOs, but has no experience with environmental remediation, natural resources restoration, or medical services. Most importantly, its efforts to claim a monopoly of representation of all people affected by Texaco and manage local politics in an undemocratic fashion have been challenged by a significant sector of indigenous peoples—in Kichwa and Huaorani communities in the Napo and Cononaco basins—who have become aware of their rights and want to participate in decision-making processes about their claims and remedies.

In 1998, *Frente* issued "resolutions . . . in the name and in representation of the organizations and communities affected . . . by Texaco," designating exclusive "official spokespersons"

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584. *See, e.g.*, BOLETIN NUMERO 3 [BULLETIN NUMBER 3], *Asambléa de Delegados de los Afectados por Texaco* [Assembly of Delegates of the People Affected by Texaco] / *Frente de Defensa de la Amazonia* [Amazon Defense Front], Nueva Loja [Lago Agrio], Sucumbíos, Ecuador, July, 2001 [hereinafter *Frente* Newsletter] (newsletter published by *Frente* and attributed to the "Assembly of Delegates of the People Affected by Texaco," announcing the lawsuit and describing remedies sought in the action, but not disclosing that the complaint seeks a ten percent share of remedial monies for the named plaintiffs and the payment of all funds to *Frente*) (on file with author).

585. In the wake of press reports announcing *Aguinda* (in November 1993), news of the $1.5 billion lawsuit spread quickly in the oil patch. Notoriety in the press and a steady stream of visitors sparked great expectations among some residents. Indigenous peoples, however, were more reserved. Many people were puzzled, and asked: "Why do strangers speak in our name without authorization, without even telling us? How can they claim to represent us when we have our own representative organizations? How can they defend our rights and solve our problems without knowing us and our world?"

586. "*Urbanos,*" who live in urban areas, are distinguished locally from non-natives living on the land, who are commonly referred to as "*campesinos*" or "*colonos.*"

for the lawsuit in Ecuador.[587] The resolutions further demanded that any initiative by outside groups to "help" communities affected by Texaco or "follow" the lawsuit must be approved by, and coordinated with, *Frente* and a second *urbano* "spokesperson."[588] In 2001, in reponse to a resurgence of local organizing in the wake of disquieting news that the plaintiffs' lawyers were negotiating a possible settlement agreement with Texaco behind closed doors,[589] *Frente* organized the "As-

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587. Initially, five "offical spokespersons" were named: *Frente*'s president, Luis Yanza; a second urban colonist in Lago Agrio; an activist in Quito; and the presidents of the Cofán and Secoya indigenous organizations (as spokespersons for indigenous peoples). *Frente de Defensa de la Amazonia* [Amazon Defense Front], *Resoluciones Caso Texaco* [Texaco Case Resolutions], ¶ 4 (Dec. 12, 1998) [hereinafter Texaco Case Resolutions I]. Two months later, the resolutions were revised to drop the activist from the list and add a representative of the Siona organization ONISE, and the plaintiffs' lawyers. The revisions also substituted the names of the Cofán and Secoya spokespersons with a reference to the Cofán and Secoya organizations, OINCE and OISE. *Frente de Defensa de la Amazonia* [Amazon Defense Front], *Resoluciones* [Resolutions], ¶ 2 (Feb. 12, 1999) [hereinafter Texaco Case Resolutions II]. None of the designated "spokespersons" were named plaintiffs; in addition, the resolutions made no mention of the Huaorani and Kichwa, who comprised the great majority of indigenous members of the proposed class and rejected the right of others to speak for them.

588. Texaco Case Resolutions I, *supra* note 587, ¶ 5. **R**

589. The news of the talks came as a surprise, and initially provoked alarm. After hearing that Texaco was disposed to negotiate an end to the lawsuit, a *campesino* organization contacted the author in the United States and asked her to clarify the status of the case. E-mail from Alejandro Soto to Judith Kimerling (Nov. 10, 1999). In response to her inquiries, an attorney for the plaintiffs denied that talks were taking place; however, Texaco revealed that preliminary negotiations had been underway for about a month. Subsequently, plaintiffs' counsel confirmed that (to the author) and further disclosed that the parties' positions had already evolved in some respects. However, in Ecuador, *Frente* (and plaintiffs' counsel) continued to vigorously deny that talks were underway. *Frente* claimed that the purpose of its organizing activities was to "unite" all of the affected communities, who needed to be prepared for the "possibility" that Texaco might propose to enter into negotiations "in the future." *See, e.g.*, *Memoria Del Taller Consultivo Sobre el Caso Texaco Realizado en la Parroquia Taracoa del Cantón Orellana Provincia de Orellana el Día Sábado 16 de Diciembre del 2000* [Minutes of the Consultation Workshop About the Texaco Case in Taracoa *Parroquia* in Orellana *Cantón,* Orellana Province, December 16, 2000] (on file with author). *Frente*'s decision to garner support for a settlement proposal represented a major change in position; at the time, the prevailing perception among local residents and Ecuadorian activists was that a settlement with Texaco would represent capitulation by the plaintiffs.

sembly of Delegates of the People Affected by Texaco's Petroleum Operations (Assembly of Delegates)," in order to create the appearance of a democratic body that could claim to represent the *afectados*, and be used to butress efforts by *Frente* to build support for a settlement proposal; legitimize decisions made by the lawyers about a possible agreement; speak in the name of all affected groups; administer monies from the litigation; and act as intermediary and gatekeeper between the affected communities and external stakeholders. Despite its impressive name, the "Assembly of Delegates" has limited participation and is evidently dominated by *Frente*. At a meeting presided over by *Frente*, delegates approved "Regulations" declaring that the "Assembly of Delegates"—comprised of twenty-two individuals "from the oil fields" who ostensibly represent colonist communties[590] and one representative each of the Siona, Secoya, Cofán and Huaorani organizations[591]—

Ironically, it is precisely this pattern of closed-door deal-making, without participation by affected peoples, that brought the environmental tragedy in the first place. In addition, from the perspective of local residents, this was the seventh negotiation—purportedly to remedy the injuries caused by Texaco—behind closed doors, between the oil company and elites who professed to represent the interests of affected communities but rebuffed their calls for transparency and participation. As discussed *supra* Part VII, the six prior "remedial" agreements—with Ecuador and Petroecuador; the Prefect of Sucumbíos; and municipal governments of Coca, Lago Agrio, Joya de los Sachas, and Shushufindi—failed to remedy injuries caused by Texaco or benefit affected rural communities.

590. The distribution of "delegates from the oil fields"— described by *Frente* as "representatives of the affected colonists"—is based on the number of wells operated by Texaco in the field, and evidently does not take into account factors such as population, length of residence, land ownership or particularized injuries. *Reglamento de la Asambléa de Delegados de los Afectados Por las Operaciones Petroleras de Texaco y del Comité Ejecutivo* [Regulations of the Assembly of Delegates of the People Affected by Texaco's Petroleum Operations and of the Executive Committee] (Apr. 27, 2001), at arts. 2-4 [hereinafter Assembly of Delegates Regulations] (on file with author); *Frente* Newsletter, *supra* note 584, at 4. R

591. The Kichwa organizations FCUNAE and FOISE were not invited to join the assembly. Instead, *Frente* invited three communities affiliated with them to "consultation" meetings with neighboring colonists. "Local coordinators" (now called "delegates from the oil fields") were elected from two communities affiliated with FCUNAE. One community is home to Maria Aguinda and other named plaintiffs, and continues to work with *Frente*. The other community no longer participates in the "Assembly of Delegates" and has denounced *Frente* for "lying" to the community in order to "trick" it into joining the assembly, and for trying to use it to claim representation of af-

"shall be the organic authority for decision-making and representation of all persons affected by the environmental, social and cultural impacts provoked by Texaco . . . in the Ecuadorian Amazon."[592]

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fected Kichwa while working to disallow the rights of most Kichwa and drive a wedge between the community and FCUNAE.

The decision to work with the Cofán, Secoya, and Siona as "indigenous nationalities," through their respective organizations, evidently continued the alliance between *Frente* and what appears to be a small group of political elites from those groups who, like *Frente*, were based in Sucumbíos Province. The Huaorani were not included in early efforts to build alliances among affected groups and, for years, were essentially ignored by *Frente* and the plaintiffs' attorneys. *See, e.g.,* Sept. 23, 1999 Plaintiffs' Attorneys' Press Release, *supra* note 180. The Huaorani organization, ONHAE, was invited to work with *Frente* after a representative of the group wrote to the author—in response to news that negotiations between the plaintiffs' attorneys and Texaco were underway—to ask her to represent the Huaorani "to maintain clarity and transparency in the process." Letter from Moi Enomenga, Coordinator ONHAE, to Judith Kimerling (undated; received on Dec. 8, 1999) (on file with author); *see also* Petition Letter to Luis Yanza, President, Amazon Defense Front (Feb. 10, 2000) (on file with author). *Frente*'s activities with ONHAE have generated conflict among the Huaorani and caused considerable consternation—and anger—in Huaorani communities nearest to the former Texaco facilities, in the Cononaco basin. **R**

592. Assembly of Delegates Regulations, *supra* note 590, arts. 2-4. The "Regulations" are written in legalistic language and purport to rest on the "authority" of "the communities and organizations affected by Texaco," but were read to the "Assembly" at its second meeting and "hurriedly" approved, without consulting the affected communities. The entire process reportedly took about thirty minutes, and some delegates were not present for the vote. Interview with Angel Shingre and Alejandro Soto, in Coca, Ecuador (June 21, 2001) [hereinafter Shingre and Soto Interview]. Shingre (since deceased) and Soto were delegates from the Yuca and Shushufindi oil fields, respectively; they abstained from the vote because they did not understand the "Regulations" and were cut off by *Frente* when they tried to ask questions. Unlike the first meeting of the "Assembly of Delegates," minutes of the second meeting (with a copy of the attendance list signed by participants) were not distributed to the delegates. The "Regulations" were subsequently published by *Frente*. However, the text simply "certifies" that it was "read, discussed and approved by the delegates of the people who are affected by Texaco's petroleum operations, meeting on April 27, 2001 in [Lago Agrio]," and does not disclose who authored the "Regulations"; how many delegates were present for the vote; or how many people, or precisely who, in representation of whom, voted to approve them. Assembly of Delegates Regulations, *supra* note 590, at 4; *see also Frente* Newsletter, *supra* note 584. This reflects a general practice, in which resolutions published by *Frente* carry the name of the "Assembly of Delegates" and purport to rest on the authority of **R** **R**

Rules in the "Regulations" for decisionmaking by the "Asssembly of Delegates" turn basic principles of due process and decision-making by consensus on their head, run roughshod over the rights of indigenous peoples to participate in decisions that affect them, and disrespect related indigenous community norms and aspirations for self-determination. The rules do not provide for consultation with, or ratification of decisions by, the affected communities, named plaintiffs, or members of the *Aguinda* class.[593] Moreover, although the "Regulations" state that decisions "shall be taken by unanimous agreement," they also authorize decisionmaking by a simple majority of the delegates who are present if there is no consensus[594] and—remarkably—decree that such decisions "shall be obligatory for all of the affected communities and organizations."[595] Those rules not only contradict commonly-expressed local political aspirations that favor decisionmaking

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all affected people(s), but do not name the decision-makers or disclose particulars of the vote.

593. Instead, the "Regulations" include a vague provision directing each delegate to "accredit his position through an act that records his legal designation by the people affected from his respective organization, zone, *parroquia* or oil field." Assembly of Delegates Regulations, *supra* note 590, art. 5. **R** The provision is confusing because no legal forms or clear guidelines were provided to delegates, and residents who participated in pre-Assembly "consultation" meetings were reportedly asked to elect a "local coordinator" and two substitutes to work with *Frente*—not legal representatives, proxies or legislators. Minutes of the Consultation Workshop About the Texaco Case in Taracoa, *supra* note 589; Shingre and Soto Interview, *supra* note 589. **R** Although *Frente*—and the "Regulations"—claim that the "Assembly of Delegates" represents all affected communities and organizations, a roster of "accredited" delegates and clear information about the terms of any "legal designations" that may have been obtained has not been distributed to the affected communities.

594. Assembly of Delegates Regulations, *supra* note 590, art. 9. Similarly, **R** although the "required" quorum for a meeting is "one-half plus one" (fourteen) delegates, the "Regulations" also provide that if a quorum is not present when a meeting is scheduled to begin, it "shall be installed one hour later, with the number of delegates who are present," if "no fewer than one-third" (nine delegates) are present. *Id.* As a result, "obligatory" decisions can be adopted (1) over the objection of as many as twelve delegates; or (2) by as few as five members of the twenty-six person assembly, in the absence of up to two-thirds of the delegates. Significantly, a majority of five could not be constituted by representatives of all of the (included) indigenous organizations combined, but could be constituted by representatives of colonists who live in the Sacha oil field alone.

595. *Id.*

by consensus and respect for decisions made at the community level, but also abrogate the rights of dissidents to pursue their own claims.[596] Although clearly at odds with basic principles of due process—and therefore legally dubious at best—the bald assertion of decisionmaking power by *Frente*[597] and the "Assembly of Delegates" could nonetheless affect the rights

596. The potential for abuse—and due process violations with regard to legal rights—is compounded by the absence of provisions for notice and consultation, or for recording and disclosing the particulars of a vote and the identity of decision-makers when "obligatory" decisions are adopted. *Id.*

Notwithstanding the limited participation and controlling rules for decisionmaking and representation, Oxfam America—which funds *Frente* to organize the "Assembly of Delegates"—describes the assembly as a "democratic body that runs by consensus." Chris Hufstader, *When There is No Clean Water*, OXFAM EXCHANGE (Oxfam America, Boston, Mass.), Fall 2004, at 12, 13, *available at* http://www.oxfamamerica.org/newsandpublications/publications/oxfam_exchange/fall04; *see also* Oxfam America, *Texaco in Ecuador: Building Consensus on a Sticky Problem*, *available at* http://www.oxfamamerica.org/whatwedo/where_we_work/south_america/news_publications/texaco/art7349.html (contending: "The style [of the 'Assembly'] is very democratic. Major decisions—such as whether to accept a settlement that Texaco once offered and whether to continue with the case in Ecuador—must be made by consultation with all the communities involved, and the assembly makes its decisions by consensus rather than by majority rule. Those ground rules have kept the group united throughout a long and often difficult process, and have made the organization extremely important is keeping the case alive, and complement the work of the legal team without letting the legal process overtake their ability to advocate on their own behalf. The communities are the decision makers with the legal team. 'What's so astounding is the way the indigenous groups, as well as the non-indigenous settlers who live in the area, have come together and formed an organization where every single affected community is represented and everybody cooperates,' [plaintiffs' attorney Steven] Donziger says . . . .)"; Oxfam America, *Texaco in Ecuador: An Interview with Luis Yanza*, *available at* http://www.oxfamamerica.org/whatwedo/where_we_work/south_america/news_publications/texaco/art7355.html. A search for references to the "Assembly of Delegates" in Spanish-language materials on Oxfam's website did not match any documents.

597. The "Regulations" also establish an Executive Committee, comprised of one colonist selected by *Frente*, a second colonist elected by the "Assembly" and the four indigenous delegates. Assembly of Delegates Regulations, *supra* note 590, art.7. Although somewhat ambiguous, the rules evidently do not require *Frente* to appoint an Executive Committee member from the "Assembly"—or even from the putative class—because the group named Luis Yanza, an "*urbano*," to the post. The committee is responsible for convening and presiding over meetings of the "Assembly" and "designat[ing] the employees, experts and collaborators to help the initiatives, proposals and projects that the Assembly of Delegates approves." *Id.* at arts. 9, 11. R

and interests of affected groups and individuals because it is supported, and in the eyes of many, orchestrated, by the *Aguinda* plaintiffs lawyers.[598] Not surprisingly, the first major

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The "Regulations" further establish that *Frente* "shall be the technical and administrative unit in charge of [both] obtaining the information" needed by the "Assembly of Delegates" and Executive Committee, and "executing and coordinating the activities derived from" their decisions. *Id.* art.8. The rule putting *Frente* "in charge of obtaining the information" illustrates the truth of the adage, "information is power." It reflects the importance of access to (accurate) information for local residents seeking a voice in the conduct of the litigation, and the limited access to information in the oil patch. Efforts to overcome hurdles to participation related to the need for better information have been a recurring feature of local organizing activities, exhibited, for example, in requests to the author for information; repeated calls for the plaintiffs' lawyers to visit the region to meet with affected residents and provide better information about the case; and growing demands, in the wake of news of the settlement talks, for "*vigilancia* (vigilance)" by the author "to guarantee clarity and transparency in the process." The "Regulations" evidently continued earlier efforts by *Frente* to control access to information about the litigation by trying to limit sources of information to the plaintiffs' attorneys, Luis Yanza and a small group of allies who claimed to be authorized—exclusively—to "inform about the legal process," in addition to speaking for the plaintiffs and all affected people(s). *See, e.g.*, Texaco Case Resolutions II, *supra* note 587, ¶ 2; *Frente* Newsletter, *supra* note 584, at 4; Jose Quenama, "*La Texaco: Contaminación en el Ecuador* [Texaco: Contamination in Ecuador]" (Quito, Ecuador, July 2002) (unpublished presentation) (on file with author). R R

598. *See, e.g.*, Oxfam America, Texaco in Ecuador: An Interview with Steven Donziger, *available at* http://www.oxfamamerica.org/whatwedo/where_we_work/south_america/news_publications/texaco/art7353.html. For indigenous communities, the assertion of power by *Frente* and its "Assembly of Delegates" not only raises troubling questions related to the adequacy of representation and basic due process protections, but also threatens to eviscerate their rights as indigenous peoples by allowing "obligatory" decisions about their rights and claims to be made entirely by outsiders. In addition to denying representation (and decisionmaking power) to the largest indigenous group, the Kichwa, the "Regulations" grant the Huaorani, Cofán, Secoya and Siona the appearance of representation, but take away their right to make their own decisions and authorize a small number of colonists to make decisions that purport to bind them. Significantly, the delegates who were invited to "represent" the affected "indigenous nationalities" in the Assembly do not have enough votes under any decisionmaking scenario allowed by the "Regulations"—even if all four delegates are in agreement and they have proper authorization from the communities and peoples they represent—to either constitute a majority to adopt a decision, or to block a decision favored by a group of colonists with which they disagree. Not surprisingly, the "Regulations"—and claims that *Frente* and the "Assembly of Delegates" represent all affected groups—have been rejected by FCUNAE

decision by the "Assembly"—after granting itself decisionmaking powers—was to ratify a vague summary of a settlement proposal presented to the group by *Frente* and Manuel Pallares, the plaintiffs lawyers' representative in Ecuador.[599]

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and the Napo Kichwa, and by growing numbers of Huaorani. *See, e.g.*, FCUNAE, *Asambléa Ordinaria De FCUNAE, En La Comuna Patas Yacu, Del Cantón Orellana, Del 13 Al 15 De Junio De 2001, Plenario Y Resoluciones De Las Comisiones* [Twentieth Ordinary Assembly of FCUNAE, *in* Comuna Patas Yacu, of Canton Orellana, from June 13-15, 2001, Plenary and Resolutions of the Commissions] 2.12- 2.17 (June 15, 2001) (on file with author); Letter from FCUNAE to Luis Yanza, Amazon Defense Front (July 15, 2001) (on file with author); Makarik Nihua, *Segunda Asambléa de Makarik Nihua realizado en la ciudad de Francisco de Orellana, sede de FCUNAE; los días 28 y 29 de Junio del 2004* [Second Assembly of Makarik Nihua held the city of Francisco de Orellana, headquarters of FCUNAE; June 28-29, 2004] 2 (on file with author).

599. *Resumen de los Rubros Generales para la propuesta de negociación* [Summary of the General Headlines for the Proposal for Negotiation] (distributed and approved at the Third "Assembly of Delegates," May 21, 2001) (on file with author). The summary mainly consists of a list of (proposed) payments that total $132,946,000. For example, it includes $33,230,000 for a "cleanup" but does not disclose which locations would be remedied or provide any information about cleanup procedures, standards, or mechanisms to verify their effectiveness. Those gaps are especially troubling in view of the lack of experience in Ecuador with proper remedial investigation and cleanup, and the absence of meaningful environmental regulation. According to Shingre and Soto, the proposal was presented to the delegates as "already done," and deliberations and revisions were aggressively discouraged. When Soto asked for information about the "technical grounds" for the proposed cleanup, *Frente* accused him of having "personal interests" and trying to "divide" the plaintiff class, and warned the assembly that any divisions would "help Texaco" and "weaken the position of the plaintiffs in the lawsuit." Shingre and Soto Interview, *supra* note 592. **R**

This illustrates a general pattern of conduct observed—and critiqued—by Shingre and Soto, in which *Frente* commonly "manipulates" meetings to ensure ratification of positions and documents that have already been developed; discourages deliberation, debate and dissent; maliciously accuses persons who dissent or persist in raising questions of being motivated by "personal interests" and trying to "divide" the plaintiffs; advocates "unity" among affected groups but interprets unity as deference to authority ("follow me," rather than consensus-building) and ensuring a "monopoly" of legal and political representation; and pressures people to conform by sowing fear that they will "help Texaco" and "weaken the position of the plaintiffs in the lawsuit" if they do not. *Id.* Before his (unrelated) murder in 2003, Shingre told the author that *Frente* no longer invited him to meetings of the "Assembly of Delegates," a development he attributed to his continuing efforts to express concerns about decisionmaking processes, and his calls for transparency and consultation with affected communities.

Although details of the settlement talks between plaintiffs' counsel and Texaco remain shrouded in secrecy—even from people in the oil patch who would be directly affected by an agreement—an English-language version of a slightly modified settlement proposal was apparently presented to the company in June 2001.[600] In October 2001, *The American Lawyer* reported, in a laudatory profile of Cristóbal Bonifaz, that Texaco had rejected a settlement proposal it "requested a few months earlier that detailed mechanisms for cleanup, medical care, and providing potable water."[601] In response to a query from the author, Texaco confirmed that the company had rejected a $141 million proposal but expressed surprise when she requested a copy of the document for FCUNAE and other local residents who were seeking detailed information about its terms. The proposal had been presented by the plaintiffs' lawyers on behalf of all affected groups and individuals and—although written in English only—"looked like a public document" because many pages of signatures were attached.[602] The signatures are curious because only a summary was distributed in the oil patch, and repeated requests—to the lawyers and *Frente*—for disclosure of the proposal that was presented

600. Subsequent to the decision by the "Assembly of Delegates" to ratify the summarized proposal, a new Spanish-language summary of a slightly modified proposal—totaling $141,738,250—was distributed by the lawyers and *Frente*. The new document provided some additional, albeit cursory information, but like the previous summary, seemed deliberately vague in many respects; provided considerably less information about proposed environmental remedies than Texaco and Ecuador had disclosed in the Remediation Contract, discussed *supra* Part VII; and did not mention attorneys fees and litiation costs, notice and possible opt-out procedures, or a likely discharge from claims and liability that presumably would be demanded by Texaco in exchange for the payments. *See generally Resumen De La Propuesta A Ser Presentada A Texaco Para Llegar A Un Acuerdo Que De Fin A La Demanda De Clase De Los Afectados* [Summary of the Proposal to be Presented to Texaco In Order to Reach an Agreement That Ends the Class-Action Lawsuit by the Affected People] (undated) (on file with author).

601. Braverman, *supra* note 182, at 100. The profile also reported, inaccurately, that "[t]he plaintiffs are approximately 30,000 indigenous people . . . ." *Id.* at 100-01. **R**

602. Telephone Communication by Timm A. Miller, Office of the General Counsel, Texaco Inc. (Dec. 5, 2001). Miller qualified the $141 million figure, however, by observing that "some parts seem unlimited."

to the company have been rebuffed.[603] Although the negotiations appear to have ended in the wake of the dismissal of *Aguinda*, many people remain concerned that they could resume as a result of the lawsuit in Lago Agrio. Those groups are angry and offended not only because lawyers who claim to defend their rights elaborated and offered an agreement to Texaco behind their backs—asking for payments of large sums of money, presumably in exchange for their claims—but also because the lawyers continue to "hide" the proposal from them and disregard the voices of the people whose rights and environment would be directly affected by a settlement agreement.[604]

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603. Notwithstanding their refusal to disclose the proposal, plaintiffs' counsel described it in a bilingual e-mail to "friends and supporters," in English, as "the petition of the indigenous organizations to settle the case which was filed with Texaco on June 11, 2001 and was under preparation for close to one year" and, in Spanish, as "the petition of the organizations of colonists and indigenous people presented on June 11 of this year to settle the case without more litigation." E-mail from Cristóbal Bonifaz to Friends and Supporters (June 29, 2001) (on file with author). In another e-mail, to a colonist delegate to the "Assembly of Delegates" who had sent another proposal to Bonifaz and expressed concerns about the negotiation process, he described it as "the proposal of *Frente* . . . which was approved by *muchísimas* [very many] organizations who incorporated their signatures." E-mail from Cristóbal Bonifaz to Ladio Domínguez (June 22, 2001) (on file with author); *see also* e-mail from Cristóbal Bonifaz to Manuel Pallares (June 22, 2001) (on file with author); Letter from Committee of Plaintiffs to Cristóbal Bonifaz (June 18, 2001) (on file with author).

Remarkably, in response to a request from FCUNAE (communicated by the author) for a copy of the proposal, a representative of Oxfam America defended the nondisclosure by claiming that the proposal "is the property of *Frente*," which is under no obligation to divulge it, even to communities and indigenous organizations whose legal rights and claims would be settled by the proposed agreement. Telephone Communication by Gabrielle Watson, Oxfam America, in Boston, Mass. (July 22, 2002).

604. Currently, the *Aguinda* attorneys estimate cleanup costs at more than $6 billion, but the basis for the estimate is murky. Efforts by communities involved in the Tena lawsuit to get information about remedial measures that underlie the estimate, and engage *Frente* and its lawyers in a dialogue about remedial alternatives have been rebuffed. For example, in October 2003, at a public forum organized by the Tena plaintiffs, *Frente*'s president was asked about the group's plans for a cleanup in the event of a victory in court. His response, that "the lawyers are the ones who can answer because they know what they are planning," suggested that *Frente* either did not have a remediation plan and/or proposal under development, or that it had one but was unwilling to disclose it. Two weeks later, *Frente* issued a press release,

The plaintiffs in the indigenous lawsuit in Tena are from twenty-eight Kichwa communities affiliated with FCUNAE and three Huaorani communities in the Cononaco basin. They came together in the wake of the dismissal of *Aguinda*, after FCUNAE organized a series of meetings with groups of communities at locations along the Napo River, to inform them about the latest developments and consider their alternatives. At the request of federation officials, the author participated in the meetings. Three alternatives were suggested for consideration: (1) negotiate with the plaintiffs' attorneys and *Frente*,

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announcing "The week of Truth for ChevronTexaco," to publicize the first public proceedings in the Lago Agrio case. Highlights included "presentation of the Remediation Plan." Press Release, Amazon Defense Front, *La Semana de Verdad para ChevronTexaco: Testimonios siguen: Plan de Remediación se presenta y los demandantes se movilizan: Bianca Jagger, la líder de los derechos humanos internacionales regresa al Ecuador para apoyar a los demandantes* [The Week of Truth for ChevronTexaco: Testimonies contiune: Remediation Plan is presented and the plaintiffs mobilize themselves; Bianca Jagger, the international human rights leader returns to Ecuador to support the plaintiffs] (Oct. 27, 2003) (on file with author). The author received a copy of the release from Acción Ecológica, and contacted Leila Salazar of the U.S.-based NGO Amazon Watch—who was named as a press contact—to request a copy of the plan. E-mail from Judith Kimerling to Leila Salazar (Jan. 9, 2004). Salazar responded by sending what she called "the summary of the preliminary remediation plan" (in English and Spanish). E-mail from Leila Salazar to Judith Kimerling (Jan. 13, 2004) (on file with author); Global Environmental Operations, Inc., *Remediation in Former Texaco Concessions in Ecuador: A Preliminary Assessment* (undated). The "summary" estimated cleanup costs at $6.114 billion, and was evidently submitted to the court in support of the plaintiffs' request for remedial funds. However, the entire document was less than four pages and failed to disclose important information and details about the "Remediation Plan." The author then requested a copy of the complete plan and information about mechanisms to consult with affected communities. E-mail from Judith Kimerling to Leila Salazar (Jan. 29, 2004) (also updating Amazon Watch on the Tena case and requesting a meeting to discuss concerns related to the NGO's "Clean Up Ecuador" campaign, including the dissemination of inaccurate information) (on file with author). In response, Salazar retreated from the language in the press advisory and claimed that there is no Remediation Plan: "the summary is the only thing there is." E-mail from Leila Salazar to Judith Kimerling (Feb. 20, 2004) (on file with author); *see also* E-mail from Judith Kimerling to Leila Salazar (May 28, 2004) (on file with author). Supporters of *Aguinda* have long promoted the lawsuit in the oil patch as the "last chance" for a cleanup. Although the absence of a comprehensive, ready-to-execute six billion dollar plan at this stage is understandable, the failure of the lawyers and their NGO supporters to foster a transparent and participatory process to develop a remedial plan—while promising a "cleanup"—is unconscionable.

to participate in the Lago Agrio lawsuit; (2) present a separate, community-based lawsuit; or (3) no action. Participants expressed considerable interest in pursuing their own lawsuit[605] and strongly opposed working with *Frente* and its lawyers.[606]

A followup meeting, called "*Reunión de Compromiso con la Demanda* (Meeting for Commitment with the Lawsuit)," was

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605. Consensus also emerged around several criteria for a possible legal action: (1) it should defend the rights of the communities and their members, respect decisionmaking power at the community level, and be accountable to the communities; (2) participation should be voluntary, and lawyers should not claim representation of any community without authorization; (3) the case should go forward only if a significant sector of affected communities decided to participate; (4) it should be part of a broader *lucha* (fight) by the communities to assert their rights, including efforts to build alliances with other affected groups and outsiders who share their concerns; (5) the conduct of the litigation and other activities must be clear and transparent, to prevent corruption and ensure "trust in the process" by community members; and (6) the legal action should seek social as well as environmental remedies, and participating communities should engage in "a process of information and reflection" to develop consensus at the grassroots level about priorities for remedial action.

606. As discussed *supra* note 186, FCUNAE refused to help Cristóbal Bonifaz when he visited to develop a lawsuit because he told them (falsely) that he was working with the author. That encounter—and some others—generated considerable distrust among the Napo Kichwa. FCUNAE responded to news of *Aguinda* by asking the author to represent the federation and its base communities, and work with them to try to make the litigation responsive their aspirations. *See, e.g.*, Brief Amicus Curiae for FCUNAE and OINCE, *supra* note 65; Letter from FCUNAE to Kohn, Nast & Graf (Nov. 9, 1993) (on file with author). Those efforts were cut off in 1995, after the author learned that the (then) president of FCUNAE, Rafael Alvarado, had been meeting behind closed doors with MEM's Deputy Secretary for the Environment, Giovanni Rosanía, to discuss issues related to the legal action; at the time, Rosanía was also involved in negotiations with Texaco related to the Remediation Contract. The decision to suspend the initiative was based on concerns related to (1) Alvarado's private talks with Rosanía; and (2) aggressive opposition to the federation's efforts by the *Aguinda* attorneys and, specifically, concern that litigation of a pending dispute over legal representation of the Kichwa plaintiffs might influence the court's forum non conveniens analysis, as a factor in favor of litigation in Ecuador, and thereby jeopardize the viability of the case. However, concerns about the conduct of the litigation persisted among Kichwa affiliated with FCUNAE, as did their perception that the plaintiffs' lawyers appear to regard themselves as the "*dueños de la demanda* (owners of the lawsuit)" when the legitimate "owners" should be the people whose rights are being defended. In addition, efforts by *Frente* to claim representation of all affected groups, and its political tactics, also offended the Napo Kichwa and were resisted and repudiated by FCUNAE. *See, e.g.*, Letter from FCUNAE to Luis Yanza, *supra* note 598. **R**

scheduled in Coca, where FCUNAE's headquarters—and the only notary in Orellana—are located. Participants in the Napo meetings agreed to decide as communities whether to join a lawsuit and, if they so decided, to select up to five representatives to be plaintiffs in the action. Any adult who knew how to read and write could be chosen as a plaintiff. The Huaorani also learned about the possible legal action after the traditional chief of a community on the Shirpuno River saw the author in Coca and asked her to "help the Huaorani like you are helping the Kichwa." The Huaorani, he explained, "are dying from the oil companies and have nowhere to go."

On July 14, 2003, ninety representatives from thirty-one communities assembled in Coca for the *Reunión de Compromiso*. The Kichwa agreed to work with their Huaorani neighbors in the new lawsuit. However, a request from a group of local colonists, who also came to the meeting and asked to join the legal action, was rejected. The indigenous plaintiffs affirmed their interest in working with colonists to defend the rights of all affected groups and secure remedies for shared environmental problems, but wanted their lawsuit to also assert their special collective rights and grievances as indigenous Amazonian peoples. Some people were also concerned that if colonists were among the plaintiffs, another *Frente*-type group might emerge to try to claim ownership of the lawsuit and relegate the indigenous communities to the margins, in favor of a small group of colonists and corrupted indigenous elites. Having become cognizant of their rights and catalyzed to action—in significant measure, as a result of *Aguinda*—they were now determined to speak for themselves as indigenous peoples and communities, and become subjects rather than objects of their rights. They further resolved to seek the collaboration of FCUNAE and ONHAE, in support of their base communities, but determined not to relinquish the decisionmaking powers of the communities to officials of the organizations.

The plaintiffs in the Tena case call themselves *Makarik Nihua*. *Makarik* is Kichwa for *luchadores* (fighters). *Nihua* was one of the last great Huaorani warriors to defend Huaorani territory before major incursions by oil companies, missionaries, colonists, and other outsiders. Their complaint seeks environmental and social remedies and asks for the proceeds of the litigation to be delivered to the communities that selected the plaintiffs and authorized them to sue. The decision by par-

ticipating Kichwa and Huaorani to work together to demand justice and remedies for injuries that were "created" by Texaco—and "continued" by Petroecuador and other oil companies—represents an unprecedented alliance between the two groups at the grassroots level.

The broad participation is significant not only because scant financial resources and poor communication and transportation facilities make it difficult for indigenous populations in affected areas to mobilize, but also because of actions by *Frente* and ChevronTexaco that were apparently intended to discourage the indigenous communities from suing.[607] Since the lawsuit was filed, participation by Huaorani has grown, as word of the alliance has spread, especially in the Cononaco River basin. Both the commitment to work at the community level and inclusion of Huaorani plaintiffs have been significant factors in motivating Huaorani participants.[608]

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607. For example, before the case was filed in Lago Agrio, *Frente* pressured the president of FCUNAE (unsuccessfully) to sign a "contract" with the plaintiffs' lawyers (Cristóbal Bonifaz and Kohn, Swift & Graf) on behalf of the organization "and in representation of all of its members," to continue litigation of *Aguinda* in Ecuador and/or the United States. *See Contrato Para Litigar El Caso En Contra De Texaco En El Ecuador* [Contract to Litigate the Case Against Texaco in Ecuador] (unsigned sample contract provided to FCUNAE naming OISE as the contracting indigenous party) (undated). In June 2003, a representative of Texaco met in Quito with a small group of indigenous leaders that included the alternate Congresswoman from Orellana, who is Kichwa, and the President of the regional (Amazonian) indigenous confederation, CONFENIAE. News of the meeting quickly reached FCUNAE (which is affiliated with CONFENIAE). Federation officials were warned against pursuing a lawsuit, and told that Texaco had offered to negotiate with the affected indigenous peoples—if they present a proposal without lawyers (or colonists). The company, they were told, has enough money to "eliminate" the author, a statement that was understood to mean that her life was in danger. Around the same time, Luis Yanza reportedly announced (falsely) on a local radio station that FCUNAE had decided to work with *Frente* in the Lago Agrio lawsuit.

608. Like many indigenous groups, the Huaorani have long resisted, and resented, efforts by outsiders to speak in their name. More recently, they have also struggled against efforts—pioneered by oil companies but also apparently adopted, at least in part, by *Frente*—to "*comprar* (buy)" ONHAE officials, and use the organization to create the appearance of support among the Huaorani for their activities. The Huaorani of *Makarik Nihua* are angry at *Frente* and Luis Yanza because, in their words, "Yanza speaks for all but works with few"; "promises to share a lot of money with ONHAE officials in order to change their thinking"; and is "*mentiroso* (a liar)." Like the Kichwa, they are offended by the complaint in Lago Agrio because it includes claims

As discussed above, the indigenous communities' lawsuit was rejected by the court in Tena. Ernesto López, the lawyer handling the suit, characterized the refusal to adjudicate the case as "dishonest" and appealed to Ecuador's Supreme Court, but is not optimistic about the appeal.[609] For communities in the new alliance, the refusal by the court to hear the case was like a slap in the face. Many people expressed "hurt" and "sadness" that their own judicial "authorities" refused to "listen" to their grievances and "*atender* (attend to)" their petition for justice. Although belief in their basic rights remains strong, the decision by the court in Tena cast renewed doubt on the value of those rights in Ecuador's legal and judicial system, misgivings that have been compounded by developments in Lago Agrio. There, the authorities of another province are "hearing" a case by a relatively small group of plaintiffs that includes claims based on injuries to the Kichwa and Huaorani communities without their consent, and asks for payments to *Frente* to remedy their grievances.[610] From the communities' perspec-

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based on injuries to them, but they were not consulted and only two indigenous communities—none of them Huaorani—have plaintiffs in the lawsuit; additionally, in the event of a victory, the monies for their remedies would be paid to *Frente*. They also complain that Yanza "invites Huaorani to many lunches" and on trips to Lago Agrio and the United States, but does not "*trabaja bien* (work well)" or consult with affected communities; that he claims to represent the Huaorani against their wishes; and that he seeks to profit from their grievances. Significantly, no Huaorani were present when the "Assembly of Delegates" voted to ratify the "Regulations" or summary of the settlement proposal.

609. *See* discussion *supra* Part X.C.2.

610. Notwithstanding the apparent efforts by plaintiffs' counsel and their NGO allies to marginalize affected Kichwa—including attempts by *Frente* to convince other affected groups that Kichwa cannot participate in the lawsuit or decisionmaking processes because Rafael Alvarado allegedly negotitiated an agreement with Texaco when he was president of FCUNAE that renounced all claims by the Kichwa (an allegation that is false), and the apparent exclusion of most Kichwa from the settlement proposal presented to Texaco in 2001 in the name of all affected residents—claims based on injuries to the Kichwa (and Huaorani) are clearly included in the Lago Agrio lawsuit, in addition to the claims by Maria Aguinda and nine other Kichwa who are named as plaintiffs. *See* Lago Agrio Complaint, *supra* note 492, ¶¶ III.4, VI; Oxfam America, An Interview with Luis Yanza, *supra* note 596 (stating that "affected" indigenous communities include Cofán, Siona, Secoya and Huaorani); Amazon Defense Front, Texaco Rainforest—The People of Ecuador, http://www.texacorainforest.org/thepeople.htm (English-language website created by the *Aguinda* plaintiffs' attorneys, attributed intitally R R

tive, Texaco and Ecuador ran roughshod over their rights for decades; then, their claims against the company attracted outsiders who profess to champion their rights but not only refuse to listen when indigenous communities want to speak for themselves, but also claim to represent them against their wishes. Now, when a substantial sector of the indigenous peoples of Orellana stepped forward to speak in their own voice and become protagonists in the celebrated fight to assert their rights and remedy their injuries, their own judicial authorities also refused to listen, and turned them away after meeting privately with lawyers for Texaco.

Activities outside court to publicize and garner support for the lawsuit in Lago Agrio have aggravated feelings of marginalization among the Kichwa and Huaorani. The *Aguinda* lawyers, *Frente* and their new NGO partner, Amazon Watch, have mounted a major public relations campaign that represents the new lawsuit as the continuation of *Aguinda*, on behalf of all affected residents. As part of that effort, they cultivate the misleading impression that *Frente* represents all affected indigenous peoples (and colonists) and that the lawsuit is a "David v. Goliath" battle, by and for the affected "rainforest peoples" and communities, to vindicate their rights. This continues despite (1) repeated protests and exhortations by FCUNAE and *Makarik Nihua* to respect community decisions to choose their own representatives and assert their rights to participate in decisionmaking about their claims and environmental remedies; (2) the refusal by FCUNAE's president to endorse the case or sign a "contract" with the plaintiffs' attorneys to continue the *Aguinda* litigation; (3) the decision by thirty-one Kichwa and Huaorani communities to pursue a separate lawsuit; (4) the fact that *Frente* is a colonist organization

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to "the plaintiffs and their lawyers" and subsequently attributed to *Frente*; first visited May 1999; last visited Oct. 31, 2005) (including photographs of Maria Aguinda and other Kichwa, and allegations that the Napo has "been rendered virtually useless as [a source] of nourishment" but stating, "[t]here are three indigenous communities that live in the area where Texaco operated: the Cofán, the Secoya, and the Siona . . . ."). The use of political rather than legal criteria by *Frente* to attempt to define "the affected communities"—and thereby exclude most Kichwa (outside court), evidently because of their continued resistence to claims by the group to speak for all affected people(s)—raises serious concerns about the wisdom and fairness of asking the Lago Agrio court to entrust administration of the remedy to *Frente* in the event of a judgment in favor of the plaintiffs.

with limited legitimacy in the oil patch, especially among grassroots indigenous populations; and (5) the decision by the lawyers to ask the court to award the relief to *Frente* and to limit the plaintiffs to forty seven individuals who do not include legitimate representatives of most affected groups.[611] Those activities have succeeded in maintaining a spotlight on the Lago Agrio lawsuit and grievances of the affected communities—es-

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611. *See, e.g.*, Koenig, *supra* note 576, at 10, 13; Press Release, Amazon Watch, Amazon Watch Calls on ChevronTexaco to Address Cancer Outbreak in Ecuador: New Health Study Finds Child Cancer Rising Rapidly in Area Where ChevronTexaco Operated: 91 Child Cancer Cases Reported, Many Under Age of 5: Study Released During $6 Billion Lawsuit (Sept. 30, 2004); Press Release, Amazon Watch, Pressure Mounts on ChevronTexaco to Confront its Responsibility for the "Rainforest Chernobyl": $6 Billion in Potential Liability for World's Largest Oil Disaster: Rising Tide of Institutional Investors Call on CEO David O'Reilly to Report on Environmental Impacts of An Eco-Disaster Said to be Far Worse Than Exxon Valdez: Human Rights Campaigner Bianca Jagger Calls on CEO to Remedy This Catastrophe: "Whilst Mr. O'Reilly is Stalling, People are Dying in the Ecuadorian Amazon: After Years of Suffering, Indigenous Chief Will Finally Face Down O'Reilly in Person on Wednesday (Apr. 26, 2004); Press Release, Amazon Watch, Environmental "Trial of Century" Pits 50,000 Ecuadorian Rainforest People Against ChevronTexaco. . . : Bianca Jagger to Visit Amazon Jungle in Ecuador: Case of Rainforest Peoples Against ChevronTexaco to Begin Oct. 21 in Lago Agrio, Sucumbíos: First Time U.S. Oil Company Forced to Face Judgment in Ecuador Court: Jagger to Meet with Indigenous Leaders and Tour Communities Ravaged by Illegal Dumping on Oct. 9th-10th (Oct. 8, 2003), http://www.amazonwatch.org/newsroom/view_news.php?id'723; Amazon Watch, Media Advisory (Oct. 7, 2003); Press Release, Amazon Watch, "Our people are dying . . . . ": Ecuadorian Indigenous Leaders Arrive in Bay Area to Urge ChevronTexaco to Clean Up Toxic Waste in Amazon Region: Indigenous Leaders Will Provide Briefing on Their Historic Billion-Dollar Class Action Suit Against the Petroleum Polluter That's Killing Their People (Dec. 9, 2002) (publicizing a visit to the Bay Area by three "indigenous leaders" from Ecuador; identifying *Frente*'s Luis Yanza, an urban colonist, as an "indigenous leader" and "affected communities spokesperson"; also asserting that Yanza and the two other "indigenous leaders"—none of whom are plaintiffs—"filed" the lawsuit against ChevronTexaco on behalf of 30,000 Ecuadorians; refering to indigenous leaders, populations, or tribes ten times but not mentioning affected colonists; and stating that "at last, these indigenous leaders will have the opportunity to speak on behalf of their people and culture and provide first-hand accounts of how ChevronTexaco has decimated their land, their culture and their lives"); Aug. 9, 2001 Amazon Defense Front Press Release, *supra* note 181. For similar contentions by the plaintiffs' lawyers, *see, e.g.*, May 31, 2001 Plaintiffs' Attorneys' Press Release, *supra* note 181; Sept. 23, 1999 Plaintiffs' Attorneys' Press Release, *supra* note 180. R R R R

pecially affected indigenous peoples[612]—and building new political alliances to pressure ChevronTexaco outside court to clean up Texaco's mess. However, the Kichwa and Huaorani in the Tena case have been excluded from the alliances that ostensibly support the affected communities, and remain in the shadows of the spotlight.[613] In addition, the portrait—in the spotlight—of the grievances and *lucha* of the *afectados* has been colored by the views and private interests of their self-appointed champions, and has offended a significant sector of the indigenous peoples whose rights and interests are purportedly being defended. As a general matter, activities by the NGOs have continued the dynamic that emerged during *Aguinda* of claiming to support the affected communities but essentially leaving the conduct of the litigation, including de-

612. As discussed supra Part V, the attorneys commonly attribute their allegations to "Indians" and "tribal leaders" without mentioning affected colonists. Amazon Watch materials occasionally refer to both indigenous peoples and *campesinos*, but usually do not, and the NGO commonly uses the term "rainforest peoples" to refer to the claimants and affected communities, in an apparent attempt to put an indigenous face on the Lago Agrio lawsuit and its activities to support the litigation. Remarkably, Amazon Watch promotes itself as a group that is dedicated to defending the rights of indigenous peoples, in addition to the environment. *See generally* Amazon Watch, http://www.amazonwatch.org; AMAZON WATCH, 2002 ANNUAL REPORT 3, *available at* http://www.amazonwatch.org/about_us/annual_reports/aw_annual_report_2002.pdf (repeatedly referring to work with indigenous peoples without mentioning work with settler populations, and claiming that "the indigenous peoples of the Amazon have come to trust and count on Amazon Watch's support"); AMAZON WATCH, 2003 ANNUAL REPORT 3, 7-12, *available at* http://www.amazonwatch.org/about_us/annual_reports/aw_annual_report_2003.pdf (characterizing campaigns by the NGO, including work to support *Aguinda*, as "triumphs for forest peoples").

613. *See, e.g.*, Shelley Alpern, *Trillium Asset Management Joins Investor Delegation in Ecuadorian Amazon to Investigate Claims that ChevronTexaco Polluted Ecosystem*, INVESTING FOR A BETTER WORLD (Trillium Asset Management, Boston, Mass.), April 2004, *available at* http://207.21.200.202/pages/news/news_detail.asp?ArticleID'347&status'CurrentIssue&Page'HotNews (reporting on a "fact-finding trip" organized by Amazon Watch for ChevronTexaco shareholders, stating (inaccurately) that the company "is being sued in a class action case [in Lago Agrio] representing 30,000 indigenous inhabitants" of the rainforest region). The shareholders were not told about the Tena case, and Trillium subsequently sponsored a shareholder resolution calling on the company to "report on new initiatives . . . to address the specific . . . concerns of villagers living near . . . sources of oil-related contamination in the area where Texaco operated in Ecuador." ChevronTexaco, Corp., Proxy Statement (Schedule 14A), at 51 (Mar. 26, 2004).

velopment of a remedial plan, to the lawyers, as if a victory in court—or settlement with plaintiffs' counsel—would automatically benefit *todos los afectados* (all affected peoples) and their rainforest environment.[614]

In December 2004, the Tena case was stalled by a national political and constitutional crisis that has shaken the judiciary and left Ecuador without a (lawful) Supreme Court for nearly a year. A special session of Congress summoned by President Lucio Gutiérrez voted to remove twenty-seven Supreme Court judges and name a new court.[615] Constitutional reforms enacted in 1997—aimed at depoliticizing the judiciary—provide life terms for Supreme Court judges and further provide that when vacancies arise, new judges should be appointed by the

614. *See, e.g.*. e-mail from Leila Salazar to Friends of Amazon Watch (Oct. 21, 2003); e-mail from The Amazon Watch Team to Friends of Amazon Watch (Oct. 21, 2003). At the same time, activities by plaintiffs' counsel—and their NGO supporters—continue to reflect limited knowledge of the affected indigenous peoples' cultures, communities and natural world, and threaten to obscure the complexities of social and environmental issues in the oil patch, including challenges related to (1) representation of diverse, multi-ethnic populations in a large area; and (2) the need to develop consensus about priorities for remedial measures to address shared environmental threats and injuries, and local concerns. The risks presented by inattention to those complex realities—and related legal and ethical challenges—have increased since the dismissal of *Aguinda* in favor of litigation in Ecuador because, although basic principles of due process are recognized under Ecuadorian law, unlike U.S. class action law, clear procedures and precedents to protect absent parties who could be affected by the litigation are not well developed.

Amazon Watch began its "Clean Up Ecuador" campaign in 2002 and initially pledged to support all affected groups, and respect grassroots decisions and concerns. However, the *Aguinda* attorneys subsequently obtained the services of a public relations firm to work with the NGO. Although Amazon Watch continues to describe its campaign as an initiative to support the affected communities, since the lawsuit began in Lago Agrio it has made support for that case the centerpiece of it campaign and appears to have become a megaphone for the plaintiffs' lawyers. *See generally* Amazon Watch, http://www.amazonwatch.org. In addition to in-kind support to publicize the group's activities, Amazon Watch has evidently received funds from Kohn, Swift and Graf, co-counsel for the *Aguinda* plaintiffs. AMAZON WATCH, 2003 ANNUAL REPORT, supra note 612, at 10; AMAZON WATCH, 2002 ANNUAL REPORT, supra note 612, at 15 (also listing Oxfam America as a donor).

615. Fifty-two lawmakers from the 100-member unicameral Congress attended the session. Juan Forero, *Firings on Ecuador's Top Court Stir Opposition Wrath*, N.Y. TIMES, Dec. 18, 2004, at A3.

Court.[616] The fired judges attempted to defy the Congressional action but were barred by police from returning to their offices.[617] They continued to meet at a local law school and petitioned IACHR to declare their removal unconstitutional.[618]

The crisis reflected and reinforced both the weakness of the judicial branch and the turbulent nature of politics in Ecuador. Gutiérrez was "angry that the court [had] sided with opposition politicians in a failed attempt to impeach him" on corruption charges, and "contended that the measure was aimed at restoring independence to the court" because the judges were closely aligned with a powerful political party.[619] The firings followed mass firings of judges on the Constitutional and Supreme Electoral courts and their replacement by political allies of the President, and "plunged . . . [the] chronically unstable" country "into uncertainly."[620] Critics accused Gutiérrez of trying to consolidate power, but at least initially, the firings did not generate popular outrage because many Ecuadorians see the courts as politicized and corrupt, and regarded the conflict as a fight between political elites. However, after the new Supreme Court invalidated corruption

616. See 1998 Constitution, supra note 57, art.202. **R**

617. Juan Forero, *Ecuador: Supreme Court Judges Locked Out*, N.Y. TIMES, Dec. 10, 2004, at A10.

618. *Un experto de la OEA analiza la demanda de los exjueces* [An expert from OAS to analyze the legal action by the ex-judges], EL COMERCIO, Jan. 7, 2005.

619. Forero, *Firings on Ecuador's Top Court Stir Opposition Wrath*, supra note 615, at A3. **R**

620. *Id.* According to the U.N. Commission on Human Rights' Special Rapporteur on the independence of judges and lawyers, the dismissals were unconstitutional. *Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice*, Impunity, U.N. General Assembly, 60th Sess., ¶ 11, U.N. Doc. A/60/321 (2005) (report of the activities of the Special Rapporteur in 2005); see also *Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice, Impunity: Report of the Special Rapporteur on the Independence of the Judiciary, Administration of Justice, Impunity, Leandro Despouy*, U.N. ESCOR, Comm'n on Human Rights, 61st Sess., ¶ 8, U.N. Doc. E/CN.4/2005/60/Add.4 (2005) (preliminary report of the Special Rapporteur on a mission to Ecuador, recommending: "The people of Ecuador have paid dearly for the high level of politicization which has contaminated their courts, and so it is vitally and urgently necessary to reconstruct a system of [judicial] institutions which is free of political interests and vicissitudes . . . .").

charges against former President Bucaram, and he returned to Ecuador from exile, demonstrations in the capital surged.

In response, the President and Congress dissolved the new Supreme Court and resolved to create new legal mechanisms to choose a new Court. The move failed to subdue the protesters, who were fed up with corrupt, inept governments and economic hardship. Demonstrators accused Gutiérrez of corruption and dictatorship and called for removal of the President—as well as all politicians in the executive, legislative, and judicial branches—chanting "*Que se vayan todos* [Out with all of them]" and "*No más de lo mismo* [No more of the same]." On April 20, 2005, a special session of Congress voted to remove Gutiérrez on the questionable constitutional ground of "abandonment" of his post. The military quickly withdrew its support from Gutiérrez, and he became the third president since 1997 to be ousted from power. Vice President Alfredo Palacio became Ecuador's seventh President in eight years.[621] However, because of "bitter divisions" in the Congress, Ecuador did not have a Supreme Court for another seven months.[622]

XIII. Conclusion and Recommendations

Texaco's discovery of commercially valuable oil in the Amazon Rainforest in Ecuador was heralded as the salvation of Ecuador's economy, the product that would pull the nation out of chronic poverty and "underdevelopment" at last. The discovery ignited an oil rush that made the "conquest" of Amazonia a national policy imperative, and petroleum quickly came to dominate Ecuador's economy and quest for progress.

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621. Juan Forero, *Ecuador's Leader Flees and Vice President Replaces Him*, N.Y. Times, Apr. 21, 2005, at A3; Juan Forero, *Ecuador's New Chief Picks Cabinet; Leftist in Economic Post*, N.Y. Times, Apr. 22, 2005, at A4; Juan Forero, *Ecuador's Congress Backs Court Move*, N.Y. Times, Apr. 19, 2005, at A13; Telephone Interview with Sister Elsie Monge, Executive Director, Ecumenical Human Rights Commission (CEDHU) in Quito (May 7, 2005). The vote was 60-2. Gutiérrez contends that the ouster was unconstitutional. However, Ecuador currently does not have a Constitutional Court, and did not have a Supreme Court until November 30, 2005. The litigation in Lago Agrio was also stalled by the political and judicial insecurity, but resumed in July 2005.

622. Another Supreme Court was installed on November 30, 2005. Juan Forero, *Ecuador: A New Supreme Court*, N.Y. Times, Nov. 30, 2005, at A14.

But the reality of oil exploration and production turned out to be far more complex than its triumphalist launch. For indigenous Amazonian peoples, the arrival of Texaco's work crews meant destruction rather than development. Their homelands were invaded and degraded by outsiders with overwhelming political, economic, and technological power. The first ones came from the sky; over time, they dramatically transformed natural and social environments. Their worlds changed forever, Amazonian peoples have borne the costs of oil development without sharing in its benefits, and without participating in decisionmaking that affects them.

In form, Ecuador is a constitutional democracy. In practice, democratic institutions are fragile. Longstanding weaknesses include chronic instability, pervasive corruption, and a discredited political class and judiciary. Racism and discrimination against indigenous peoples and the poor by both public and private actors are widespread. Indigenous Amazonian peoples live far from the centers of power and the seat of government. Cultural, linguistic, and historical distances further separate them from the government. In practice, if not always by law, they have been essentially shut out of the national political system that governs Ecuador's oil frontier and claims ownership of the hydrocarbon resources.

From the perspective of Amazonian peoples, Ecuador's policy of national integration and assimilation—in response to the discovery of valuable oil resources in their territories—meant national expansion (and occupation of their traditional lands) and ethnocide. In 1998, Ecuador adopted a new constitution that formally recognizes the multi-cultural nature of Ecuadorian society and some collective rights of indigenous peoples, in addition to expanded environmental rights for all citizens. However, implementation of those rights in the oil patch has lagged.

Operations by Texaco in the oil frontier spanned nearly three decades, and reflected and reinforced two tiers of inequality. As a so-called "Third World" country, Ecuador depended on Texaco—seen there as a prestigious U.S. company, with technical expertise, experience, and access to international oil field technology—to transfer petroleum technology and design, procure, construct, and operate the infrastructure that turned the nation into an oil exporter. Within Ecuador, the Amazon is effectively a "Fourth World." Indigenous Ama-

zonian peoples face both "First World-Third World" disparities and inequities with respect to the dominant national culture.

At the onset of the oil boom, nationalist sentiments were stimulated in petroleum policymakers. However, when confronted with the realities of governance and the "capital-intensive, technology-driven"[623] nature of oil exploration and production, Ecuador's governments have vacillated over the extent to which petroleum policy should accommodate the interests of foreign oil companies or be nationalistic in outlook. Although relations between Ecuador and Texaco and other multinational companies have not been static, at the core of those relationships lies a stark and enduring political reality. Since the oil boom began, successive governments have linked national development plans and economic policy almost exclusively with petroleum policy, and the health of the oil industry has become a central concern for the State. But in the international arena, Ecuador is a relatively small producer. As a result, its petroleum policy does not significantly influence the international industry, and it is vulnerable to global forces and pressures, including the needs and demands of multinational oil companies. As a general matter, oil development has accentuated Ecuador's dependence on foreign export markets and foreign investment, technology, and expertise rather than providing the answer to Ecuador's development aspirations.

Alarm over forecasts of the depletion of productive oil reserves has been a recurring theme in petroleum politics, as have the twin policy goals of expanded reserves and renewed exploration, and the corollary need to reform laws and policies to make the nation more attractive to foreign investors. Thus, after initial gains in state control and participation during the early years of the oil boom—including the creation of a state oil company to acquire training and technology from Texaco and ownership interests in the consortium that developed the fields—before long, Ecuador's policymakers learned that they have less independent power than is commonly believed. Despite Ecuador's nominal authority as a sovereign nation, the actual power that government officials can—or believe they can—exercise over multinational oil companies is limited.

623. CHEVRONTEXACO, UP TO THE CHALLENGE, *supra* note 34, at 17. R

Since at least 1971, Ecuador's Law of Hydrocarbons has included boilerplate environmental directives. In theory, those provisions—and others—offer mechanisms for state regulation of significant sources of oil field pollution. In practice, however, Texaco (and other oil companies) have ignored the laws, and successive governments have failed to implement and enforce them. When Texaco began its operations, there was little public awareness or political interest in environmental issues. Moreover, environmental protection in the oil patch depends on the use of technology, and Ecuador relied on Texaco—as the operator in the oil fields—to transfer petroleum technology and train national technicians. This reliance on Texaco's expertise and access to technology continued even after Petroecuador became the majority shareholder in the consortium led by Texaco, in 1977. In the environmental law vacuum, Texaco set its own environmental standards and policed itself. As Petroecuador's "professor," Texaco also set the standard for that company's operations. Government regulators in the hydrocarbon sector—who had to learn on the job—also received their basic education in the "school" of Texaco. But Texaco's standards and practices did not include environmental protection or monitoring. Ecuadorian oil field workers who were trained by Texaco were so unaware of the hazards of crude oil during the 1970s and 1980s that they applied it to their heads to prevent balding, and gave it to elderly parents who suffered from arthritis. Those rumors, attributing medicinal qualities to Amazon crude, were not surprising given the status of petroleum at the time as the harbinger of a great future for the nation, and Texaco's neglect of environmental protection.

Ecuador's petroleum policy in the 1970s and 1980s revolved around economic and national development issues and did not include a serious environmental component. The historical record, however, indicates that environmental neglect was not a conscious policy choice by Ecuador at that time. Unlike Texaco, which had—or should have had—knowledge about the hazards of oil field pollution and technology that could be used to reduce it, the Ecuadorians were inexperienced and apparently unaware of the environmental tradeoffs in the oil patch. In the triumphalist welcome to Texaco's discovery of commercially valuable oil and the struggle over whether petroleum policy should be nationalistic or tradition-

alistic in outlook, environmental issues were eclipsed altogether. When confronted in 1990 with an independent study that documented shocking pollution and other impacts in the oil frontier (subsequently published as *Amazon Crude*), government officials professed ignorance.

That basic view—that public officials did not realize that industry operations were taking a serious toll on the environment until international environmentalists put a spotlight on the region—has been echoed by a number of civilian and military officials. Although they frequently struggled with Texaco (and other foreign oil companies) over economic issues and the pace of exploration and production, government officials did not question Texaco about "technical" matters because they relied on the company for technical expertise. Texaco's international prestige and its day-to-day control, as the operator of field operations, gave the company enormous power in the oil patch—power that was compounded by the culture of impunity in Ecuador and deficiencies in the rule of law and good governance generally.

In the wake of the *Amazon Crude* study that documented the environmental tragedy—published in English in 1991 and in Spanish in 1993—enviromental protection has become an important policy issue in Ecuador, and officials in Petroecuador and the government can no longer profess ignorance. However, the culture of gross indifference for the environment—and disregard for the rights of indigenous and *campesino* populations—persists in the oil frontier, notwithstanding the increased environmental awareness, international attention, and new laws and regulations on paper.

Initially, the oil boom spurred unprecedented economic growth in Ecuador. However, it was not sustained, and the benefits have not been broadly distributed. The dream of national prosperity is unfulfilled and the percentage of Ecuadorians living in poverty remains stubbornly high. Successive governments have used the oil reserves to accumulate a staggering foreign debt, and payments on the debt now account for more than forty percent of the national budget, roughly the same percentage as oil's contribution to export earnings and more than its share of tax revenues.

In Amazonia, Texaco's operations were a massive industrial undertaking, characterized by the continued use of out-

dated technology, callousness toward the welfare of local populations and the environment, and a markedly disproportionate distribution of the burdens and benefits of development. The company caused widespread and long-lasting environmental and social impacts, including severe pollution from both accidental spills and routine, deliberate discharges and emissions. Additional direct and indirect impacts include dislocation of indigenous peoples and loss of territory and sovereignty over their natural resources; the massive influx of outsiders; disease; deforestation; dependency; loss, fragmentation and degradation of rainforest habitat; and loss, depletion and degradation of renewable natural resources. The injuries are so serious—and notorious—that other oil companies now go to great lengths to try to distinguish their operations from Texaco. *We are not like Texaco; we use leading edge technology and international standards to protect the environment*, has become a common refrain in Ecuador.

Operations by Texaco not only violently disrupted forest peoples' way of life, but also created poverty among them by reducing their range for hunting, fishing, and gathering, and destroying and degrading important natural resources that provided secure, self-reliant, and sustainable sources of food, water, medicine, and shelter. When Texaco began its search for oil, the area was unspoiled humid tropical forest. Now, in the headwaters of an ecosystem that is world-renowned for biological richness and is believed to contain 20-25% of the world's flowing fresh water, many families no longer have clean water or enough food. Increasingly, both indigenous and colonist residents attribute health problems—including malnutrition, skin rashes, memory loss, headaches, respiratory ailments, miscarriage, and cancer—to the pollution that saturates the area. For native Amazonian peoples whose lands were invaded and degraded by outsiders, enviromental impacts and loss of territory are intimately linked to social and cultural impacts. Both food security and food sovereignty have been impaired, and their cultures have been put under considerable pressure from external sources. Many indigenous communities have also seen their political sovereignty eroded, as the reach and influence of Ecuadorian political institutions expanded in the oil frontier.

Notwithstanding those and other injuries, most indigenous communities affected by Texaco's operations have man-

aged to maintain a strong sense of identity and rich cultural life. Dependence on the rainforest environment remains high, even as the quality and quantity of renewable natural resources continues to grow poorer, and sharp inequities in access to resources have emerged. If present trends continue, however, widespread poverty, disease, hunger, and social disintegration can be expected. To survive as peoples, indigenous populations must regain control over their remaining territories—which contain the last resources on which they depend for their economies and cultural survival—and reverse the trend toward environmental degradation. Unless remedial action is taken to clean up and restore damaged areas, prevent further pollution, and upgrade and repair—or properly close and decommission—aging oil development facilities, the operations that were launched by Texaco and continued by Petroecuador will continue to threaten and harm natural resources at a number of locations, further diminishing the ability of present and future generations to continue, or revitalize, a sustainable and self-reliant way of life, and further reducing their resource base for sustainable development.

The "voluntary remedial work" carried out by Texaco Petroleum in the late 1990s, pursuant to the Remediation Contract negotiated with Ecuador's government, was for the most part cosmetic and did not contain or reverse the tragic legacy of Texaco's irresponsible operations in the region, nor did it benefit affected rural populations. As a general matter, environmental quality, already poor in many areas, can be expected to continue to decline. Indeed, the remedial accord—which was negotiated behind closed doors, without meaningful participation by affected communities, transparency, or other democratic safeguards—seems more like an agreement between polluters to limit cleanup requirements and lower and divide their costs, than a remedial program based on a credible assessment of environmental conditions and measures that are needed to remedy them.

The final release of Texaco (and its corporate family and successor corporations) from liability to Ecuador and Petroecuador reflects both Texaco's enduring political and economic power and the selective application of the rule of law in the oil frontier. Inasmuch as it liberates the company from any and all environmental obligations to the Ecuadorian State, the release raises serious questions of law and legitimacy. It

represents an abdication by Ecuador of basic responsibilities to its citizens, and is legally dubious because it contradicts the State's constitutional duties, which cannot properly be relinquished by government officials in negotiations with oil companies.

The *Aguinda v. Texaco* lawsuit—filed by U.S.-based lawyers in 1993 on behalf of indigenous and colonist residents of Ecuador who have been harmed by pollution from the company's operations—created an opportunity for environmental justice and corporate accountability. The allegations echoed longstanding grievances and contributed to the growing awareness that indigenous peoples and the poor have rights in the oil patch, and that oil companies have duties to them and must answer to a public authority. In a related development, the lawsuit emboldened affected populations and catalyzed many people to action. However, many factors make it difficult for local communities to participate in the litigation or have a voice in its conduct.

Class action litigation can be a powerful vehicle to change corporate behavior and obtain remedies for large numbers of people. But in cases like *Aguinda* it can be difficult to provide class members with meaningful input into the conduct of the litigation. The failure of the plaintiffs' lawyers and their NGO supporters to foster transparent, participatory, and accountable processes for decisionmaking by the claimants—and their apparent determination to, in the words of local critics, "speak for all but work only with a few"—threatens the case's potential to sow the seeds of a veritable environmental justice and human rights legacy in the oil frontier.

The litigation has attracted a number of NGOs and other self-appointed champions of the rights of the *afectados*—who include indigenous Amazonian Kichwa, Huaorani, Cofán, Secoya, and Siona, as well as *campesinos* from other regions who used roads built by Texaco to colonize the oil frontier. However, as in the litigation, far too little attention has been paid to the need to listen to the affected communities and be accountable to them. The lawsuit has become an end unto itself, rather that one means among others to a greater goal—as if a victory in court, or settlement with the plaintiffs' lawyers, would automatically benefit all affected groups and the rainforest environment.

Although most supporters of the *afectados* appear well-intentioned, the lawsuit—and vacuum left by Ecuador's failure to take responsibility for implementing effective environmental remedies—have also attracted opportunists, and a new group of local and external elites have emerged. Although the plaintiffs' lawyers and other litigation elites claim to support the "demands" of the affected communities, and have succeeded in keeping a spotlight on the grievances of the *afectados*, especially indigenous peoples, they have allowed only token participation to the people whose rights are being defended. As a result, they threaten to overshadow the affected communities and impose their own views and private interests. Not surprisingly, they have offended a significant sector of indigenous peoples—in Kichwa and Huaorani communities in the Napo and Cononaco basins—who have become aware of their rights and want to participate in decisionmaking processes about their claims and remedies, including through legal action.

At the same time, the need by the plaintiffs' attorneys and other elites to legitimize their activities and develop mechanisms to deal—in their way—with a large and diverse group of claimants has led them to try to impose (and/or support) a political process, the so-called "Assembly of Delegates of the People Affected by Texaco," with limited grassroots participation and rules for decisionmaking and representation that are contrary to basic principles of due process; disrespect indigenous cultures and aspirations for self-determination; and violate community norms. Notwithstanding those developments and challenges, indigenous and *campesino* residents of the oil frontier have continued to struggle to understand the litigation and make it responsive to their needs and aspirations.

For lawyers, activists, academics, and oil companies, legal precedents that penalize multinational corporations and build instruments for international environmental accountability under the current free trade regime are clearly significant. But to the *Aguinda* plaintiffs and class, that is an abstract concept; they have concrete needs. When it comes to remedies, environmental cases like *Aguinda* pose special, but not necessarily insurmountable, challenges. It remains to be seen whether a victory in court—or settlement through plaintiffs' counsel—will obtain meaningful remedies for affected populations and the environment, or simply empower and enrich a

new layer of elites, and set back grassroots struggles for corporate accountability and environmental justice by promoting conflict, corruption, and cynicism. Those who have suffered most from Texaco's operations risk becoming symbols of justice without getting justice or adequate remedies.

It also remains to be seen whether the *Aguinda* plaintiffs and class will get an impartial adjudication of their claims. The decision to dismiss *Aguinda v. Texaco* represents an abdication of responsibility by the federal judiciary and sends a troubling message: that U.S. laws and institutions create and protect multinational corporations, but decline to act when they harm people and the environment abroad. Indeed, application of the forum non conveniens doctrine by the *Aguinda* court seems to have less to do with justice and convenience than with shielding ChevronTexaco from accountability, and can be expected to reinforce and help perpetuate the culture of impunity in the oil fields. The basic determination by the court—that the plaintiffs' claims have "nothing to do with the United States"[624]—is essentially a legal fiction, and rests primarily on a portrait of Texaco's role in Ecuador's oil frontier that is at odds with the historical record, and that differs dramatically from the portrait cultivated by Texaco (and Texaco Petroleum) before the litigation.

The analysis by the court was colored by a series of detailed but questionable factual assumptions, including erroneous and unsupported findings about the litigation record in Ecuador's courts, and rulings on disputed material facts related to decisionmaking and control of the operations that gave rise to the plaintiffs' claims. In addition, the balancing of private and public interest factors by the District Court was lopsided. Although the court properly considered a number of factors that favor litigation in the defendant's preferred forum (Ecuador), it did not take into account a number of factors that favor the plaintiffs' choice of a U.S. forum, or show deference to the plaintiffs' choice.[625]

Litigation by foreign plaintiffs in U.S courts based on development activities that are carried out in a foreign country, especially in partnership with the government of that country,

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624. *Aguinda*, 142 F. Supp. 2d at 537.

625. *See* discussion *supra* Part X.F (summarizing more specific conclusions).

raises difficult legal, political and practical issues. However, there is a significant public interest—and moral obligation—in the United States to help protect the global environment and to remedy injuries in other countries that result from the activities of U.S. corporations. U.S. courts have considerable experience with complex civil litigation and remedies and are held in high regard by many people around the world. In the oil frontier in Amazonia, and many other locations, the lack of meaningful environmental regulation and impartial fora to administer justice are serious problems. The *Aguinda* case shows that even with fifteen years in the spotlight and considerable political and legal activity, peoples' rights are still being violated, and no one is accepting responsibility. Until governments develop effective environmental regulation of transnational corporations and credible, impartial fora to adjudicate grievances and remedy the injuries they cause, U.S. courts should not use the forum non conveniens doctrine to deny foreign plaintiffs who have real grievances against U.S-based corporations a day in court.

For indigenous peoples and *campesinos* who have been injured by Texaco and Petroecuador, environmental and social remedies are urgently needed. Although much of the damage is irreversible, a number of measures could be undertaken to ease the injuries of the *afectados*, prevent further harm, and help heal waters and forests for future generations. The Ecuadorian government should establish a Blue Ribbon commission to assess current conditions in the affected areas and develop and oversee the implementation of a community-centered environmental remediation plan. The commission should include independent experts with experience in environmental remediation, and representatives of affected indigenous peoples and colonists, Petroecuador, and ChevronTexaco. The selection of commissioners to represent the *afectados* should be made by the affected communities, and the number of representatives should be sufficient so that diverse groups who seek to participate in the process can feel truly represented. The work by the commission should be clear and transparent, and include mechanisms to inform, consult, and gain the confidence and approval of affected communities. The commission should also develop and monitor the implementation of a credible mechanism to indemnify affected residents and support community-centered sustainable develop-

ment initiatives. ChevronTexaco should assume primary responsibility for the costs of those activities,[626] but Ecuador, Petroecuador and the United States government should also accept responsibility for their complicity in the tragedy, and contribute. In addition, Petroecuador and Ecuador need to become serious about environmental protection in the oil patch—and respect for the rights of local populations—to prevent the re-contamination of areas that are remedied.

To prevent further injuries to Amazonian indigenous peoples and protect their rights in the development process, the principle of free, prior, and informed consent needs to be applied in the oil fields. As a general matter, the imposition of alien models of development on indigenous populations against their wishes is unconscionable. In the oil frontier in Amazonia, the experience of indigenous peoples with Texaco, Petroecuador, and *Aguinda v. Texaco* clearly shows that national and international political and legal systems favor the interests of the oil industry, and cannot—or will not—prevent and remedy violations of the rights of indigenous peoples.

For the rule of law to serve as an instrument of justice, the rules must be fair. When rules are inequitable, the rule of law can be an instrument of aggression and destruction, rather than democracy and development. The use of the rule of law to promote and impose oil development, but not to control or remedy the injuries it causes, is fundamentally unfair and reflects and reinforces gross inequities in law and governance. To continue to subject indigenous peoples to the reach and logic of global markets without equal rights and protection of the law is unjust. In effect, corporations and governments already exercise the right to free, prior, and informed consent when they negotiate contracts for development, as do landowners in many locations. Until indigenous peoples also exercise that right—without coercion, manipulation, or the threat of losing their lands if they say "no" to development projects—the kinds of abuses that began with ChevronTexaco, and are still going on today, can be expected to continue, and the

626. In 2005, ChevronTexaco (now Chevron) reported an annual profit of $14.1 billion—a record level for the company for the third year in a row. Chevron's fourth-quarter profit—$4.14 billion—also set a new record for quarterly earnings. Associated Press, *Rising Oil Prices Help Lift Chevron Profit to Quarterly Record*, N.Y. TIMES, Jan. 28, 2006 at C13.

rights of indigenous peoples in the oil frontier will continue to be violated by state parties and corporations.

Throughout Amazonia, the environmental, social, and cultural costs of continued expansion of the oil frontier are still high. At best, the jury is out on whether oil companies can extract oil and gas from a rainforest environment without serious injury; the track record of the industry to date strongly suggests that they cannot. Moreover, the cumulative impact of expanding oil, gas, and international pipeline projects has not been adequately assessed. No new hydrocarbon development should go forward in Amazonia until major problems that already exist have been corrected, and governments and industry have demonstrated—by action at existing facilities rather than plans for future ones—that they can honor promises to protect the environment and respect the rights of local populations. At least some areas—including protected natural areas, flooded forests, and the territories of the Taromenane-Tagaeri band of Huaorani and other voluntarily isolated indigenous peoples—should be off-limits to oil and other industrial development. Modern oil and gas production that is compatible with sustainable development and the well-being of Amazonian peoples, if it is attainable, must be based on free, prior, and informed consent; comprehensive environmental planning that fully considers the cumulative impact of incremental hydrocarbon and infrastructure development throughout the region; strict controls; access to redress and remedies; and careful long-term monitoring, anchored in the rule of law and broad public participation, in the light of the day.