

## Pace International Law Review

---

Volume 12  
Issue 1 *Spring 2000*

Article 3

---

April 2000

# The Implication of *Jota v. Texaco* and the Accountability of Transnational Corporation

Peggy Rodgers Kalas

Follow this and additional works at: <http://digitalcommons.pace.edu/pilr>

---

### Recommended Citation

Peggy Rodgers Kalas, *The Implication of Jota v. Texaco and the Accountability of Transnational Corporation*, 12 Pace Int'l L. Rev. 47 (2000)

Available at: <http://digitalcommons.pace.edu/pilr/vol12/iss1/3>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [cpittson@law.pace.edu](mailto:cpittson@law.pace.edu).

# THE IMPLICATIONS OF *JOTA v. TEXACO* AND THE ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS

Peggy Rodgers Kalas<sup>†</sup>

This article examines the detrimental effects of transnational corporations (“TNCs”) in developing countries in the context of oil exploration and exploitation in Ecuador, and the problems of holding such corporations accountable for environmental impacts caused by their operations. In the case of Ecuador, the physical and cultural survival of indigenous people is threatened by the environmental contamination caused by oil exploration and colonization of indigenous peoples’ land. In three separate but related actions, residents of the Oriente region of Ecuador and Peru have brought class action suits against Texaco in the courts of the United States seeking relief for vast devastation to that region caused by decades of oil exploration and extraction activities of an oil consortium. These cases raise important issues concerning the appropriateness of a United States forum for litigation in which a foreign government is significantly interested, and the availability of a forum for foreign plaintiffs that have been harmed by multinational corporations. Until recently, indigenous people and other groups similarly harmed by detrimental corporate practices have been repeatedly rejected from adjudication in U.S. courts. By reversing a District Court decision dismissing the case, the recent ruling by the Second Circuit Court of Appeals in *Jota v. Texaco, Inc.* potentially opens the door for individuals harmed by transnational corporate actions seeking a forum in U.S. courts.

---

<sup>†</sup> LL.M., New York University School of Law, 1999; J.D., University of Maryland School of Law, 1991; B.B.A, University of Notre Dame, 1984. Ms. Kalas practices environmental law in New York and Washington, D.C. The author is grateful to Professor Benedict Kingsbury for his suggestions and valuable insights on this topic.

Part I of this article examines human rights violations by transnational corporations through events that occurred in relation to the Huaoroni tribe in Ecuador. Part II analyzes cases brought in the United States by the Huaorani people and other indigenous groups against Texaco. Part III looks at the extent TNCs have been held accountable for environmental degradation and human rights violations, and examines the evolving recognition of the right to a healthy environment within international human rights law. Part IV concludes that the recognition of a fundamental right to a healthy environment as customary international law would have positive ramifications on the ways TNCs conduct their international operations. In the absence of a universal code of conduct for corporations, or an international treaty which extends justiciable environmental rights to individuals, "home" countries of TNCs have an obligation to provide a forum for injured parties, as it may be the only means of redress for tortious conduct by multinational corporations.

## I. BACKGROUND

Ecuador turned to oil production in the Oriente for its major source of income over twenty years ago.<sup>1</sup> The initial exploration for oil was undertaken in 1964 by a Texaco subsidiary ("TexPet") pursuant to a concession agreement with the Republic of Ecuador. Further exploration between 1965 and 1973 by a joint Texaco-Gulf consortium led to discovery of substantial oil reserves. In 1974, with the start of large-scale extraction, Petroecuador<sup>2</sup> acquired a twenty-five percent interest in the consortium, which was increased to sixty-five and one-half percent in 1976 when Petroecuador acquired Gulf's share.<sup>3</sup> Thus, from the early 1970s until 1990, Texaco sent approximately 1.4 bil-

---

<sup>1</sup> See ADRIANA FABRA, *INDIGENOUS PEOPLES, ENVIRONMENTAL DEGRADATION, AND HUMAN RIGHTS: A CASE STUDY* in *Human Rights Approaches To Environmental Protection* 245 (Alan Boyle & Michael Anderson eds., 1996).

<sup>2</sup> Petroecuador is a company wholly owned by the Government of Ecuador. In 1992, Petroecuador acquired 100% ownership of the consortium, after which time Texaco was no longer involved. Petroecuador now manages oil production in the Oriente in a consortia with international oil companies.

<sup>3</sup> See Victoria C. Arthaud, *Environmental Destruction in the Amazon: Can U.S. Courts Provide a Forum for the Claims of Indigenous Peoples?*, 7 *Geo. Int'l Env'tl. L. Rev.* 195, 198 & n. 17 (1994).

lion barrels of oil through the Trans-Ecuadoran Pipeline, 312 miles from the Oriente region to the Pacific Coast.<sup>4</sup> Over the years, pipeline ruptures resulted in an estimated 16.8 million gallons of crude oil to spill into the Oriente environment.<sup>5</sup>

The Ecuadoran government grants foreign companies rights to exploit large blocks of the Oriente for oil once the companies have found commercial quantities of oil in the block.<sup>6</sup> Today, oil exports represent almost half of Ecuador's total export earnings.<sup>7</sup> Nevertheless, the oil development policies of the Ecuadoran government have not been beneficial to overall economic development. In 1970, before the oil boom, Ecuador's national debt stood at less than \$300 million. Twenty years and many oil companies later, Ecuador had a national debt of more than \$12 billion.<sup>8</sup>

#### A. *Effects on the Environment*

The detrimental results from oil exploration extend beyond the Oriente region to the global community. Tropical forests cover over fourteen percent of the land surface yet they hold at least half of the world's species, most of which have neither been studied or named.<sup>9</sup> The Oriente is one of the richest biological treasures in the world, containing 9,000 to 12,000 species of plants (roughly five percent of all plant species on earth).<sup>10</sup> At least 1,300 plant species are used mostly for medicinal purposes by the forest people of Amazonia.<sup>11</sup> Many of the indigenous plants in the rainforest have the potential of con-

---

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See* Jennifer Brady, *The Huaorani Tribe of Ecuador: A Study in Self-Determination for Indigenous Peoples*, 10 HARV. HUM. RTS. J. 291, 293 n. 7 (1997).

<sup>7</sup> *See id.*

<sup>8</sup> Joe Kane, *SAVAGES*, excerpted in the SAN FRANCISCO EXAMINER, Oct. 29, 1995, at M-12. The production of oil turned into a vicious cycle as Ecuador had no choice but to continue to produce oil quickly and cheaply. *See Id.*

<sup>9</sup> World Wildlife Fund, *The Importance of Biological Diversity* at 9, provided in Plaintiff's Supplemental Submission Regarding Global Effects of Ecuadoran Environmental Destruction in Further Opposition to Texaco Inc.'s Motions to Dismiss (1994) (*Aguinda v. Texaco, Inc.*) [hereinafter Plaintiff's Supplemental Submission].

<sup>10</sup> Joe Kane, *Letter From The Amazon: With Spears From All Sides*, THE NEW YORKER, Sept. 27, 1993, at 59.

<sup>11</sup> *See id.* at 15.

taining anti-cancer properties.<sup>12</sup> In the United States, about twenty-five percent of the prescribed drugs are derived from tropical rainforest plants.<sup>13</sup> Other negative effects from oil exploration include massive deforestation as a result of road construction.<sup>14</sup> The clearing and burning of the rainforest diminishes rainfall there and releases vast amounts of greenhouse gases, thereby contributing to global warming.<sup>15</sup> Oil slicks in pits are often set on fire and burn for hours, resulting in plumes of black smoke. These emissions leave residue on vegetation, animals and water. They also cause skin rashes to develop on children and contain nitrogen, sulfur, carbon, heavy metals and hydrocarbons, many of which are toxic.<sup>16</sup>

### B. *Effects on Indigenous Peoples*

Nearly forty percent of Ecuador's eleven million residents are indigenous, belonging to about eight ethnic groups.<sup>17</sup> The Amazon basin, also known as the Oriente, represents almost half of Ecuador's total territory, and is home to 350,000 to 500,000 people, of whom twenty-five to fifty percent are indigenous.<sup>18</sup> Of all the indigenous peoples in Ecuador, the Huaorani are the most vulnerable to oil development.<sup>19</sup> The Huaorani

---

<sup>12</sup> See "Tropical Deforestation," Hearings Before the Subcommittee on International Organizations, 96th Cong., 2nd Sess. 1 (1980), ("some scientists believe that seventy percent of the plants that possess anticancer properties live in tropical moist forests."); See also Rainforest Action Network, Fact Sheet No. 10B (1993) (approximately 7,000 medical compounds prescribed by Western doctors are derived from plants; in 1985, these had an estimated retail value of U.S. \$43 billion), provided in Tab 4 of Plaintiff's Supplemental Submission, *supra* note 9.

<sup>13</sup> See CHRIS PARK, TROPICAL RAINFORESTS 89 (1992).

<sup>14</sup> See JUDITH KIMERLING, AMAZON CRUDE 75 (NRDC 1992) [hereinafter AMAZON CRUDE]("[r]oad construction by oil companies is the primary engine of deforestation in the Oriente"). In order to lay pipelines, oil companies build networks of road throughout the region.

<sup>15</sup> See Rainforest Action Network, Fact Sheet No. 12 (1993); Plaintiff's Supplemental Submission, *supra* note 12. Releases of greenhouse gases may cause climatic changes that lead to desertification and sea level rises.

<sup>16</sup> See AMAZON CRUDE, *supra* note 14, at 67.

<sup>17</sup> See Fabra, *supra* note 1, citing Confederacion de Nacionalidades Indigenas del Ecuador (CONAIE)(February 1991).

<sup>18</sup> See AMAZON CRUDE, *supra* note 14.

<sup>19</sup> A number of articles have addressed the plight of the Huaorani people in relation to oil development in Ecuador. See Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 HASTINGS INT'L & COMP. L. REV. 849 (1991); Judith Kimerling, *The Environmental Audit of Texaco's Amazon Oil*

number only approximately 1,200 people in seventeen dispersed communities, and have very limited contact to the outside world. Traditionally, they have depended upon the land for their subsistence, and remain primarily hunters and gatherers. Yet, despite the influence of missionaries and oil companies, they have preserved their culture. Negative effects on the Huaoroni due to oil development include lack of potable water resulting from frequent oil spills and groundwater contamination,<sup>20</sup> hunting game driven away by noise, intensive motor boat river traffic, and numerous health concerns, including skin rashes, pre-cancerous growths, stomach problems, chronic headaches and fever.<sup>21</sup> Alcoholism and prostitution have been introduced into the Huaorani society as a result of the Huaorani working for the oil companies.<sup>22</sup> Witnesses have reported that there have been confidential attempts by government and oil companies to “exterminate” non-civilized Huaorani.<sup>23</sup> In addition, the oil companies fail to bring new jobs into the region because they bring in their work force from other regions or countries, thus they only provide temporary positions to the local, affected communities.<sup>24</sup>

## II. THE CASES: SEQUIHUA, AGUINDA AND JOTA

A total of three separate but related class action suits have been brought by affected residents—mostly indigenous peo-

---

*Fields: Environmental Justice or Business as Usual*, 7 HARV. HUM. RTS. J. 199 (1994) [hereinafter *Environmental Audit*]; Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 SW. J. OF L. & TRADE AM. 293 (1995) [hereinafter *Environmental Protection*]; Brady, *supra* note 6; Joe Kane, *supra* note 10; See also, AMAZON CRUDE, *supra* note 14.

<sup>20</sup> Contamination of the water supply extends beyond small rivers and streams to large bodies of water. Fish are limited and have a metallic odor. On frequent occasions when the water also has an odor, people are reluctant to bathe because of skin rashes that result. See *id.*

<sup>21</sup> For a detailed review of deleterious health effects from oil-related pollution, see *Rights Violations in the Ecuadorian Amazon The Human Consequences of Oil Development*, The Center for Economic and Social Rights 12-20 (March 1994) (visited March 16, 2000) <<http://www.cesr.org/text%20files/oil-1.pdf>> [hereinafter *Rights Violations*].

<sup>22</sup> See AMAZON CRUDE, *supra* note 14, at 77, 81.

<sup>23</sup> *Id.* at 250. The clans living in the forest have been known to kill with spears if they feel threatened, and those Huaorani who could not be controlled by missionaries “had to be eliminated.” *Id.*

<sup>24</sup> See Fabra, *supra* note 1, at 248.

ple—against an oil consortium over which both Texaco and Ecuador's state-owned oil company, Petroecuador, have at various times exercised substantial control. Two of these suits<sup>25</sup> have been brought in the United States by residents of the Oriente region of Ecuador against Texaco for personal injuries resulting from Texaco's exploration and exploitation of the region's rich oil fields. These suits sought more than one billion dollars in damages and cleanup costs, and demanded that Texaco rebuild the oil-pumping infrastructure to meet prevailing United States standards. A third suit, *Ashanga, et. al. v. Texaco, Inc.*,<sup>26</sup> was brought by Peruvian residents who live downstream from Ecuador's Oriente region, and asserted similar injuries resulting from the activities of the TNCs. In all three suits, the plaintiffs alleged that Texpet, a Texaco subsidiary, dumped an estimated thirty billion gallons of toxic waste into their environment while extracting oil from the Ecuadoran Amazon between 1964 and 1992.<sup>27</sup> The plaintiffs alleged that instead of pumping the substances back into emptied wells, Texaco dumped them into local rivers, directly into unlined landfills or spread them on the local dirt roads.<sup>28</sup> The plaintiffs claimed that Texaco, contrary to world-wide accepted practices, did not make any provisions with any of the oil wells it created in the Oriente region for the re-injection of the "production water" into the ground.<sup>29</sup> In addition, they alleged that the Trans-Ecuadoran Pipeline, con-

---

<sup>25</sup> See *Sequihua, et. al. v. Texaco, Inc., et. al.*, 847 F. Supp. 61 (S.D. Tex. 1994); *Aguinda, et. al., v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).

<sup>26</sup> *Ashanga et. al. v. Texaco, Inc.*, S.D.N.Y. Dkt. No. 94 Civ. 9266 (1994).

<sup>27</sup> See *id.*

<sup>28</sup> Plaintiffs complaint alleged that Texaco failed to pump unprocessable crude oil and toxic residues back into the wells, as is the industry practice. Instead, Texaco disposed of these toxic substances by dumping them in open, unlined pits, into the streams, rivers and wetlands, burning them in open pits without any temperature or air pollution controls, and spreading oil on the roads. The complaint further alleges that Texaco designed and constructed oil pipelines without adequate safety features, resulting in spills of millions of gallons of crude oil. *Plaintiff's Complaint, Aguinda v. Texaco, Inc.*, No. 93 CIV 7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994) [hereinafter *Aguinda Complaint*].

<sup>29</sup> "Production Water" is a highly toxic product, containing heavy metal salts, including arsenic, lead and mercury, hydrocarbons (benzene and naphthalene, toxic ions and crude oil). These substances are suspected, and in some cases, known carcinogens. *Aguinda Complaint, supra* note 28, at 18, para. 39, 40. Instead, Texaco's oil extraction design called for the dumping of production water into the watershed of the region. The Ecuadoran government estimates that 16.8 million gallons (on average, 2,000 gallons per day for 20 years) of oil have spilled

structed by Texaco, leaked large amounts of petroleum into the environment, resulting in serious health effects from the contamination, including poisoning, skin rashes, and pre-cancerous growths.<sup>30</sup>

A. *Sequihua v. Texaco, Inc.*

The first action, *Sequihua v. Texaco, Inc.*, was brought in 1993 in the Southern District of Texas by Ecuadoran residents from the Oriente province, alleging damages as a result of air, water and soil contamination caused by Texaco and its affiliates.<sup>31</sup> After only five months, the case was dismissed by District Judge Norman Black, on the grounds of international comity and *forum non conveniens*. In its application of the principle of *forum non conveniens*, the *Sequihua* court reviewed a number of private and public interest factors that led to its determination.<sup>32</sup> Private interest factors considered by the *Sequihua* court included, (i) the necessity of multiple on-site investigations in Ecuador, (ii) numerous foreign witnesses for liability and damages, (iii) essential proof would be beyond compulsory process of the U.S. court, (iv) costs of obtaining witnesses would be significantly greater in litigation in the U.S., and (v) language barriers and translation costs would be greater in the United States since the plaintiffs and essential witnesses speak Spanish and Indian dialects such as Quichua.<sup>33</sup> In his review of public interest factors, Judge Black pointed to (i) the strong public interest in favor of resolving disputes pertaining to land at their origin, (ii) Ecuador has a greater underlying interest in the events than the United States, (iii) choice of law rules would require the court to apply foreign substantive laws, (iv) extraterritorial injunctive relief by a US court would be unenforceable in Ecuador, and (v) the congested dockets of U.S. courts.<sup>34</sup> Taken together, Judge Black reasoned that the public and private factors required dismissal of the case.

---

from the pipeline, which is approximately six million gallons more than was spilled in the Exxon Valdez oil spill. *Id.* at 20, para. 42.

<sup>30</sup> *See id.*

<sup>31</sup> *Sequihua*, *supra* note 25.

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*



## B. *Aguinda and Ashanga*

Two separate class action suits were also brought against Texaco in 1993 in the District Court for the Southern District of New York.<sup>35</sup> One suit, *Aguinda, et. al v. Texaco, Inc.*, was filed by Ecuadoran residents of the Oriente region;<sup>36</sup> the second suit, *Gabriel Ashanga Jota, et. al. v. Texaco, Inc.*, (“Ashanga”)<sup>37</sup> was brought by Peruvian residents who live downstream from Ecuador in conjunction with a federation of thirty-six indigenous organizations in Peru.<sup>38</sup> The plaintiffs in both suits allege

---

<sup>35</sup> See *Aguinda Complaint*, *supra* note 28. *Aguinda* was originally assigned to the late Judge Broderick who allowed plaintiffs “unusual leeway” to prove their jurisdictional issues. See *id.* at 625. After Judge Broderick’s death, the case was reassigned to Judge Rakoff.

<sup>36</sup> A number of indigenous and environmental groups, from Ecuador and the U.S., also participated in the case through *amicus curiae* briefs and affidavits attesting to the impact of Texaco’s operations on the indigenous peoples lifestyles. See Arthaud, *supra* note 3, at 218. Environmental groups such as the Environmental Defense Fund and Oxfam America also requested that the State Department ignore Ecuador’s request for intervention because it would send “a confusing signal to indigenous peoples and others who look to our country as a leader in the fight to protect the global environment.” *Id.* at 153.

<sup>37</sup> For purposes of this article, “Ashanga” refers to the District Court’s case, and “Jota” refers to the Court of Appeals ruling of the consolidated action.

<sup>38</sup> *Ashanga et. al. v. Texaco, Inc.*, S.D.N.Y. Dkt. No. 94 Civ. 9266 (1994) [hereinafter *Ashanga Complaint*]. The principle differences between *Ashanga* and *Aguinda* concern the residence of plaintiffs and places where relief is sought. The *Ashanga* plaintiffs live in Peru, while the *Aguinda* plaintiffs live in Ecuador, and the *Ashanga* plaintiffs seek equitable relief both in Peru and Ecuador, while the *Aguinda* plaintiffs sought equitable relief in Ecuador only. The plaintiffs in *Aguinda* consisted of at least 30,000 residents of Ecuador, including various indigenous tribes and immigrants to the Amazon region of Ecuador. *Aguinda Complaint*, *supra* note 28, paras. 11, 30.

The *Ashanga* suit is brought on behalf of “[a]ll individuals who at any time from 1972 to the present have resided within two miles of the banks of the Napo River in Peru, measured when the river is at high flood stage, and who are harmed in various ways by the actions of defendant, as described in this Complaint.” See *Ashanga*, para. 26 at 13 [hereinafter *Ashanga Complaint*]. The class includes at least 25,000 members, 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 to the region. The Quichua, Orejones, Yaguas, and Secoyas have inhabited the Peruvian rainforest for centuries. See *id.* at para. 27. The Napo River is one of the principal tributaries of the Amazon. It collects the waters from the northern Andes Mountains of Ecuador and the southern Andes Mountains of Colombia. It flows approximately 200 miles in Ecuadoran territory, growing gradually in size, and is navigable in its entire flow through Peruvian territory. See *id.* at para. 34. Due to oil exploration related activities, the Napo River is dangerously contaminated with high levels of toxins, such as benzene, toluene, xylene, mercury, lead and hydrocarbons, many of which are known

violations of the Alien Tort Claims Act,<sup>39</sup> as well as common law environmental claims, including negligence, public and private nuisance, strict liability, and trespass. In addition, the complaints included counts under common law theories of medical monitoring and civil conspiracy.<sup>40</sup> Plaintiffs sought relief in U.S. courts because they allegedly are unable to obtain relief in Ecuador.<sup>41</sup> The Alien Tort Claims Act grants federal district courts original jurisdiction in “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>42</sup> In the *Aguinda* complaint, no violation of an international treaty was alleged, thus, at issue was whether Texaco violated the “law of nations” or customary international law.<sup>43</sup>

The litigation in these cases was also complicated by the fact, according to court documents, that powers within the Ecuador government were split over whether they should join the litigation in U.S. courts. Ecuador’s Ambassador to the United States had vigorously objected to the U.S. State Department, arguing against a United States jurisdiction.<sup>44</sup>

While the *Aguinda* Court recognized that it differed from *Sequihua* because Texaco is headquartered in its judicial dis-

---

carcinogens. In addressing the jurisdictional issues in *Ashanga*, plaintiffs argued that Peruvian courts were not appropriate for the action because (1) neither Texaco nor any of its subsidiaries has a legal presence in Peru, and could not be sued in Peruvian courts, (ii) Texaco has no assets in Peru, and therefore plaintiffs could not collect a judgment obtained against Texaco in Peru, and (iii) Peruvian courts could not adequately adjudicate complex “toxic tort” litigation. *See id.* at paras. 53-54.

<sup>39</sup> *Aguinda* Complaint, *supra* note 28; *Ashanga* Complaint, *supra* note 38.

<sup>40</sup> *Aguinda* Complaint, *supra* note 28.

<sup>41</sup> *See id.* at 5-6.

<sup>42</sup> Judiciary Act of 1789, ch. 20, §9(b), codified at 28 U.S.C. §1350 (1988).

<sup>43</sup> *See infra* note 102 and accompanying text.

<sup>44</sup> In June 1996, Ecuador’s Ambassador to the United States, Ambassador Edgar Teran, submitted a letter to the Court where he reiterated his previous objections to the lawsuit. (Letter from Ambassador Teran to Judge Rakoff, June 12, 1996) provided in Court documents of *Aguinda*. *See also* Plaintiff’s Supplemental Memorandum in Further Opposition to Texaco, Inc.’s Motions to Dismiss (July 1996)[hereinafter Plaintiff’s Supplemental Memorandum]. Plaintiffs argued that the Attorney General never consented to an Ambassador as the legal representative of the Ecuadoran Government “simply because he is Ecuador’s diplomatic representative.” Plaintiff’s Supplemental Memorandum at 2. Plaintiffs further noted that the Ambassador has a predisposition in favor of Texaco. Specifically, the Ambassador’s former law firm listed Texaco as one of its clients. *Id.*

trict, Judge Rakoff of the New York District Court, nevertheless relied heavily on the reasoning of *Sequihua*, stating that such difference was "insufficient to overcome the balance of other factors that weigh so heavily against retaining jurisdiction, as outlined in *Sequihua*."<sup>45</sup>

Judge Rakoff further pondered that plaintiffs' failure to join indispensable parties, namely, Petroecuador and the Republic of Ecuador ("the Republic"), was another reason for dismissal of the case.<sup>46</sup> Primarily, the Court found that the equitable relief sought by plaintiffs (including total environmental cleanup of the affected lands in Ecuador and future direct monitoring) could not be undertaken in the absence of Petroecuador or the Republic.<sup>47</sup>

Subsequently, in November 1996, the U.S. District court dismissed the *Aguinda* case. The District Court's dismissal of the *Aguinda* case rested on three foundations: (i) *forum non conveniens*, (ii) international comity, and (iii) failure to join necessary and indispensable parties under Rule 19 of the Federal Rules of Civil Procedure.<sup>48</sup> Shortly thereafter, plaintiffs moved for reconsideration, but not on the ground that the Court had overlooked factual matters or controlling decisions. Rather, reconsideration was premised on the allegation that the Republic of Ecuador (the "Republic"), which previously had strenuously objected to the Court's exercise of jurisdiction over the Ecuadoran-centered dispute,<sup>49</sup> was now prepared not only to

---

<sup>45</sup> *Aguinda*, *supra* note 28, at 627.

<sup>46</sup> *See id.*

<sup>47</sup> Under the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §1603(b) and §1604, neither the Republic or Petroecuador is subject to suit in the United States, unless they agree to a waiver of immunity, or fall within an exception provided under the Act.

<sup>48</sup> FED. R. CIV. P. 19.

<sup>49</sup> The Republic of Ecuador also submitted an *amicus curiae* brief that argued litigation in a United States court would diminish Ecuador's sovereignty. *See* Brief Amicus Curiae of the Republic of Ecuador, (January 1994). In particular, Ecuador referred to its need for foreign investment, and the reliance foreign investors place in Ecuador's laws and regulations, prior to investing in Ecuador. "Foreign investors naturally assume that disputes relating to the development of Ecuador's natural resources are to be adjudicated by the courts of Ecuador." *Id.* at 2. Thus, Ecuador's primary concern was that U.S. jurisdiction over the lawsuit would become a serious disincentive to U.S. companies to invest in Ecuador, and thereby disrupt Ecuador's economic program. The Republic also stated that it implemented policies and regulations for the development of Ecuador's petroleum re-

withdraw its objection but also to seek to intervene in the case. At the same time, the Republic and Petroecuador filed a motion seeking to intervene as plaintiffs in the dismissed action.<sup>50</sup> On August 12, 1997, Judge Rakoff denied *Aguinda's* motion for reconsideration and the Republic's and Petroecuador's motion to intervene.<sup>51</sup> On August 13, 1997, Judge Rakoff also dismissed the *Ashanga* suit on the same grounds as *Aguinda*.

C. *Court of Appeals: Jota, et al. v. Texaco, Inc.*

*Jota, et al. v. Texaco, Inc.*, is a consolidation of the appeals from the *Aguinda* and *Ashanga* class action suits that had been dismissed by the New York District Court, and the denial of Ecuador's motion to intervene. On October 5, 1998, the U.S. Court of Appeals for the Second Circuit vacated the District Court's decision dismissing the lawsuits on jurisdictional grounds, and remanded the case for further consideration.<sup>52</sup> Specifically, the unanimous panel found that in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador, the District Court's dismissal on the grounds of *forum non conveniens* and

---

sources. Therefore, a U.S. court would "necessarily require an examination of the policies of Ecuador with respect to its natural resources." *Id.* at 6.

<sup>50</sup> The motion was filed pursuant to FED. R. CIV. P. 24(a) and (b).

<sup>51</sup> Judge Rakoff based his decision on the following reasons: (i) The motion to intervene was prejudicially untimely since it was made after the suit had already been dismissed (and the undercurrent of this reasoning was that the Republic had, as recently as June 1996 reiterated its objection to U.S. adjudication in the interests of international comity). Moreover, the Republic's position was that it had changed its view of the case as a result of an electoral change, and for policy reasons, the Court could not support such motivations; (ii) the Republic attached limitations and conditions to its proposed waiver of sovereign immunity "such that it would retain all the benefits of a proper party plaintiff while not being required to assume all the correlative burdens;" and (iii) even if there were no limitations on the Republic's and Petroecuador's request to intervene, they have no legal interest warranting such intervention because both the Republic and Petroecuador had previously entered into a formal settlement with Texaco, releasing Texaco from all liabilities it may have to the Republic and Petroecuador. See Memorandum Order (August 12, 1997)(provided in Court documents). As part of a 1995 cleanup agreement with the previous Ecuadoran government, Texaco pledged to build water treatment systems in four cities, with approximately one million dollars for reforestation, new schools and medical dispensaries, but residents state that they have not seen any money. Reportedly, Texaco undertook cleanup of about \$40 million. See *Ecuadoreans Want Texaco to Clear Toxic Residue*, (last modified Mar. 3, 2000) <<http://www.latinolink.com/news/news98>>.

<sup>52</sup> *Gabriel Ashanga Jota et. al. v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) [hereinafter *Jota*].

international comity was erroneous. In addition, the appellate court found that the District Court's reasoning regarding the plaintiffs' failure to join an indispensable party was appropriate only to the extent of activities currently under the Republic's control. While it agreed that Ecuador's motion to intervene had been properly denied, the Court of Appeals issued specific instructions that the District Court should reconsider upon remand in light of the Republic's changed litigating position.

### 1. *Forum non conveniens*

The common law doctrine of *forum non conveniens* permits a federal court to dismiss a case if adjudication in *another forum* would better serve the interests of justice and convenience of the parties.<sup>53</sup> Accordingly, the Court of Appeals noted that the doctrine presupposes the availability of at least two forums where the defendant is amenable to process.<sup>54</sup> Although Texaco's subsidiary, TexPet is subject to suit in Ecuadoran courts, Texaco did not dispute that it was *not* amenable to suit in Ecuador – a fact which the District Court had neglected to consider in its analysis. In dismissing the case, the District Court had based its reasoning concerning *forum non conveniens* on the *Sequihua* court's decision. There, the *Sequihua* court took only a cursory look at whether an adequate forum was available. In fact, the *Sequihua* Court's entire analysis on the issue follows:

In this case, it is clear from the affidavits of two former Ecuadoran Supreme Court justices that an adequate forum is available in Ecuador. Plaintiffs are residents of Ecuador, and Defendants are alleged to have conducted business in that country. Ecuador provides private remedies for tortious conduct and maintains an independent judicial system with adequate procedural safeguards. Therefore, Ecuador is an adequate and available

---

<sup>53</sup> In federal courts, *forum non conveniens* is not governed by Federal Rules of Civil Procedure. Unlike transfer of venue under FED R.CIV.P 1404(a), *forum non conveniens* determinations result in the dismissal of the action, requiring plaintiff to file suit in another forum. "The availability of an adequate alternative forum is a prerequisite for a *forum non conveniens* dismissal." Comment, Brooke Clagett, *Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs*, 9 TUL. ENVTL. L.J. 513, 517 (1996) [hereinafter *Foreign Plaintiffs*].

<sup>54</sup> See *Jota*, *supra* note 52, at 159.

forum even though it may not provide the same benefits as the American system.<sup>55</sup>

The Court of Appeals found that the District Court's dismissal on the grounds of *forum non conveniens* was inappropriate.<sup>56</sup> In remanding the case back to the District Court, the Court of Appeals directed the District Court to "independently reweigh the factors relevant to a *forum non conveniens* dismissal, rather than simply relying on *Sequihua*."<sup>57</sup>

## 2. Comity

The principles of international comity refer to "the recognition one nation allows within its territory to the legislative, executive or judicial acts of another nation."<sup>58</sup> In applying its decision, the District Court had adopted the comity considerations set forth in *Sequihua*, which found that (i) the alleged harm occurred entirely in Ecuador; (ii) the conduct was regulated by the Republic and exercise of jurisdiction would interfere with Ecuador's sovereign right to control its own environmental resources; and (iii) "the Republic of Ecuador had expressed its strenuous objections to the exercise of jurisdiction by this Court." The Court of Appeals found that the District Court erred in failing to consider whether Ecuador provided an adequate forum, and whether Texaco had consented to the jurisdiction of Ecuadoran courts. The Appellate court added that since the case is being remanded to consider these issues, the District Court should also "reconsider the merits of the comity

---

<sup>55</sup> *Sequihua, et. al. v. Texaco Inc., et. al.*, 847 F. Supp. 61 (S.D. Tex. 199).

<sup>56</sup> See *Jota, supra* note 52, at 159. In its decision, the court pointed to the litigation surrounding the Bhopal gas leak in India, where dismissal on the grounds of *forum non conveniens* was conditioned on the grounds that Union Carbide consented to personal jurisdiction in India. See *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 203-04 (2d Cir. 1987).

<sup>57</sup> See *Jota, supra* note 52. Plaintiffs stated that differences between *Jota* and *Sequihua* include that the *Jota* case is brought under the Alien Tort Claims Act, and dismissal would be contrary to Congress' intent to provide a federal forum for aliens suing domestic entities. In addition, unlike the plaintiffs in *Sequihua*, plaintiffs in *Jota* are only challenging decisions made by Texaco within the United States, and therefore, necessary documents and witnesses are more accessible in a U.S. forum. *Id.*

<sup>58</sup> *Jota, supra* note 52, at 159, quoting *Pravin Banker Associates, Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 854 (2d Cir. 1997)(quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)).

issue in light of Ecuador's changed litigating position."<sup>59</sup> The *Jota* court implied that *Sequihua* had been correctly decided in light of the fact that the Republic had vigorously opposed jurisdiction at that time. Nonetheless, the Court of Appeals noted that the District Court's reliance on *Sequihua* was "substantially eroded" since the Republic *now* embraced a United States forum.<sup>60</sup>

### 3. *Failure to Join an Indispensable Party*

The Court of Appeals reviewed the District Court's determination on failure to join an indispensable party under the abuse of discretion standard.<sup>61</sup> Plaintiffs argued, and the Court of Appeals agreed, that the Republic's participation was not necessary for the full scope of equitable relief sought.<sup>62</sup> Rather, at most, the dismissal of certain equitable claims requiring the Republic's participation may be necessary, but the remaining equitable and legal claims should be allowed to stand.<sup>63</sup> The District Court had relied on Rule 19(b) of the Federal Rules of Civil Procedure, and reasoned that without Ecuador as a party, plaintiffs could not receive *complete* relief. The Court of Appeals rejected the District Court's analysis, stating that while Rule 19(a) requires the Court to join, where feasible, any person who is necessary to effect complete relief, Rule 19(b) "does not authorize dismissal simply because such a party cannot be joined." Instead, the Court must consider "in equity and good conscience . . . the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided."<sup>64</sup> The Appellate Court therefore concluded that while the District Court had discretion to dis-

---

<sup>59</sup> See *id.* at 160.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.* at 161, quoting *Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70, 75 (2d Cir. 1984).

<sup>62</sup> The specific relief requested by plaintiffs includes "undertaking or financing environmental cleanup, to include access to potable water and hunting and fishing grounds, renovating or closing the Trans-Ecuadoran Pipeline, creation of an environmental monitoring fund, formulating standards to govern future Texaco oil development, creation of a medical monitoring fund, an injunction restraining Texaco from entering into activities that run a high risk of environmental or human injuries, and restitution." *Jota*, *supra* note 52, at 164, n. 3.

<sup>63</sup> See *id.* at 9.

<sup>64</sup> FED. R. CIV. P. 19(b).

miss some portions of plaintiff's complaint, dismissal of the entire complaint exceeded its discretion since some portions of the relief could be granted by Texaco without the participation of the Republic.

#### 4. *Denial of Ecuador's Post-Judgment Motion to Intervene*

With respect to the District Court's denial of Ecuador's post-judgment motion to intervene, on the issue of timeliness, the Republic argued that (i) Judge Rakoff was aware of conflicting opinions within the Ecuadoran government over the appropriate forum for the lawsuit, and (ii) the Republic did not realize the need to intervene in the action before it had been dismissed.<sup>65</sup> The Court of Appeals rejected the Republic's arguments noting that the official position of the Ecuadoran Ambassador to the United States remained opposed to the litigation, stating that "[a]n ambassador generally has the power to 'bind the state that he represents.'"<sup>66</sup> The Court of Appeals concluded that the District Court was therefore entitled to rely on the Ambassador's representations unless it was aware that he lacked the authority to bind Ecuador.<sup>67</sup> The Court of Appeals also noted that the Republic's statement that it had not expected the Court's decision to treat it as an indispensable party was not warranted since the motion had been pending before the Court for some time. Although the Court of Appeals agreed with the District Court that Ecuador would need to agree to a complete waiver of sovereign immunity in order to intervene, the Court concluded that on remand, Ecuador's motion to intervene will be available for reconsideration, and Ecuador will have the opportunity to revise its position regarding its waiver of sovereign immunity.<sup>68</sup>

---

<sup>65</sup> See *Jota*, *supra* note 52, at 162.

<sup>66</sup> *Id.*, quoting *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda*, 877 F.2d 189, 192 (2d Cir. 1989); See also *Developments in the Law - International Environmental Law*, 104 HARV. L. REV. 1609 (1991). Court documents filed by plaintiffs allege that Ambassador Teran had close ties to Texaco, including the law firm to which he was affiliated listed Texaco as one of its clients. See *supra* note 44. Documents provided to Judge Rakoff showed that the Ecuadoran Congress supported the litigation in United States courts.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*



In its decision, the Court of Appeals declined to decide under what circumstances a court might remand a case *solely* because of a nation's altered litigating position. Rather, it limited its decision to remand on the grounds of *forum non conveniens*, comity, and failure to join an indispensable party. Nevertheless, it directed the District Court to consider Ecuador's changed position when reconsidering these grounds.<sup>69</sup> Thus, although the Court of Appeals emphasized that it was not basing its decision to remand on the fact that Ecuador had officially changed its position, it is questionable whether the Court would have come to the same conclusions had Ecuador continued to oppose jurisdiction in the U.S. courts.

##### 5. *Recent Developments*

Currently pending before the District Court is the renewed motion by Texaco to dismiss the case on grounds of *forum non conveniens* and international comity, premised on Texaco's consent to the jurisdiction of the court of Ecuador and Peru. Upon remand, the District Court will now have to reassess whether Ecuador provides a suitable alternative forum through an inquiry of whether an adequate remedy is available in Ecuadoran courts.<sup>70</sup> Although the New York District Court found that the application of Ecuadoran law by a New York jury was problematic, the Court has also found that recent events call into question the ability of Ecuadoran tribunal to adjudicate in an impartial and independent manner.<sup>71</sup>

---

<sup>69</sup> *See id.*

<sup>70</sup> A detailed discussion of Ecuador's environmental laws is beyond the scope of this article. For a thorough overview of Ecuador's environmental regulations and available remedies, *see generally*, Kimerling, *Environmental Protection*, *supra* note 19.

<sup>71</sup> On January 21, 2000, a military coup deposed the existing President, and recounted a resurgence of military activity controlling the judiciary. Based on the events, on January 31, 2000, the District Court ordered the parties to further brief the issue of whether an Ecuadoran court could independently and impartially adjudicate the case. *Aguinda v. Texaco, Inc., Jota v. Texaco, Inc.*, 93 Civ. 7527 (JSR), 94 Civ. 9266 (S.D.N.Y., Jan. 31, 2000).

## a. Ecuadoran Law

Although the 1979 Ecuadoran Constitution includes the right to an environment free of contamination,<sup>72</sup> Ecuador's judicial system provides no practical means for private citizens to redress environmental harm.<sup>73</sup> Under the Ecuadoran Civil Code, Texaco was bound by a general duty of care in all of its operations.<sup>74</sup> Incorporating both the "polluter pays" principle and a duty to make restitution, Texaco's liability for damages in Ecuador depends upon whether Texaco was negligent or malicious, and whether damage or threatened harm exists in accordance with principles under the Civil Code. Although Ecuadoran law theoretically provides protection of the rights of Amazonian people and land from destructive development policies, the law is applied selectively and implements a policy of maximizing oil profits.<sup>75</sup> Even when Ecuador's environmental laws are enforced, the minimal fines imposed do little in the way of deterrence.<sup>76</sup>

In its Complaint, Plaintiffs stated that procedural barriers in Ecuador make it an inadequate forum. Such barriers include: (i) prohibition of parties from calling their own witnesses unless opposing parties agree; (ii) discovery limited to questioning conducted by the judge; (iii) no oral, direct or cross examination of witnesses is allowed, and (iv) no provision for class action suits.<sup>77</sup> Other barriers to an impartial forum in Ecuador include a judiciary that is biased since it is controlled by the military,

---

<sup>72</sup> See Kimerling, *Environmental Audit*, *supra* note 19, at 251. Art. 19(2) of the Ecuadoran Constitution provides: "Without prejudice to other rights necessary for a complete moral and material development that derives from the person's nature, the State guarantees: . . . The right to live in an environment free of contamination. It is the duty of the State to be vigilant so that this right should not be affected and to guard nature's preservation. The law will establish the restrictions to exercise certain rights or liberties so as to protect the environment." In addition, Art. 44 provides that the Ecuadoran State guarantees the civil, political, economic, social, and cultural rights recognized in international instruments in force. *Id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See id.* at 209.

<sup>75</sup> See Kimerling, *Environmental Protection*, *supra* note 19, at 377.

<sup>76</sup> Robert F. Kennedy, Jr., *Preface to JUDITH KIMERLING*, *supra* note 13, at ix, xxvi.

<sup>77</sup> *Aguinda Complaint*, *supra* note 28, n.2 at 3.

which is funded exclusively by oil revenues.<sup>78</sup> With weak domestic enforcement in host countries, victims of environmental abuses have no choice but to seek redress outside their national legal system.

### III. ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS

TNCs offer many enticing benefits to developing countries. Even Agenda 21, produced by the 1991 Earth Summit, recognized that "business and industry, including transnational corporations, play a crucial role in the social and economic development of a country."<sup>79</sup> TNCs contribute to the growth of developing nations by providing "major trading, employment and livelihood opportunities" and strengthening the role of women in society.<sup>80</sup> In addition, TNCs are the principle vehicle for the transfer of technology, and increase in the facilities of host countries in international trade through established global networks of the TNC. Similarly, developing countries are attractive to TNCs for a variety of reasons, including less stringent environmental regulations, availability of untapped natural resources, and cheap labor. Despite these mutually beneficial aspects, the track record of TNCs in developing countries is dubious, at best.<sup>81</sup>

---

<sup>78</sup> See Arthaud, *supra* note 3, at 227. In addition, a Department of State representative stated that indigenous peoples had been victims of attacks by paramilitary groups.

<sup>79</sup> *Reports to the U.N. Conference on Environment and Development*, U.N. Conference on Environment and Development, Agenda 21, Annex II, at 29, U.N. Doc. A/CONF. 151/26 (1992) [hereinafter Agenda 21]. "Transnational Corporation" is defined as "a national company in two or more countries operating in association, with one controlling the other in whole or in part." See Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, (1995). *Id.* at 1 n. 2, quoting THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 30 (1992).

<sup>80</sup> See Agenda 21, *supra* note 79.

<sup>81</sup> Toxic gas released from Union Carbide's plant in Bhopal, India resulted in the death of over 1800 people and affected 200,000 more. See Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U.L. REV. 235, 236 n. 2 (1994). Oil exploitation activities by TNCs in the Niger Delta region of Nigeria has resulted in increased cancer among the Ogoni people, and the devastation of the Ogoni's homeland, including leaking pipelines, polluted water and wells, air pollution, and emulsified oil in villagers' fields. See Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L. J. 261, 268 (1997).

Although industrialized nations establish stringent environmental regulations for corporations operating within their borders, these regulations do not apply extraterritorially to similar operations in foreign countries.<sup>82</sup> For instance, in the United States, the Resource Conservation Recovery Act (RCRA) regulates the treatment, storage and disposal of hazardous wastes from "cradle to grave."<sup>83</sup> Similarly, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) imposes strict liability for the cleanup of hazardous wastes on all potentially responsible parties.<sup>84</sup> However, neither of these statutes applies to the operation of U.S. or other foreign corporations abroad.<sup>85</sup> In the absence of a universal code of conduct for international corporations,<sup>86</sup> a double standard exists where industrialized-based companies can oper-

---

Activities by a Japanese/Malaysian joint venture resulted in the dumping of radioactive waste in a small Malaysian village. See ANDREW HARDING, PRACTICAL HUMAN RIGHTS, NGOS AND THE ENVIRONMENT IN MALAYSIA, , IN HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL (Alan Boyle and Michael Anderson eds., 1996). Burmese citizens were subjected to forced labor and other human rights abuses in connection with a UNOCAL gas pipeline project. See *National Coalition Government of the Union of Burma, et. al. v. UNOCAL, Inc., et. al.*, 176 F.R.D. 329 (C.D. Cal. 1997).

<sup>82</sup> See Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) 42 U.S.C. §9601-9675; and Resource Conservation Recovery Act, 42 U.S.C. §6901-6922. And, as in the case of Ecuador, host countries often choose not to enforce their environmental regulations against TNCs, because they are often working in tandem toward a profit motive.

<sup>83</sup> R. PERCIVAL, et. al., ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY 107 (1996).

<sup>84</sup> *Id.* at 108.

<sup>85</sup> See Arthaud, *supra* note 3, at 210.

<sup>86</sup> Although the United Nations has tried to establish a code of conduct for TNCs, the effort was abandoned when it discovered that compromise among nations was not possible. See Fowler, *supra* note 79, at 3. The 1988 draft provides the most recent provision of the U.N. Code of Conduct concerning environmental protection: "Transnational corporations shall carry out their activities in accordance with national laws, regulations, established administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. Transnational corporations should, in performing their activities, take steps to protect the environment and where damaged rehabilitate it and should make efforts to develop and apply adequate technologies for this purpose." U.N. Draft Code of Conduct on Transnational Corporations, U.N. ESCOR, Org. Sess. 1988, Provisional Agenda Item 2, at 11, U.N. Doc. E/1988/39/Add.1, (1988).

The Organization for Economic Development (OECD) has also formulated a set of guidelines for multinational enterprises, which place responsibility on TNCs to take appropriate measures to mitigate adverse environmental impacts. *OECD*

ate without regard to the standards imposed by their "home" countries with often devastating consequences.<sup>87</sup> Unregulated TNCs have the ability to move their manufacturing from country to country in search of those who will work for the lowest wages and under the lowest standards.<sup>88</sup> Ironically, the onus has been on host countries to regulate the behavior of TNCs operating within their borders, even though the wealth and global power of a TNC often extends far beyond that of the host country within which it operates.<sup>89</sup> In the countries where the companies are headquartered, governments are caught in the middle of global corporate investment policies and professed expectations that investment will advance human rights.<sup>90</sup>

Some commentators propose that the U.S. should require that all U.S. persons and corporations comply with U.S. standards in their foreign operations.<sup>91</sup> Taking this a step further, an international agreement on the environmental conduct of TNCs could require that all corporations comply with the envi-

---

*Guideline for Multinational Enterprises*, 25 I.L.M. 494 (1986). However, neither the UN draft Code of conduct, or the OECD guidelines have any binding effect.

<sup>87</sup> Oil Exploration activities by oil conglomerates have had disastrous effects beyond Ecuador. In Nigeria, the Ogoni people have claimed that Royal Dutch Shell has polluted their waters and lands, as well as their livelihood, which depended upon fishing and farming. See generally, Eaton, *supra* note 81; see also Douglas Cassel, *1963 Corporate Initiatives: A Second Human Rights Revolution*, 19 *FORDHAM INT'L L.J.* 1963 (1996). And despite the protests of the international community, a leading activist against Shell, Ken Saro-Wiwa, was executed in 1995 by Nigeria's military regime. Shell refused to play a role in stopping the execution. See Eaton, *supra* note 81 at 270-271; see also Ambrose O.O. Ekpu, *Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria*, 24 *DENV. J. INT'L L. & POL'Y* 55 (1995); Gen. Abdulsalami Abubaker, *Opposition Groups in Nigeria Threaten Foreign Oil Workers*, *New York N.Y. TIMES*, October 12, 1998; *Ethnic Clashes Kill Hundreds of Nigerians*, *York N.Y. TIMES*, October, 4, 1998.

One alternative to giving domestic laws extraterritorial effect or legislating standards of conduct for MNCs is the adoption of voluntary corporate codes. See Brad J. Kieserman, *Comment, Profits and Principles: Promoting Multinational Corporate Responsibility By Amending the Alien Tort Claims Act*, 48 *CATH.U.L. REV.* 881, 883 (1999). For a survey of voluntary corporate codes of conduct, see Leslie Wells, *A Wolf in Sheep's Clothing: Shy Unocal Should Be Liable Under U.S. Law for Human Rights Abuses in Burma*, 32 *COLUM. J.L. & SOC. PROBS.* 35 (1999).

<sup>88</sup> See Thomas L. Friedman, *N.Y. TIMES*, July 30, 1999 (op.ed).

<sup>89</sup> See Fowler, *supra* note 79.

<sup>90</sup> See Human Rights Watch Program on Corporations and Human Rights, last visited March, 2000. <<http://www.hrw.org/hrw/about/initiative/corp.html>>

<sup>91</sup> See Alan Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act*, 17 *ECOLOGY L.Q.* 477 (1990).

ronmental regulations of their state of incorporation when operating on foreign soil. Realistically, such an agreement would be difficult to reach for policy and economic reasons, (some developing countries may prefer relaxed environmental standards as a method of encouraging investment and strengthening their competitive advantage in drawing those industries).<sup>92</sup> Such an agreement might also encourage certain states with less restrictive environmental standards to become a haven for the incorporation of TNCs seeking to evade strict environmental standards (although requirements for incorporation could be structured so as to avoid sham incorporations).

With little international oversight, multinational corporations are left free to pursue their profits in developing countries without sufficient regulatory restrictions, resulting in human and environmental tragedies. Left with no opportunity to obtain reparation in their own domestic courts, plaintiffs injured by private actors have sought a forum in U.S. courts.

#### A. *Redress in U.S. Courts*

Increasingly, foreign plaintiffs have brought actions for human rights abuses in U.S. District Courts under the Alien Tort Claims Act (“the ATCA”),<sup>93</sup> not without some difficulty.<sup>94</sup> Under the ATCA, a foreign citizen can bring suit for any human rights abuse that violates “the law of nations”<sup>95</sup> or an international treaty to which the U.S. belongs.<sup>96</sup> In bringing such claims, plaintiffs must get around two substantial hoops. First,

---

<sup>92</sup> See *Developments in the Law – International Environmental Law*, *supra* note 66.

<sup>93</sup> 28 U.S.C. §1350 (1994).

<sup>94</sup> Only one suit brought under ATCA against a private corporate defendant has survived a motion for summary judgment. See *Doe v. Unocal*, 963 F. Supp. 880, 897-98 (C.D. Cal. 1997). In *Unocal*, Burmese citizens brought suit against a Myanmar oil and gas enterprise and Unocal, alleging human rights violations in furtherance of the Yadana gas pipeline project in Burma.

<sup>95</sup> The court in the landmark case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), adopted guidelines for determining a violation of the law of nations under the ATCA: (i) the wrong must be a violation that “commands the ‘general assent of civilized nations’”; (ii) the prohibition against the wrong must be “clear and unambiguous” and (iii) the nations of othe world must demonstrate expressly by international agreements “that the wrong is of mutual, and not merely several, concern.” *Id.* at 881, 884, 888.

<sup>96</sup> See *supra* note 94.

under the doctrine of *forum non conveniens*,<sup>97</sup> past precedents indicate that foreign plaintiffs cannot easily establish convenience of a U.S. forum. While courts have some discretion in cases involving foreign plaintiffs and domestic defendants, courts have tended to dismiss such cases.<sup>98</sup>

Second, although the ATCA provides original district court jurisdiction over all cases where an alien sues for a tort committed in violation of "the law of nations"<sup>99</sup> or under a treaty of the United States, courts have construed the ATCA narrowly, finding that it "applies only to shockingly egregious violations of universally recognized principles of international law."<sup>100</sup> In the application of the ATCA to human rights violations, the holdings have been limited to situations "where the nations of the world have demonstrated that the wrong is of mutual and not merely several concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."<sup>101</sup>

---

<sup>97</sup> See generally, *Foreign Plaintiffs*, *supra* note 53, (which argues that *forum non conveniens* should be inapplicable to suits by private plaintiffs against U.S. corporations for environmental damage resulting from the development of natural resources). See e.g., *Dow Chemical Co. v. Castro Alfaro*, 786 S.W. 2d 674 (Tex. 1990) (where the Supreme Court of Texas held that the doctrine of *forum non conveniens* was inapplicable to personal injury suits brought in Texas).

<sup>98</sup> See e.g., *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985), cert. denied, 474 U.S. 948 (1985); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995); *Sequihua v. Texaco*, 847 F. Supp. 61 (1994); *Cabalчета v. Standard Fruit Co.*, 667 F. Supp. 833 (S.D. Fla. 1987), aff'd in part and rev'd in part, 883 F.2d 1553 (11th Cir. 1989); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), aff'd in part and rev'd in part, 809 F.2d 195 (2d Cir. 1987).

<sup>99</sup> The law of nations is customary international law, which is established through the widespread practice of nations, as well as the conviction by states that the practice reflects a legal obligation or *opinio juris*. See AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 44 (Peter Malanczuk, ed., 7th ed., 1997).

<sup>100</sup> *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983). See also *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (where foreign plaintiffs alleged that U.S. defendant's dumping of hazardous waste in a foreign country violated Principle 21 of the Stockholm Declaration, the court held there was no violation of the law of nations, and therefore, the ATCA did not apply).

<sup>101</sup> *Zapata*, *id.* at 692. U.S. courts have found jurisdiction where conduct violated established norms of international human rights law, and therefore, the law of nations. See *Filartiga v. Americo Norberto Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (where a high level Paraguayan police officer violated the ATCA in the torture of another Paraguayan citizen); see also *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 116 S. Ct. 2524 (1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090-94 (S.D. Fla. 1997); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 889-92 (C.D. Cal. 1997).

In the *Jota* case, plaintiffs have brought their case under the ATCA, but do not allege a violation of an international treaty. Therefore, for U.S. District Court jurisdiction under the ATCA, plaintiffs must establish a violation of the law of nations.<sup>102</sup> While it is established as customary international law that a state may incur liability from environmental damage that arises beyond national borders, the extent that this principle can be extended to corporations is unsettled.<sup>103</sup> Accordingly, the question remains whether the human right to a healthy environment is recognized among nations to the extent to be considered “the law of nations.”<sup>104</sup>

### B. *The Human Right to a Healthy Environment*

Although the human right to a healthy environment exists in principle, it is debatable as to whether it has crystallized to the level of customary international law.<sup>105</sup> Many human rights

---

<sup>102</sup> Upon remand, plaintiffs will base their arguments for jurisdiction under the ATCA on principles set forth in *Filartiga*, which stated that the “law of nations ‘may be ascertained by consulting the works of jurists . . . or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’” See *Filartiga*, *id.* at 880 (citing *United States v. Smith*, 18 S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820); *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292, 295 (E.D. Pa. 1963)). Telephone Interview with Plaintiffs’ attorney, Christobel Bonifaz, December 17, 1998. Plaintiffs have testimony by experts in the case that attest that Texaco did not follow standard industry practice concerning the production water; Plaintiffs argue that this practice is violative of general practice under New York and U.S. law and therefore a violation of the law of nations. See *id.*

<sup>103</sup> See *Trail Smelter Arbitration (U.S. v. Canada)* [1941], 3 R.I.A.A. 1905; *Lac Lanoux case (France v. Spain)*, 53 AM.J.INT’L L. 156 (1957); see also *The Rio Declaration on Environment and Development*, U.N. Doc. A/CONF. 151/5 Rev. 1 (1992), reprinted in 31 I.L.M. 874 (1992) (Principle 2 provides that states have “the sovereign right to exploit their own resources pursuant to their own environmental and developmental 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.”); see also *Declaration of the United Nations Conference on the Human Environment*, Principle 21, U.N. Doc. A/CONF. 48/14 (Stockholm 1972), reprinted in 11 I.L.M. 1416 (1972)[hereinafter *Stockholm Declaration*].

<sup>104</sup> For a detailed discussion on this issue, see *Eaton*, *supra* note 81 at 297-299 (states view the right to a healthy environment as an aspiration, not a legal obligation or *opinio juris*; accordingly, the right to a healthy environment is not yet customary international law). *Eaton* further argues that the right to a healthy environment is also not part of general international law because it is not “inherent in the nature of the basic concept of the international system.” *Id.* at 298.

<sup>105</sup> Principle 22 of the *Stockholm Declaration* provides that states “shall cooperate to develop the international law relating to liability and compensation for



treaties contain provisions that recognize emerging environmental rights,<sup>106</sup> but there is no consensus as to what that right entails.<sup>107</sup> Considered “third generation” rights by some (where the primary characteristic is that they are essentially collective in dimension and require international cooperation for their achievement),<sup>108</sup> others argue that a healthy environment is a precondition to “first generation” substantive rights, such as the right to life.<sup>109</sup> Without legal recognition of the right to a healthy environment, such rights are not binding, and international tribunals do not have the jurisdiction to hear a claim. Thus, absent an international treaty on international environmental rights, or the recognition of the human right to a healthy environment as customary international law, the human right to a healthy environment remains nonjusticiable throughout most of the world.<sup>110</sup>

---

the victims of pollution and other environmental damage caused by activities within the jurisdiction of such states to areas beyond their jurisdiction.” Stockholm Declaration on the Human Environment, U.N. Doc. A/CONF.151/5/Rev. 1 (1972), reprinted in 11 I.L.M. 1416 (1972). Although this gives support to the concept of liability for environmental damage beyond national borders, it places no real requirements on states.

<sup>106</sup> See *The International Bill of Human Rights*, which includes the Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948); the International Covenant of Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200A (XXI), art. 49; and the International Covenant of Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, 2200 (XXI), art. 27.

<sup>107</sup> Although a detailed examination of human rights and the environment is beyond the scope of this article, many articles have provided a comprehensive examination of emerging environmental rights as human rights. See, e.g., E. Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675 (1993); Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. OF INT'L LAW 103 (1991); William A. Shutkin, *International Human Rights and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479, 493-500 (1991); Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law*, 10 GEO. INT'L ENVTL. L. REV. 309 (1998).

<sup>108</sup> See Burns H. Weston, *Human Rights*, 6 HUM. RTS. Q. 257, 266 (1986). (Weston suggests other third generation rights include the right to political, economic, and cultural self-determination, the right to economic and social development; the right to participate in and benefit from the common heritage of mankind; and the right to peace).

<sup>109</sup> See Shelton, *supra* note 107, at 104-111.

<sup>110</sup> The Indian courts have read a substantive right to a “wholesome environment” as inclusive within the justiciable fundamental right to life, under Art. 21 of the Indian Constitution. Thus, individuals have a cause of action for violations that have serious detrimental results to the environment.

### 1. *Indigenous Peoples and Environmental Rights*

While disproportionate environmental impacts have disastrous effects for all groups-at-risk, the effects on indigenous peoples are particularly pronounced. Increasingly, human rights concerns for indigenous peoples have centered on the fact that they inhabit some of the world's most fragile ecosystems and suffer from some of the worst environmental degradation.<sup>111</sup> Most indigenous people have a land-based subsistence economy; thus, when their environment is negatively impacted, it goes to the core of their existence as a group.<sup>112</sup>

The emerging integration of environmental, developmental and human rights objectives is apparent in recent instruments concerning indigenous peoples, such as the United Nations<sup>113</sup>

---

<sup>111</sup> See Shutkin, *supra* note 107, 493-500.

<sup>112</sup> See TOM B.K. GOLDTOOTH, *INDIGENOUS NATIONS: SUMMARY OF SOVEREIGNTY AND ITS IMPLICATIONS FOR ENVIRONMENTAL PROTECTION*, 138, 143 (cited in *Environmental Justice, Issues, Policies, and Solutions* (1995); if one controls the resources, then one controls the land). TNCs and national governments have extracted natural resources of indigenous lands, and continue to do so at an expanding rate. In the case of Ecuador, the resources are controlled by the government, and therefore, the indigenous peoples of the Oriente region have no control effective land rights (even though they may hold title to the land). After repeated protests by indigenous groups, the Huaorani were granted communal legal title to 612,560 hectares of their traditional territory. However, this land grant has done little to address their concerns about oil development since a condition in the grant bans them from obstructing oil development on their land, because the State is the owner of subsoil resources. See Taylor, *supra* note 107, at 252-53. Both the Constitution Art. 46(1) and Hydrocarbons Law (Art. 1) establish that deposits of hydrocarbons in Ecuadoran territory belong to the state. In addition, conditions to their land title forbid them to carry out any mining or oil exploration/exploitation, nor can they give concession to others to exploit their territory. See *id.*

<sup>113</sup> Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted Aug. 26, 1994, 31 I.L.M. 541 (1995) [hereinafter 1994 U.N. Indigenous Peoples Declaration]. Arts. 25-28 of the Declaration provide the most significance to the environment. Art. 26 provides that "Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation or of encroachment upon these rights." Art. 27 states that "Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent."

and Inter-American Commission on Human Rights<sup>114</sup> draft declarations on indigenous peoples. The ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries<sup>115</sup> makes explicit references to links between indigenous peoples and the environment (although many states, including Ecuador, have not ratified it, and are therefore not bound by its provisions).<sup>116</sup> The preamble to the 1992 Convention on Biological Diversity recognizes the “dependence of many indigenous and local communities embodying traditional lifestyles on biological resources.”<sup>117</sup> Taken together, these documents indicate that the rights of indigenous peoples are crystallizing into a substantial body of law. However, the provisions of these conventions only apply to states. Therefore, non-state actors such as multinational corporations escape their purview.

International human rights committees and tribunals have increasingly extended the application of the fundamental right to a healthy environment to situations concerning life-threatening environmental risks.<sup>118</sup> Recent decisions indicate an emerging international consensus that states have an affirmative duty to prevent situations in their jurisdictions that may threaten human life.<sup>119</sup>

---

<sup>114</sup> Organization of American States, Inter-American Commission on Human Rights, Draft of the Inter-American Declaration on the Rights of Indigenous Peoples, OEA/Ser. G, CP/doc. 2878/97 corr.1 (Feb. 10, 1998). Available at <[www.oas.org](http://www.oas.org)> (last visited June 26, 2000).

<sup>115</sup> International Labour Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, ILO Convention No. 169 (1989). Available at <<http://ilolex.ilo.ch:1567/scripts/convd.pl?c169>> (last visited June 26, 2000).

<sup>116</sup> Art. 2 of the Convention provides that “governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.” Article 4 states that “special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.” Part II of the Convention specifically focuses on land, including provisions for the recognition of cultural and spiritual values of the land, land ownership rights, rights to natural resources, and protection from unlawful relocation their land. *See also* arts. 13, 14, 15, and 16.

<sup>117</sup> Convention on Biological Diversity, opened for signature June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 27, 1993). Ecuador has ratified the Convention.

<sup>118</sup> *See* Taylor, *supra* note 107, at 340.

<sup>119</sup> *See* Michelle Leighton Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355, 362-63 (1993).

In 1990, a petition was filed on behalf of the Huaorani people with the Inter-American Commission on Human Rights (IACHR) against the government of Ecuador.<sup>120</sup> The petition alleged violation of the Huaorani people's rights under the American Convention on Human Rights, as a result of the oil development operations in their territory. Such violations included the contamination of their water, soil and air.<sup>121</sup> Upon investigation, the Commission released their report that concluded development must

take place under conditions that respect and ensure the human rights of the individuals affected . . . 'Decontamination is needed to correct mistakes that ought never to have happened.' Both the State and the companies conducting oil exploration 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.<sup>122</sup>

The Commission's recommendations included that the Republic of Ecuador implement measures to ensure (i) full participation of all persons in decisions that directly affect their environment, and (ii) access to effective judicial recourse.<sup>123</sup>

A decision by the Inter-American Commission on Human Rights determined that ecological destruction of Yanomami lands violated the right to life, through the incursion of disease, colonists, and the displacement of Yanomami people.<sup>124</sup> The Inter-American Commission recommended that the Brazilian government take preventative health measures, establish a Yanomami park, and consult with indigenous populations.

The International Human Rights Committee examined environmental threats to the right to life under Article 6(1) of the International Covenant on Civil and Political Rights

---

<sup>120</sup> The petition was brought by the Confederacion de Nacionalidades Indigenas de la Amazonia Ecuatoriana (CONFENIAE). In 1992, the Organizacio de la Nacionalidad Huaorani de la Amazonia Ecuatoriana (ONHAE) joined CONFENIAE as co-petitioners in the case. See Fabra, *supra* note 1, at 259.

<sup>121</sup> See Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, 77 (1997).

<sup>122</sup> See *id.* at 94.

<sup>123</sup> See *id.*

<sup>124</sup> Case No. 7615, Inter-Am. C.H.R. 24, OEA/ser.L/V/II.66, doc.10 rev. 1 (1985).

(ICCPR).<sup>125</sup> There, Canadian residents alleged that radioactive waste that remained after the government conducted a cleanup constituted serious risks to health in violation to Article 6 of the Covenant. Although the Committee dismissed the case on jurisdictional issues, it stated that the case "raised serious issues with regard to the obligation of States parties to protect human life."<sup>126</sup>

The European Commission of Human Rights (ECHR) upheld the rights of the victim in *Lopez Ostra v. Spain*.<sup>127</sup> There, the plaintiff suffered from emissions from a waste treatment plant built on municipal property with a government subsidy just twelve metres from her home. The plaintiff filed complaints based on violations of fundamental rights under the Spanish constitution, but was afforded no relief.<sup>128</sup> Lopez Ostra then applied to the ECHR stating that local authorities' inaction violated her rights under the European Convention of Human Rights.<sup>129</sup> The Commission found a violation of Art. 8 (protection of private life and family), but rejected an Art. 3 claim (prohibition against torture and inhuman and degrading treatment).<sup>130</sup> In its decision, the ECHR explained that States have both a positive duty to take measures to secure rights under Art. 8, and a negative duty to stop official interference.<sup>131</sup> Spain was held liable for four million pesetas in damages and over one million pesetas for costs and expenses.<sup>132</sup>

These decisions indicate that international human rights tribunals are moving in the direction of applying human rights principles for remedies in cases involving environmental harm. Despite these decisions, the standard view is that an indepen-

---

<sup>125</sup> International Covenant on Civil and Political Rights, Art. 6(1).

<sup>126</sup> See Taylor, *supra* note 107, at 341 (citing E.H.P. Canada, No. 67/1980, in 2 Selected Decisions of the Human Rights Commission Under the Optional Protocol 20 (1990)).

<sup>127</sup> *Lopez Ostra v. Spain*, 20 E.H.R.R. 277 (1995).

<sup>128</sup> See *id.*

<sup>129</sup> See *id.*

<sup>130</sup> In its finding that Spain violated the Convention, the Commission stated "despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being . . . and the applicant's effective enjoyment of her right to respect for her home and her private and family life."

<sup>131</sup> See *id.*

<sup>132</sup> *Lopez Ostra v. Spain*, 20 E.H.R.R. 277 (1995).

dent right to the environment has not yet crystallized into customary international law.<sup>133</sup>

While human rights law can play an essential role in the protection of individuals from a government's political processes,<sup>134</sup> it does have certain limitations: (i) enforcement capabilities are generally limited to making recommendations; and (ii) international human rights bodies ignore the role of non-state actors. Thus, human rights law must be viewed as only one aspect of bringing violations to light and applying public pressure to governments.<sup>135</sup>

#### IV. CONCLUSION

The issues raised concerning the Huaorani's plight due to oil exploitation are just one example of numerous injustices by transnational corporations being repeated around the world. Unquestionably, oil development operations in the Amazonian rainforest threaten the very existence of the Huaorani people, and demonstrate the strong link between environmental degradation and human rights concerns. In the case of the Huaorani people, effective access to justice is near impossible. Most Huaorani have no knowledge or understanding of Ecuadoran laws and the legal system, do not speak the language in which the laws are written, and have different values from other Ecuadorans.<sup>136</sup> In addition, most indigenous groups lack the financial resources to pursue long-term litigation against multinational companies and governmental bodies.

How should developing countries balance the need for foreign investment with human rights violations and obligations to the environment? What recourse do indigenous peoples and other affected individuals have when the government has neglected their interests? Should host countries bear the burden of regulation and oversight of TNCs, when potential effects on humans and the environment violate international human rights norms?

TNCs do not fit into traditional roles of international law because they are not states or international organizations.

---

<sup>133</sup> See Taylor, *supra* note 107, at 345.

<sup>134</sup> See Shelton, *supra* note 107, at 107.

<sup>135</sup> See *Rights Violations*, *supra* note 21, at 29.

<sup>136</sup> See Fabra, *supra* note 1.

Therefore, there is no international court that can exercise jurisdiction in cases involving corporations.<sup>137</sup> Yet, TNC's wield more wealth and power than many developing countries. In recognition that international law is expanding to include the private sector, dispute settlement mechanisms of human rights tribunals should be amended to allow for the inclusion of claims against multinational companies. In addition, global environmental standards should be required and adopted by TNCs. It is hypocritical that one standard should apply for citizens of industrialized countries, while lesser standards are applied to those in developing countries.

The adoption of an international treaty on the human right to a healthy environment would demonstrate that environmental human rights have reached the status of customary international law. The creation of a treaty that sets forth the right to a healthy environment would provide minimum international standards and legitimize international supervision of a state's domestic policies. In addition, it would provide individuals with environmentally related claims much needed access to human rights forums such as the United Nations Human Rights Committee, and the European Committee on Human Rights.

If the human right to a healthy environment was recognized as customary international law, states would be obliged to take certain measures to protect its citizens from detrimental development activities of transnational corporations. Such obligations would exist regardless of domestic laws or the ratification of an international treaty that espoused such rights. Where states choose to ignore their obligations under customary international law, the international community could apply

---

<sup>137</sup> There is, however, emerging recognition of the private sector's role in international law. Some international tribunals can exercise jurisdiction over the private sector in disputes falling within the auspices of a convention. See *The International Seabed Authority of the Law of the Sea Convention*, U.N. Doc. A/52/260, Ann. (July 28, 1997) reprinted at 36 I.L.M. 1492 (1997). See also *Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings*, The International Centre for the Settlement of Investment Disputes (ICSID), Rule 1 (1966) which places corporations on par with states. The rules are available at <<http://www.asser.nl/ica/icsid/htm>> (last visited June 19, 2000). The Kyoto Protocol is the first international environmental treaty in which the private sector is expected to play a significant role, through the Clean Development Mechanism and flexible trading regimes. See Peggy Kalas, Alexia Hering, *Dispute Resolution Under the Kyoto Protocol*, 27 *Ecol. L.Q.* 53 (2000).

universal standards to hold transnational corporations accountable. In addition, violations of the human right to a healthy environment would clearly fall within the purview of the ATCA as a violation of the law of nations.

In the absence of adequate enforcement of domestic laws by Ecuador, a universal code of conduct, or an international treaty that extends justiciable environmental rights to the individual, there exists no adequate recourse for the Huaorani, or other peoples and environments at risk. Unless U.S. courts are willing to open their doors to foreign plaintiffs, U.S. multinational corporations will have no incentive to discontinue their detrimental operations in developing countries whose need for foreign investment appear greater than their interest in preserving a healthy environment for their citizens.<sup>138</sup> Historically, U.S. courts have been all too willing to dismiss such cases on the basis of *forum non conveniens*. The decision in *Jota* by the District Court on remand is awaited, as it may provide hope for victims of environmentally abusive practices of TNCs that such conduct may be found violative of international legal norms. While class action litigation may not be a panacea for the grievances of victims of human rights violations and may raise additional concerns (e.g., who defines the class, who has authority to speak for the class) it is the only tool available at present with the potential to provide at least some type of remedy to victims, and prod multinational actors into responsible actions.

---

<sup>138</sup> See *Foreign Plaintiffs*, *supra* note 53, at 522.