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Litigation as a Tool for Development: The Environment, Human Rights, and the Case of Texaco in Ecuador

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As the process of globalization continues into the twenty-first century, ensuring that transnational corporations are held accountable for their work abroad will be one of the greatest challenges faced by development specialists. In the current context, litigation in U.S. courts is an increasingly important tool in assuring that the people of underdeveloped nations do not suffer from the exploitation, pollution, and cultural degradation that has marked such countries' "progress" in the past. This paper examines the case of *María Aguinda et al. v. Texaco Inc.*, in which a group of indigenous Ecuadorans have sued the U.S.-based petroleum giant in response to environmental and human health damages resulting from its work in Ecuador in the 1970s and 1980s, in order to provide an example of one way in which litigation can foster development. In the context of the *Aguinda* case, this paper presents several specific recommendations for developing the legal means by which corporations can be held accountable on an international level beyond the U.S. court system.

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INTRODUCTION

In the opening of his book, *Development as Freedom*, Amartya Sen states that "development can be seen . . . as a process of expanding the real freedoms that people enjoy" (Sen 1999, 3). Though his words can be taken to have many meanings, surely amongst these are the freedoms to live free of illness, to practice one's cultural traditions, and to live in a clean environment. It has taken many years for the environmental and human rights movements to join forces and for the world to realize that the right to a clean environment is a basic human right. This right is based not only on health implications, but also on the idea that a clean environment is beneficial in and of itself, with lasting and important consequences for the cultural and social well-being of a community. This notion has gained more recognition in the past decade, triggering a shift that has meant, and will continue to mean, changes in the social, scientific, and judicial frameworks that govern human interaction.

While the increasing recognition that a healthy environment is a human right can be observed across a variety of fields, it is most evident in the law. The 1990s in particular produced a marked increase in the concern for corporate accountability and the efforts of citizens worldwide to monitor the actions of multinational corporations and the governments that host them. Concerned citizens and non-governmental organizations (NGOs) have recently begun to use a variety of legal resources to pursue their claims against economic giants such as Union Carbide, Unocal, Freeport-McMoRan, and ChevronTexaco. While they have done so with mixed results, the current movement toward international accountability is clearly gaining momentum. As the third world faces a series of challenges in making the leap to development, litigation promises to be an increasingly important tool in assuring that the people of underdeveloped nations do not suffer from the exploitation, pollution, and cultural degradation that has marked such countries' "progress" in the past.

This paper will examine the role of litigation in shaping development from an environmental and human rights perspective, focusing specifically on the case of Ecuador and the work of oil giant Texaco (now ChevronTexaco) and its subsidiaries. It is important that policy makers do not overlook the importance of law as a tool for development.[1] Through litigation in particular, the U.S. legal system affords individuals from developing countries an opportunity to hold corporations, governments, and other individuals accountable for their actions abroad. Though there are concerns about the "imperialistic" nature of using litigation in the United States for international torts claims (see Koh 2001), several safeguards,

including the rule of *forum non conveniens*, exist to ensure that such claims are not unnecessarily decided in U.S. courts. Ample room exists within the U.S. legal structure for cases to be heard that could not reasonably be brought in foreign courts due to deficiencies such as corruption and a lack of effective legal infrastructure.

This paper examines the role of litigation in development. It recommends that specialists continue to employ litigation as a tool to advance transnational justice, accountability, and awareness. Further, it suggests that the international community set its sights on the implementation and enforcement of global standards for corporate consideration of human rights and the environment. Establishing effective national legal systems within a greater international framework is of the utmost importance.

The case filed against Texaco by a group of indigenous Ecuadorans in 1993, *María Aguinda et al. v. Texaco, Inc.* (*Aguinda*), serves as an interesting example of the ways in which litigation can be used to enforce corporate accountability and, on a different level, to shape the course of development. Though the case has yet to be decided, it has already set several precedents for the law, human rights, and the environmental movement.

Setting: the Oriente, Northeastern Ecuador

Ecuador's easternmost region, the Oriente, is an area of tropical rainforest that forms the westernmost part of the Amazon basin. It has been hailed by conservationists as one of the world's greatest resources and is home to approximately 5 percent of the country's population—500,000 people in an area of 13 million hectares. The ecological and cultural diversity of the Oriente is considered to be unmatched in any other part of the world. The area is home to more than 1,000 species of birds, 100 species of mammals, and more than 10 spoken languages. Biologist Norman Myers has called the Oriente "surely the richest biotic zone on earth and [it] deserves to rank as a kind of global epicenter of biodiversity" (CESR 1994, 5).

Though several areas have been set aside for protection by the Ecuadoran government, including national parks such as Yasuní and Cuyabeno, the Oriente is nonetheless a region rich in natural resources that have been exploited by a number of domestic and foreign interests. Chief among these is the petroleum industry, which has had a dominant presence in the region since the oil boom of the 1970s.

The petroleum industry funds approximately 50 percent of Ecuador's national budget (Armstrong and Vallejo 1992). While clearly an important source of jobs, income, and development for Ecuador, the industry has had an irreversibly detrimental effect on some of the country's most frag-

ile areas. Extensive oil exploration has led to contamination of the area's lands and rivers with toxic wastes, habit destruction by company roads, and a massive assault on the indigenous people of the region through the influx of *colonos* (settlers) from the coast, the loss of native flora and fauna resources, and disease.[2]

The Corporation: Texaco's History in Ecuador

Today, oil accounts for approximately 20 percent of Ecuador's economic output and 30 percent of the government's revenue, produced by a number of national and international companies working in the country. Texaco has maintained a long presence in the Oriente. The company arrived in 1964, and most of its exploration and drilling occurred from 1972 to 1992. During this period, Texaco employed 841 people directly, with another 2,000 through subcontractors, and drilled 339 wells in a 430,000-hectare area in order to obtain more than 1.5 billion barrels of oil (Kimerling 1991). In 1974, Ecuador was the second largest oil exporter in Latin America, but some experts now estimate that there are only 10-20 years remaining for oil production in the Oriente (Jochnick 2001, 3).

Texaco ceased operating in Ecuador in 1992. In 1990, it transferred the remainder of its operations to Petroecuador, the national oil company that had been its partner for nearly 20 years (Armstrong and Vellejo 1992). One of Texaco's lawyers in the *Aguinda* case has stated that Texaco's subsidiary working in Ecuador (TEXPET) was a minority partner in Petroecuador's consortium and that Petroecuador made all the major decisions, not Texaco itself (Appleson 2002, 1).[3]

The Lawsuit: *María Aguinda et al. v. Texaco, Inc.*

Aguinda was filed first in the United States in 1993. The plaintiffs claim that Texaco did not follow existing laws and regulations governing the disposal of waste and produced water from the drilling process.[4] Texaco's presence in the Oriente has undoubtedly had a tremendous and lasting impact on the region's economy, society, and health. Even Texaco cannot deny that its operations, along with those of several other oil companies, led to massive environmental degradation and human health problems. Thus, the question in the case lies not with what damage was caused, but who is ultimately responsible for its remediation. ChevronTexaco's stance is that the parent corporation should not be held responsible for the actions of its subsidiary or its partner, Petroecuador.

The production of oil is rather complex, requiring a tremendous amount of resources. For each barrel of oil produced, there is also a barrel of

waste and produced water. Normally, such produced water is injected into the ground or stored in lined, covered pits. Texaco, allege the plaintiffs in *Aguinda*, did not follow these procedures or maintain basic standards to protect human health and the environment. Alberto Wray, a lawyer for the plaintiffs, told *Diario Hoy*, a newspaper based in Quito, "the central argument is that, in designing their procedures and techniques for oil exploration and exploitation, Texaco preferred to use the cheapest methods, even though it polluted . . . The technology they used was prohibited by law in the United States" (Acosta 2002, 1).[5]

Texaco is charged with destroying more than 2.5 million acres of rainforest and discharging 20 billion gallons of produced water into the local rivers, contaminating them with such chemicals and heavy metals as benzene, toluene, arsenic, lead, mercury, and cadmium. Instead of reinserting its wastes into the wells, as is standard procedure, Texaco, allege the plaintiffs, discharged its wastes into waterways, spread oil on roads, and left open pits full of contaminants. Indeed, one 1987 government study of Texaco's practices found that "crude oil was regularly dumped into the woods, farmlands and bodies of water and that 80 percent of the waste pits were poorly constructed" (CESR 1994, 6). As a result, the local indigenous population has suffered a slew of health complications.

Studies by the Ecuadoran government and researchers from Harvard University have identified eight different types of cancer prevalent in the region where Texaco worked, and, in some places, a rate of cancer more than 1,000 times that of the historic norm. *Diario Hoy* reported that cancer cases occur in the region for 31 percent of the population, while the national average is 12.3 percent (Acosta 2002).

With respect to the corporation's actions in Ecuador, Texaco's attorneys dispute the plaintiffs' assertions, arguing that the company followed all Ecuadoran regulations regarding oil extraction and development. Conceding that in Ecuador there were in fact no environmental protection laws in place at the time, plaintiffs argue that Texaco should have followed conventional practices from the United States, such as reinserting wastes into wells and lining and covering their waste pits. Today's regulations require such standards, although the Ecuadoran Union of Popular Health Promoters "has found that Petroecuador does not follow these guidelines and continues to release the toxic wastes directly into the environment" (Armstrong and Vallejo 1992). Despite the fact that water contamination in the Oriente has reached levels much higher than those the U.S. Environmental Protection Agency considers safe, such water is nonetheless used regularly for drinking, bathing, and fishing. Petroecuador contends

that Texaco is responsible for this contamination, while Texaco denies responsibility (Armstrong and Vallejo 1992). In 1995, Texaco signed a $40 million agreement with the government of Ecuador to clean up the contaminated sites, but this remediation has not yet occurred and health and environmental problems continue to be prevalent in the area.

Many argue that problems such as those in Ecuador are a natural part of the development course—that social and environmental problems were inherent in the development of countries like the United States, so developing countries should also be allowed such mishaps as part of their development. Strict environmental regulations are a luxury, these analysts contend, afforded to wealthy countries only after they have spent years developing the technology, economic base, and social systems to make them possible. As such, they argue that it is "ecological imperialism" to assume that developing countries should prioritize environmental protection over economic development and social stability (Shikwati 2002, 1).[6] This argument lacks credibility, however, especially when one realizes that the virtues of first world development include the worldwide availability of technology to affordably prevent environmental and health disasters and the global awareness of the consequences of such problems.

Legal Analysis

The Role of Law in Enforcing Corporate Accountability

In today's multinational economy, activists, citizens, and NGOs have increasingly tried to hold corporations responsible for the work they perform in countries foreign to their own. Corporations have traditionally been held to the standard of maximizing profits "while staying within the bounds of the law"—a measure that has recently been recognized as deficient as citizens become cognizant of the many important social obligations of corporations (Saunders 2001, 13).

Particularly in countries like the United States, regulations have long existed that govern the techniques and standards of corporations working domestically. However, few standards have been set for corporations working abroad, employing foreign labor, and affecting foreign environments.[7] One technique for managing such work has been corporate and governmental codes of conduct, which recently have included the United Nations Global Compact and the Clinton-era Model Business Principles in the United States. Such codes of conduct have proven to be frequently ineffective due to their voluntary nature, although they can be helpful because "they provide standards and guidelines for respecting human rights" for corporations operating abroad (Saunders 2001, 13).

A second method for enforcing fair labor standards, environmental

protection practices, and human rights in corporations working abroad is litigation in U.S. courts under the Alien Torts Claims Act (ATCA), an archaic statute that was all but forgotten until 1980.[8]

The Alien Tort Claims Act

The ATCA (28 U.S.C. §1350), which was originally part of the Judiciary Act of 1789, "grants jurisdiction to U.S. district courts over any civil action brought by an alien for a tort committed in violation of the 'law of nations' or a U.S. treaty" (Saunders 2001, 7). Originally used for crimes such as piracy, the law now "acts as a tool for holding human rights violators liable to victims seeking redress when options in their own countries are limited" (Saunders 2001, 7). The ATCA was not used in modern times until *Filartiga v. Pena-Irala*, a 1980 case in which a Paraguayan police officer was held liable in a U.S. court for the torture of a Paraguayan national. The ATCA was successfully employed by Filartiga's lawyers primarily because the crime was determined to be state-sponsored torture, which is a violation of international customary law. The court established that "the law of nations must be interpreted 'not as it was in 1789, but as it has evolved and exists among the nations of the world today'" (Koh 2001, 3).

Since *Filartiga*, the ATCA has been invoked in many cases, but without a long track record of success for the plaintiffs, primarily due to problems with jurisdiction and the nature of the events in question—specifically, their relation to state actions and international customary law. One landmark case, however, is *Kadic v. Karadzic* of 1995, in which citizens of Bosnia-Herzegovina claimed that the leader of the rebel military "engaged in systematic violations of international human rights law" (Saunders 2001, 8). The Court of Appeals held that certain violations of international law do not require state culpability, which opened the door to finding non-state actors liable under the ATCA for certain crimes.

It is through the *Kadic* precedent that various NGOs, activists, and citizens have brought ATCA claims against corporations in the United States. These cases, many of which are still underway, include litigation against Freeport-McMoRan, a U.S. mining company accused of human rights and environmental violations in Indonesia; *Doe v. Unocal*, in which Burmese farmers have alleged that Unocal sponsored forced labor, torture, and rape during the construction of a large pipeline along the Thai-Burmese border; and, of course, *Aguinda*.[9] Courts have applied "well-established norms of international law" to assert that, under the ATCA, corporations can be held liable "for their direct complicity in international human rights abuses" (EarthRights International 2003).[10]

Jurisdiction and the Problem of *Forum Non Conveniens*

One of the greatest obstacles to plaintiffs bringing claims in U.S. courts under the ATCA is the problem of *forum non conveniens*, which "is granted when a case can be pursued more effectively and fairly in another country" (Saunders 2001, 11).[11] It is a common argument employed by the defense in ATCA cases because so many of the events in question occur in countries other than the United States.

For their part, plaintiffs have offered several reasons why U.S. courts should in fact consider such claims. First, there is frequently some substantial interest in the United States involved (in *Aguinda*, plaintiffs claimed that Texaco officials based in New York were aware of and responsible for the subsidiary's actions in Ecuador), and second, local courts are often incapable of efficiently or fairly hearing such cases. Many ATCA claims involve the work of corporations in developing countries that may be vulnerable to corruption, have inefficient judicial systems, or simply lack the capacity to handle claims on the scale of cases like *Aguinda*, a class-action suit that involves some 30,000 plaintiffs. Nonetheless, the *forum non conveniens* argument has proven persuasive in recent years, leading judges to frequently dismiss cases outright. Indeed, it was under this rationale that after ten grueling years, *Aguinda* was sent back to Ecuador to be tried in Nueva Loja.

The *Aguinda* case stems from two earlier cases filed in 1993 and 1994, in which the plaintiffs argued that a Texaco subsidiary discharged 30 billion gallons of toxic waste into the Oriente's rivers and surrounding environment. Under the ATCA, *Aguinda* was first filed in White Plains, New York, where Texaco is headquartered. During the ten years that *Aguinda* was in U.S. courts, debate was intensely focused on the legal question of jurisdiction. Like many other cases brought under the ATCA, defense attorneys argued *forum non conveniens*—that hearing the case in New York was not ideal, given that Texaco worked in Ecuador, the plaintiffs live in Ecuador, and the alleged damage occurred in Ecuador. Attorneys for the plaintiffs, however, insisted that Ecuador was not a suitable location because of the inferior justice system, which, they argued, could not sustain a case as large and complex as *Aguinda*, especially since Ecuador did not have the infrastructure to handle class action lawsuits.

The Second District Court in New York dismissed the case twice, in 1996 and 1997, under the rule of *forum non conveniens*, stating that Ecuador would be a more appropriate location for the trial. In 1998, the Second Circuit Court of Appeals reversed the decision and remanded the case to the lower court for reconsideration. Finally, in 2003, the case was sent

to Ecuador, where the Superior Court of Justice in Nueva Loja accepted it on May 14.

The Context in Ecuador

During Ecuador's oil boom, the country lacked any coherent environmental regulations. The first step toward environmental protection laws came in 1990, after Texaco had transferred its operations to Petroecuador (Armstrong and Vallejo 1992). Despite the efforts of some in the Ecuadoran government to assist in the *Aguinda* case, including passing additional environmental legislation and offering statements that assure Ecuador will enforce any decision by U.S. courts (now moot), there is little doubt that in terms of efficiency, resources, and impartiality, the justice system in Ecuador falls far short of its U.S. counterpart.

Sworn affidavits in the case file include a statement by Chris Jochnick, founder of the Center for Economic and Social Rights in New York, who has conducted research regarding human rights conditions in Ecuador. His affidavit includes the assertions that "it is well-documented that in Ecuador the government commits systematic and pervasive human rights abuses against Ecuadoran citizens, particularly those whose interests or objectives are viewed as being contrary to those of the oil industry;" that "there are two types of jurisprudential systems in Ecuador—one that exists on paper and another that exists in practice;" and that "the Ecuadoran army receives revenue directly from the petroleum industry and it has a vested interest in limiting the liability of the oil companies in Ecuador" (Jochnick 2001, 1-4).

Such claims notwithstanding, U.S. courts nevertheless ruled—after a decade of debate—that the Ecuadoran system is capable of handling *Aguinda*. Now that the case is permanently in Ecuador, attorneys for the plaintiffs must make the most of the resources at their disposal—a task that will be difficult, but with which they are already making progress. Cristobal Bonifaz, who was born in Ecuador but now lives in Massachusetts, is the lead attorney on the case. He is currently more optimistic than he was several years ago, largely due to recent changes that have occurred in Ecuador. In particular, while *Aguinda* was bouncing through U.S. courts, Bonifaz worked with the Ecuadoran government to create a law similar to the Comprehensive Environmental Response, Compensation, and Liability Act (better known as Superfund) in the United States, which requires that polluters pay to clean up their contaminated sites, even if they are no longer in operation.[12] Before this law, called the Law of Environmental Management (*la Ley de la Gestión Ambiental*), existed in Ecuador, the lawyers

feared that any decision in their favor would be impossible, especially due to the country's economic dependence on the petroleum industry.

Now that the case is in Ecuadoran courts and the environmental law is in place, Bonifaz has said that he expects an initial decision within a few months (Solano 2003). Bonifaz and other attorneys for the plaintiffs insist that the Law of Environmental Management is intended to be retroactive and does not have a statute of limitations, but this is a point of contention between the two parties (Woodard 2003, 1). If the court does decide in the plaintiff's favor, retroactive applicability of the law will certainly be a key issue during the appeals process.

Based on its history in the United States, *Aguinda* has already set an important precedent for future cases. When the U.S. court dismissed the case on the grounds of *forum non conveniens*, sending it to Ecuador, it did so with one important requirement: that "any final ruling and financial penalty imposed against ChevronTexaco would be enforceable in the United States" (Forero 2003, W1). This is the first time that such a statement has been made—that "a U.S. court has agreed to recognize as binding a foreign court's authority in deciding whether a U.S. company has damaged the environment" (McNulty 2003, 2). ChevronTexaco accepted the Ecuadoran court's jurisdiction in the case as part of its motion to dismiss the case from U.S. courts based on the *forum non conveniens* rule (Rakoff 2001, 4-5). Steven Donziger, one attorney on the plaintiffs' legal team, told the *Financial Times* that "this trial is one of the most extraordinary in the history of the indigenous movement in Ecuador and Latin America. It is the first major trial about environmental damage in which a multinational American defendant has shown up to defend charges with a court order from the U.S. hanging over its head" (McNulty 2003, 2).

IMPLICATIONS

Now that the case is in the court in Nueva Loja—more commonly known by its oil-boom-inspired nickname, Lago Agrio ("Sour Lake")—what does this mean for the affected people, for the case, and for the international legal system? Though it is still too early to determine any concrete effects, it is clear that the case has the potential to be groundbreaking. When the case was still being heard in the United States, plaintiffs' attorneys feared that a change in location would prove fatal for their demands, because the Ecuadoran court does not have adequate resources or standards as strict as those in the United States.

In similar corporate accountability cases, the defendants are almost always successful in having cases dismissed or receiving favorable outcomes. They

have more resources and money to invest in the litigation and, for the most part, the laws are still somewhat biased in their favor.[13] However, many such cases are receiving greater publicity and attention beyond the legal world. Although this publicity may not affect the Ecuadoran judge's final decision, it will certainly continue to influence the environmental debate both in Ecuador and the international legal arena. Indeed, environmental and human rights activists, concerned consumers, and legal scholars everywhere are awaiting the decision of the Ecuadoran court, because of its potential to set a number of groundbreaking precedents.

Despite popular support for the plaintiffs in the case, however, some critics have argued that a victory for the plaintiffs would spell economic disaster for Ecuador, contending that such a signal would prompt oil companies to relocate to countries where the threat of litigation is not as apparent. In fact, Ecuador already has increasing difficulty attracting and maintaining the business of multinational oil companies, although for reasons unrelated to its environmental standards or the publicity of the *Aguinda* case. One report indicates that some oil executives complain that "Ecuador has reneged on agreements, raised tax and royalty rates beyond what is palatable to investors and otherwise changed the legal framework governing how companies operate" (Forero 2004b, W1). Nonetheless, this problem seems more emblematic than indicative of an impending shift in the Ecuadoran economy or oil market; most of the complaints focus on tax and contract issues, and oil companies continue to recognize Ecuador as a leading source of oil, particularly since production increased to 500,000 barrels a day in December 2003 (Forero 2004b, W1). Given the limited world supply of oil and current U.S. rhetoric promoting the expansion of oil resources beyond the Middle East, a scenario in which oil companies abandon Ecuador en masse does not seem likely.

Alternatively, a victory for the *Aguinda* plaintiffs could mark the beginning of a greater international trend toward state and corporate accountability, providing hope that universal standards on health, safety, and environmental protection could be implemented worldwide. If the plaintiffs are successful, it will be a victory not only for the people of Ecuador, but for all those who work in the international environmental and human rights sphere. Such a decision would mark the first time that a case against a U.S. corporation has been won—and most significantly the first time such a case was successful in a judicial system considered inferior to that of the United States.

Though the ATCA has provided the means for such claims to be brought to court in the United States, it has thus far not proven too successful

in bringing justice to victims of corporate irresponsibility abroad.[14] A demonstration that such cases can achieve justice in the developing world would send a tremendous signal both to activists working against corporations and to corporations themselves. Indeed, *Aguinda* has the potential to mark a significant change in international attitudes about transnational business practices. Traditionally, activists and lawyers have believed that a fair judicial system free of corruption could not exist in a country like Ecuador. Environmentalists hope that the Superior Court of Justice of Nueva Loja will prove them wrong.

In the years that have passed since *Aguinda* was first filed, Ecuador has changed its laws for the better, with much help from attorneys like Bonifaz. While it is impossible to speculate about what Ecuador's legislative trajectory would have been without the publicity brought by *Aguinda*, the case clearly influenced Ecuador's approach to environmental protection dramatically. Indeed, were it not for the *Aguinda* spotlight, the passion of attorneys like Bonifaz, and the mobilization of the country's significant indigenous population, Ecuador would likely not have adopted such far-reaching legislation so quickly.

If the people of Ecuador are successful in their demands against Texaco, this will serve as a victory not only for them, but also for the international justice system and the environmental and human rights movements as a whole.

Conclusion and Recommendations

Development specialists must continue to recognize the law as a means for effective, efficient, and sustainable development. A number of conventional techniques exist for employing legal tools in establishing workable frameworks for development, including everything from cracking down on corruption to establishing tax systems and enabling the growth of civil society. However, many of these approaches require a "big picture" view, a great deal of time, and endless frustration in deciding which institutions to build first and how to go about doing so.

A technique that is often overlooked is litigation. Clearly, due to high costs and slow progress, litigation should not be considered a panacea—particularly for struggling legal systems—but rather one of many tools that can often prove more directly effective and, at times, more efficient than standard policy making procedures. That *Aguinda* has attracted worldwide attention, spurred the creation of new and much needed environmental legislation in Ecuador, and forced oil companies to consider the impact of their work is a testament to this. Though the case remains unresolved

at the time of this writing, it has already had a lasting effect on the state of Ecuador's legal environment: lawyers were successful in helping the government establish new environmental laws that, if enforced, will have a significant impact on the remediation of past ecological damage and future conservation efforts; local indigenous groups have made their voices heard as far away as New York courtrooms; and the world has seen that multinational corporations cannot forever continue to operate in developing countries with impunity.

The fact that lawsuits like *Aguinda*, directed at U.S. and European corporations working in developing countries, have increased in recent years is indicative of both the positive and negative aspects of globalization. It is not surprising that legal systems are on track to become as intertwined as the world's markets. However, legal means for redress are increasing at a much slower rate than that of the problems they seek to combat. Globalization of the world's business structure has provided ample opportunity for corporations to take advantage of less-developed economies, labor standards, and environmental regulations, but there is not yet a reliable and consistent way to develop, monitor, and enforce fair and effective standards for such work.

U.S. courts, while far from perfect, are an example of an effective system through which citizens can find redress—be it financial compensation, environmental remediation, or punitive damages—through civil suits against businesses, governments, and other individuals that fail to meet established minimum standards of human and environmental safety. The international legal system is clearly in need of a similar mechanism. While this cannot be created overnight, the legal and policy community must begin to work toward the establishment of a system that will set standards for businesses working transnationally, enforce such standards, and provide the means for redress in cases where such standards are not enforced.

Three interdependent recommendations that begin to address the problem of corporate accountability in the developing world are presented below: 1) establish internationally viable minimum standards for labor, human rights, and the environment; 2) develop national strategies for monitoring, enforcement, and redress; and 3) create a legal safety net within the international system for use when national mechanisms are insufficient.

Establish internationally viable minimum standards for labor, human rights, and the environment: The first step toward promoting and enforcing corporate accountability is to establish worldwide minimum labor and

environmental protection standards, a process which began with the July 26, 2000, launch of the United Nations Global Compact project. The Global Compact "seeks to advance responsible corporate citizenship so that business can be part of the solution to the challenges of globalization" through voluntary adherence to nine principles for human rights, labor standards, and the environment.[15] The Global Compact, while a good start in addressing issues of corporate responsibility, is not a regulatory body, nor does it have any concrete means to monitor or enforce any of its nine principles. Instead, it "relies on public accountability, transparency and the enlightened self-interest of companies, labor, and civil society to initiate and share substantive action in pursuing the principles upon which the global compact is based" (Global Compact 2000).

This system may prove effective for some "enlightened" corporations, but is clearly inadequate for the most egregious and frequent offenders of its general standards.[16] A more concrete and specific list of industry-specific standards is needed, with some mechanism for accountability. In the case of the oil sector, such standards could include minimizing produced water through re-perforation of wells; use of impervious pit liners and secondary containment mechanisms; and appropriate management of hazardous wastes listed under such standards as the Basel Convention or the United States' Resource Conservation and Recovery Act.

There is no realistic way to convince corporations to agree to such voluntary standards if the governments of the countries in which they work are not able to enforce them. Thus, a second, complementary recommendation is that national governments work to develop their own laws to enforce labor and environmental standards, and to provide means for redress in the case of violations.

Develop national strategies for monitoring, enforcement, and redress: Implementing recommendations for corporate accountability into national legal regimes is an inherently complex and difficult process. Corruption, coupled with the lack of capital and infrastructure, is one of the most obvious impediments to such development. However, this does not mean that policy makers and governments—particularly those of less developed countries where such problems are most prevalent—should not seek to address such problems. While there has traditionally been immense political and economic pressure for developing countries not to pass legislation requiring stricter labor, human rights, and environmental standards, *Aguinda* suggests that we may be witnessing increasing pressure in the opposite direction as well, as has been seen in Ecuador. During the course of the

Aguinda case, Ecuador passed its Law of Environmental Management, indigenous groups rallied against further oil development in the Oriente, and local communities began to advocate for greater dependence on non-oil-based revenue sources.[17]

How countries develop legal systems for the establishment, monitoring, and enforcement of basic standards will vary significantly. Some techniques will be more feasible in some settings than others, and many countries may choose to establish standards above the minimum necessary. However, governments should consider—to the greatest extent practicable—a variety of mechanisms, including:

- Legislation, such as Ecuador's Law of Environmental Management, that sets forth clear standards for labor, human rights, and environmental protection;

- Means for consistent contractual agreements between host country governments and foreign corporations, detailing the responsibilities of each;

- Monitoring capacity, which could include state agents in the field or a reporting system by which citizens and NGOs could notify appropriate government officials;

- Enforcement of regulations through penalties, most likely financial, for companies that do not comply; and

- Efficient means for redress, including compensatory and punitive damages and environmental remediation. In many cases, this would probably resemble the U.S. system for civil lawsuits and torts claims.

Clearly, these changes cannot happen overnight. Even if developing countries are successful in building adequate legal infrastructures, problems will persist, and business interests will still face a bottom line of maximizing profits rather than minimizing human and environmental impacts. In order to address interim and continuing problems, there should be an international system in place to act as a safety net when national systems fail.

Create a legal safety net within the international system for use when national mechanisms are insufficient: Litigation in U.S. courts under the ATCA is currently the only means by which citizens from foreign states

can bring claims against U.S. corporations for torts committed abroad. This system is useful for people who, like the plaintiffs in *Aguinda*, do not believe that their domestic legal systems are equipped to address their problems. However, it has its obvious limitations, and the international community must establish a more effective framework for handling transnational torts claims.

One option is the creation of an international civil court modeled on the recently established International Criminal Court (ICC).[18] The ICC is independent from the United Nations and differs from the United Nations' International Court of Justice in that it was established by treaty and has the ability to prosecute individuals. Like the ICC, an international civil court could be established by treaty, independent from the United Nations, and have the capacity to hear claims against legal persons, including corporations. Claims could be brought by individuals, governments, or NGOs.

Jurisdiction of such a court would necessarily be limited to certain types of claims, much like the ICC is limited to the severe crimes of genocide, crimes against humanity, and war crimes. Determining how to define and implement such limitations would be one of the most challenging tasks of policy makers interested in establishing such a court. Another obvious difficulty would be convincing nations like the United States, which remains an opponent of the ICC, to accept the jurisdiction of such a court. While U.S. interests would certainly be the target of many claims brought before an international civil court, they would also benefit from its capacity to rule in their favor. U.S. interests abroad are frequently harmed through violations including corruption, breach of contract, and defiance of intellectual property laws. While convincing parties that participation in such a court is beneficial would be difficult, it is not out of the question given the substantial benefits they could receive from such an institution.

These recommendations are far-reaching and will undoubtedly prove difficult to implement. However, following the globalization boom of the past few decades, it is obvious that a major revision of national and international legal systems is necessary. This will not be an easy task, nor will it happen quickly.

The U.S. legal system is often seen as an example for developing countries to follow, but only recently has it been used as a specific tool to advance other nations' development. The ATCA provides a means by which internationally based claims can be heard in U.S. courts. Until other mechanisms exist, the ATCA will remain a useful tool to address corporate accountability in the developing world.[19] As long as judges continue to use

much discretion to avoid the ATCA becoming "an instrument of imperialism" by which courts can "impose the policy choices of one country on another" (Koh 2001, 9), litigation in U.S. courts may prove an effective catalyst for development because it enables development specialists to focus on specific problems, one at a time.

Lawyers, activists, and policy makers must continue to take advantage of the ease by which knowledge and resources can cross frontiers. The *Aguinda* experience demonstrates that it is possible to effect change through existing legal structures. Even if the plaintiffs are not ultimately successful against Texaco, the case has already shown the world that there is legitimacy in pursuing claims against such transnational corporate giants, and it has provided hope for success in such undertakings.

Notes

[1] In 2000, Texaco Inc. merged with Chevron Corporation to form what is now ChevronTexaco, the fourth largest energy company in the world. The company employs 53,000 people and works in more than 180 countries. Operations produce more than 2.6 million barrels of oil per day, with reserves of more than 11.9 billion barrels (ChevronTexaco 2003).

[2] Thousands of settlers, primarily from Ecuador's coastal regions, have moved into the Oriente in the past few decades. Much of this migration is due to the availability of roads built by the petroleum companies. Rainforest Action Network estimates that such roads opened "more than 2.5 million acres of the forest to colonization . . . Forests are being cut down by oil companies and settlers at a rate of approximately 340,000 hectares a year" (Armstrong and Vallejo 1992). The population of the Oriente more than doubled from 173,469 in 1974 to 383,201 in 1994. The Ecuadoran government encouraged settlers from the coast and highlands to move to the Oriente, but this has created more problems than it has solved. The land is extremely infertile, and settlers clear huge expanses of forest in order to build their farms. 36 percent of the Oriente is now claimed by such settlers and 60 percent of the deforestation in the Oriente is attributed to agriculture (Gorman 1996, 1).

[3] Amazon Watch, an environmental NGO operating in Latin America, reports about Texaco's subsidiary TEXPET: "All of the important decisions with regards to Texaco's operations were made by managers located in the U.S., not employees of TEXPET based in Ecuador. Texaco financed, designed, constructed, and managed Ecuador's oil infrastructure from its inception through the early 1990s, when it abandoned the country and ceded its interest to the state oil company. TEXPET no longer exists and ChevronTexaco has no assets in Ecuador" (Amazon Watch 2003, 4).

[4] Produced water, a byproduct of oil production, is water contaminated with oil, chemicals, and a number of heavy metals. It is frequently reinserted into wells once drilling has been completed.

[5] Translated from Spanish: "el argumento central del juicio es que, al diseñar los procedimientos y poner en práctica las técnicas para la exploración y explotación petrolera, Texaco prefirió utilizar métodos más baratos aunque sean contaminantes . . . la tecnología era prohibida por ley en EE.UU." (Acosta 2002, 1).

[6] Shikwati explains his argument as follows: "The cleanest countries in the world are also the wealthiest. They can afford the technologies that reduce pollution, make water drinkable, and preserve forests, rivers and other natural habitats. Yet their initial stages of development relied on practices that would not today be considered 'environmentally-friendly.' Growth and wealth led to new technologies, which eventually resulted in a commitment to addressing environmental problems—but only once basic human needs had been met by society. What developing countries need now is just that: the chance to develop, and the only way this can be achieved is through economic growth on their own terms" (Shikwati 2002, 1).

[7] One interesting example of an attempt to address such problems through legislation is the case of Massachusetts' "Burma Law." The controversial law, enacted in 1996 due to concerns over poor human rights standards under Myanmar's military dictatorship, was modeled after anti-apartheid laws designed to boycott companies conducting business in South Africa. The law referred only to transactions with the Massachusetts state government, not other private parties, and gave preferential treatment to companies that did not have business relationships in Myanmar. Many businesses objected to the law and, through the lawsuit of *National Foreign Trade Council v. Baker*, it was eventually ruled unconstitutional on the grounds that states cannot make foreign policy and trade decisions contradictory to those of the federal government (Greenhouse 2000, A23).

[8] The ATCA provides a forum for claims to be heard in U.S. courts for torts committed abroad. Broadly defined, a tort is a claim which requires an injuring party to pay damages to a victim in compensation for an injury committed intentionally or by negligence.

[9] In *Doe v. Unocal*, Burmese plaintiffs sued the U.S. energy corporation for its direct involvement in human rights abuses associated with the construction of a large pipeline in Myanmar. The case is particularly significant because a federal appeals court held in 2002 that plaintiffs had presented evidence proving that Unocal "knowingly provided substantial assistance to the military in its commission of forced labor, murder and rape, while the military secured the project and built project infrastructure. Accordingly, the court held that Unocal could be held

liable for aiding and abetting the military's abuses" (EarthRights International 2003). ChevronTexaco is also being sued under similar circumstances by a group of Nigerian plaintiffs who allege that the company committed human rights abuses during its operations in Nigeria, including killing protesters during a peaceful demonstration and "the destruction of two villages by soldiers in ChevronTexaco helicopters and boats" (EarthRights International 2003).

[10] ATCA has come under fire recently, and some legal experts are unsure of its future. The case of *Alvarez-Machain v. U.S.*, in which a Mexican national has sued the U.S. government for human rights abuses, will be heard by the Supreme Court on March 30, 2004. One question the Court may consider is the ability of foreign nationals to sue in U.S. courts under the ATCA. The Bush administration has been critical of the use of ATCA, calling it a threat to foreign policy, national security, and the war on terrorism. Legal scholar and former U.S. Assistant Secretary for Human Rights Harold Koh has taken issue with this view. He made the following statement before the U.S. Congress:

> The Administration's position toward the ATCA and [the Torture Victims Protection Act] is perverse in four ways. First, it would virtually repeal these laws, without congressional participation, by granting immunity to all human rights abusers, whether official or corporate, so long as they commit their violations abroad. Second, the Administration's approach does not help, but rather undermines, the war against terrorism, for it would immunize from suit not just corporate defendants, but also Fidel Castro, Kim Jong Il, Saddam Hussein or any state sponsor of terrorism. Third, if under this theory "private enterprises" such as corporations cannot be held liable for gross human rights abuse overseas, then neither can Osama bin Laden, Al Qaeda, other terrorist groups like Hizbollah and Hamas, and/or any other private terrorist organization. Fourth, if adopted, the Administration's position would perversely push similar lawsuits against our companies into foreign courts, where they will lack the protections of U.S. law. Surely, it is a strange way to fight a war against terrorism to deprive victims of terrorism of a well-tested tool of accountability. (Koh 2003, 6).

[11] *Forum non conveniens* literally means "inconvenient forum." In the *Aguinda* case, New York was eventually determined to be an inconvenient forum to hold the trial when compared to Ecuador, where the plaintiffs live and where most of the events occurred.

[12] Superfund, passed in 1980, gives EPA the authority to respond to and clean up hazardous waste sites and to prosecute polluters.

[13] The high costs associated with litigation are an obvious hindrance to plaintiffs, particularly in the context of poor or disenfranchised groups like those represented in *Aguinda*. In some ATCA cases, as in other public interest cases, attorneys work on a purely *pro bono* basis or on behalf of NGOs that fund the costs. In other instances, they base their pay on what, if any, agreement is reached.

[14] Although no ATCA case against a corporation has yet reached a judgment favorable to the plaintiffs, Koh points out that settlements are an alternative means to reaching an end: "ATCA cases against corporations . . . may nonetheless yield benefits for the plaintiffs through legal and political settlements. Although no ATCA case against a corporation has yet settled out of court, Texaco reportedly offered a $500 million settlement to the plaintiffs in *Jota v. Texaco, Inc.* In addition to legal settlements, ATCA cases may facilitate political settlements between the parties" (Koh 2001, 6). (*Jota v. Texaco, Inc.* is one predecessor to the *Aguinda* case.)

[15] These nine principles are that businesses should: 1) "support and respect the protection of internationally proclaimed human rights within their sphere of influence;" 2) ensure "that they are not complicit in human rights abuses;" 3) "uphold the freedom of association and the effective recognition of the right to collective bargaining;" 4) eliminate "all forms of forced and compulsory labor;" 5) effectively abolish child labor; 6) "eliminate discrimination in respect of employment and occupation; 7) "support a precautionary approach to environmental challenges;" 8) "undertake initiatives to promote greater environmental responsibility;" and 9) "encourage the development and diffusion of environmentally friendly technologies" (United Nations Global Compact 2000).

[16] Of the 1,204 current corporations listed as signatories to the Compact, less than fifty are from the energy sector. Most of them are less well-known companies, only one of which, the Amerada Hess Corporation, is based in the United States (United Nations Global Compact 2000).

[17] The *New York Times* reported in December 2003 that indigenous leaders in Ecuador are becoming increasingly vocal in their opposition to oil exploration in the Oriente due to a number of factors, including environmental destruction and lack of profit-sharing with local communities. Ecuador's constitution does not give indigenous peoples the right to the oil and gas below their land, but oil companies cannot explore without the consent of the local population (Forero 2003b, A1). As one alternative to dependence on oil development, one group of Achuar people has opened the Kapawi Ecolodge and Reserve, a successful and legitimately eco-friendly foray into Ecuador's lucrative tourism industry. One local is quoted as saying, "We do not need petroleum. We need more tourists" (Forero 2004, A4).

[18] The Statute of the International Criminal Court entered into force on July 1, 2002, following its sixtieth state ratification. The ICC is independent from the United Nations and has jurisdiction to prosecute genocide, crimes against humanity, and war crimes. The Court does not have retroactive jurisdiction and therefore cannot prosecute crimes that occurred before July 1, 2002 (International Criminal Court 2004).

[19] Koh suggests that "the most effective multilateral approach would be to establish an international treaty that specifies the human rights obligations of corporations and requires states parties to provide criminal, civil, or administrative remedies for violations of those obligations," instead of expanding the jurisdictional scope of ATCA (Koh 2001, 9). While this is a suggestion that could be successful if implemented, multilateral ratification of a binding treaty detailing corporate obligations seems unlikely in the near future.

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