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Remedies for Foreign Citizens Subjected to Outsourced Pollution: A Case Study of American Big Oil in the Ecuadorian Amazon

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Cover Page Footnote

I would like to thank Professor Uma Outka for her guidance and support with this article and so much more. Thanks also to Professor Randall Abate for his encouragement and to the staff of the Florida A&M University Law Review for their constructive edits.

REMEDIES FOR FOREIGN CITIZENS SUBJECTED TO OUTSOURCED POLLUTION: A CASE STUDY OF AMERICAN BIG OIL IN THE ECUADORIAN AMAZON

Ava Azad^A

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INTRODUCTION

The term “globalization” generally carries a positive connotation, invoking images of progress and international unity. “Technology”

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similarly enjoys a reputation of enabling human advancement and improving sustenance, shelter, education, and overall quality of life. Both promote the development of the other and their success has become intertwined. Development of the oil industry is one newsworthy example of the coming together of technology and globalization as nations rush to discover, extract, and refine oil wherever possible and sell the fuel to their own citizens or export it to other nations. Oil is also an example of dangers generally not associated with technology and globalization. The hazards of oil spills and waste for human and environmental health are highly publicized and difficult to doubt.¹ As the oil industry has become globalized, so have the dangers to which it leads. The focus of this paper is one such danger: the disproportionate impact the exploitation of land for oil production by U.S. companies has had on the indigenous people of Ecuador.

Oil exploration in the Amazon has become a booming global industry in recent decades. While the indigenous tribes of the region have resisted the destruction of their land, they have been effectively powerless.² The disproportionate impact the oil business has had on indigenous peoples, who lead nomadic lifestyles and are ill-equipped to successfully participate in judicial proceedings, creates environmental justice concerns.³ The attempt to remedy harm thus caused is a complicated endeavor as it may involve the domestic laws of multiple countries as well as international laws, as was the case in the Texaco-Ecuador conflict addressed in this article.

1. *E.g.*, Suzanne Goldenberg, *Gulf Oil Spill is Public Health Risk*, *Environmental Scientists Warn*, THE GUARDIAN (May 28, 2010, 4:29 PM), <http://www.guardian.co.uk/environment/2010/may/28/bp-gulf-oil-spill-pollution>; Bryan Walsh, *Worst-Case Scenario: Fighting the Gulf Oil Spill*, TIME (Apr. 30, 2010), <http://www.time.com/time/health/article/0,8599,1986102,00.html>; Ed Markey, *One Year After the BP Oil Spill, Dangers Remain*, GRIST (Apr. 20, 2011), <http://grist.org/oil/2011-04-20-one-year-after-the-bp-oil-spill-drilling-is-no-safer/>.

2. *E.g.*, Steven Nelson, *Ecuador's Amazon Rainforest May Be Auctioned to Chinese Oil Companies*, U.S. NEWS (Mar. 28, 2013), <http://www.usnews.com/news/newsgram/articles/2013/03/28/ecuadors-amazon-rainforest-may-be-auctioned-to-chinese-oil-companies>; Lauren Johnson, *Ecuador's Indigenous Leaders Oppose New Oil Exploration's Plan in Amazon Region*, EARTH ISLAND J. (Nov. 13, 2012), http://www.earthisland.org/journal/index.php/elist/eListRead/ecuadors_indigenous_leaders_oppose_new_oil_exploration/; Kelly Hearn, *Oil Exploration in Amazon Threatens "Unseen" Tribes*, NAT'L GEOGRAPHIC NEWS (Mar. 21, 2008), <http://news.nationalgeographic.com/news/2008/03/080321-unseen-tribes.html>.

3. "Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to development, implementation, and enforcement of environmental laws, regulations, and policies." *Environmental Justice*, EPA.GOV, <http://www.epa.gov/environmentaljustice/> (last updated July 24, 2014) [hereinafter *Environmental Justice*].

This paper focuses on the relationship between United States oil companies and Latin American countries for four main reasons. First, the United States is a worthy point of reference in a discussion involving countries with pollution-outsourcing corporations. It is a world power, a nation with relatively progressive environmental laws, and one of only a few nations in which the world's major oil companies originated.⁴ Given its geographic proximity to Latin America and infamous oil exploration conducted in the region in recent decades,⁵ the relationship between the two regions is highly relevant to the issue of outsourcing polluting oil activities. Second, the global significance of the Amazon as an ecological, biodiversity powerhouse makes it an ideal candidate for consideration as a victim of globalization. "The Amazon is the largest and oldest block of tropical rainforest on earth—over 60% of our planet's richest ecosystem."⁶ The Amazon is extraordinary in size—spanning nine South American countries, and in ecological prowess—as the most biologically diverse region in the world. This places it high on the priority list of regions that require environmental attention. Third, the nature and size of the forest and degree of oil exploration that takes place there explain the effects on "some of the last remaining indigenous cultures," making this an environmental justice issue.⁷ Finally, many areas of the Amazon are being exploited for oil extraction, resulting in the implication of multiple countries. The result is that the laws of multiple countries govern one of the largest environmental landmarks of the planet. This requires a comprehensive analysis of pertinent domestic and international laws to discover the alternatives most effective in combatting the inevitable environmental and social harms caused by the outsourcing of pollution.

Such an analysis demonstrates that domestic laws and international agreements are independently insufficient to provide adequate redress for plaintiffs. Domestic laws should prohibit multinational cor-

4. *E.g.*, Rob Wile, *The 15 Biggest Oil Companies In The World*, BUS. INSIDER (Oct. 25, 2012), <http://www.businessinsider.com/platts-worlds-biggest-oil-companies-2012-10?op=1>. See also, Corey Flintoff, *Where Does America Get Oil? You May Be Surprised*, NPR (Apr. 12, 2012), <http://www.npr.org/2012/04/11/150444802/where-does-america-get-oil-you-may-be-surprised> ("America is one of the world's largest oil producers . . .").

5. *E.g.*, Bryan Walsh, *Drilling for Oil Way, Way Offshore*, TIME (Aug. 18, 2008), <http://www.time.com/time/health/article/0,8599,1833379,00.html>; Jonathan Watts, *Petition to halt oil exploration in Ecuadorian Amazon gets 1m signatures*, THE GUARDIAN (Feb. 6, 2013), <http://www.guardian.co.uk/world/2013/feb/06/petition-oil-ecuadorean-amazon-signatures>.

6. J. TIMMONS ROBERTS & NIKKI D. THANOS, *TROUBLE IN PARADISE: GLOBALIZATION AND ENVIRONMENTAL CRISES IN LATIN AMERICA* 132 (2003).

7. *Id.* at 142.

porations (MNCs) from transporting their polluting activities abroad or provide high environmental standards to which they hold MNCs even when conducting operations abroad. Additionally, international laws must be available to supplement enforcement when domestic laws or their administration are lacking.

Part I of this paper first describes the benefits U.S. companies derive from the outsourcing of pollution. Part I also details the Texaco-Ecuador controversy and describes the harmful results of exporting pollution. Part II revisits the benefits that outsourcing pollution brings to outsourcing MNCs and explains why the law is necessary in managing environmental justice. Next, Part II discusses examples of domestic laws in the U.S. and in Ecuador that may provide remedies for foreign plaintiffs negatively affected by MNCs. The section then briefly discusses examples of outsourcing pollution in other parts of the world to allow for a more in-depth comparative analysis. Finally, Part II discusses several international resources on which plaintiffs may rely. This section concludes by proposing potential avenues for recovery, exploring possible combinations of domestic and international laws, and determining which are likely to be most effective.

I. BACKGROUND

A. *Pollution Outsourcing and How it Benefits Companies*

Many people are familiar with the concept of outsourcing jobs, which U.S. companies do to cut costs and increase profit by exploiting low-cost labor abroad. Similarly, there are economic advantages for American companies to conduct environmentally risky activities abroad. Not only does the ability to produce oil globally increase the number of locations from which a company can extract and profit from oil, but performing these operations in countries with more lenient or unenforced environmental laws limits the liability to which a business is exposed compared to when the business is subject to U.S. environmental laws.⁸

Of the countries in the Northern Hemisphere that account for the exploitation of natural resources south of the equator, the United

8. See *infra* Part I.A.; see also Francis O. Adeola, *Cross-National Environmental Injustice and Human Rights Issues: A Review of Evidence in the Developing World*, 43 AM. BEHAV. SCIENTIST 686, 691 (2000) (listing “[t]he absence of national environmental policy in many developing countries, lack of rigorous environmental laws and sanctions against polluters, and desperation to accept pollution for economic gains in many poor countries” as reasons for outsourcing pollution).

States is the largest consumer.⁹ Outsourcing activities with a high pollution-causing risk, like oil extraction and production, means outsourcing the pollution and environmental injustice that result from those activities.¹⁰ Hence, the parties benefiting and profiting from environmentally hazardous industrial activities “are insulated by distance from direct sources of toxins.”¹¹ Internal colonialism aids in MNCs polluting in foreign nations because those countries themselves are divided between dominant groups and weaker groups that are easily overpowered.¹²

In the United States, the Environmental Protection Agency and state environmental agencies conduct inspections to monitor compliance with federal and state environmental laws, which prevents oil companies from escaping enforcement of those laws.¹³ If a company is in violation of environmental laws, the agency with jurisdiction will employ one of its authorized administrative powers to penalize the violating entity. For example, in 1999 EPA found 54% of oil refineries in the U.S. in “significant non-compliance” with the Clean Air Act, 22% in significant non-compliance with the Clean Water Act, and 32% in violation of the Resource Conservation and Recovery Act.¹⁴ The enforcement power granted to government agencies coupled with their follow-through in ensuring compliance with the laws results in relatively powerful environmental protection in the United States as compared to Latin American countries.¹⁵ Unfortunately, the very

9. *Id.* at 694 (citing LYNTON K. CALDWELL, *BETWEEN TWO WORLDS: SCIENCE, THE ENVIRONMENTAL MOVEMENT AND POLICY CHOICE* (1990); ALLAN SCHNAIBERG & KENNETH A. GOULD, *ENVIRONMENT AND SOCIETY: THE ENDURING CONFLICT* (1994)).

10. Adeola, *supra* note 8, at 691 (“The condition of environmental injustice is directly related to the global stratification system in which the economically and politically powerful states are able to shift or impose the environmental burden on weaker states. Underdeveloped societies are relatively powerless and disadvantaged due to their weak, subordinate position in the world system.”).

11. *Id.* at 688; see also Theodore H. Moran, *Multinational Corporations and Dependency: A Dialogue for Dependents and Non-Dependents*, 32 INT’L ORG. 79, 80 (1978) (“The benefits of foreign investment are ‘poorly’ (or ‘unfairly’ or ‘unequally’) distributed between the multinational and the host, or the country pays ‘too high’ a price for what it gets . . .”).

12. Adeola, *supra* note 8, at 693.

13. *Compliance Monitoring, Inspections and Evaluations*, EPA.GOV, <http://www.epa.gov/compliance/monitoring/inspections/> (last updated June 13, 2012). The authority for these environmental agencies’ oversight is derived from various environmental statutes. *E.g.*, 33 U.S.C. § 1251(d) (“the Administrator of the Environmental Protection Agency . . . shall administer this chapter.”).

14. Dara O’ Rourke & Sarah Connolly, *Just Oil? The Distribution of Environmental and Social Impacts of Oil Production and Consumption*, 28 ANN. REV. ENVTL. RES. 587, 603 (2003).

15. See *infra* Parts III.A. & III.D.

strength of such environmental laws in industrialized countries leads to violations of human rights and the right of indigenous groups to a healthy environment in less-industrialized nations.¹⁶

B. *The Story of Texaco in the Ecuadorian Amazon*

In recent years, one case of outsourced pollution by an American MNC has gained considerable attention. Various scholarly¹⁷ and media¹⁸ sources, including a documentary entitled *Crude*,¹⁹ have recounted the story of Texaco's oil development in the Ecuadorian Amazon primarily from the perspectives of the plaintiffs and their lawyers. Non-profit organizations and environmental groups condemn the oil company's operations in the Amazon, exposing its alleged endangerment of the ecosystem and native indigenous groups,²⁰ while Chevron presents its side of the story in a website dedicated to the contro-

16. Adeola, *supra* note 8, at 701.

17. *E.g.*, Peggy R. Kalas, *The Implications of Jota v. Texaco and the Accountability of Transnational Corporations*, 12 PACE INT'L L. REV. 47 (2000); Judith Kimerling, *The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice or Business as Usual?*, 7 HARV. HUM. RTS. J. 199 (1994); Jennifer K. Rankin, *U.S. Laws in the Rainforest: Can a U.S. Court Find Liability for Extraterritorial Pollution Caused by a U.S. Corporation? An Analysis of Aguinda v. Texaco, Inc.*, 18 B.C. INT'L & COMP. L. REV. 221 (1995); Victoria C. Arthaud, Note, *Environmental Destruction in the Amazon: Can U.S. Courts Provide a Forum for the Claims of Indigenous Peoples?*, 7 GEO. INT'L ENVTL. L. REV. 195 (1994); Jennifer E. Brady, Note, *The Huaorani Tribe of Ecuador: A Study in Self-Determination for Indigenous Peoples*, 10 HARV. HUM. RTS. J. 291 (1997); Cortelyou Kenney, Comment, *Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation*, 97 CALIF. L. REV. 857 (2009); Jonathan L. Mannina, Note, *The Human Rights Implications of Economic Development: A Case Study of the Huaorani People of Ecuador*, 5 GEO. INT'L ENVTL. L. REV. 117 (1992).

18. *E.g.*, Karen Hinton, *Chevron in Ecuador: U.S. Oil Company Spies on Latin American Country to Escape Multi-Billion Court Judgment*, HUFFINGTON POST (Mar. 14, 2013), http://www.huffingtonpost.com/karen-hinton/chevron-in-ecuador-us-oil-company-spies-on-latin-american-country_b_2861425.html; Patrick R. Keefe, *Reversal of Fortune*, THE NEW YORKER (Jan. 9, 2012), http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe?currentPage=1; Clifford Krauss, *Consultant Recants in Chevron Pollution Case in Ecuador*, N.Y. TIMES (Apr. 12, 2013), http://www.nytimes.com/2013/04/13/business/research-recanted-in-oil-pollution-case-in-ecuador.html?_r=0; *Chevron Loses in Ecuador Amazon Case*, INDUSTRY WKLY. (Jan. 31, 2013), <http://www.industryweek.com/environment/chevron-loses-ecuador-amazon-case>; *Supreme Court Won't Consider Blocking \$18B Judgment Against Chevron*, CNN (Oct. 24, 2012), <http://www.cnn.com/2012/10/10/world/americas/chevron-ecuador-lawsuit>.

19. CRUDE (Entendre Films 2009).

20. *E.g.*, *Chevron's Chernobyl in the Amazon*, AMAZON WATCH, <http://amazonwatch.org/work/chevron>; *Chevron's Toxic Legacy in Ecuador*, RAINFOREST ACTION NETWORK, <http://ran.org/chevrans-toxic-legacy-ecuador>; *The True Story of Chevron's Ecuador Disaster*, CHEVRONTOXICO: THE CAMPAIGN FOR JUSTICE IN ECUADOR, <http://chevrontoxico.com/> (last visited Feb. 10, 2015).

versy²¹. Despite the somewhat stagnant and predictable arguments by the parties, a long and convoluted factual and legal history precedes the present conflict.

The “Oriente” is the portion of the Amazon that lies in Ecuador.²² Eight indigenous tribes occupy the area.²³ Texaco Petroleum, now a Chevron subsidiary,²⁴ discovered commercial oil in the Oriente in 1967.²⁵ It built a 312-mile oil pipeline from the Oriente to the Pacific coast of Ecuador in 1972.²⁶ Until 1989, Texaco used the pipeline to ship what amounted to 1.4 billion barrels of oil.²⁷ Throughout the 17 years of use by Texaco, “[t]he pipeline ruptured twenty-seven times, spilling what was estimated to be 16.8 million gallons of raw crude (more than Exxon Valdez), most of it into the Oriente’s delicate web of rivers, creeks, and lagoons.”²⁸ Texaco finally withdrew from its operations in Ecuador in 1992.²⁹

The Oriente region holds 5% of the world’s plant species, yet “almost no attempt was made to assess the environmental impact of oil development”³⁰ Ideally, the Ecuadorian government would assess these impacts—for example, in accordance with statutory require-

21. *Ecuador Lawsuit*, CHEVRON, <http://www.chevron.com/ecuador/> (last visited Feb. 10, 2015).

22. Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador’s Amazon Oil Fields*, 2 SW. J.L. & TRADE AM. 293, 295 (1995) [hereinafter *Rights, Responsibilities, and Realities*]. Judith Kimerling is a professor at the City University of New York Queens College. Professor Kimerling was an environmental litigator for seven years and worked on the Love Canal litigation during her five years as Assistant Attorney General for New York State. She moved to Ecuador in 1989 to research oil development in the Amazon and its effects on indigenous peoples. She has since published several articles and a book, *Amazon Crude*, on the topic. Kimerling also worked briefly as an attorney for the National Resources Defense Council (NRDC) after an invitation to do so from Robert Kennedy and S. Jacob Scherr, the director of the organization’s international program at the time. She was fired from that position for refusing to accede to the NRDC’s decision to endorse Conoco’s plans to produce oil in the Oriente. See David Bartecchi, *A Profile of Judith Kimerling, the 2011 Albertson Medal Winner*, VILLAGE EARTH (July 15, 2011), <http://villageearth.org/pages/village-earth-blog/a-profile-of-judith-kimerling-the-2011-albertson-medal-winner>; see also Joe Kane, *Letter from the Amazon: With Spears from All Sides*, THE NEW YORKER 54, 60-62 (Sep. 27, 1993), <http://archives.newyorker.com/?i=1993-09-27#folio=054>.

23. *Rights, Responsibilities, and Realities*, *supra* note 22, at 295.

24. Chevron Corporation, *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, <http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf>.

25. Kane, *supra* note 22, at 59.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 235 (2d Cir. 2012).

30. Kane, *supra* note 22, at 60.

ments like the National Environmental Policy Act of 1969³¹ in the U.S.—since profit motive may taint assessments prepared by oil companies.

The people of the Oriente have “high rates of cancer, birth defects, and other health problems linked to contaminants.”³² Along with leaks from pipeline ruptures, oil waste containing toxic chemicals such as arsenic, cyanide, lead, and mercury were disposed of in waste pits—large holes dug into the ground next to oil wells—, which are washed out by rainfall into other waters and land.³³ The people affected by oil activities and their repercussions were not consulted in the decision to allow Texaco to drill for oil in the Oriente.³⁴ Members of the Huaorani tribe—the tribe most famous for suffering at the hands of Texaco’s operations—cut down trees and attempted to block Texaco’s entrance, but their efforts were short lived due to military coercion, which led to the tribe signing an agreement with Texaco.³⁵

Oriente residents first filed suit against Texaco in American courts in Texas in 1993.³⁶ After the dismissal of that case, the plaintiffs brought suit in New York federal court.³⁷ Texaco fought for years to have the case dismissed and moved to Ecuadorian courts, which had the potential of creating a more challenging case for plaintiffs due to Texaco’s influence in Ecuador.³⁸ The company eventually succeeded in its efforts to convince the court that Ecuadorian courts (and Peruvian courts for plaintiffs harmed in Peru) would be a more appropriate forum for the parties to conduct their case.³⁹

In Ecuador, after more than a decade of litigation and Chevron’s accusations of corruption and fraud in the judicial system,⁴⁰ the

31. 42 U.S.C. §§ 4321-4370h (2014).

32. Kane, *supra* note 22, at 60.

33. *Id.*

34. *Id.*

35. *Id.*

36. Keefe, *supra* note 18, at 1; *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996) (dismissing on grounds of comity and forum non conveniens); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).

37. *Aguinda*, 945 F. Supp. at 625, *vacated*, *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

38. Keefe, *supra* note 18, at 3 (“Ecuador’s judicial system was notoriously corrupt, and its government relied on oil revenues for a third of its annual budget. ‘Texaco ran that country for twenty years,’ Chris Jochnick, a law-school friend of Donzinger’s [the lead American attorney on the case] who lived in Ecuador at the time and now works for Oxfam America, told me.”).

39. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff’d as modified*, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

40. CRUDE, *supra* note 19; Keefe, *supra* note 18, at 5-9.

court found Chevron liable for over \$8 million for environmental damages,⁴¹ an amount that eventually more than doubled because the company refused to make a public apology to those who suffered from the pollution.⁴² The conflict took another twist when Argentine courts agreed to freeze Chevron's assets in Argentina to enable the plaintiffs to collect on the judgment (Chevron does not have assets in Ecuador that plaintiffs could have pursued).⁴³ The company challenged the authority of the plaintiffs to utilize this method in a suit filed in New York successfully seeking an injunction to bar plaintiffs from enforcing the Ecuadorian judgment outside of Ecuador.⁴⁴ The court of appeals reversed that ruling,⁴⁵ and the Supreme Court denied certiorari.⁴⁶ Dozens of other court and tribunal opinions have confronted various components of this case.⁴⁷ They will not all be addressed in this article.

As it stands in Ecuador, the rulings are in the plaintiffs' favor; however, with Chevron's resistance, the 20-year battle is not yet resolved and the environmental degradation allegedly caused by Texaco remains to be remediated. The most recent U.S. ruling on the case came in March 2014 when Judge Kaplan of the District Court for the Southern District of New York held the results of the trial in Ecuador unenforceable, agreeing with plaintiff Chevron that the Ecuadorian

41. Corte Provincial de Justicia Sucumbios [Sucumbios Provincial Court of Justice], 14/02/2011, Juicio No. 2003-0002 (Ecuador); *Chevron ordered to pay \$8 billion by Ecuador court*, L.A. TIMES (Feb. 14, 2011), <http://articles.latimes.com/2011/feb/14/business/la-fi-chevron-20110214>; *Ecuador appeals court rules against Chevron in oil case*, BBC NEWS (Jan. 4, 2012), <http://www.bbc.co.uk/news/world-latin-america-16404268>.

42. *Ecuador appeals court rules against Chevron in oil case*, *supra* note 41; *Supreme Court Won't Consider Blocking \$18B Judgment Against Chevron*, *supra* note 18; *Ecuador Court Upholds \$8.6 Billion Ruling Against Chevron*, CNN (Jan. 4, 2012), <http://www.cnn.com/2012/01/04/world/americas/ecuador-chevron-lawsuit/index.html>. See *Ecuador Court Upholds \$18BN Penalty Against Chevron*, THE GUARDIAN (Jan. 4, 2012), <http://www.guardian.co.uk/business/2012/jan/04/ecuador-upholds-chevron-fine> (discussing an Ecuadorean appeals court's decision to uphold an \$18 billion judgment against Chevron).

43. *E.g.*, *Argentine Court Rules Against Chevron in Ecuador Amazon Case*, GLOBALPOST (Feb. 1, 2013), <http://www.globalpost.com/dispatch/news/afp/130201/argentine-court-rules-against-chevron-ecuador-amazon-case#1>; *Argentina 'Freezes Chevron Assets' Over Ecuador Damage*, BBC NEWS (Nov. 7, 2012), <http://www.bbc.co.uk/news/world-latin-america-20246295>.

44. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011).

45. *Naranjo*, 667 F.3d at 232.

46. *Chevron Corp. v. Naranjo*, 133 S. Ct. 423 (2012).

47. *E.g.*, *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011) (addressing plaintiffs' appeal of the lower court's denial of plaintiffs' motions to stay arbitration); *In re Chevron Corp.*, 749 F. Supp. 2d 170 (S.D.N.Y. 2010) (granting Chevron's motion to require Donziger to respond to oil company's subpoena, and denying Republic of Ecuador's motion to intervene in the matter); *In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011) (affirming lower court's order requiring Ecuadorian plaintiffs to disclose documents Chevron sought through discovery).

court proceedings were tainted by fraud and corruption.⁴⁸ This ruling, unless reversed, will certainly affect U.S. courts' future decisions on enforcing the foreign decision, and may influence other nations' courts as they are faced with demands to honor the Ecuadorian judgment.⁴⁹ The saga continues with the appeal of Judge Kaplan's decision to the Second Circuit by some of the now-defendants.⁵⁰

C. Hazards Resulting from the Actions of MNCs

1. Damage to Natural Resources

Oil production can lead to various forms of environmental degradation. Clearing land to make way for oil exploration can cause deforestation and erosion.⁵¹ The need for transportation by air and ground, as evidenced by the Oriente controversy, requires landing strip and road construction that necessarily destroy natural habitats.⁵² The distance between oil production and consumption necessitates transportation across long distances, inevitably resulting in oil spills.⁵³ Media coverage exposes large oil spills and the environmental catastrophes they cause; however, "smaller but cumulatively significant spills from shipping, pipelines, and leaks often go undocumented."⁵⁴

Drilling for oil requires a great deal of water, which, when discharged, "result[s] in chemical contamination of land and water from petroleum waste, drilling fluids, and by-products of drilling such as water, drill cuttings, and mud."⁵⁵ Contaminated water, referred to as "produced water," that results from extraction contains heavy metals, volatile aromatic hydrocarbons including benzene, toluene, and xylene,

48. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014).

49. Clifford Krauss, *Big Victory for Chevron Over Claims in Ecuador*, N.Y. TIMES (Mar. 4, 2014), http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?_r=0.

50. Brief for Defendants-Appellants, *Chevron Corp. v. Naranjo* (2d Cir. filed July 1, 2014) (No. 14-0826-cv), available at <http://www.cnsenvironmentallaw.com/2014/07/08/LAPsbrief.pdf>; Corrected Brief for Defendants-Appellants, *Chevron Corp. v. Naranjo* (2d Cir. filed July 16, 2014) (No. 14-826(L)), available at <http://guptabeck.com/wp-content/uploads/2012/05/CA2-brief-corrections-RC4.pdf>.

51. O'Rourke & Connolly, *supra* note 14, at 594; SANTIAGO BORASIN ET AL., OIL: A LIFE CYCLE ANALYSIS OF ITS HEALTH AND ENVIRONMENTAL IMPACTS 6 (Paul R. Epstein and Jesse Selber eds., Mar. 2002), available at <http://chge.med.harvard.edu/sites/default/files/oilfullreport.pdf>.

52. BORASIN ET AL., *supra* note 51, at 9.

53. O'Rourke & Connolly, *supra* note 14, at 598.

54. *Id.*

55. *Id.* at 594.

and other toxic compounds.⁵⁶ Drilling and extraction of oil can lead to chronic environmental degradation, physical fouling of water and soil, habitat disruption, and livestock destruction.⁵⁷ As an example of the effects of American oil operations in the States, “[t]he oil and gas industry in the United States alone creates more solid and liquid waste than all other categories of municipal, agricultural, mining, and industrial wastes combined.”⁵⁸

Although there was much argument regarding the environmental damages caused in Ecuador by Texaco, ultimately the company’s contention in that case was legal, not factual.⁵⁹ Texaco claimed that it had remediated the pollution it had caused and for which it was legally responsible given its share—37%—of oil development in the Oriente, and was not liable for clean-up of any remaining pollution.⁶⁰ Thus, it is important for attorneys and scholars of remediation suits to recall that pollution is not illegal *per se*, and that an MNC’s defenses may not be limited because it polluted by scientific standards when it is not legally accountable for that pollution.

2. Environmental Justice

Causing environmental damage abroad is an obvious consequence of outsourcing pollution-causing operations. Environmental injustice⁶¹ resulting from the location of that pollution and the people it affects is less obvious. In the United States, the government must provide environmental justice for all citizens as required by the Equal Protection Clause of the Fourteenth Amendment of the Constitution.⁶² However, as evidenced by the results of oil development in the Amazon, globalization means environmental justice considerations should not be domestically limited.⁶³

Environmental injustice is arguably a violation of basic human rights.⁶⁴ What is especially disheartening about environmental justice

56. BORASIN ET AL., *supra* note 51, at 10.

57. *Id.* at 6.

58. O’Rourke & Connolly, *supra* note 14, at 594.

59. Keefe, *supra* note 18, at 6.

60. *Id.*

61. See *Environmental Justice*, *supra* note 3.

62. THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008) [hereinafter THE LAW OF ENVIRONMENTAL JUSTICE].

63. See, e.g., RUCHI ANAND, INTERNATIONAL ENVIRONMENTAL JUSTICE: A NORTH-SOUTH DIMENSION (2004); Luz Claudio, *Standing on Principle: The Global Push for Environmental Justice*, 115 ENVIRON HEALTH PERSPECT. 10 (2007).

64. Adeola, *supra* note 8, at 686.

cases such as that in the Oriente is that the public health and ecological costs resulting from the activity “typically far outweigh the short-term economic gains.”⁶⁵ This is not surprising, considering the high costs of litigation and the reality that such cases can continue for as long as 20 years if not longer, as with the Oriente case. In an article discussing the global effects of oil production written at a time when the Bush administration was pushing for increased oil exploration and production within and outside the United States, the authors stated, “the actual distribution of costs and benefits of increased oil production among countries, communities, and individuals is almost completely absent from public discourse.”⁶⁶ Although environmental justice has gained momentum in recent years as an area of concern in the environmental movement, it is far from reaching the forefront of decision-making factors considered by businesses and governments.

Many nations have shown disregard for environmental justice when faced with opportunities to develop and profit from natural resources.⁶⁷ As the Huaorani’s struggle to force their way into the discussion of Texaco’s oil exploration and the case of the Urarina in Peru⁶⁸ demonstrate, minority groups are often purposely excluded from planning and negotiations that will directly affect their well-being in the long run.⁶⁹ Especially when a nation faces economic difficulties and its government desperately seeks a source of revenue, minority groups with little physical or political power can be ignored for the sake of the nation.

It is difficult to quantify the harm to indigenous groups because there is no comprehensive set of data on, for example, effects of oil releases on indigenous people.⁷⁰ This makes it difficult to point to specific numbers that show the disproportionate impact on these minority groups. Unfortunately, it is not surprising that there is little information available on this point because globally, little value is expressed for the survival of indigenous groups, especially as compared to indus-

65. *Id.* at 695.

66. O’Rourke & Connolly, *supra* note 14, at 588.

67. See Adeola, *supra* note 8, at 687 (stating “[t]here are some governments, especially in Africa, Latin America, and Southeast Asia, that have adopted a policy of systematic genocide against minority groups in order to appropriate their lands and natural resources,” specifically referencing indigenous people of Irian Jaya, Indonesia, the assassination of Wilson Pinheiro and Francisco “Chico” Mendes in the Amazon, and the execution of Nigerian tribal members).

68. See *infra* Part II.E.

69. See Adeola, *supra* note 8, at 688 (“Both environmental injustice and environmental racism are promoted through systematic exclusion of minority groups in vital environmental policies and decisions.”).

70. O’Rourke & Connolly, *supra* note 14, at 602.

trial advancement and development. Given indigenous peoples' disempowered position, minority status, and lack of the resources necessary to prevail in a lawsuit in most countries—as hunter-gatherers isolated from non-indigenous groups—they are often voiceless at the hands of those manipulating their land and risking their survival.⁷¹ With this understanding, those who are in a position to create a voice for indigenous and other minority groups in environmental discussions must play a more active role in protecting those groups and concerning those with power with the consequences of laws, both domestic and international.

II. ANALYSIS

A. *Legal Logic for U.S. Companies Outsourcing Oil Production*

To understand how to better structure domestic and international environmental laws to prevent international violations of environmental justice, it is useful to consider domestic environmental laws and to determine why they may encourage a company to conduct its business in a foreign country. The oil industry, like many industries that involve risky operations that are likely to result in toxic waste, is highly regulated in the United States. As one example of this regulation,

[t]he Emergency Planning and Community Right-to-Know Act of 1986⁷² requires that manufacturing facilities above a certain size provide information about toxic chemical releases and offsite waste transfers to the national Toxics Release Inventory (“TRI”). The oil refining sector, but not exploration or extraction, is required to report to the TRI.⁷³

At least 15 other federal statutes and programs further regulate the oil industry.⁷⁴ This plethora of regulations prevents the oil indus-

71. See generally Kane, *supra* note 22 (telling the story of the indigenous Huaorani tribe in Ecuador who were absent in practice, yet present in name in the fight against U.S. oil production on their land); see also *infra* Part II.E. (discussing the Ogoni people of Nigeria).

72. 42 U.S.C. §§ 11004-1049 (1986).

73. O'Rourke & Connolly, *supra* note 14, at 603.

74. This includes the Federal Land Policy and Management Act (43 U.S.C. § 1701-87), the Federal Oil and Gas Leasing Reform Act (30 U.S.C. § 181-287), the Outer Continental Shelf Lands Act (43 U.S.C. § 1331-56), the National Environmental Policy Act (42 U.S.C. § 4321-70), the Oil Pollution Act (33 U.S.C. § 2701-62), the Clean Air Act's National Emission Standards for Hazardous Air Pollutants (40 C.F.R. § 61-63) and National Ambient Air Quality Standards (40 C.F.R. § 50), the Clean Water Act's National Pollutant Discharge Elimination System (33 U.S.C. § 1342) and Spill Prevention Control and Countermeasure

try from managing operations in a way that would result in the destruction that it has in the Amazon or, at the very least, would result in civil or criminal penalties.⁷⁵ Not only does this signify that a foreign forum would provide an escape for oil companies, making oil operations less burdensome to perform, but may also result in less money spent on court costs and fines for violating regulations. With this in mind, we consider what the law's role should be in counteracting environmental injustice that may occur as a result of outsourcing oil operations.

B. Why the Law is Necessary to Prevent Environmental Injustice

In the late 1960s and early 1970s the United States entered a period of staunch environmentalism. After the Industrial Revolution, numerous wars, and rapidly advancing technology, people realized that action was required to protect the remaining natural resources and prevent further degradation of the environment. In recent decades, the environmental justice movement has become a key component of the environmental movement, with domestic and international implications. The reasons why law is necessary in the fight for environmental justice are the reasons why law is necessary and exists for most other societally elected rights and wrongs—the people deem a certain liberty significant enough to deserve protection and/or a certain wrongdoing reprehensible enough to deserve punishment. We generally regard the right to live in an environment that is not contaminated—or in the least not contaminated to the point of causing public and environmental health issues—as one that deserves protection. Support for this contention comes in the form of the environmental laws and regulations that exist in the United States

Requirements (33 U.S.C. § 1321), and the Safe Drinking Water Act's Underground Injection Control program (40 C.F.R. § 144). O' Rourke & Connolly, *supra* note 14, at 609. The Resource Conservation and Recovery Act (42 U.S.C. § 6901-92) and the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601-75) apply as well. *Id.* Fuel is regulated under the Oxygenated Fuels Program (Press Release, EPA, New Oxygenated Fuels Program (Oct. 30, 1992), available at <http://www2.epa.gov/aboutepa/new-oxygenated-fuels-program> (announcing a program created under the Clean Air Act)), the Highway Diesel Fuel Program (*Heavy-Duty Highway Diesel Program*, EPA.GOV, <http://www.epa.gov/otaq/highway-diesel/index.htm> (last updated Aug. 8, 2012)), the Reformulated Fuels Program (*RFG Regulations and Standards*, EPA.GOV, <http://www.epa.gov/otaq/fuels/gasolinefuels/rfg/regulations.htm> (last updated Feb. 6, 2015), and the Leaded Gasoline Removal Program. *Id.* Further, the Occupational Safety and Health Administration regulates worker safety for those in the oil industry. *About OSHA*, OSHA.GOV, <http://www.osha.gov/about.html> (last visited Feb. 10, 2015).

75. See *supra* Part II.B.; Kane, *supra* note 22, at 79 (“In my mind, and in the minds of many others, there is no question that the behavior of American oil companies in the Amazon would invite prosecution if they acted that way at home.”).

and worldwide. If we esteem this right and esteem equality, as we expressly do, it results that all people should share in this right equally. When politically weak minority groups are the target of environmental injustice, it presents a problem that must be addressed legally. Specifically, *international* law is necessary to combat environmental injustice because “indigenous peoples are often shut out of the national political systems that govern them, in practice if not by law”⁷⁶

Furthermore, we cannot expect individuals and businesses, whose motives are often not limited to public well-being and justice, to self-govern; therefore, governments must establish laws to govern them. In fact, outsourcing pollution by oil companies is a classic, even exaggerated example of a negative externality: the company reaps the financial benefits of oil production while evading liability from the environmental penalties to which it likely would be subject in the United States and transferring the cost of pollution to the residents of the foreign nation. Enhancing domestic and international laws to hold MNCs more accountable for their actions abroad would internalize the resulting pollution costs. In addition, it would serve to protect the global commons,⁷⁷ the protection of which would otherwise be ignored as it more easily can be on a global scale where the polluters are even further away from their contamination.

The cases discussed in this paper present a sample of the environmental injustice that indigenous groups suffer globally. One source states, “[i]n the western Amazon alone, at least 50 indigenous groups, many of which are the world’s last isolated indigenous peoples, live within oil and gas concessions that are under exploration or preproduction.”⁷⁸ The well-being of the environment is arguably more crucial to the well-being and survival of indigenous groups than groups with non-indigenous lifestyles. Indigenous peoples depend highly on their immediate surroundings for food, water, shelter, medicine, and even cultural identity.⁷⁹

76. *Rights, Responsibilities, and Realities*, *supra* note 22, at 308.

77. Referring to the concept of “tragedy of the commons,” which presents the scenario of a group of people exploiting and benefitting from a resource without an individual incentive to minimize or mitigate harm caused until the resource is depleted. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

78. O’Rourke & Connolly, *supra* note 14, at 596.

79. *See id.* (“[T]erritorial integrity and control are necessary for the cultural reproduction and ultimately the survival of Amazonian indigenous populations whose way of life and well being are closely tied to a thriving rainforest[.]”); *Rights, Responsibilities, and Realities*, *supra* note 22, at 299 (“In the Amazon, oil development has created poverty among indigenous peoples, by destroying natural resources that they use for nutritional, medicinal, domestic, and religious purposes, and by endangering food and water supplies.”).

Another function of law that confirms the need for legal protection against environmental injustice is that of giving a voice to those who would otherwise be without it. The groups who need protection against environmental injustice are the groups that do not have the resources to defend themselves legally by, for example, suing in a tort action. As an example, the Organization of the Huaorani Nation of the Ecuadorian Amazon seemingly has “no office, no phone, and no money.”⁸⁰ Organizations such as these are not well-equipped to tackle a lawsuit in a system that is set up for those with access to more modern methods of living. For a corporation like Chevron, financing reputable lawyers with abundant resources is an expense built into the business; however, for individuals harmed as a result of that company’s actions, the need to fund a legal battle is not a way of existence. The dichotomy between wealthy defendant-corporations and impoverished plaintiff-minorities was evident in the crusade for financial support led by the plaintiffs’ attorney, Steven Donziger.⁸¹ These disadvantages that minorities affected by pollution face necessitates laws to provide for their protection.

C. *U.S. Domestic Laws that May Provide Remedies to Plaintiffs*

For foreign plaintiffs seeking recourse in U.S. courts for environmental justice violations, the pertinent statute under which to sue is the Alien Tort Claims Act (ATCA; sometimes referred to as the Alien Tort Statute, or ATS).⁸² The ATCA, enacted in 1789,⁸³ grants district courts “original jurisdiction of 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.”⁸⁴ For a tort to be actionable under the ATCA, it must be well-established in international law.⁸⁵ The act does not, however, have to be that of a state actor, but may be an act by a private individual.⁸⁶ Plaintiffs filing suit against corporations under the ATCA have not been successful in obtaining remedies. In fact, “[t]o date, . . . no

80. Kane, *supra* note 22, at 56.

81. Keefe, *supra* note 18, at 4.

82. 13 U.S.C. § 1350 (2012).

83. *E.g.*, *The Alien Tort Claims Act Overview*, PBS, <http://www.pbs.org/now/politics/alientort.html>; GARY C. HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* 1 (2003).

84. 13 U.S.C. § 1350 (2012).

85. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 333 (S.D.N.Y. 2005).

86. *Kadic*, 70 F.3d at 239 (“We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of

contested corporate [Alien Tort Statute] case has resulted in a jury verdict in favor of the plaintiffs.”⁸⁷ Many suits brought in U.S. courts for foreign torts have been dismissed on grounds of forum non conveniens and comity.⁸⁸

Another factor that comes into play in cases involving corporations as parties is the question of identifying the appropriate entity to sue. Plaintiffs must identify the individuals responsible for causing the harm and trace them to the corresponding business entity—a difficult hunt given the complexity of corporate law and the relationships between corporations. This could be a difficult task particularly because creating a corporation limits the liability of those behind the scenes—e.g., shareholders are not personally liable for liabilities of the corporation and parent corporations are not liable for liabilities of their subsidiaries⁸⁹—so plaintiffs may be confused and restricted by who to list as defendants. However, certain exceptions allow plaintiffs to argue for holding parent companies liable for the actions of foreign subsidiaries.⁹⁰ Plaintiffs can defeat the limits on corporate liability by piercing the corporate veil⁹¹ or pursuing the parent company directly

a state or only as private individuals.”); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996).

87. *The Alien Tort Statute*, THE CENTER FOR JUSTICE & ACCOUNTABILITY (2014), <http://www.cja.org/article.php?id=435>.

88. THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 62, at 772. See *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (granting defendant oil company’s renewed motion to dismiss case on forum non conveniens where defendant agreed to suit in Ecuador and Peru); *Torres v. S. Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997) (affirming dismissal of tort suit of 700 Peruvian citizens against copper company under forum non conveniens); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff’d in part, modified in part*, 809 F.2d 1295 (2d Cir. 1987), *cert. denied*, 485 U.S. 871 (1987) (dismissing case of gas leak at chemical plant in India under forum non conveniens stating that Indian courts would be a more effective forum for the case); *Delgado v. Shell Oil Co.*, 890 F. Supp. 132 (S.D. Tex. 1995) (dismissing action joining claims of citizens from 12 foreign countries for injuries obtained from nematocid exposure stating that the 12 countries provided adequate alternative forums); *Sequihua v. Texaco*, 847 F. Supp. 61 (S.D. Tex. 1994) (dismissing case brought by Ecuadorian citizens for soil, air, and water contamination); *but see Jota*, 157 F.3d 153 (reversing district court decision to dismiss under forum non conveniens and international comity where plaintiffs could not seek relief in Ecuadorian courts because of defendant’s failure to agree to suit abroad).

89. David S. Bakst, *Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive*, 19 B.C. INT’L & COMP. L. REV. 323 (1996).

90. WALDEMAR BRAUL & PAUL WILSON, PARENT CORPORATION LIABILITY FOR FOREIGN SUBSIDIARIES 1, available at <http://www.fasken.com/files/Publication/03f8fcd4-b06b-45c8-8572-c077387d5df7/Presentation/PublicationAttachment/8fbfe0af-b79f-4d21-999b-4423cb779dc8/PARENT%20CORPORATION%20LIABILITY%20FOR%20FOREIGN%20SUBSIDIARIES.pdf>.

91. “Piercing the corporate veil” is a “[l]egal theory used to ignore the separate entity of the corporation and hold individual shareholders individually liable.” Clarence

for tort liability.⁹² These considerations are important for foreign plaintiffs seeking damages for environmental degradation caused by U.S. corporations; however, they will not be discussed further, as corporate law is not within the purview of this paper.

For plaintiffs who have succeeded in lawsuits abroad, the next step may be to invoke the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) to enforce that judgment in the U.S. The Uniform Law Commissioners promulgated the UFCMJRA in 1962, with a revised version promulgated in 2005.⁹³ The Act provides for

Featherstone, *Tag You're It!!! Finding the Liable Business Entity*, Env'tl. Prot. Agency 8th National Training Conference on PRP Search Enhancement and Financial Analysis (June 5-8, 2012). *Accord, e.g., In re Friedlander Capital Mgmt. Corp.*, 411 B.R. 434, 440-41 (Bankr. S.D. Fla. 2009) ("Under . . . veil piercing, a party attempts to pierce the corporate veil in order to hold the corporate shareholders liable for the actions of the corporation."); *Amore ex rel. Estates of Amore v. Accor*, 529 F. Supp. 2d 85, 93 (D.D.C. 2008) ("Courts reserve piercing the corporate veil for the rare circumstances in which an individual or corporation abuses the corporate form or exerts undue influence over a corporate entity to accomplish an improper or unlawful purpose. . . . Traditional notions of piercing the corporate veil involve 'shareholders and officers [who] may be held personally liable for their corporations' obligations . . . if they . . . met the requirements of 'piercing the corporate veil' under traditional common law principles.") (internal citations omitted). This principle is not limited to shareholder liability for a corporation's actions, but extends to parent corporations' liability for actions of subsidiaries. *See, e.g., Andrew N. Davis, Stephen J. Humes & Catherine K. Lin, When Is The Parent Company Liable? A Lesson In Corporations, Subsidiaries and Environmental Problems*, 12 BUS. LAW TODAY 29, 29-30 (2002) ("The interaction of common corporate functions and activities with certain environmental laws can potentially impose future environmental obligations on a parent corporation with respect to its subsidiary's operations. . . . [I]n many instances, a corporate parent's risk of incurring environmental liability under U.S. law because of participation in or control of its subsidiaries' environmental operations, or because the parent made corporate resources available to its subsidiaries, the use of such resources would be extended to pay for an environmental cleanup at the subsidiary level. Just as likely, corporate parents can face potential risk of exposure for the activities of their corporate subsidiaries located outside of the United States.").

92. *See* BRAUL & WILSON, *supra* note 90, at 1. (citing cases from the United States, Canada, and Europe including *Re Oil Spill By The Amoco Cadiz Off The Coast of France On March 16, 1978*, MDL Docket No. 376 ND Ill. 1984, *American Maritime Cases*, 2123-2199 (holding Standard Oil liable for oil spill of its subsidiary Amoco Transport, a Liberian corporation); *Beazer & Atl. v. Env'tl. Appeal Bd.*, Vancouver Registry Doc. L001638 (B.C.S.C. 2000) (ordering parent corporation to remedy contamination caused by its defunct subsidiary); *United Can. Malt Ltd. v. Outboard Marine Corp. of Can.*, 34 C.E.L.R. 116 (N.S. 2000) (holding parent U.S. corporation could be held liable for leachate contamination by its Canadian subsidiary by piercing the corporate veil because parent corporation "controlled" the subsidiary); *U.S. v. Bestfoods*, 118 S. Ct. 1876 (1998) (holding that parent corporation can be held liable under CERCLA for its subsidiary's actions); *Lubbe v. Cape Plc*, 4 All E.R. 268 (English House of Lords 2000) (permitting over 3,000 South Africans to bring suit in England against English parent corporation for subsidiary asbestos mine's tortious activity)).

93. *Foreign-Country Money Judgments Recognition Act Summary*, UNIFORM LAW COMMISSION (2014), <http://www.uniformlaws.org/ActSummary.aspx?title=Foreign-Country+Money+Judgments+Recognition+Act> [hereinafter *FCMJRA Summary*].

enforcement of foreign judgments in U.S. state courts, except in certain situations of mandatory or discretionary non-recognition.⁹⁴

New York is one of the 32 states that have adopted this uniform law.⁹⁵ In Chevron's most recent attempt to evade liability, the corporation successfully urged the New York federal district court to declare the Ecuadorian judgment unenforceable under the Act's exceptions, which include foreign judgments obtained using fraud or from a corrupt court.⁹⁶ This lawsuit took place even though plaintiffs have not yet attempted to enforce the judgment in New York, demonstrating the Act's potential as a preemptive force.

States that have not adopted the UFCMJRA rely on common law to address questions of foreign judgment recognition.⁹⁷ The general common law principles on foreign judgments strongly resemble those of the UFCMJRA, and are reflected in the Restatement (Third) of Foreign Relations Law.⁹⁸ Some states consider reciprocity (i.e., whether the foreign nation would recognize a similar U.S. judgment) in deciding whether to honor a foreign judgment.⁹⁹ Federal courts apply either federal principles (in cases of federal question subject matter jurisdiction) or the law of the corresponding state (under the *Erie* doctrine in cases of diversity subject matter jurisdiction).¹⁰⁰

With these options in mind, the discussion will now turn to the ways in which a plaintiff might seek a judgment in Ecuador.

D. Ecuadorian Domestic Laws that May Provide Remedies to Plaintiffs

At the time Texaco entered into negotiations with Ecuador, Ecuador did not have the Constitution it has today, which is replete with protections for the natural world and those who inhabit it.¹⁰¹ As in the

94. *Id.*; UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4 (2005), available at <http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf>.

95. See *FCMJRA Summary*, *supra* note 93; N.Y. C.P.L.R. §§ 5301-09 (McKinney 1970).

96. See *supra* note 48.

97. RONALD A. BRAND, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 6 (2012), available at [http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/\\$file/brandenforce.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/$file/brandenforce.pdf) (examining laws governing recognition and enforcement of foreign judgments in state and federal courts). Special thanks to Professor John Head for his insights into the topic of foreign judgment recognition laws.

98. *Id.* at 6-7.

99. *Id.* at 11-12.

100. *Id.* at 4-5.

101. See Kane, *supra* note 22 and accompanying text. Texaco discovered oil in Ecuador in 1967. *Rights, Responsibilities, and Realities*, *supra* note 22, at 300. Ecuador adopted the

United States, the Ecuadorian Constitution is the supreme law of the land.¹⁰² Unlike in the U.S., this “supreme law” has not been strictly administered.¹⁰³ Article 424 first declares the Constitution to prevail over all other laws; next it joins the Constitution with “international human rights treaties ratified by the State and which recognize more favorable rights than those contained in the Constitution” as prevailing over all other laws and actions of public power.¹⁰⁴ In continuing with hierarchical establishment, Article 425 plainly orders the sources of authority: “the Constitution; international treaties and agreements; organic laws; ordinary laws; regional norms and district ordinances”¹⁰⁵ The supremacy of the Constitution is not surprising or unique; however, the positioning of international treaties and agreements in the hierarchy is noteworthy. It signifies that where Constitutional language or enforcement is lacking, international agreements ratified by the country are the most authoritative laws. Although the political forces within the country may be incapable of or unwilling to compel compliance with national laws, foreign nations can reference Ecuador’s own constitution in combination with its adoption of international treaties to enforce compliance at the international level.

The judiciary is tasked with administering justice through, *inter alia*, administrative, economic, and financial autonomy, and public decisions.¹⁰⁶ Moreover, access to judicial administration is gratui-

constitution that was in force during oil exploration and conflict in 1978. *Id.* Ecuador’s environmental laws when Texaco entered were generally sparse and did not serve to regulate the MNC’s activities. *See* Keefe, *supra* note 18, at 2 (“Texaco’s practices did not directly violate Ecuadorian law; in fact, the country had no meaningful environmental regulations at the time.”).

102. CONSTITUCIÓN DEL ECUADOR, art. 424 [All references herein were translated by the author].

103. *Rights, Responsibilities, and Realities*, *supra* note 22, at 298. *See also*, Mary E. Whittemore, Comment, *The Problem of Enforcing Nature’s Rights Under Ecuador’s Constitution: Why the 2008 Environmental Amendments Have No Bite*, 20 PAC. RIM L. & POL’Y J. 659 (2011) (discussing why the environmental amendments to the Ecuadorian Constitution will likely not be enforced); Watts, *supra* note 5 (“The petition . . . calls on Correa [Ecuador’s president] to stop oil exploration in the Amazon and uphold the Ecuadorian constitution, which is the only one in the world to recognise the rights of nature Ecuador is seeking \$27 billion . . . in compensation from Texaco for damages the US company[] . . . did in the Amazon, yet the government continues to promote exploration by Petroamazonas, Repsol and other oil firms.”).

104. CONSTITUCIÓN DEL ECUADOR, art. 424.

105. CONSTITUCIÓN DEL ECUADOR, art. 425.

106. CONSTITUCIÓN DEL ECUADOR, art. 168.

tous.¹⁰⁷ However, parties to suits are often obligated to pay administrative costs or bribes to court officials.¹⁰⁸

The Ecuadorian Constitution recognizes its citizens' right to a healthy environment.¹⁰⁹ The Constitution declares "environmental preservation, ecosystem conservation, biodiversity and integrity of the nation's genetic patrimony, prevention of environmental harm and recuperation of degraded natural areas" of public interest.¹¹⁰ The charter continues to assert that "the State will promote . . . the use of environmentally clean technology and alternative energy that is non-contaminating and of low impact" in both the private and public sectors.¹¹¹ Further, "energy sovereignty will not advance to the detriment of alimentary sovereignty, nor will it affect the right to water."¹¹² Article 15 also strictly prohibits "the development, production, possession, commercialization, import, transport, storage and use of . . . highly toxic persistent organic contaminants . . . harmful to human health or that threaten alimentary sovereignty or ecosystems . . . as with the introduction of . . . toxic waste into national territory."¹¹³

The Ecuadorian Constitution even goes so far as to proclaim rights held by nature.¹¹⁴ In fact, Ecuador is the first nation to declare such rights in its Constitution regarding nature as an entity possessing legal rights separate from people's property rights in nature.¹¹⁵ The newly added Article 71 reads,

Nature or Mother Earth, where life is reproduced and realized, has the right to integral respect for its existence and the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes. Every person, community, village or nationality can demand from public authorities compliance with the rights of nature. To apply or interpret these rights, the following principles established in the Constitution shall be observed.¹¹⁶

107. *Id.*

108. *Rights, Responsibilities, and Realities, supra* note 22, at 305. See also Roger Parloff, *Key Chevron Witness Describes Alleged Corruption in Ecuadorian Courts*, FORTUNE (Oct. 28, 2013, 2:55 PM), <http://fortune.com/2013/10/28/key-chevron-witness-describes-alleged-corruption-in-ecuadorian-courts/> (recounting the testimony of an Ecuadorian judge stating that he bribed and was bribed and that most judges in Ecuador are bribed).

109. CONSTITUCIÓN DEL ECUADOR, art. 14.

110. *Id.*

111. CONSTITUCIÓN DEL ECUADOR, art. 15.

112. *Id.*

113. *Id.*

114. CONSTITUCIÓN DEL ECUADOR, tít. II, cap. 7.

115. Andrew Revkin, *Ecuador Constitution Grants Rights to Nature*, N.Y. TIMES (Sep. 29, 2008), <http://dotearth.blogs.nytimes.com/2008/09/29/ecuador-constitution-grants-nature-rights/>.

116. CONSTITUCIÓN DEL ECUADOR, art. 71.

The proceeding sections assert that the State will incentivize its people “to protect nature, and will promote respect for all the elements that form an ecosystem,”¹¹⁷ and that nature has a right to restoration independent from the State’s and individuals’ obligation to indemnify individuals who depend on affected natural systems.¹¹⁸ Article 72 states, “in cases of serious or permanent environmental impact, *including those occasioned by the exploitation of non-renewable natural resources*, the State will establish the most effective mechanisms to achieve restoration, and will adopt adequate measures to eliminate or mitigate injurious environmental consequences.”¹¹⁹

Article 73 of the Constitution accounts for biodiversity protection by obliging the government to take “precautionary and restrictive measures with activities that may lead to the extinction of a species, destruction of ecosystems or permanent alteration of natural cycles.”¹²⁰ Finally, the last article of the Constitution’s seventh chapter grants people the right to benefit from the environment and natural riches that will provide them a good life.¹²¹ “Environmental services will not be susceptible to appropriation; their production, benefits, uses and application will be regulated by the State.”¹²²

These amendments to the Constitution were added in 2008, decades after Texaco initiated its dealings with Ecuador.¹²³ As for providing recourse for the Huaorani and similarly situated people, these provisions cannot provide a remedy without applying the Constitution retroactively. An unrelated case decided in 2011 was the first successful attempt to apply the new provisions to protect the environment.¹²⁴ This case provides hope that the new constitution will result in stronger environmental protection and repair in the future, with the help of determined plaintiffs willing to push for enforcement of the supreme law.

117. *Id.*

118. CONSTITUCIÓN DEL ECUADOR, art. 72.

119. *Id.* (emphasis added).

120. CONSTITUCIÓN DEL ECUADOR, art. 73.

121. CONSTITUCIÓN DEL ECUADOR, art. 74.

122. *Id.*

123. Revkin, *supra* note 115.

124. Corte Provincial de Justicia de Loja [Loja Provincial Court of Justice], 30/3/2011, “Richard Fredrick Wheeler y Eleanor Geer Huddle c. Paulo Carrion / acción de protección,” Juicio No. 11121-2011-0010 (Ecuador), available at <http://mariomelo.files.wordpress.com/2011/04/proteccion-derechosnatura-loja-11.pdf> (applying the constitutionally-established rights of the environment to find that the Vilcabamba River is entitled to respect and regeneration, suspending a road construction project that had led to the dumping of waste into the river, and requiring defendants to publically apologize for initiating construction without an environmental license).

Less hopeful is the fact that nothing in the Ecuadorian Constitution specifically provides for the protection of indigenous peoples. The closest it comes to such a notion is the protection provided for culture, which is limited to the national identity, celebration of and appreciation for the arts, artistic expression, and diversity generally.¹²⁵ One reporter who spent time in Ecuador investigating the Oriente controversy stated that,

Manuel Navarro, who was the Petroecuador executive charged with overseeing the relationship between the Indians and the Company, told me that under Ecuadorian law foreign oil companies are prohibited from negotiating directly with the Indian groups, because such contact jeopardizes the Indians. (It is just this law, in fact, behind which such companies as Arco and Texaco hide when they're accused of ignoring the Indians on whose land they're drilling for oil.)¹²⁶

This law, in theory, is beneficial for indigenous groups because it protects them from companies coercing tribe members to sign agreements they neither understand nor can read.¹²⁷

The Ecuadorian Constitution does provide for equality and protection of all citizens.¹²⁸ However, the prevalence of racism toward indigenous groups and concentration of power in a limited few means lack of protection for indigenous peoples.¹²⁹ The tendency is to develop indigenous lands and “promote assimilation into the dominant Ecuadorian culture.”¹³⁰ The Amazonian indigenous groups are therefore subject to two types of marginalization: one by the foreign oil company developing their land, and one by their own government permitting the development.¹³¹

One portion of the Constitution does mention cultural diversity in relation to environmental principles: Title VII, Chapter 2, Biodivers-

125. CONSTITUCIÓN DEL ECUADOR, art. 377-80.

126. Kane, *supra* note 22, at 77.

127. *Id.* at 76 (describing the signing of an agreement drafted by U.S. oil company Maxus by Huaorani tribe representatives who opposed the road construction the agreement claimed they supported, and who were likely all illiterate).

128. *E.g.*, CONSTITUCIÓN DEL ECUADOR, art. 11 § 2 (stating that all people are equal and possess the same rights, duties, and opportunities).

129. *See, e.g.*, JAMES D. BOWEN, A SUBTLE KIND OF RACISM: ELITES, DEMOCRACY, AND INDIGENOUS MOVEMENTS IN MODERN ECUADOR (2008) (discussing inequality and racism against indigenous peoples in Ecuador and throughout Latin America); JEANNETTE SÁNCHEZ, INEQUALITY, ETHNICITY AND SOCIAL DISORDER: THE ECUADORIAN CASE (2005), available at http://siteresources.worldbank.org/INTDECINEQ/Resources/1149208-1147789289867/IIIWB_Conference_Inequality_Ethnicity_and_Social_Disorder.pdf (discussing racism toward indigenous peoples and their treatment as “second-rate citizens”).

130. *Rights, Responsibilities, and Realities, supra* note 22, at 297.

131. *Id.* at 297.

ity and natural resources.¹³² The first section of this chapter states, “the State will guarantee a sustainable model of development, environmentally balanced and respectful of the cultural diversity, which conserves biodiversity and the ability of ecosystems to regenerate naturally, and assures the satisfaction of the needs of present and future generations.”¹³³ One of the segments of the Constitution most significant to the Huaorani is a later part of this section, which asserts, “The State will guarantee the active and permanent participation of affected persons, communities, towns and nationalities, in the planning, execution and control of all activities that generate environmental impacts.”¹³⁴ The law prohibiting foreign companies from negotiating with indigenous peoples¹³⁵ most certainly conflicts with this provision of the Constitution by removing indigenous tribes from pivotal business discussions.

This section of the Constitution also has provisions that mirror the U.S.’s CERCLA by imposing liability for environmental harm, including sanctions and a duty to integrally restore the ecosystem and indemnify affected persons and communities.¹³⁶ It also includes provisions that mirror the U.S.’s RCRA by making “all actors of the processes of production, distribution, commercialization, and use of goods or services” assume the responsibility to act in an environmentally cautious manner and mitigate resulting damages.¹³⁷ Legal actions to impose liability for environmental harm are “non-prescriptive,” meaning they cannot be limited by statutes of limitation.¹³⁸

Chapter 2 of Title VII contains numerous articles following those discussed above, but they all hum the same tune. Article after article, biodiversity and natural resources (e.g., land, water) are praised for their undeniable import and the State is obliged with taking measures in nearly all ways conceivable to ensure the well-being of the environment.¹³⁹

Simultaneously, the Ecuadorian government is responsible for determining the fate of the nation’s oil. In Ecuador, subsurface minerals belong to the government;¹⁴⁰ thus, when foreign companies want to

132. CONSTITUCIÓN DEL ECUADOR, tít. VII, cap. 2.

133. CONSTITUCIÓN DEL ECUADOR, art. 395.

134. *Id.*

135. *See supra* note 126 and accompanying text.

136. CONSTITUCIÓN DEL ECUADOR, art. 396.

137. *Id.*

138. *Id.*

139. CONSTITUCIÓN DEL ECUADOR, art. 397-415.

140. Kane, *supra* note 22, at 56; Keefe, *supra* note 18, at 2.

gain access and rights to oil, they must obtain approval from the government. If the environmental standards for the government are lower in countries like Ecuador than they are in the U.S., and the foreign government is incentivized to do business with oil companies, those companies will be well-received in those nations. The principal motivation of Latin American governments when inviting foreign companies to ransack their Amazonia is to create a source of revenue for the country because of the massive amounts of international debt these nations have incurred over time.¹⁴¹ In the Ecuadorian Amazon, for example, where “[o]il development . . . is virtually unregulated,” the government’s international debt is high, and nearly half of its income is derived from oil, the government invites foreign companies like Texaco that will create revenue.¹⁴² This economic dependence is the reason why the nation’s environmental regulations, first established in 1990, are so poorly enforced.¹⁴³ The government’s welcome in combination with the lack of regulation for oil development makes such situations prime opportunities for companies seeking to maximize profit through an environmentally risky activity.

This can be contrasted with the process such a company must undergo to obtain comparable rights to oil in the United States. Oil is a leasable mineral in the U.S. and unless an entity owns the property on which it is conducting its operations, it must obtain a lease from the government to use federal land.¹⁴⁴ Since granting such a lease would be a “major federal action”¹⁴⁵ that may significantly harm the human environment, the granting agency must satisfy the standards of the National Environmental Policy Act (NEPA). NEPA requires the agency to consider the impact of its actions (e.g., actions it supports through leasing) on the environment, and consider the possibility of alternative actions meeting the purpose and need of the proposed action.¹⁴⁶ The public nature of this process also serves to educate the public on

141. TIMMONS, *supra* note 6, at 17-21.

142. Kane, *supra* note 22, at 56. *See also Rights, Responsibilities, and Realities*, *supra* note 22, at 299 (“petroleum provides roughly forty to fifty percent of Ecuador’s export income and national budget, depending on the international price of oil.”); Keefe, *supra* note 18, at 2 (“The government of Ecuador had been aware of Texaco’s techniques from the start, and for many years Texaco was in a consortium that included the national oil company.”).

143. O’Rourke & Connolly, *supra* note 14, at 612. *See also Rights, Responsibilities, and Realities*, *supra* note 22, at 295 (“Although Ecuadorian law is theoretically replete with environmental rights and responsibilities that protect biodiversity and the natural resources that are vital to the health and well-being of local populations, the law has not played an effective role in protecting environmental and human rights in the Amazon.”).

144. 30 U.S.C. §§ 181, 226 (2005).

145. 30 U.S.C. § 185(h) (2005).

146. 42 U.S.C. § 4332(2)(C) (1970).

problems with and alternatives to federal (and state, under the state counterparts to NEPA) actions affecting the environment. The NEPA process is tedious and time-consuming, often taking several years to overcome legal challenges to the sufficiency of the government's analysis, and would certainly serve to discourage a company from engaging in such negotiations with the government.

The Ecuadorian legal system is highly corrupt due to courts' manipulation by the executive and legislative branches, which compete for power. Therefore, the judiciary does not serve as recourse for potential litigants unable or unwilling to try their hand at a corrupt system that would require large bribes to reach a resolution.¹⁴⁷ To emphasize how problematic a biased judge may be, the Ecuadorian judicial system does not provide for jury trials; thus, a case may rest on the discretion of just one judge.¹⁴⁸ Failure to administer justice properly may actually incentivize foreign businesses, such as oil tycoons, to conduct operations abroad where, even if taken to court, they can prevail by out-financing their case (i.e., through bribes) against weak opponents, like indigenous groups.

Another critique is that many of Ecuador's "constitutional provisions [and statutes] have simply been copied from other countries."¹⁴⁹ Further, Ecuador's government is a constitutional democracy, but the "democratic institutions remain fragile and underdeveloped, and a strong executive dominates the government," which is not traditionally held to the laws of the country.¹⁵⁰ The judiciary has failed to properly administer the laws and compensate for the deficiencies in other areas of government.¹⁵¹ The Constitution requires

147. *Rights, Responsibilities, and Realities*, *supra* note 22, at 301-06. *See also supra* note 48 and accompanying text (describing the ruling of a New York court that the Ecuadorian judgment, held to be tainted by fraud and corruption, is unenforceable).

148. Keefe, *supra* note 18, at 3.

149. *Rights, Responsibilities, and Realities*, *supra* note 22, at 300, 300 n. 21 (claiming, as examples to support this statement, that the people's constitutional right to live in an environment without contamination was taken from the Chilean constitution, and that the Law for the Prevention and Control of Environmental Contamination was copied from Mexican law. Kimerling also characterizes Ecuadorian statutory law as segmented and contradictory.). *Accord* LAURA CHINCILLA & DAVID SCOTT, *THE ADMINISTRATION OF JUSTICE IN ECUADOR* 69 (1993) ("Ecuadorian law is characterized by extensive copying of foreign codes with little reference to the social and economic reality of the country in which the code is being applied, uncoordinated participation of diverse institutional actors in the implementation of legislation, and even sometimes, contradictions between norms.").

150. *Rights, Responsibilities, and Realities*, *supra* note 22, at 295-96. *See also* CHINCILLA & SCOTT, *supra* note 149, at 76 ("The Ecuadorian Judiciary is unquestionably the weakest branch of government. It has been subservient to the executive and legislative branches throughout much of its history . . .").

151. *Rights, Responsibilities, and Realities*, *supra* note 22, at 296.

the judiciary to be “internally and externally independent,” a requirement the violation of which should result in administrative, civil, and penal repercussions in accordance with the law.¹⁵² These supposed safeguards of judicial autonomy fail in practice because of their subordination to the nation’s social and political tendencies.¹⁵³

E. International Environmental Injustice and Domestic Environmental Laws in Other Nations

Latin America is not the only region in the world where indigenous groups are threatened. One example from Africa is the Ogoni tribe of Nigeria. When members of this tribe took matters upon themselves and protested the military government, environmental injustice, and human rights violations in their country against the Ogoni people, sixteen tribe members were jailed and nine, including the leader of the Movement for the Survival of the Ogoni People, were executed after a trial in front of a military tribunal.¹⁵⁴ This case illustrates that if the government is authoritarian and corrupt, internal protests and cries for change within a nation can only do so much good and may even result in greater harm.

Another case of Amazonian indigenous peoples falling victim to oil exploration is the entrance of a British oil company into the lands of the Urarina of Peru.¹⁵⁵ As in the Oriente case, the MNC obtained the signature of one tribe member, who did not represent the majority, as though it were an indication of the group’s consent.¹⁵⁶ This type of manipulation by an MNC of illiterate indigenous tribe members undermines one of the few reliable resources some groups have to fight large corporations: solidarity among tribe members.

Yet another setback to ensuring global environmental well-being and justice is the lack of environmental laws in many nations. According to the U.S. Energy Information Administration (EIA), Nigeria has no pollution control policy; therefore, “the laws that do exist are

152. CONSTITUCIÓN DEL ECUADOR, art. 168.

153. *Rights, Responsibilities, and Realities*, *supra* note 22, at 300 (“[T]he Constitution formally guarantees judicial independence. . . . [I]n practice, however, these and other constitutional guarantees have been largely ineffective due to the enormous gap between constitutional ideals and Ecuador’s social values and power structures.”). According to Kimerling, “In the Amazon, the oil industry is essentially self-policing in environmental matters.” *Id.* at 296. See also Chincilla & Scott, *supra* note 149, at 70-72 (describing the ways in which social trends have influenced the poor administration of justice by the Ecuadorian judiciary).

154. Adeola, *supra* note 8, at 700-01.

155. BORASIN ET AL., *supra* note 51, at 18.

156. *Id.*

not enforced.”¹⁵⁷ The EIA also reports that Saudi Arabia had no environmental protection agency until 2001.¹⁵⁸

With these obstacles facing so many indigenous tribes internationally, it is instructive to consider legal remedies these groups may have at the international level.

F. International Legal Recourse for Plaintiffs

Although environmental justice has become of international concern as well as domestic, there is no single international forum established to resolve environmental justice claims as, for example, the Environmental Protection Agency does in the United States.¹⁵⁹ Certain organizations and subcommittees exist, however, whose missions overlap with discovering and impeding environmental injustice. The United Nations Human Rights Committee is one example. Another is the Inter-American Commission on Human Rights of the Organization of American States. Often times the most effective resource in forcing parties to act in accordance with environmental justice principles is the pressure or shame brought on that party by international players.¹⁶⁰

One recourse Chevron sought in the Oriente case was international arbitration overseen by a tribunal of international arbitrators.¹⁶¹ The tribunal considered whether the proceedings in Ecuador were in accordance with international law, and published a procedural order and interim measures suspending enforcement of the Ecuador judgment pending the final results of the arbitration.¹⁶² The interim measures the tribunal imposed were taken pursuant to Article 26 of the United Nations Commission on International Trade Law (UNCITRAL)¹⁶³ Arbitration Rules.¹⁶⁴ This demonstrates one way in

157. O'Rourke & Connolly, *supra* note 14, at 612.

158. *Id.*

159. GRACER ET AL., *supra* note 88, at 765.

160. *Rights, Responsibilities, and Realities*, *supra* note 22, at 312 (“The effectiveness of human rights litigation in remedying violations generally depends on engaging reluctant governments, and persuading or shaming them to voluntarily remedy violations of law.”).

161. *E.g.*, Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, First Interim Award on Interim Measures (2012), available at <http://italaw.com/sites/default/files/case-documents/ita0173.pdf>.

162. *Id.* at 13-16.

163. UNCITRAL is the “core legal body of the United Nations system in the field of international trade law . . . UNCITRAL’s business is the modernization and harmonization of rules on international business.” *About UNCITRAL*, UNCITRAL, http://www.uncitral.org/uncitral/en/about_us.html.

164. *Chevron*, PCA Case No. 2009-23 at 10, 16.

which a party to a case crossing country lines can bind the hands of the other party by causing delay with the support of an international entity.

In addition to the further-reaching treaties described above, certain limited international treaties exist that may provide tools for fighting these injustices. If an incident similar to that between the U.S. and Ecuador were to occur between the United States and Canada or Mexico, one source of relief for aggrieved plaintiffs could be the North American Agreement on Environmental Cooperation (NAAEC),¹⁶⁵ which is enforceable against parties of the North American Free Trade Agreement (NAFTA).¹⁶⁶ This agreement allows NAFTA nations to force other NAFTA nations to enforce their environmental laws.¹⁶⁷ The drawback is that the environmental laws that apply are only the domestic laws of one country, and the NAAEC is only available to the three NAFTA member-nations. This may be helpful in situations where, for example, U.S. companies on the border with Mexico are polluting air that affects both countries, but not where one country is polluting in another and subject to the host country's environmental laws.

Under the NAAEC, non-profits and citizens of one of the NAFTA nations can submit a complaint alleging one of the other nations has not acted in accordance with its environmental laws.¹⁶⁸ The secretariat of the Commission for Environmental Cooperation (CEC), the agency that administers the NAAEC, then considers the complaint and decides whether to move forward and whether the accused country should respond to the allegation.¹⁶⁹ If the facts of the record are confirmed by a two-thirds vote of the CEC council, the record is released to the complainant and the public.¹⁷⁰ Complaints from citizens often involve a government's failure to account for indigenous people's environmental needs, especially in Mexico and Canada.¹⁷¹

Although the NAAEC allows citizens to bring environmental law violations to the international forum, even where a record is approved, no enforcement remedy exists under the agreement to ensure

165. *North American Agreement on Environmental Cooperation*, COMMISSION FOR ENVIRONMENTAL COOPERATION, <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567> (last visited Feb. 16, 2015).

166. GRACER ET AL., *supra* note 88, at 766.

167. *Id.*

168. *Id.* at 767.

169. *Id.* at 766-67.

170. *Id.* at 767-68.

171. GRACER ET AL., *supra* note 88, at 768-69.

that the culprit nation amends its errors.¹⁷² Citizens and non-governmental organizations can only hope that the government will take steps to correct the violations, such as engaging in a formal consultation with another NAFTA party under Article 22 of the NAAEC or in formal dispute resolution under Part V of the NAAEC.¹⁷³ As is the case with international agreements generally, the NAAEC is beneficial in theory because it brings environmental issues to the discussion; however, its effectiveness is limited due to a lack of enforcement.

G. A Need for a Combination of the Above Laws to Provide Recourse

The preceding analysis of domestic and international laws leads to several conclusions. One avenue for improvement is making industry activities that involve high risks of pollution not legally exportable. This would hold every corporation to the standards of the country in which it is incorporated and unable to escape these laws to conduct its activities in a nation with lower environmental standards. However, with the rapid rate of globalization we encounter today, a proposition to disincentivize international expansion would be met with great protest.

Another potential solution is for domestic environmental laws to apply to MNCs when they conduct business in foreign nations to prevent them from thwarting the severity of their home nations' laws simply by polluting elsewhere.¹⁷⁴ The difficulty with this method is enforcement. For example, to implement this change in the laws, an already overextended EPA may have to hire inspectors to monitor compliance at an international level. Even under such a system, there would not be enough governmental employees to provide as much oversight as would likely be required for controlling companies all around the world.

This method could also be implemented by requiring companies that go abroad to hire an outside third party to inspect for compliance and report to EPA. However, this may lead to issues of dishonesty and fraud. One final way to implement this method is to instruct the environmental enforcement body in the foreign nation to monitor the U.S. company as it would its own, but apply U.S. environmental laws instead of the host nation's laws. If a company is in violation, the foreign government agent could report the wrongdoing to EPA for enforcement. Teaching a new set of environmental laws and regulations to a

172. *Id.* at 768.

173. *Id.*

174. *E.g.*, Adeola, *supra* note 8, at 703.

foreign citizen, however, would be a cumbersome task, and may result in improper application of U.S. laws by an inexperienced agent. Further, the same problem exists in this situation as exists where the host nation applies its own laws: a host government that is foremost concerned with revenue production will not be incentivized to report an MNC's environmental law violations even if they are of the laws of the MNC's home state.

These considerations lead to the conclusion that the most practical domestic environmental laws to apply to MNCs are those of the host state. This allows each nation's environmental protection agency to become an expert in its own laws without the overwhelming burden of learning and applying the laws of other nations. Where this becomes insufficient is when a nation is lacking either stringent environmental laws or their enforcement. In situations where a home state has enacted a statute such as the ATCA, a plaintiff may avoid environmental law claims altogether and seek redress for tort or other actions in the home state. Otherwise, where application of domestic laws proves inadequate for effective protection, international agreements serve as the remedy.

Thus, a plaintiff suffering at the hands of an invasive MNC must first determine which laws and which forum would put her in the strongest position. If the claims are environmental, only the laws of the host country and international laws will apply. If the host country's environmental laws are weak or the judicial system corrupt, the plaintiff may prefer an international forum. For claims of human rights violations, the claims should likely be international as many treaties address human rights and such violations generally cause international outrage. Alternatively, if a plaintiff decides the facts of her case fall within the home state's laws providing a cause of action for extra-territorial activities, she may first pursue that route to avoid litigation in the host state or litigation or arbitration under international agreements, the enforcement of which is often an obstacle. While making the decision of where and for what claims to file suit, a plaintiff will likely realize that she is not limited to only one of these options. If the first attempt is unsuccessful, she can pursue the next best recourse until all possible paths to recovery have been exhausted.

CONCLUSION

The importance of protecting the environment and those who inhabit it is now a globally recognized principle. There is much less of a consensus, however, regarding how best to structure laws to provide

for the most effective protection of environmental rights. Countries create their own laws independently as well as joining other nations in forming international agreements on the subject. Considering the many intricacies involved in outsourcing pollution to a foreign country, it would be extremely difficult if not impossible to ensure a respectable outcome regarding the resulting environmental harm caused by MNCs without combining domestic and international laws to meet the needs of our ever-globalizing world. With both tiers of laws available, we are better able to provide a voice to disproportionately affected minority groups so they may defend their cultures, health, and the environments on which they so dearly rely.